IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1357/5/7/20 (T)

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

Monday 11th January 2021

Before:
THE HONOURABLE MR JUSTICE JACOBS

(Chairman)

(Sitting as a Tribunal in England and Wales)

BETWEEN:

FIAT CHRYSLER AUTOMOBILES N.V. & OTHERS

Claimants

-v-

JTEKT EUROPE BEARINGS B.V. & OTHERS

Defendants

A P P E A R AN C E S

Paul Harris QC and Philip Woolfe (instructed by Quinn Emanuel Urquhart & Sullivan UK LLP appeared on behalf of the Claimants)

Robert O'Donoghue QC and Hugo Leith (instructed by White & Case LLP appeared on behalf of the NTN Defendants)

Monday, 11 January 2021

(1.30 pm)

CASE MANAGEMENT CONFERENCE

MR HARRIS: Good afternoon, my Lord. This is Paul Harris speaking for the Claimants. I hope you can see and hear me acceptably. My learned friend Mr O'Donoghue appears again on behalf of NTN, the sole remaining group of Defendants left in ju the claim.

MR JUSTICE JACOBS: I can see and hear both of you, I can't hear Mr O'Donoghue yet, because I'm getting a bit of feedback.

MR HARRIS: Yes.

MR JUSTICE JACOBS: I will see if that's better. Yes, that is better.

MR HARRIS: It may be, in the usual way, Mr O'Donoghue's face will appear when he first makes his submissions.

MR JUSTICE JACOBS: I managed to get his face now.

Submissions by MR HARRIS

MR HARRIS: Very good.

Well, my Lord, I hope you have had the opportunity at least to glance at the skeleton arguments. You will see that there is a relatively short list of issues for today and there is a new one just to be added as a postscript, which is, pursuant to a letter from the CAT only an hour or so ago, we could deal with an actual trial start date right at the very end.

So I'm obviously in the court's hands, Mr Chairman, as to how you would like to proceed, but on my list, there are issues to do with confidentiality, issues to do with our draft reamendments to the particulars of claim, and then, thirdly, there are issues to do with the timetable to trial. Those are the three issues on my list and as I say, there's now (inaudible - audio breaks down) minor issue regarding some directions for the actual start of the trial in January 2022.

MR JUSTICE JACOBS: Let's deal with the start of the trial first. Shall we deal with that?

MR HARRIS: By all means. We have helpfully had an indication that pursuant to your directions from the CMC of July last year that we could start the trial at the beginning of term January 2022. We have this suggestion to make in that regard, bearing in mind that it's not desperately satisfactory to start an actual trial on the first day of term.

We thought that, if it meets with your approval, Mr Chairman, Sir, that skeletons could be provided on 12 January. We apprehend that the start of term will be Monday the 10th, which is the second full week of January. In any event, skeletons on the 12th and then a pre-reading week, as much for the CAT's benefit as for anybody else's, for the week of the 17th, with the actual trial to start on

the 24th. As you know, that's currently provisionally set down or going to be set down for 10 weeks.

So those were the dates that we suggested on the fourth item.

MR JUSTICE JACOBS: So does that effectively extend it to a 12-week trial or is it envisaged, in fact, that the case can be dealt with within 10 weeks including the pre-reading?

MR HARRIS: Unclear. As matters stand, my Lord, Sir, the 10 weeks is the best available guestimate. I hadn't, by suggesting there be a pre-reading week, consciously intended to add an eleventh week. That prospect fills me with horror, in fact, but there we go.

MR JUSTICE JACOBS: Well, I suspect this will become a bit clearer by the time of the pre-trial review and you'll be able to agree a timetable.

MR HARRIS: Yes.

MR JUSTICE JACOBS: But let me ask Mr O'Donoghue whether you have got any comments on that.

MR O'DONOGHUE: My Lord, two points. First of all, we are keen for the trial to start properly as early as possible at the start of term. Our suggestion, therefore, would be that there would be some reading days at the very start of term, which would obviously be a matter, Sir, for you to consider; something like three to five days perhaps.

Secondly and perhaps more importantly, this is set down

for 10 weeks. That obviously depends to a good extent on the number of witnesses we have. That would be clarified over the course of the coming months. So if, for example, we end up with a situation whereby there are two experts and a small handful of factual witnesses, I struggle, sitting here today, to understand how we're going to take 10 weeks.

As, Sir, you indicated, that can be reviewed at the stage of the PTR, but we are keen that the trial start as soon as possible on or after the 10th. On that basis, skeletons would come before Christmas.

MR JUSTICE JACOBS: Yes. Well, I'm reluctant to extend it from 10 weeks at the moment. I don't think Mr Harris is asking me to do that. Term always starts on 11 January and has always various meetings that go on which I have to attend in the morning, which is why I had to start today a little bit late.

I would have thought that skeletons should come in before Christmas, but you can address me on that, Mr Harris, if you think that's not appropriate. Then we could have five days of pre-reading beginning on what I think will be Tuesday the 11th, but starting the case on the following Tuesday or Wednesday, whatever that might be.

We can revisit that at the PTR, but that is what I would have in mind. But for present purposes, what we're really concerned to do is to decide what the date of the trial is, even if it includes pre-reading. So why don't we say we'll

start on 12 January and we can discuss other aspects, skeletons, how long is going to be required for pre-reading at a pre-trial review, which I think we're going to have at the back end of this year, on the current timetable.

MR HARRIS: Sir, that's acceptable to us as Claimants, yes. So provisionally proceed on the basis that skeletons come in before Christmas, which I think -- perhaps the last relevant day is 20 December. Then the pre-reading period starts on 12 January.

MR JUSTICE JACOBS: Yes.

MR O'DONOGHUE: But as you rightly point out, both the time estimate and some of the detail can be dealt with at the PTR.

MR JUSTICE JACOBS: Yes. The only slight qualification I have got is obviously I'll be sitting with two other people who have yet to be appointed. We decided, in conjunction with the President of the CAT, that we wouldn't appoint anyone for the moment. I mean, it's possible that one of the appointees that one has in mind wouldn't be able to start on the 12th and might only be able to start on the 14th, so we'll give a bit of flexibility about it. But let's cross that bridge when we come to it.

MR HARRIS: Yes, Sir. Thank you.

MR JUSTICE JACOBS: All right. Okay. Well, I think the next thing I'd like to just address is timetable and pleadings.

MR HARRIS: Yes.

MR JUSTICE JACOBS: That has a knock-on impact on the disclosure issue which has been raised.

Mr Harris, have you now served your proposed amendments?

MR HARRIS: Yes, we did. To be fair to Mr O'Donoghue and his team, it wasn't until very, very late on Friday night or perhaps the wee hours of Saturday morning, but that is now in the bundle and I would like to now briefly show them to you.

But perhaps the place to start is perhaps with the existing order. If I could just turn in my own submissions and identify, that's to be found in your order of July, which is to be found in bundle A and in particular at tab 10, which is page A/185. You may have that in the hard copy core bundle. I certainly do.

MR JUSTICE JACOBS: Yes, thank you.

MR HARRIS: Just by way of reminder, the timetabling provisions are set out towards the end of the Order, beginning on page A/190, procedural timetable. What you'll see, Sir, is that at paragraph 15, the CMC is in fact today rather than just at the end of last term.

Then, importantly, and as was indeed debated and then ordered by you at the last CMC, the intention was that disclosure should be completed by the end of this month, 29 January. Then having done that, in the usual way, there's some months between the completion of disclosure in these sometimes complex follow-on cases as regards causation

quantum by 7 May, so early May.

Then the remaining provisions are, you know, fairly standard form provisions leading to the trial, but the most important ones for present purposes are end of January was the intended date of completion of disclosure following argument and early May for witnesses of fact following argument.

Just whilst we're with the Order, and this will be germane to a point later in the submissions, but so as to the save time, if you were to turn into the schedule just as a brief reminder, this is page A/195. You'll perhaps just recall, although it was six or seven months ago, that disclosure under the heading "RFQs", just down from the top of page A/195, was by reference to 12 RFQs, essentially, from each side.

Then if you just cast your eye over A, B, C and D, you'll see that it was fairly comprehensive disclosure as regards the sample of RFQs. That was deliberately, if you recall the argument, how it was structured: not every RFQ, but the RFQs that do get provided is pretty comprehensive disclosure as regards those RFQs because they are highly relevant to a case by us, which is that there has been illegal pricing as regards, amongst other things, RFQs. The reason I remind you of that will become much more apparent later on when we talk about confidentiality.

But as regards trial steps, that is the shape of things as they come. There are two aspects, therefore, to trial preparation: what, if any, meaningful or substantive amendments need to be made so as to encompass that which was always envisaged, namely our amendments to our particulars of claim following disclosure to us of the Commission file? That's one issue. With your permission, I'll address that first in just a moment.

But then the other issue for today is what impact is there upon the timetable to trial of that which is adverted to in the correspondence from my learned friend's solicitors and in particular their suggestion that there should be, at an unspecified date at some point in the next few months, another CMC which other CMC is said to be needed in order to address "disclosure"? As we see it, that is a real problem. With your permission, I'll take that bit second.

So just to set the scene then, a few brief submissions, I hope, from me as regards our draft particulars of claim and how it doesn't have any material impact upon timetable.

MR JUSTICE JACOBS: Well, let's see what the shape of the debate is. I haven't looked at the draft particulars yet. They're in the updated bundle are they, somewhere?

MR HARRIS: Yes, and I would propose, subject to seeing what the shape of the debate is, to show you them, noting that some parts, as matters presently stand, are said to be in

a Confidentiality Ring, confidential material. I'm conscious that there are some people potentially on this hearing who are tuning in from the public website stream. I'm alert to that, but just so that everybody is alert to that.

MR JUSTICE JACOBS: Can I just have a quick look? Where are the pleadings?

MR HARRIS: Yes, the pleadings have now been inserted into bundle C and it's tab 165, which you'll find starts at page C/654. Just prior to that is the claim form that's been amended. That one has been amended because, as I say, NTN is the only corporate group left in this claim, so we have obviously, in the usual way, deleted the settling Defendants.

I appreciate you can't be expected to digest these proposed reamendments on the hoof, but what I can do, and I'm delighted to say you don't need to, because what I can do is very, very simply identify to you the four types of re-amendment and then I can show you just a couple of examples of one of the types, which is more than sufficient.

So the four types, for your Lordship's note, the vast bulk -- so if you were to just literally scroll through, you will see that the vast bulk that appears I hope in green on your screen is essentially around paragraph 40, which is now many, many pages. That is all simply details of the operation of the secret cartel that we knew nothing about that had been gleaned by us from the disclosure of the

Commission file that you ordered the Defendants to give us at the last CMC. So it's entirely orthodox. This is what happens in almost all of these follow-on claims. The Claimant knows nothing about the cartel, does its best to plead that at first instance. Then it is disclosed Commission file documents, then it reads them and then it updates its particulars. That's the vast, vast bulk.

So that's item one. In a minute, I'll show you a couple of example paragraphs so that you can get the flavour of them, but just --

MR JUSTICE JACOBS: I just want to get a feel of how many pages this occupies, because the debate at the moment, looking at the skeletons, was that you want the Defendants to say within seven days whether they're objecting to this and Mr O'Donoghue says that he'd like to have 14 days.

MR HARRIS: We have agreed with that.

MR O'DONOGHUE: We have now agreed.

MR HARRIS: We have agreed with that, 14 days. I'll show you a letter where this agreement is set out, so yes.

MR JUSTICE JACOBS: Right.

MR HARRIS: But it's important to note, and I will take you to one or two only in a minute, but it's important to note that that entire section of something like 30 pages that goes from 30A to 40IIII is simply, in an orthodox manner, a chronological recitation of that which we have now learned

about the particulars of the file, particulars of the cartel, from secret documents that had never been to shown to us before, and of course they all come from the Defendants, all of them.

MR JUSTICE JACOBS: But in a sense, I have now got a feel for it. Given that you're agreed that Mr O'Donoghue has 14 days to look at this and to say what his position is, why do I need to get into the detail of it at this stage?

MR HARRIS: For this reason: you don't now need to get into the detail, but the reason I'm just emphasising the point about the provenance of the documents and why we have done it is because it had been vaguely but never specifically suggested in the correspondence from my learned friend's solicitors that there needs to be another CMC at some point in the next few months at which "disclosure" is going to be required by him from -- and one of the reasons that has been adverted to in that correspondence as to why such further disclosure might be required is because we're going to be repleading our case as regards the Commission file documents.

That, with great respect, is just a mistake because, as I say, the provenance of these documents is entirely from the Defendants. There is no disclosure from the Claimants, who are the victims of the secret cartel, relating to the operation of this secret cartel in which they didn't participate. So any particularisation that I have now given

with Mr Woolfe in these pleadings to the operation of the cartel cannot conceivably give rise to any disclosure from us to the Defendants.

That's the point. That's the point that I just want to get home. If you were to read any one of these particulars, you would see the point. They're documents from the Defendants.

On top of that, you will of course recall, because this was argued about last time, these documents are very familiar to the Defendants. It was us to whom they were not familiar. So the suggestion, if it's ever going to be made, that there needs to be an enormous amount of time on the part of the Defendants to even figure out whether they want to ask for more disclosure is also misplaced because these are Defendant documents.

Secondly, they were generated during the course of a prolonged Commission investigation procedure leading to a settlement in which unsurprisingly the Defendants participated, so they know these documents and what they say.

Thirdly, of course, as you will recall from last time, this particular Defendant, as did others, went almost to, I think, the door of trial or possibly even the first day of trial with another Claimant in this jurisdiction, the French car company Peugeot, and so had to gear up by reference to these documents.

So the point, and I'm now going to move on to the second category, which is much shorter, but the point as regards this first category is it doesn't give rise to any risk of any further disclosure by us to, the Claimants, to NTN, the Defendants. It's common ground that 14 days is enough for Mr O'Donoghue and his clients to consider these particulars.

MR JUSTICE JACOBS: There are some sort of knock-on timetabling issues relating to the particulars as to how long it's going to take to serve a defence, amended defence, and so forth. Have you come to an agreement on that?

MR HARRIS: Yes, and I'll show you a letter in a minute, if I may, where you can actually see the dates written out.

MR JUSTICE JACOBS: Good. All right.

MR O'DONOGHUE: Well, my Lord --

MR HARRIS: I'm told it's not agreed.

MR O'DONOGHUE: -- it's not agreed.

MR HARRIS: I'm sorry, I'm told it's not agreed, so I'll show you the letter and then Mr O'Donoghue can make submissions.

MR JUSTICE JACOBS: Because at the moment, Mr Harris, I'm not being faced, at the moment anyway, as I understand Mr O'Donoghue's position, either with an application for any disclosure. He's only had this document for a relatively short time. So I don't have to express any views at all as to whether or not you're right that this can't fairly be said

to give rise to any disclosure applications. I'm not faced with one at the moment.

I'm not faced with an application to amend the timetable in any respect, save possibly for the insertion of an additional CMC.

MR HARRIS: That's not quite right and I apologise, therefore, if it hasn't been made sufficiently clear in our skeleton argument.

I will invite you to make a direction that any further disclosure applications that Mr O'Donoghue's client does wish to make should be made by I think it's 22 January, so approximately two weeks from today. I'm about to explain in a bit more detail why I invite you to do that, and they're all connected.

Mr O'Donoghue, as we apprehend it from the correspondence, his side's position is, "No, we don't need to worry about any of this today because there will be another CMC in 'a few months', at which point we'll ask for some unspecified disclosure". We say no, because that will interrupt the timetable. Critically, and that's why I showed you the two dates in the existing procedural timetable, it will mean that your direction that all disclosure should be complete by 29 January will not be met by the Defendants.

I hasten to add that we have no further applications for disclosure and we have dealt with the disclosure according to

your timetable. But what we're worried about is the Defendants dragging their feet and not adhering to the timetable and not coming clean as to what exactly it is that they want.

Secondly, if Mr O'Donoghue's clients are allowed to have a CMC in a few months at which there be some disclosure that we don't yet know about and then that takes some time to deal with, there is a clear risk that we won't be able to meet the deadline for witness statements of 7 May. That concerns us because if we miss disclosure and witness statements, the trial date might be in jeopardy. That's what we, with great respect, say shouldn't be countenanced by the court.

Hence, to skip to the end of my submission, that's why we're going to be inviting you, once I've explained a few more of the amendments, to make a direction that if Mr O'Donoghue really does want some more disclosure, then he and his clients should ask for that by application by no later than 22 January, even though it will inevitably mean that the disclosure is not quite completed by the existing date of 29 January.

I hope that makes the position at least clear.

MR JUSTICE JACOBS: I do understand that you are asking for a date to be set for any further disclosure applications. Your date is a little bit earlier than his date for considering the pleadings.

MR HARRIS: That's right, but as I say, I'm about to show you the three other categories of re-amendment, and they are piffling and have no timetabling or disclosure implications.

MR JUSTICE JACOBS: Okay.

MR HARRIS: But by way the biggest one is the one you have already looked at, and I've explained why that has no timetabling or no disclosure timetabling implications.

The second category, my Lord, is a pleading on interest, which has been added to the back. If you want to see it, it begins on page C/719. It's now annex 5.

MR JUSTICE JACOBS: Yes.

MR HARRIS: But this may or may not be a familiar document to you, my Lord, because this pleading was ordered to be made by you, ordered by you to be made by us in the Autumn, and we did, because we served this pleading on 25 September.

All that has happened in green in annex 5 is it was originally in a separate document, pursuant to your direction in July, and we have now just added it into the back of the pleading for housekeeping purposes. Okay?

So the only change, and I'll explain why it's been made, is if you were to look at paragraph 7 on page C/720, in the original version, it's said the figure for total compound interest claim which is -- well, it now reads 26 million; it read, in the version that was served in September, 24.4 million. That's the only change. The reason that

that's changed is because we have now had the opportunity slightly to update the underlying claim for quantum, which I'm going to show you is the third re-amendment in the main body of the pleading.

MR JUSTICE JACOBS: When was the compound interest plea served? Was it October or November?

MR HARRIS: It was served on 25 September, pursuant to your directions, and then there was a reply by the other side. Indeed, there's even been a short RFI, which I'll come back to.

But more notably, Sir, is that we served it on 25 September, so they have had this pleading for literally months. We have then provided the underlying disclosure that relates to this pleading as long ago as 6 November. So, again, for months, over two months. We have not had a single disclosure application by reference to interest, even though they have had this pleading for months and the underlying disclosure for months.

So if and insofar as (inaudible - audio breaks down) says, "We want a CMC in some months' time at which we're going to ask for some disclosure", it can't relate to interest because if there were any queries or requests for interest, then they should have been made by now. In any event, even if they haven't been made by now whereas they should have been, they certainly could and should have been

made by no later than 22 January.

So that's category 2 of the reamendments, interest, and it has no timetabling or no disclosure implications.

Just for the sake the completeness, there was a short RFI served by the Defendant, NTN, as regards this interest pleading. That hasn't yet been answered, but there's no application about that. If the Defendants wish to persist with requests for answers for that, that can be dealt with in the usual way. In any event, it need not be dealt with today. It is not a live issue for today and it has no timetabling let alone disclosure implications.

So that's just for completeness, lest it be said that I've missed that out.

So then that takes me onto the third category of change to the pleading in the reamendments. The third one is a very short section on binding recitals. You may well recall, my Lord, that this was going to be an issue for today, but then, at the eleventh hour, NTN conceded as regards the outstanding issues and agreed with our position on them.

So it's no longer a live issue, but just so you now how this is dealt with in the pleading, if you could perhaps, please, just turn up, in the first instance, paragraph 6, which is on page C/657. You will see that in green at the bottom of paragraph 6 on page C/657 -- just to read those two sentences, please, Sir.

MR JUSTICE JACOBS: In paragraph 6?

MR HARRIS: Yes, the ones in green at the bottom of paragraph 6.

(Pause)

MR JUSTICE JACOBS: Okay, yes.

MR HARRIS: You were also to read, please, on page C/671, if you could please just read paragraph 39(b).

(Pause)

MR JUSTICE JACOBS: Okay.

MR HARRIS: So all that the reamendments do is set out, including by reference to the binding recital schedule that you'll find elsewhere in core bundle A, the agreement that the parties have now reached as to how the recitals are to be dealt with. Some are binding as essential basis, some are binding because of abuse of process, but it's all been agreed. It's a non-issue. Of course, it doesn't give rise to any disclosure implications. These are questions of law about what's binding and what isn't, what's an abuse of process and what isn't.

So although there are, therefore, the two parts of this document that have been re-amended that you have just read, they have no timetabling impact and no disclosure impact. That's the third category of the four that I'm drawing to your attention.

You don't need to turn it up, but you would find the binding recitals schedule at tab 4 of bundle A. It's a much

lengthier document, but, as I say, it has no disclosure implications.

Then that leaves me only with the fourth one, and this is the shortest of all. You'll find this one at paragraph 51.A of this re-amended pleading, which is to be found on page C/711.

All that that says is that by reference to -- it doesn't say this, but what's happened is that by reference to disclosure that we have received since the last CMC, we and our experts have been able to crunch the numbers a little bit more and look at the documents, exactly as you would expect, and we've been able to give an approximate figure there as to the compensation which is sought, namely €52 million exclusive of interest, which, as you know, is separately pleaded.

This is exactly what you would expect and, indeed, what we said we would do at the last CMC. One gets quantum disclosure, having not been able to plead an actual figure. This is exactly how it always works. Then, at the same time as one updates the pleadings so as to express further particulars of the cartel from the documents on the Commission file, one takes those same documents, if possible, and one updates the quantum plea. That's what we have done.

So we've now added in that figure. That also explains why annex 4, which you don't need to turn up, but which is

referred to in 51A, is just an updating of -- it's a split of the 52 million pursuant to the details of the pleading. So, again, it doesn't give rise to any timetabling issues and it doesn't give rise to any disclosure issues.

So where we have reached so far, my Lord, just drawing the strings together, is that there is a re-amended pleading. It does have 30-odd pages of additional pleading in. It's entirely orthodox, but on the main issue, namely Commission file disclosure and particulars of the secret cartel, it has no timetabling issues and no disclosure issues from the Claimants to the Defendants.

You may recall that I actually made that submission or words to that effect at the first CMC. I said, "There will be no impact upon the timetable you have set down, though we will have to amend or now re-amend our pleading", because this is what always happened and it was already built-in, if you like.

Then, as I say, the updating of the interest is a non-issue because they have already had that and disclosure. The updating of the quantum is neither here nor there for timetabling or disclosure purposes and nor does the change about binding recitals.

So what I just need to do now is show you the letter that I have threatened twice to show you in which we've agreed to the two weeks to have regard to these amendments. That's,

according to my note, to be found in bundle C at tab 162 at page 640. If you need a tab number, it's tab 162. It's bundle C3.

MR JUSTICE JACOBS: I have got it. For some reason, the tabs don't show up on the left-hand side of my computer screen, but I have got 640 anyway.

MR HARRIS: Good. You'll see that the letter begins from my solicitors on 7 January at 639, but the relevant bit is over the page, 640, a third of the way down:

"As to the timetable, full responsive pleadings while FCA considers the proposal set out in our letter to be reasonable and sufficient."

That was the seven-day proposal that you mentioned a moment ago, but we said:

"We would be content to adjust the timetable as follows."

Then we provide our draft particulars by today, which we did late on Friday night. Then there is a 14-day period that's now agreed -- that's item (ii) -- whether they indicate they consent.

Then we had suggested the next dates. I apprehend from what Mr O'Donoghue just said that they're not agreed, but there's no magic in these particular dates. We would formally file them the next day if consent is forthcoming. We have suggested then a full month to amend the reply. It may be that Mr O'Donoghue doesn't like that one. If so

advised, then further amendments to our reply by 19 March.

Insofar as the argument is going to be directed at (iv), the amount of time for my learned friend's team to deal with the amendments, I simply reiterate the two points I have already made and then add a third, which is these are documents that are intensely familiar to the Defendants but not to us, for the reasons I have given, namely the previous litigation going to the eve of trial and the Commission investigation. They're obviously Defendant documents as well.

So whereas it will be pointed out that it has taken us X months to deal with the proposed reamendments and we're only offering one month for them to be dealt with in response, that's not a fair equation because they were brand new documents to us. Christmas intervened to some extent.

More importantly, a lot of the documents, and we're going to see one if not two of these when we deal with confidentiality later on today, are in foreign languages. So we have had to deal with unfamiliar documents in foreign languages with Christmas intervening. We have managed to do that in -- I think we got disclosure three months ago. So we have done that in three months and we're offering a month to the Defendants to reply to documents where none of those impediments are applicable.

But, as I say, there's no particular magic to these. If

the court wished to adjust them in response to submissions, then that could be done. Importantly, these pleading-type changes, they don't impact upon the remainder, particularly, of the trial timetable. For the reasons I've given, most particularly, they don't impact upon disclosure with a knock-on impact upon witness statements.

So those are my submissions as regards the first part of the timetabling dispute, namely the reamendments. I just add that in the usual way, this is subject to liberty to apply, just as the existing order is. So if, for the sake of argument, in one month my learned friend's team has been able to deal with -- I don't know -- for the sake of argument 95% of the reamendments, bearing in mind that it's his own documents, but there is a particular issue about one or two of them or something like that, then there could be, either by agreement and/or by application to the court, a short extension of time so as to deal with anything that remains outstanding.

So, Sir, subject to any questions on that part, it just falls to me to deal with what I said to you on more than one occasion as being set out in my learned friend's solicitors' correspondence. In that regard, can I just show you quickly one or two letters. You'll be delighted to hear that you don't have to wade through even volume 3, let alone volumes 1 to 3, of this voluminous correspondence.

But if I can please just pick it up at tab 154 of volume C3, which is page C/613.

MR O'DONOGHUE: Are we still on directions or are we moving on to confidentiality?

MR JUSTICE JACOBS: There should be a firm deadline by which any further applications are to be made and your preferred date is 22 January.

MR HARRIS: That's right, yes, but if I could, can I just show you -- as I say, this part -- I'm nearly finished on the whole question of trial directions, but you're completely right. You have got my position.

Can I just show you; the real concern that we've got is neatly encapsulated in the letter at bundle C3 of 3 at tab 154.

MR JUSTICE JACOBS: What C reference is it? What page?

MR HARRIS: It begins at C/611.

MR JUSTICE JACOBS: Yes, okay.

MR HARRIS: I'd like to show you one sentence on that page and two sentences on page 613.

So picking it up at 611, my learned friend's solicitors are White & Case. So this is just before Christmas, and what my learned friend's solicitors -- if you have the third paragraph down, my Lord, between the two hole-punches, if you're in hard copy -- they say:

"However, the NTN Defendants consider the CMC on

11 January would be a premature non-event where possibly two/three issues have not crystallised, those issues not urgent."

Then, number 3, this is the one that concerns us, my Lord:

"More importantly, it is anticipated that a CMC be required in February/March 2021 to deal with a broader range of case management issues, not least of all intention to amend."

Then if you flick over two pages or scroll down two pages to 613, we see that, halfway down under the heading "The NTN's Defendants' position", there's a reiteration of the need apparently for another CMC in a month or two's time. At the bottom of that substantive paragraph, is your Lordship able to pick up (vi) at the very end of that paragraph?

MR JUSTICE JACOBS: Yes.

MR HARRIS: So what is said is, amongst other things, this CMC is supposed to deal with "disclosure issues", but they're not specified. We have tried repeatedly to ascertain what they are and we've got nothing. It is not said what it is.

But what we do know from this same letter, if you go up approximately 16 lines to the bullet point "Timetable to trial", what we see is in that bullet point, six lines down there's a sentence beginning "further". Do you have that my Lord?

MR JUSTICE JACOBS: Yes.

MR HARRIS: So that one says:

"Further, the NTN Defendants do not consider they will be in a position by 11 January 2021 to have determined their position in relation to the adequacy of the Claimant's disclosure."

That is the problem, my Lord. They got this disclosure on 6 November, so they have had it for well over two months. Some of it came in stages, but nevertheless, this was the timetable that your Lordship ordered. They didn't raise a single query about any aspect of it until 5 January, so that's last week. They now, notwithstanding the fact that there's been a CMC in the diary pursuant to your Lordship's order since July which they wanted and they were insisting upon -- I appreciate it's gone from the end of last term to the beginning of this term, but that's neither here nor there for these purposes, and now they say:

"We do not consider we will be in a position to have determined our position in relation to the adequacy of your disclosure by today."

Well, if that's true, which we find extraordinary, but if it's true, well, they brought that problem upon themselves. It's not acceptable, in our very respectful submission, that they should now say at this CMC that they wanted their -- "Oh, well, we should have another CMC in a month or two's

time", which is far closer to the date of witness statements and after the date that you ordered for completion of disclosure, at which they're going to ask for some broad and undefined disclosure.

Therein lies the rub, my Lord. That's why we have said we would very much like, and we're grateful to the Tribunal for allowing this, to address you today. We can't have a situation where there is just further unspecified disclosure asked for after the date that's already been ordered for disclosure, interrupting the trial timetable in circumstances where NTN hasn't even bothered to assess the disclosure that it's received to date.

As I say, we've repeatedly asked for them to specify exactly what disclosure it is that they seek and that hasn't been forthcoming. What we have had and the reason I have spent some time, and I apologise if it was slightly painful, dealing with the draft reamendments is that we have been repeatedly told, "Oh, well, we don't even know because we haven't seen your reamendments".

First of all, they now have seen the proposed reamendments and secondly, there was never any prospect of those reamendments having any impact upon disclosure, and none of them do, which is what I have just showed you.

May I just have one moment to just check my note? But I think that's what I have to say about disclosure, because

you have got the point: that I seek a direction for all further applications by NTN to be made by the 22nd. Can I just go on mute for one moment, check my note and also just take a brief instruction? I'm grateful. (Pause)

Yes, I'm just reminded, and we mentioned this in our skeleton argument, that we have specifically sought to ascertain in writing in the correspondence from my learned friend's solicitors that they won't seek at this future and unlisted CMC at which disclosure is going to apparently be sought to reopen the categories of disclosure that we already argued about and that you ordered in June and July.

In particular, you'll recall, perhaps faintly but nevertheless recall, that there was deep and complex argument by reference to multiple expert reports as to what quantum disclosure should be ordered. It's taken some months to get out and then should have -- well, we've looked at it, even if the other side hasn't.

That's what we want to make sure doesn't happen at any significantly later date. That should be ruled out. They've had the opportunity to seek orders for quantum disclosure. They have got it. If they had had any issues with it, it should have been dealt with today at the very latest. There are no issues with it because there is no application and indeed they have said words to the effect of, "Well, we don't know whether we're even in a position to tell you what to

do".

That's what we need to -- what we can live with is if -- we don't think it's likely, but if there are some much more discrete disclosure applications of, if you like, a specific disclosure variety, say, for instance, we have disclosed some document that's in a chain of documents and they look at it and they say, "Oh, well, we need to see X, Y and Z further documents from the chain", or something like that, and they make an application for it, albeit by the 22nd, then notwithstanding that that will take us a little bit beyond the 29th, nevertheless the trial timetable won't be interrupted. It can be dealt with in the witness statements and what have you. But that's the real worry.

When we specifically said in a letter that appears at C/633 -- I'm not sure you need to turn this up, but we specifically sought a confirmation that the NTN Defendants further disclosure -- that it may seek further disclosure will be limited and targeted and not the broad categories of quantum and disclosure that were sought at the first CMC. My learned friend's solicitors have refused to give that confirmation, so it leads us to worry that this is deliberate foot-dragging.

This is all, of course, against a background of, you'll recall, my Lord, that NTN didn't want there to be a trial date at all at the first CMC. We had to argue that you

should set it down, and you did. NTN, of course, is a proven wrongdoer that inevitably owes us money and is simply trying, in my respectful submission, to put off the day when it pays. It shouldn't be allowed to do so, just like you didn't allow it when they didn't want a trial to be set down.

Unless I can assist further, those are the timetabling submissions, subject to any reply.

MR JUSTICE JACOBS: Okay, thank you very much indeed.

Let's just focus on what I think are the important points, which are timetabling for present purposes. Let's take the pleading first.

It's agreed that you're going to have 14 days to consider this pleading. I understand the point that you have made; that you should have that time and it could have come earlier and everything else, but you're getting 14 days.

Now, one possibility is that at the conclusion of the 14-day period, you will say, "We object to these amendments". I don't know whether you'll say that; possibly not, but always a possibility. One possibility is you say, "We agree to them", and you'll have to amend your defence.

Just taking the latter, how long would you require to amend your defence?

Submissions by MR O'DONOGHUE

MR O'DONOGHUE: Well, my Lord, we received this pleading at 12.31 am on Saturday morning. It's 67 pages. Our client is

overseas and we have not had time to deal with it really in any meaningful fashion. So that's the starting point.

There is no point raking over the coals, but to take three months to get to the point of serving the draft amendments and to then say, well, we should be bounced into a deadline for disclosure applications, which would expire even before the deadline for consent to the pleading amendments, really is quite extraordinary.

Now, in the interests of being constructive, my Lord, the current deadline proposed by FCA is 26 February and we would seek an extra week in relation to that deadline simply because of the scale of the amendments. So it isn't a significant extension, but it is an important one.

I'm happy to address your Lordship on why we say we need that extra week, but I think your Lordship --

MR JUSTICE JACOBS: If you want to. I don't think Mr Harris even is going to fight you too hard on that, given what he said. If he does, I'd be against him. You can have --

MR HARRIS: I'm not opposed, my Lord.

MR JUSTICE JACOBS: Right.

MR O'DONOGHUE: So that puts a bit more light rather than heat on the position.

Now, in relation to Mr Harris's request that we should indicate by 22 January definitively in a guillotine fashion what disclosure applications, if any, we would make, in my

submission, there are objections of principle and practicality to that. With respect, I think Mr Harris has fundamentally misunderstood what we're seeking to do here and why.

The fundamental objection of principle to what Mr Harris proposes is that he proposes that any and all future disclosure in this case would be definitively guillotined even before pleadings had closed. That really is an extraordinary submission because we have yet to plead our amended defence. They have yet to plead out an amended reply.

In 20-plus years of practice, I have never heard a suggestion that any and all disclosure, subject perhaps to these minimalist discrete applications, would in principle be precluded before the close of pleadings. In my submission, that is simply wrong in principle and is completely backwards. So there is a fundamental problem with what Mr Harris is contending for. It is simply wrong in principle.

Now, I did make the point, my Lord, that the suggestion that we should definitively decide on disclosure before we have decided our position on consenting to the amendments really is completely backwards. That is a smaller point, but it is an illustration of the extreme nature of Mr Harris's proposal. It is, with respect, rather unfair to sit on these

amendments for three months and then bounce us into a two-week period in which he says we should make any and all disclosure applications.

But the fundamental point, my Lord, is a practical one. I hope everybody at this hearing can agree that the objective is to have the trial in good enough shape for January that the issues can be heard and determined fairly, including for the benefit of the court and the parties.

Our suggestion that there would be the option of a CMC perhaps in March, I think more realistically the start of April, is a purely pragmatic measure which reflects, first of all, the significant amendments to the pleading; second, the fact that each side is working intensively on the preparation of trial documents, including, of course, in particular the proximity of witness statements; and third, that the initial disclosure process would not have completed until 29 January.

We are simply making a pragmatic optional proposal that there should be something baked into the timetable whereby, in relative proximity, disclosure issues, if indeed they arise at all, that there is that optionality built into the process.

We would therefore suggest as a way forward that if there is to be any direction in relation to guillotining these applications, that that cannot logically come until perhaps seven days after the date of service of the FCA Claimant's

reply.

So Mr Harris, I think, has misunderstood the nature of what we're proposing.

Of course, there is a further point, which is the later an application is made, if indeed one is made, then the less likely it is to be granted. That is something which would fall on the head of the party making the application. So if there are discrete applications which would need to be made, it is in that party's interest to get on with those applications as soon as possible.

Sir, you have shown extraordinary flexibility to deal with things at short notice on paper if possible. If and to the extent that we make applications, it would be open to either party to front load those applications as and when they arise.

So we're simply putting in place something pragmatic to deal with the possibility that discrete issues may arise. We accept, of course, at this stage that if there are to be applications, subject, of course, to the further pleadings from the Claimants in the reply, that they should be focused and tractable. I hope that goes without saying and I'm surprised to see that Mr Harris seemed to think there was any disagreement on that. Of course that is agreed.

Can I pick up on a handful of discrete points. There was a suggestion that the Defendants had effectively sat on

disclosure applications. With respect, that is not a correct description of the correspondence in the sequencing of events.

So if I could ask your Lordship first of all to turn to C/583. It's a letter dated 15 December from my solicitors to Mr Harris's solicitors. Does your Lordship have that? Sir, do you have that page?

MR JUSTICE JACOBS: Sorry, I put myself on mute. I do have that, yes.

MR O'DONOGHUE: So you'll see in the second paragraph, this is 15 December, so not long before Christmas, second sentence:

"As the application of the NTN Defendants, the review of your client's disclosure is ongoing, and RBB have a number of preliminary queries for AlixPartners in relation to the disclosure provided […] We trust that the parties will continue to cooperate […] ventilate the issues properly in correspondence, and therefore NTN does not anticipate making applications at the January-listed CMC."

Sir, we have always been crystal clear with them that we were reviewing intensively the disclosure provided in early November 2020. We were seeking to iron out as many issues as we could by way of correspondence. We did not intend making premature applications, but we would deal with these co-operatively, conscientiously and responsively and would only come to the court as a last resort.

Of course, Sir, you will be aware in that context that at this stage, we were suggesting a CMC to take place in February or March. Therefore, we were keen to crack on with things and not to delay things. Now, as it happened, the amendments have come when they've come and the process of amending, with the best will in the world, is going to take until well into March. Therefore, we don't see any good sense in having a CMC before at least the pleadings have closed.

Just, Sir, to give you the further reference, if you then flick onto 588 of the correspondence bundle, you'll see -- so this is a response from FCA dated 17 December. It's the penultimate paragraph:

"In view of the above, we consider that the CMC will need to go ahead to determine this discrete point."

Which, at that stage, was the question of recitals and I think, to be fair to them, also confidentiality. Sir, certainly at this stage, it was not being suggested that the collaborative approach being put forward whereby disclosure issues would, if possible, be resolved by correspondence and, if truly necessary, then the subject of discrete application not to be heard in January, there wasn't any pushback at that stage.

So, my Lord, ultimately, this is a question of pragmatism. We want this trial in good shape so that it can

be properly and fairly heard. The option of a CMC perhaps late March/early April, coupled with our undertaking that we will make any applications of a discrete variety within seven days of my learned friend's re-amended reply, I would suggest is a reasonable, proportionate and perfectly pragmatic way forward.

The last thing anybody wants is to have a trial whereby important documentation is incomplete or missing. It is in everybody's interest that some time is spent over the next several weeks dealing with these issues. If and to the extent they arise and there are consequential amendments needed to the further directions, we can cross that bridge when we come to it.

There is actually, Sir, a bit of flex in the timetable. It might be that one way this could be dealt with would be by way of supplemental witness statements. But even with the January trial date, if we have witness evidence in May, expert reports in September, there is enough flex in the timetable to accommodate all of this.

But I do emphasise the point that if any applications were made, they would have to be brought forward as promptly as possible and they would have to be pretty self-contained and tractable. We are perfectly alive to that concern.

It does seem to me, Sir, with respect, that Mr Harris has essentially misunderstood what we had been suggesting. It

may be the parties are simply at cross purposes, but we are simply making a pragmatic proposal to try and ensure this trial is in good shape to be heard and determined.

MR JUSTICE JACOBS: Right. Just let me ask you a couple of things, Mr O'Donoghue.

There are two aspects of possible disclosure which seem to have been ventilated in the correspondence and in the argument. One is disclosure arising out of the amended pleading and one is arising out of, if you like, the existing pleading, the existing disclosure that was given in November ultimately, I think, and the existing further information as to compound interest, which was given in September, and all of those sorts of things.

Now, isn't it possible to draw a line under the latter relatively quickly?

MR O'DONOGHUE: Well, my Lord, in my respectful submission, the most efficient way to deal with this is to deal with those applications if and when they arise, because if, for example, we had sat on disclosure for months and months and months and then suddenly came up with an issue at the eleventh hour, that would be a factor, Sir, that you would take very much into account in the context of assessing any such application.

But we do think that the straitjacket of trying to shoehorn applications into different dates and different

types is a potential false economy. These are essentially matters of discretion. The question of lateness or sitting on things would be a factor going to discretion but not more.

We would respectfully suggest that one risks creating more problems than one solves by being over-prescriptive, because, my Lord, I do emphasise the point, and your Lordship will remember this perhaps from practice, that often when one is running through material with a view to producing witness statements, issues can and do crop up. There may at that stage, which is something ongoing, be discrete disclosure applications which would arise. That is no criticism of any party; it is just the nature of things.

In my submission, what paragraph 15 of the first CMC order was intended to achieve and has achieved is that the bulk of the exercise in relation to those specific points would be substantially completed by 29 January, and that objective has been achieved.

Now, if, on the back of that, and bearing in mind the progress to witness statements, there are a small number of discrete points, in my submission, they can and should be accommodated pretty briskly. We think that a guillotine is unnecessary and, Sir, your discretion in terms of timing and the content of those applications is the way forward.

MR JUSTICE JACOBS: Right, okay.

The second thing I want to ask you is this. I think

you're accepting that there should be some deadline by which you make applications, whether it's subject to the possibility of making further applications later on when expert evidence has come in and witness statements have come in, but in principle, you accept that there should be, and I'll call it, a guillotine, but you say that will come, should come after the amended pleadings have worked their way through by 19 or 26 March.

MR O'DONOGHUE: Sir, yes. I mean, I have never seen, in more than 20 years, disclosure being barred in relation to pleadings which are not closed. That would be an extraordinary order to make.

Sir, we are pragmatic. We have volunteered, against our interest, that there would be a form of guillotine, but if there is to be a deadline, it can only logically come after pleadings have closed. We've put in place a pretty aggressive deadline. It's seven days within the reply. In the context of the timetable we are facing, that is something which is perfectly achievable.

The reason we have insisted on the option of a CMC in late March or perhaps, more realistically, first half of April, before the end of term, is that we want all these issues done and dusted as early as reasonably possible so that this can be bedded down properly for trial.

So it is a case, Sir, of more speed and less haste. We

do want these things buttoned down, but it has to be done in a way that is logical and is fair. The suggestion of doing this even before we had considered the issue of consent to the amendments, with respect, is not serious.

MR JUSTICE JACOBS: Right. Let's assume that we do put in place some sort of deadline for you to make your disclosure requests, and I'll consider whether I should set some further CMC as well, are you suggesting that the 7 May deadline or timetable for the exchange of witness statements is going to be affected by that?

MR O'DONOGHUE: Not at this stage, no.

MR JUSTICE JACOBS: Does that mean you that reserve your -- effectively, you say, "Well, not at this stage, but maybe when we have seen what disclosure requests we're going to be making, that may move", or are you saying that realistically, anything that is the product of any further application in terms of witness statements can be dealt with in supplemental witness statements in accordance with the existing timetable, which is June?

MR O'DONOGHUE: My Lord, I would suggest two ways forward. First, if there are applications -- and to be clear, Sir, at this stage, it is entirely possible there may not be applications.

MR JUSTICE JACOBS: Yes.

MR O'DONOGHUE: We have that in mind. I mean, this is an option.

I do emphasise that. If applications are made and heard, then it would be incumbent on the parties, if an order is made, to comply with that in double quick time. So, in my submission, the parties can expect limited indulgence from the Tribunal at that stage.

So my strong hope is the 7 May deadline can still be kept intact, but if and to the extent that discrete issues might arise, then supplemental witness statements will be one way forward. My Lord, I have done a number of these trials and in virtually every case there have been supplemental witness statements. It's the nature of these things. Sir, as you noted, it is often the case, even following expert reports, that specific disclosure applications arise again. So this is something of an ongoing iterative process.

But in relation to the bulk of the heavy lifting for 7 May, this will concern material in relation to the procurements and the negotiations and so on. That is material that, in large part, can and should be assembled at this stage and would not be affected by any disclosure application. So we hope that all or certainly the vast bulk of the witness evidence would still hit the deadline of 7 May. To the extent there are any sort of straggling points, they would be either non-existent or perhaps very, very short supplemental statements on a particular point.

Sir, as a pragmatic proposal, we do not think in any

shape or form this would derail anything. Indeed, we are keen to front load this process as best we can at this stage and to try and get it done and dusted at this stage before the end of this term.

MR JUSTICE JACOBS: Right, okay.

Mr Harris, do you want to reply briefly?

Submissions in reply by MR HARRIS

MR HARRIS: Very briefly, yes.

What you have just seen is prevarication on the part of a guilty Defendant writ large, not prepared to commit, not asking for more disclosure from the original quantum categories, not prepared to commit to meeting the deadline, existing deadline, for disclosure, not prepared to commit definitively to meeting the existing deadline for witness statements.

This is exactly the sort of prevarication that we encountered at the first CMC and that the court gave short shrift to. My respectful first reply submission is it should again give short shrift. It should see through what's really going on here, which is an attempt to avoid judgment day.

The discrete second submission is if you were to look at -- Mr O'Donoghue, with great respect to him, has omitted to mention what we say in our skeleton at paragraph 12. He claimed that this was a fundamentally misconceived suggestion for a direction. Far from it.

What it says quite clearly in paragraph 12 is that you are invited, with respect, to make a direction for no further disclosure after 22 January, save unless good reason is shown why the matter could not have been raised at an earlier date. That entirely disposes of approximately the first 10 minutes' worth of submissions made by Mr O'Donoghue.

Again, Mr O'Donoghue complained that we hadn't understood the position and that the parties were like ships passing in the night. Far from it. We have understood perfectly well that what's really going on here is an attempt to reopen -- your Lordship hit the nail quite on the head when you said, "Can't we draw a line underneath those matters that were essentially dealt with in argument in June and July that were then subject to the Order?" Absolutely. That's exactly what we're getting at.

Those quantum issues, that were complex, required detailed debate, relied upon expert evidence and that had been going on now for seven months since June and July, they are the ones where you definitively need to draw a line.

It's already clear, in my submission, the Defendants are not going to meet their existing ordered obligation to comply fully with disclosure on those categories by the 29th, but we are nevertheless prepared to deal with that, subject to a direction that all of those matters, if there are any further matters, should be dealt with by applications issued

no later than the 22nd.

If and insofar as Mr O'Donoghue has then got some separate discrete issues, such as the ones that he adverted to and that I actually mentioned in my own submissions about how you can receive a document later, perhaps about liability or perhaps about a particular meeting, and then you say, "Oh, I need another few documents from that chain", well, they will be something that could be dealt with later, if they arise. What's more, there's quite the possibility that there will be ones there where Mr O'Donoghue is able to say, "Well, I had a good reason for not being able to do that by 22 January that has only just emerged".

So your Lordship is quite right. What we need to do is, with respect, pin down again, like happened last time, this Defendant to the existing timetable that was put in place for good reason and it shouldn't be allowed to shift on these critical quantum disclosure issues.

In that regard, just to elaborate upon what I said before, the only, only query that we have had, notwithstanding the disclosure on quantum was provided by us months ago, was on 5 January, after they had had it for months, and about volume of commerce. Nothing else.

But your Lordship will perhaps recall that actually though, that's the easiest of the quantum disclosure categories. The ones where we had the biggest debate were

things like interest and pass-on and overcharge. They are the ones where the experts really knuckle down. That's where their contrasting regression analyses clash. That's what we have been doing since June and July.

That's what we can't allow to have reopened by this open-ended suggestion, which is now even more extraordinary than it was before we began submissions. At least in the letters this other CMC was said to be February or March, but now all of a sudden it's migrated to early April. But early April is a month before witness statements and in circumstances where Easter falls between early April and the date for witness statements. It's a completely, with respect, transparent attempt to push the timetable out and it's not acceptable, given the existing directions that you have already made.

I should also add that unlike the Defendants, who have already prepared to the eve of trial for a trial on essentially the same issues as are now being litigated, albeit against a different automotive manufacturer Claimant, we haven't. So the person that would be imperilled, the injustice will be upon us if, at the time when we're supposed to be dealing with witness statements to 7 May, all of a sudden we are met with a revised raft of quantum disclosure applications with expert evidence.

It won't impact upon the Defendants. They ought to be

already ready with witness statements that deal with the substance of this case. They've already done them for another case. I appreciate they'll be topped and tailed, but the substance has been done. That's another reason why they shouldn't be allowed any more wriggle room beyond that which we have already accepted, subject to the court's direction, is permissible, namely a guillotine of the 22nd, subject to good reason.

I would also invite you to note, my Lord, that in the course of his submissions, Mr O'Donoghue has again, just as in correspondence from his solicitors, failed to explain why it is that they haven't made any further requests for quantum disclosure, for example, as regards interest or overcharge or pass-on. They could have done. They have had this for a long time, but it's been kept back from even you, Sir, in these submissions. We invited them specifically to confirm that they wouldn't, effectively, in writing and I have effectively specifically invited him to do so again orally and he hasn't. That is truly worrisome and it's another reason why we should have a so-called guillotine.

Then the last two points are much more minor. Just for the sake of good order, my learned friend has now advanced an odd new argument that: oh, well, you shouldn't have these disclosure applications even brought to the fore prior to the close of pleadings. But that doesn't work because it was my

learned friend's team that was originally seeking the disclosure -- the CMC in December 2020, which is now taking place today. That was always going to be well before pleadings were finished.

It's entirely common that one deals with the difficult issues of quantum in a follow-on damages case well before pleadings are closed. The proof of that, of course, is in the pudding; that you did deal with them well before pleadings were closed back in June and July last year. As I have said, the orthodox changes that we have made in the draft reamendments happen in all of these cases and they don't impact upon disclosure.

Then the last point is simply a much more minor point about supplemental statements; again, a new point from my learned friend. But that's wrong in principle. What happens in these cases is that every effort is made to avoid supplemental statements, and that's how all the directions are shaped and that's how disclosure is carried out, but that I accept the submission this far only: that it is in the way of things that notwithstanding that every effort is made to avoid them altogether, sometimes they can't be avoided. But that's not because at a CMC now before -- at this stage of the litigation the court has been persuaded, "Oh, well, don't worry, because even though you've directed when this work should really be being done, we can all have another bite of

the cherry in supplementals". That, with respect, is back to front.

So those are my reply submissions on the timetabling issues, unless I can assist you further. I think you may be on mute, Sir.

MR JUSTICE JACOBS: I think I'm back off mute now. Right, let me just say what I think should happen.

RULING

MR JUSTICE JACOBS: I am asked to resolve various issues as regards to timetabling. The initial question is as to the timetable to be set in relation to amendments which were put forward by the claimants late on Friday 8 January evening or early on Saturday 9 January, this CMC taking place on the afternoon of Monday, 11 January.

The parties are not in substantial dispute as to that. It is agreed that the defendants should have 14 days in which to consider the amendments which have been put forward and to indicate in writing whether or not they are prepared to consent to those amendments.

On the assumption that consent is forthcoming (which is a reasonable assumption to make given the nature of the amendments, but does not preclude the defendants from taking a different position) there is no longer any substantial dispute that the defendants should plead an amended defence by

5 March. This is a week beyond the 26 February date ventilated in correspondence. The reply from the claimants should come on 26 March, which is a further week beyond the 19 March date which was previously indicated.

The next question is whether or not I should at this stage impose a deadline for the making of further applications for disclosure by the defendants, who have foreshadowed the possibility of such applications in correspondence. If so, then there is an issue as to what that deadline should be.

The competing dates, if a deadline were to be imposed, are (a) 22 January, for which the claimants contend, and (b) the later date for which the defendants contend, namely some time after the close of amended pleadings. The latter date, on the timetable I have indicated, would come to fruition on 26 March 2021, and therefore a possible deadline would be a week after that in early April.

As far as the question of a guillotine is concerned, I have some hesitation in laying down a guillotine, for the simple reason that, even as proposed by the claimants, the proposed guillotine would be subject to an exception, namely if good reason could be shown. In a case where disclosure is, to some extent, ongoing, where witness statements and expert reports are to be served in due course, it is in practice difficult to preclude a party from making disclosure

applications if they genuinely arise out of issues which have developed.

Therefore, I have some hesitation in imposing a rigid guillotine of any kind. But it does seem to me that Mr Harris has a fair point that disclosure in this case was due to have been completed by 29 January 2021. This CMC was fixed some time ago at a time when it was envisaged, as has actually happened, that a substantial amount of disclosure would have been provided by each side to the other. Indeed, the claimant's position is that they have provided all their disclosure some time ago.

What I propose to do in relation to the question of guillotines is this. I will make it clear to the defendants that, as Mr O'Donoghue more or less accepted in his submissions, that if there are applications for disclosure (i) which arise out of the existing materials previously been provided by the claimants, or (ii) which arise out of the further information which was provided by the claimants in relation to compound interest, or (iii) where in some way, directly or indirectly, the defendants are seeking to challenge the disclosure decisions which I made some months ago, then those applications must and should be made promptly.

That is not to say that I will penalise them if they are not made by 22 January, but if they are not made promptly, and are only made at a much later stage, then it is going to be, obviously, much more difficult to persuade me that they should be allowed because of the potential impact on the

trial timetable.

But I am going to say that the guillotine, insofar as there is one, should be as proposed by Mr O'Donoghue, namely some time after the amended pleadings have been finalised, because I think that is the fair way to approach matters. I think it is appropriate, if pleadings have been substantially amended, for a party to be able to consider, in conjunction with its legal advisors, where the case now stands in the light of the amended pleadings. Each party is entitled to stand back and look at the pleadings as a whole as they have been finalised and to say: "Well, what now, in the light of the case that is now being put forward, do we actually need by way of disclosure?"

It may well be that in this case there is nothing really that arises out of the amendments which generates any legitimate requests for disclosure. If so, then if applications are made which really relate to matters which arise from documents which were disclosed last year, or the compound interest pleading, or are a challenge to my prior disclosure decisions, I am not going to be very sympathetic for reasons already explained.

But I do not think the defendants should, in circumstances where there has been a significant volume of amendments with which they are now having to deal, be shut out from taking a view as to what, if anything, those amendments give rise, and in that context, taking into account whatever it is the

claimants say in their reply.

The short answer, therefore, is that I will not impose a 22 January deadline. But I will make it clear, as I have done, that applications can be made to me now arising out of the existing pleadings and the existing disclosure. I will endeavour to deal with those, if necessary, by way of a short oral hearing or, if necessary, on paper. There should also be a deadline, subject to good reason, which comes a week after the amended reply, for any disclosure applications formally to be made by the defendants.

I have in mind that even if an application were to be made, that will not impact upon the date for witness statements, which is currently 7 May 2021. I will need very considerable persuasion if it were to be suggested that that date should be changed in any way as a result of the disclosure applications.

I am not at the moment minded to set a date for the determination of any such applications. One of the things which has struck me as I have listened to the arguments is that, at the present stage, this is all very theoretical. I do not accept that this is a case where I can conclude, on the present material, that the defendants are prevaricating in some way. It seems to me that the more realistic conclusion is that they wish to keep their options open for as long as

they possibly can, particularly in circumstances where they have been given an amended pleading.

The upshot of all of that, Mr Harris and Mr O'Donoghue, is that there is no 22 January deadline. But the defendants are encouraged strongly to make any applications which they can make as quickly as they can. The guillotine, which is always subject to reasonable cause, for making disclosure applications arising out of the amended pleadings or anything that has gone on before should early April. You can address me on what date is appropriate, but I had in mind, I think, 2 April.

MR O'DONOGHUE: My Lord, the seven days (inaudible - feedback).

MR JUSTICE JACOBS: I think someone has got their (inaudible - feedback) echo on that. I missed that, I'm afraid, Mr O'Donoghue.

MR O'DONOGHUE: Sir, is that better?

MR JUSTICE JACOBS: Yes, that's much better. Thank you.

MR O'DONOGHUE: So yes, the reply plus seven days was my proposal, so I have no issues with 2 April.

MR JUSTICE JACOBS: Yes.

MR HARRIS: Sir, we respectfully suggest five days and of course, if we get our reply -- if there is no reply or if we get our reply in a lot sooner, then it would be significantly before the first week of April. We do have the concerns about that

date that we expressed before, but partly we can address them ourselves by either not putting in a reply or amending further any reply or only doing so much more quickly than a month.

MR JUSTICE JACOBS: Why don't we leave your reply date as 19 March then?

MR HARRIS: Yes. I think the issue, Sir, is we'd rather have the later date as the deadline just in case it's needed, but we either may not need to amend or if we did, we would try to do so sooner. But what we do say is whether it's on the existing proposed date or a sooner date because we make a sooner date, five business days rather than seven.

MR JUSTICE JACOBS: Right. I'll say seven days after the service of the reply.

MR HARRIS: I'm grateful.

MR JUSTICE JACOBS: If you don't manage to serve, then you'll get the application earlier.

MR HARRIS: Understood. That's very helpful. I'm most grateful. Thank you, my Lord, for spending so much attention on that.

That from my list then leaves only one issue, which is confidentiality dispute. If it pleases the court, I will address you on that now.

MR JUSTICE JACOBS: Yes. Is this being transcribed by Opus?

MR HARRIS: It may be a convenient moment for a break.

MR JUSTICE JACOBS: I just wonder if I should give everybody

a break. All right, let's take 10 minutes.

MR HARRIS: So reconvene at 3.10?

MR JUSTICE JACOBS: Yes. Thank you.

(3.00 pm)

(Short break)

(3.10 pm)

Submissions by MR HARRIS

MR HARRIS: Good afternoon, Sir. Unless you have any other matters, I'd like to just address you on confidentiality. Of course, you have seen the shape of that argument from the skeleton argument, so I will cut to the chase.

We have serious concerns about the misapplication of confidentiality designations by NTN, the Defendants, and their solicitors. It's not limited to just a few documents here and there. What's gone wrong is a misunderstanding or a misapplication of confidentiality designations across the board. That gives rise to three particular problems, which is why I raise it with the Tribunal today.

The first is that we have to waste time and money ourselves, as does the Tribunal, in addressing this issue. It should have been dealt with, actually, without needing to the trouble the Tribunal at all. That's the first problem.

The second problem is we're unable to take instructions from our own lay clients because most of the material that has been wrongfully designated has gone into this so-called

Inner Confidentiality Ring, although sometimes referred to as the "legal eyes only ring" or "external eyes only ring". So obviously we can't take instructions about it.

Then, thirdly, it means that contrary to obvious principle, our own clients, the ones who pay our bills, aren't able to participate fully in the proceedings that they themselves have brought.

So those are the reasons of principle why this needs to be addressed. I will take you very briefly, you'll be pleased to hear, to the authorities in due course, but just to set the scene, this is essentially the chronology and why we raise it today.

MR JUSTICE JACOBS: Before you go into it, isn't this dealt with in the existing Confidentiality Order? Isn't there a mechanism for resolving these issues?

MR HARRIS: It is not dealt with in the way I put it, for this reason: the Confidentiality Ring Order is intended to deal with specific complaints about specific documents only. It's not intended to deal with a situation where, as here, a party has wrongfully -- wrongly either applied the wrong disciplines or, as here, wrongly failed to apply any relevant principles, resulting in vast swathes of the material that's been disclosed being wrongfully designated.

I shall show you clear authority on that in just a moment. It's the President of the Tribunal,

Mr Justice Roth, in the recent case of Infederation deprecating strongly exactly what has happened in this case. Exactly. It's almost a carbon copy.

That's the problem, you see. If, which isn't this case, I simply had five specific documents and there was a dispute about the particular reasons for the designation of those five documents, either in the Inner Ring or the Outer Ring or in any ring, then that could have precipitated an application and you could have resolved it. But that's not this case.

My complaint today is that there needs to be a wholesale further exercise conducted by the Defendant of its confidentiality designations because it's not done them properly. I'll make good that point in a moment.

So that's the answer to your Lordship's question.

MR JUSTICE JACOBS: Why can't you follow the procedures in the designation provisions of the Order, or does Mr Justice Roth say that provisions like this are simply inapplicable in certain circumstances?

MR HARRIS: If you like, I can cut to that and show you the passages. What he says is there shouldn't be a wholesale treatment of documents en masse as confidential and then leave it to the other side to come back, if needs be, repeatedly, at great time and wasted time and cost, to say, "Oh, well, actually, you've got this one wrong", and then the next day, "Oh, well actually, you've got this wrong", and

then the next week, "Oh, you've got these five wrong", and then the next week, "You have got these 20 wrong". That's exactly what you shouldn't do.

Maybe I should take you to those passages so that you have got them firmly in mind. They're in bundle D, the authorities bundle, and it's to be found at tab 5. In particular, page D/147 is the start of the case.

So that you know, the facts are not really important, but this was a battle between the Google Shopping algorithm, they were the Defendants, and a much smaller company which had invented essentially a shopping algorithm for searching for the price comparison sites. It was a huge battle between the two of them which we don't need to detain ourselves with.

But in the context of that, there was an Inner Ring of legal eyes only and there was an Outer Ring of the two main lay clients for the Claimant, Infederation, plus the lawyers plus the experts. Then, in the usual way, there's a Non-Confidential Ring, but just subject to the usual litigation undertaking. So it's very, very similar to our case in that sense.

Then the specific battle that was raised was whether or not a particular, I think, German expert on algorithms of this type could be added by the Claimant to the specific ring in that case. Then there's a very interesting clarification of the principles to be applied when dealing with

Confidentiality Rings of these different tiers.

Eventually, Mr Justice Roth, sitting in the High Court in that case, admitted the German expert to the Claimant's rings, notwithstanding opposition of Google, unless Google decided not to pursue certain allegations, in which case, the addition wouldn't be needed. So that's the background.

But the particular point that arises is to be found under the heading "Postscript" on page D/165 at the very end of case. D/165. I'm in your Lordship's hands. You may find it quicker just to read paragraphs 56 to 59, or alternatively, I can read them out.

MR JUSTICE JACOBS: I'll read them to myself.

MR HARRIS: Thank you very much.

(Pause)

MR JUSTICE JACOBS: Yes, okay.

MR HARRIS: So that's the key part of the case, but can I just show you one other aspect before I show you some correspondence. There's another helpful summary on page D/161 at the bottom of paragraph 42.

So his Lordship, Mr Justice Roth, has reviewed the authorities about various rings. He refers to the Al Rawi case, etc, principles of open justice, all the sorts of things that you'd expect him to refer to. Then he summarises it in the final two sentences as follows:

"In my view, the important points to emerge from the

authorities are that: (i) such arrangements are exceptional ..."

I obviously rely on that:

"... (ii) they must be limited to the narrowest extent possible ..."

I obviously rely upon that:

"... (iii) they require careful scrutiny by the court to ensure that there is no resulting unfairness."

I rely on that, but obviously it's less directly germane.

Then just finishing off:

"Any dispute over admission of an individual to the ring ..."

Pausing there, that's what was going on in the Google case, in adding Dr Klöckner, to the ring:

"... must be determined on the particular circumstances of the case."

So it's against the background -- incidentally, we pointed this case out and this set of principles to the Defendants a long time ago, although, as Mr O'Donoghue has repeatedly said, he's an experienced practitioner in this regard and this should have been extremely familiar, but with some regret, it's obviously not what the Defendants, NTN, did. To the contrary, what they did was they applied a blanket en masse designation not just of confidentiality, Sir, but of Inner Ring Confidentiality to either the entirety

or almost the entirety of the documents that they were going to disclose.

So there were 1,907 documents disclosed and they were all or almost every one put into the Inner Confidentiality Ring, thus disabling my lay clients from seeing any of them and my solicitors from taking any instructions on any of them.

You can see that, Sir, if you turn to the correspondence at C, volume 2, tab 126, which is page C/494. You will recall that at the end of the Infederation case, Mr Justice Roth specifically refers to the duties on the part of solicitors to advise their lay clients as to how this process -- principle of open justice should be applied in the context of confidentiality, but look what happened in this case, my Lord.

Under the heading "Confidentiality designations" -- this is second paragraph of C/494 -- NTN's solicitors write -- they refer to paragraph 6 of the Order and then they say, second sentence:

"We were entitled to designate."

But then they say:

"NTN has done so, designating its disclosure into the Inner Confidentiality Ring in the first instance."

That's exactly what they did; they put it all into the Inner Confidentiality Ring.

They then say:

"In our experience, this is an entirely orthodox manner in which to proceed."

With respect, absolutely not. That's an entirely unorthodox and mistaken way in which to proceed. Far from it being narrowed to the "narrowest possible extent" or being "exceptional", you can see that White & Case, for reasons best known to themselves, have put the entirety into the wrong ring. That is totally contrary to good practice and the law as set in many places, including in Infederation.

Unsurprisingly, we pointed this out because it immediately started to impact upon our ability to deal with their disclosure. We said, "Well, hang on, that's not right". We pointed this out and then they said, "Oh, well, we'll do it again". So it was an acknowledgement they got it wrong and they said they'd do it again.

Let me show you that one. If you were to turn to tab 138 at C/521, what you'll see that is that following the two letters of ours to which they refer at the beginning, they then say in the second paragraph:

"We have now completed a second review of confidentiality of NTN's disclosure."

So that's their own disclosure. Then let's just see what happens. It's over the page. If you scroll down, there's something like 30 pages of re-designations because they got them wrong first time round. Luckily, you don't need to look

at any of the detail, but if you just scroll onto 522, you'll see the first of the 30-odd pages is 16 documents that were removed altogether from the ring, so there shouldn't have been any form of confidentiality on NTN's own case. That then scrolls on for 21 pages, taking you to 348 documents.

MR JUSTICE JACOBS: Could you just pause one second, because I need to plug in my computer. Otherwise, I'm going to lose you.

MR HARRIS: No problem.

(Pause)

MR JUSTICE JACOBS: Okay, I'm there.

MR HARRIS: Good. So there were 348 of the 1,907 that should never have been in the Confidentiality Ring at all, on my learned friend's solicitors' own admission. So that had gone badly wrong.

Then if you scroll down from page 21, which is C/541 of the bundle, to the end of that table, 549, there's another eight pages comprising almost 150 further documents which shouldn't have been in the Inner Confidentiality Ring, on my learned friend's solicitors' own admission, but should have been in the Outer Confidentiality Ring. In other words, it had gone very badly wrong and it had to be corrected when we pointed it out. Far from being the orthodox approach, it was completely mistaken.

But what you will then note is, because I have referred

now twice to the fact there were 1,907 documents, is that this only comprises a re-designation of just under 500. So call it 25% thereabouts, 25/30%. That left, therefore, approximately 70% or so of the documents as still being Inner Confidentiality Ring designated documents, giving rise to the three problems to which I referred at the outset, in particular that we couldn't obtain any instructions in relation to them.

So this letter was 9 December and we then said, "Well, hang on a minute. With respect, you have also done the second exercise wrong because ..." and then we have put out some details in tab 44. That's to be found at -- page C/589 is the beginning of the letter and the relevant bit starts at the bottom of 589.

So that's our letter of 17 December, my solicitors, we refer to the fact that there's been this second review, but we say it's similarly defective. Then we give some examples which are illustrative of an obviously defective second review at the bottom of the page:

"The documents that indicate a clearly defective review include ..."

Then there's items 1, 2 and 3. They're of a similar variety. 20 documents that only show a particular logo. Well, they are not confidential at all, let alone Inner Confidentiality. 18 that show another logo and then five

that show a third logo.

Now, they're actually of the less important variety because, frankly, we don't care about those documents, but it nevertheless shows that the Inner Confidentiality Ring of the most exceptionally confidential nature was wrongly retained.

But then, more importantly, at item 4 there are 62 FCA documents. So these are documents that originally, as the world of commerce -- the wheels of the world of commence were turning, were documents that either we created or were sent to us, but in the mists of time, given that this cartel is from 2004 to 2011, in our disclosure exercise, we didn't locate them. So we haven't got them, but they were located by my learned friend's team and then sent to us in their disclosure. Yet it is said that documents that we already had once -- they may even have been our documents -- are somehow Inner Confidentiality Ring documents that we are not allowed to show to the people who created them. It's nonsense. I'll show you two or three of those in a moment.

Then there's two documents comprising of blank tables, item 5, and three entirely blank documents. Again, less important in the scheme of things, but nevertheless indicative of the fact that this second exercise that is supposed to have been done with the great responsibility of experienced solicitor practitioners has been done incorrectly.

This was not, Sir, intended to be a comprehensive view of every one of the remaining 1,500 or so documents. The reason for that is precisely because Mr Justice Roth says in Infederation it is not for one party wrongly to designate everything and then, at great time and wasted cost, for the other party to come along and say, "Hang on a minute, you have got it wrong", and then the next day and then the next day and then the next day. So these are just illustrative examples.

If you see the penultimate sentence of the penultimate paragraph, you can see the figures. So following the NTN Defendants' second confidentiality review, 1,387 documents, so that is more than 70% of the disclosure, are still said to be Inner Ring Confidential. That's, we say, illustrative of the fact that the exercise still hasn't been done properly.

I will just show you in a moment two or three of these documents, bearing in mind that they are currently designated Inner Ring Confidential, so I will be very careful about how I do it.

But just before I do that, can I just remind you of something with which you're doubtless very familiar, which is those statements of policy and principle at European and at Competition and Markets Authority level that say very clearly that it's extremely difficult to seek to maintain a commercial confidentiality objection to disclosure, to put

something in a ring, whether Inner or Outer, if it's over five years old.

I'll happily show you these documents if you want. They ought not to be controversial. They're mentioned in my skeleton. They are to be found at tab 4 of the authorities. It's two European cases that say, basically, beyond five years, you're not going to get it at European level, confidentiality. I paraphrase to save time.

Then the CMA policy document at tab 6, which actually says two years. The CMA's policy is if it is more than two years old they're unlikely to accept a confidentiality claim.

Now, these documents are largely far, far older than that. They largely relate to the time of the cartel, which is 2004 to 2011, so way more than even five, let alone two years ago. So that is the category of, we apprehend, the type of claim that is sought to be made by NTN, some kind of commercial confidentiality, although we're somewhat at a loss, Sir, because we have sought repeatedly in correspondence to ascertain the basis on which these designations are being carried out. We have asked repeatedly for NTN and its solicitors to explain how and why they've maintained these redactions of 70% plus of the documents and we have been met with no explanation, save only at the eleventh hour with a deeply flawed partial explanation.

Can I show you that as the last letter before I turn to one or two documents. It's to be found in tab 161 of bundle C, which is bundle 3 of 3, the most recent correspondence, at page C/638. I hope you ought to have there a letter dated 7 January. Under the heading "Confidentiality" on the second page, so C/638, NTN respond through its solicitors to our repeated protestations that even the second review is defective. They say, "No, it hasn't been", and this is the explanation; incidentally, the first explanation:

"NTN has assessed confidentiality at the level of the parent document. This is manifest from the fact that certain logos have been designated confidential because the relevant parent email has been designated confidential. This would be obvious to anyone familiar with the mechanics of electronic document review. We reject ..."

Then it says "illogical":

"We reject the illogical suggestion that NTN should have de-designated individual documents where they form part of a family containing confidential material."

Well, with great respect, it's obviously wrong. You apply confidentiality designations to individual documents. That's of course what we have done. My solicitors being experienced competition litigators, that's what they have done. They have gone through each document and they've said,

"Is it confidential at all and in particular, is it Inner or Outer?" If it's not, including where they are old documents, it doesn't get any kind of confidentiality protection.

But in sharp contrast, my learned friend's solicitors apply the Inner, the very highest most confidentiality designation to every single document from the outset and then they only removed approximately 30% at our instigation. Now there remain 70% and it transpires that that's because they haven't even applied their mind to the de-designation or the proper designation of individual documents. They simply haven't done it.

They've just said -- it says here in this letter, so far as I can understand it, "Oh, well, there's a parent document", for example, a parent email. It might have five or ten attachments or it might be a document that's got three or four associated documents. Because one of them in the parent level has got some confidentiality, that's it; they're all confidential and, what's more, Inner Confidential, Inner Ring.

That's plainly wrong and gives rise to -- it explains why those five items that I identified in my solicitors' letter are so wrong. It explains why there's a wrongful confidentiality designation of lots and lots of logos, but, much more importantly, why over at least 62 documents, that are our documents to begin with or we once had, have been

wrongly designated.

As I say, that is not because we have not gone through all 1,300 remaining documents and said, "This is the full and exhaustive list of where you've gone wrong", because that's precisely what you're not supposed to do when it's obvious that the other side has applied an illegitimate approach.

So where does that leave us, my Lord? I obviously don't want to, particularly in the confines of a video hearing, show you many of these documents, but just so you can get a flavour of one or two, I'd like to do that, but I don't want to read them out for obvious reasons.

Can I take one document, and this is why I showed you the RFQ part of the existing procedural directions order at an earlier stage. This is an RFQ, so it is right at the very heart of the sampling exercise that you ordered, my Lord, back in June and July. It's to be found in bundle A at page 213.1. In other words, it got inserted into the core bundle, so you may not have it in hard copy. It got inserted behind our skeleton argument, if that's of any help to you.

MR JUSTICE JACOBS: What was the page reference again?

MR HARRIS: Our skeleton argument finishes on 213 and the next page should be 213.1.

MR JUSTICE JACOBS: Yes, okay.

MR HARRIS: Now, this is, as you see at the top, designated Inner Confidentiality Ring, so I'm not going to read out anything

that's sensitive and I suggest that nobody else does. But you can see what it is; it's an RFQ. So it's one of the sampled. What's more, it comes from us. It's a Fiat document. You can see that at the top. It's 18 pages. You can see it says pages 1 to 18. It's dated July 2006, so some 14 years ago.

This is a document that we are being told cannot be shown by us to our own client even though we created it and even though it's 14 years old and even though obviously it's the client's claim and they have a right to participate. This is an example of one that I mentioned to you before; that although we created it originally, we no longer have it and we got it from the Defendants in disclosure.

So I don't need to say anything more about it other than that is manifestly a wrong and illegitimate designation as Inner Confidentiality Ring and it goes to the heart of the issues in the case about pricing and practices to do with RFQs.

So that's the first document. There are lots of examples of this. I'm just showing you one. That's 18 pages of one.

Another document is to be found 18 pages later at 213.18. This is a much shorter document, but again, it's a product card with some technical characteristics about the pricing and other offering of the bearings that are the subject of this case. Again, it's 2007, this document, and again,

originally, although we no longer have it, it was created by us, and yet we're being told by NTN, "You can't show it to your lay clients". It couldn't be more wrong, in my respectful submission.

The next document again is quick. This is A/213.19, so page 19 of the clip. This is a good example of one that originally came in a foreign language. My very learned junior Mr Woolfe, who speaks Italian, has given a convenient translation on 213.20. I obviously am not going to read it out because it's said to be ICR, but if you could just cast your eye very briefly, my Lord, over the English translation.

(Pause)

MR JUSTICE JACOBS: Yes, okay. I've looked at that.

MR HARRIS: You can see it's about price negotiations on the subject of it. They are right at the heart of the pleading.

So although I do not need to, for these purposes, explain to you why these documents are relevant, they are all obviously relevant because otherwise, they wouldn't have been disclosed. But what I can say to you is we obviously need to take instructions on that document. It's right at the heart of the issues in this case, like the RFQs are. But again, we're being told we can't because it's in the Confidentiality Ring.

That's notwithstanding the fact that at the time in question, the company that authored this letter -- you can

see that on the top right-hand side of 213.19 -- Magneti Marelli, throughout the entire period of the claim, that was a subsidiary of my client. It no longer is, but that's not so relevant. Yet we're being told we can't take any instructions on it, we can't show it to anyone, we're not allowed to know the context from our -- I mean, I need say no more.

Then just last but not least, the remainder of this clip, which, as I say, is not exhaustive at all, is more examples of documents, many of which originally came from my clients or its relevant subsidiaries and were sent to NTN and other Defendants, but we're now told we can't see again.

So the last one I just want to pick up with you, Sir, it begins in Italian on page 213.3. There is a chain of emails in Italian. Again, Mr Woolfe has very helpfully -- the last one is already in English on page 213.36, but just so you can see, the English there begins on 213.37.

You don't really need to even need to read them in English, let alone Italian. All I need to say about them, bearing in mind they are currently designated ICR, is that it's all about price negotiations in the context of particular supplies of particular pieces; in other words, the very issues in this case.

As it happens, just for your note, this one postdates the cartel. So that you know, it says 2013, not 2011. But as

you may recall from our pleading, and I'll happily show you if you wanted to, we have expressly pleaded that the ongoing anti-competitive price increases extend beyond the cartel period, including because, as you may recall, the RFQs are for multiyear periods and they take a year or two to settle and then they last for seven or eight years. Therefore, that explains why materials that were subject to anti-competitive behaviour before 2011 nevertheless have price effects after 2011. That's not disputed for today's purposes.

It also goes, we apprehend, to a point in the pleading where my learned friend's team at paragraph 41 of his defence has pleaded a failure to mitigate.

In any event, they're price negotiations within a relevant pleaded period arguably to do with mitigation. Frankly, I don't have to explain, let alone justify, why they're relevant for these purposes of designation. They have been disclosed because they are relevant. Yet we're not allowed to show them to our lay clients or obtain any context or any instructions.

So there we go. That is the background in the correspondence, the issues of principle as a matter of law, some specific examples of how this has gone wrong, but not an exhaustive list.

That just leads, subject to any questions from you, Sir, to me, to a short conclusion. Against that background of it

so obviously having gone wrong and far from being the narrowest possible or exceptional or being done by reference to obviously correct principles, it's not exceptional, it's not at all narrow, it's been done by reference to obviously incorrect principles such as family parent documents. It's obviously gone wrong, no matter what principles it's applied to because it encompasses large numbers of documents that originally were our documents anyway, leaving aside the sort of logo point and the blank tables point.

What do I therefore invite you to do? With respect, I say that far from having to go through the laborious, time-consuming and costly process of taking however many of the 1,300-odd documents that are left and making an application under paragraph 6 of the Confidentiality Ring Order in relation to each such document, far better, given that it's so obviously gone wrong, for, with respect, we say, this Tribunal to now direct my learned friend's team to do this exercise properly by reference to the principles that are in fact set out in the relevant case law.

By way of simple postscript, I add that it's much better, we respectfully contend, for it to be done now because of what happens if it's allowed to be left in an unsatisfactory state.

What happens in these trials where there are over-inclusive confidential designations, as is currently the

position, is that one gets to the actual trial and then people like me or, for that matter, Mr O'Donoghue, they stand up, and this could literally happen on the opening day before you in the trial, and they say, "Well, my Lord, I'm very sorry, but this bit, we're going to have to throw out the members of the public or cut them off the live stream because it's said to be an Inner Confidentiality Ring or, for that matter, Outer Confidentiality Ring". Then what happens is everyone gets thrown out and then it quickly emerges that actually, there's nothing confidential in it at all and either have to come back in or -- and then five minutes later, there's again a misdesignation.

So you either do that, which is highly disruptive and not conducive to the good administration of justice, or as happened in the case presided over by Mr Justice Birss in the Unwired Planet litigation, there were so many claims for confidentiality that were so overclaimed that, in practical terms, he said, "Look, we can't just keep opening the door. It's not like a revolving door here for people who come in and come out and can live stream or not. We're just going to have to shut the court whilst we deal with things that are said to be confidential", even though afterwards it's transpired that many of them are not.

That plainly is not acceptable from an open justice perspective. It wastes time. I've seen it so many times.

Much better, where it's so obviously gone wrong, in my respectful submission, for this to be done properly now. Only then, once we can have some degree of confidence that my learned friend and his solicitors have done it properly for once and there's anything left, maybe a handful of documents, if need be, we can present an application to you about those. But the examples that I've given, they can't be maintained as Inner Confidentiality Ring.

May I just take one instruction for one moment? (Pause)

Yes, Mr Woolfe helpfully reminds me that although we apprehend that the reasoning is going to be something connected with commercial confidentiality for any designations as confidential, we haven't had that said to us anywhere, even though we have pressed. So we haven't had an explanation about how or why it's commercially confidential, how or why it should go beyond two years, let alone five years, or how or why -- and this is critical, my Lord -- that applies to any of the remaining 1,300 documents, let alone the ones that we have happened to have identified to date. So if that is about to come, that has never been done before, which is again regrettable.

Unless I can assist further, those are the submissions and the Order that I seek on confidentiality.

MR JUSTICE JACOBS: Okay, thank you.

Mr O'Donoghue.

Submissions by MR O'DONOGHUE

MR O'DONOGHUE: My Lord, I'm grateful. My Lord, the premise of Mr Harris's submissions --

MR JUSTICE JACOBS: Just pause a second. The sound quality is not very good. It was fine before.

MR O'DONOGHUE: Is everybody else on mute?

MR JUSTICE JACOBS: Say something again. It sounds a bit like a Dalek speaking, which is bad.

MR O'DONOGHUE: My Lord, is that any better? No. Let me just check my microphone. Just one second, please. (Pause)

My Lord, what I might do is log back in to see if that helps. (Pause)

MR LEITH: My Lord, it's Hugo Leith. I'm junior counsel for the Defendants. I'm not sure if anyone on this forum can assist. Mr O'Donoghue sent a message that he's trying to log back in, but he's waiting and I think he needs to be readmitted into the Microsoft Teams platform.

MR JUSTICE JACOBS: Right, okay. I'm sure those responsible will have heard that and hopefully that will be dealt with.

MR LEITH: Thank you, Sir.

THE USHER: We're just going to take the live stream off for a second just so that we can repin Robert O'Donoghue.

MR JUSTICE JACOBS: I can see you, Mr O'Donoghue. Do you want to say something and see if it's any better?

MR O'DONOGHUE: My Lord, is that better?

MR JUSTICE JACOBS: That's much better. Thank you.

MR O'DONOGHUE: I'm sorry for this digression.

My Lord, the premise of Mr Harris' submissions is that the confidentiality process on the NTN side has, what he says, gone badly wrong. With respect, that is manifestly incorrect.

What has happened is that the Confidentiality Ring has been put in place as proposed by FCA. There have been a number of queries on both sides in relation to designations of confidentiality. Both sides have actively, and certainly in our case actively and conscientiously, engaged with particular queries as and when they have emerged.

Indeed, as we will come to, on 7 January, we had a further request in relation to 21 queries from FCA and we have undertaken to deal with those by the end of this week.

So precisely the process as set out in the Confidentiality Ring Order whereby the parties would co-operate to resolve any queries in relation to confidentiality and then, and only then, trouble your Lordship with a contested application. That process is being followed and is working well and, in my submission, will continue to work well.

So it really should be a last resort, in my submission, first of all, that either party would have to come before your Lordship to have a particular query resolved, but

second, what I would call a nuclear option of the entire process on the NTN side effectively being jettisoned and for an entire re-designation exercise to be conducted de novo. That would be an extraordinary order.

Mr Harris has not provided an example of a single case in which that has been done. Even in the Foundem case, which I will come to, Mr Justice Roth reminded the parties of some principles, but did not make any order in that regard.

It is simply premature and manifestly disproportionate and there is no basis whatsoever to suggest that that nuclear option should be engaged.

Now, what Mr Harris effectively has done is to go through a small handful of documents -- which we are actively considering and if there are de-designations to be made, we will probably try to do so -- and try and use that as some sort of crowbar or cantilever to suggest that the entire process in relation to 1,500 documents is deficient. With respect, he doesn't come within an ass's roar of making good that point. He cannot use five documents as the basis for contending that the entire process is defective.

Now, I'm going to have to go through this methodically and chronologically because Mr Harris rather jumped around and glossed over quite important points, but my essential submission is that the current process is working very well. It has been effective. It has been a two-way process. There

have been similar issues on their documents which we have raised, which I'll come to. There is no reason to think that in the period between now and trial that process will not continue to work effectively and to ensure that the trial can take place in the most open possible fashion. So those are the starting points.

Now, my Lord, just to develop the submissions, a small point, but it was FCA who in the first instance proposed a Confidentiality Ring containing Inner and Outer Ring restrictions. This is on the basis -- for your Lordship's reference, it's C9, paragraph 24 -- that Confidentiality Rings are usual in cartel damages claims. Now, I cannot think of a single follow-on case in which a Confidentiality Ring has not been proposed. So that the procedure had been followed in this case from the outset at FCA's prompting is an entirely orthodox one and is one which has been followed in every other case.

The second general point: the commercial sensitivity here, in my submission, is rather obvious. FCA and NTN have been involved in continuous procurements in which either side being privy to information concerning the other side could have a significant adverse and lasting impact on ongoing commercial relations.

Now, your Lordship will recall that the disclosure primarily made to date is essentially of procurement-related

materials and the sensitivity of those materials, both externally and as between the parties to some extent, as a general matter, in my submission, is obvious.

If I can just give your Lordship one reference, FCA has itself extensively relied on this particular point, including in relation to documents that predate 2013. If we can just turn quickly to 512 of the C bundle, my Lord, it's the second paragraph. So this is a query we raised in relation to their documents, so this shows the two-way street and the collaborative process:

"We confirm the FCA documents listed in annex B relate to pricing evaluation processes which, although set out in documents dated prior to 2013, contain information that is relevant to current processes and therefore commercially sensitive and confidential."

So through that collaborative process, we have seen their explanation and we accept it. So Mr Harris simply is wrong to suggest there is some sort of iron clad rule being applied in this case that if something pre-dates 2013, it cannot be confidential. That is a clear example where we have accepted confidentiality on their side, having engaged in a co-operative exercise with them.

Now, it has been a two-way street. I have shown you the problem in relation to historic documents pre-dating 2013 which we have accepted, but FCA at one point even suggested

that its own disclosure statement was confidential. Again, we had significant correspondence on that issue and eventually they have provided us with a non-confidential version of that statement. So it has been a two-way street and it is working extremely well.

Now, what Mr Harris now seeks, in spite of the fact this process has been working extremely effectively and has been the subject of active deep and conscientious engagement by both parties, is that we and we alone would conduct a comprehensive review of the confidentiality designations and then secondly, it seems, in relation to each and every one of the 1,500 or so documents, provide an explanation as to why that document in particular should be continued to be regarded as confidential.

Now, we consider that any such order would be wholly disproportionate and inappropriate and in any event is highly premature.

I'll come to the point of substance, but there is a point of process which is important, in my submission. The way in which this issue has arisen on the FCA side is fundamentally deficient. That is a reason in itself to refuse the Order that it seeks.

As your Lordship pointed out at the outset, the Confidentiality Ring provides that in the event that a party disagrees with designations made by the opposing party,

an application must be made. That is paragraph 6.5.3 of the Order. Such an application must obviously be on notice to allow the other side time to react.

Now, the court has no application. It has no witness statement. It has no draft order. Indeed, apart from the full handful of documents which were annexed to Mr Harris' skeleton, the court doesn't even have a single document on which there is said to be a confidentiality dispute.

The first time that FCA intimated that they would ask the court at the CMC to order NTN to conduct a de novo review was in its letter of 7 January. So that was on the day the skeleton arguments were due and at a time when FCA was fully aware that NTN was to yet to revert to it, by 15 January, on the various queries that FCA had raised in relation to confidentiality.

So, in our submission, this is an opportunistic set of submissions by FCA since we had specifically informed them that we would deal by the end of this week with the 21 outstanding confidentiality queries that they had.

Secondly, FCA had confirmed -- it's at C/516 for your Lordship's reference -- that it would not be making any confidentiality applications at the CMC and in fact, at one stage, FCA was content to proceed without a CMC at all.

So there is, in our submission, an element of mischief making in this application.

Now, turning to the substance of what has been contended for, if we can start with the letter of 17 December. It's at C/590. So your Lordship will see that what was originally provided was a list of 139 documents in the annex over which certain queries were raised. Then if you go to page 2 of that letter, there's a suggestion that that was impeding FCA's ability to provide instructions. Then you will see also on page 2 that FCA reserved the right to request further documents be de-designated.

So we carefully considered that request and your Lordship will see our response at 605. Your Lordship will see at the bottom of the page there was the issue to do with their redacted disclosure statements. That was an ongoing issue at that stage. In relation to our designations, we asked them for further information in relation to the base numbers to allow the documents to be properly identified:

"An important point is raised in relation to family documents. Please also confirm whether the examples you have identified are standalone documents. If not and they're part of a family, please confirm that you have considered the confidentiality claim in respect of the entire family. With the example of an email, if any part of that single document, including its attachments and logos embedded within it, contain Inner or Outer Confidentiality Ring information, the document as a whole has been disclosed into the Inner or

Outer Confidentiality Ring as the case may be."

Then, secondly, in relation to the point about seeking instructions, we asked them for further information on the document numbers that they were referring to so that we could consider to what extent these documents can be redacted and/or re-designated, if at all. We say:

"It would be entirely contrived to suggest, for example, that the NTN logos complained of are impacting your ability to seek instructions from your clients."

Now, Mr Harris has fairly conceded that that isn't the case.

So in relation to the 139 documents, we raised a basic query as to whether these related to family documents or not.

If we then move on through the correspondence at 634 --

MR JUSTICE JACOBS: Yes, okay. I'm there.

MR O'DONOGHUE: -- you'll see, my Lord, at that stage, there is a much shortened set of requests in annex A which relates to 21 documents. So you will see annex A, my Lord, on page 636. So we have gone from 139 to 21. Importantly, there has been no engagement on the question as to whether the documents in respect of which they raised the 139 queries were family documents or not. They simply haven't engaged on that point. So we took it from this letter that they had effectively abandoned the point in relation to families of documents.

This does rather suggest that FCA's basic approach was

based on a fundamental misunderstanding of the approach to electronic disclosure. FCA now say that the 21 documents are a sample, but they don't dispute the basic point that things like a logo embedded within emails are part of a larger set of documents which they do not dispute are confidential.

MR JUSTICE JACOBS: I thought they do address on 634 the question of family documents.

MR O'DONOGHUE: Well, my Lord, it boils down to a practical point, which is if they do not contest that the family documents are properly designated, it doesn't really assist them to refer to a logo or a blank page because that isn't really the point.

MR JUSTICE JACOBS: My point is they do say on page 634 that they don't consider it necessary to explain whether the sample are standalone or form part of a family.

MR O'DONOGHUE: Well, my Lord, we disagree on that because if it is accepted that the family is confidential, then for Mr Harris to make good his point today, he would also need to show that there is no basis for confidentiality in relation to that document at all.

MR JUSTICE JACOBS: The point on the letter was you have to look at individual documents. That's what the next sentence says.

MR O'DONOGHUE: Well, my Lord, yes, but the only specific point put to us was in relation to logos and blank pages which, with respect, is a non-point.

My Lord, the correspondence goes on. If we then look at 634.

MR JUSTICE JACOBS: That's where I was looking. I think maybe you were on some other document.

MR O'DONOGHUE: Yes, my Lord, it's 638.

MR JUSTICE JACOBS: Right.

MR O'DONOGHUE: So it's the second page that Mr Harris has shown you. So we say:

"The documents [this is now the 21 documents] do not evidence a defective confidentiality review. We assess confidentiality of the parent."

There remains a point about the logos:

"This would be obvious to anyone familiar with the mechanics of electronic document review, and we reject the illogical suggestion that NTN should de-designate individual documents where they form part of a family containing confidential material and we also reject the suggestion that it is burdensome for you to request that NTN reconsider the confidentiality designation of documents which you consider necessary for you to seek instructions since you are reviewing such documents as a necessary element of determining whether instructions are required in relation to it."

My Lord, the practical point is the next sentence:

"We will consider the documents listed at annex A to your

letter of even date and refer by 15 January as to whether NTN agrees to alter the confidentiality designations."

So that process is underway this week. It may be that when we get to the end of the week that FCA has a point, doesn't have a point or has a bit of a point in relation to confidentiality.

The last sentence is also important. We had thought it was common ground that this would be dealt with, to the extent necessary, on paper. Now, by that, we meant that if there were particular issues in relation to particular documents, us having completed the exercise as indicated by 15 January, then and only then could those particular issues and particular documents be considered. This is a very good illustration of the co-operative and iterative process that we have been engaged in dealing with documents proactively and responsively as and when they arise.

So that is the approach we have taken.

So, my Lord, the question for your Lordship today is whether it would be correct to order NTN to undertake the whole exercise again at this stage before we have finally considered the documents that they have listed in the letter of 7 January. We say plainly no for four reasons.

First of all, a point I have already made is that the existing process is working very well. We have been responsive and co-operative. We have, where appropriate,

de-designated documents. We have, where appropriate, shifted documents from Inner to Outer Confidentiality.

As we indicate in our letter of 7 January, we will revert by the end of this week on the 21 documents that FCA says are most pressing in terms of instructions. Therefore, it is entirely premature to make the Order that Mr Harris seeks.

Second, there is no good basis for the Order FCA seeks. FCA's most pressing complaint concerns the 21 documents listed in annex A, where it may or may not have a point. We will respond by the end of the week. In terms of the Order for the confidentiality, we are talking about 1,907 documents and FCA has thus far only suggested that 21 of them may involve the need to take some instructions. Indeed, the court cannot even take this as read because apart from the small handful of examples put forward by Mr Harris, as annexed to his skeleton, the 21 documents have simply not been made available to the court.

NTN has not, therefore, had the occasion to explain its approach to confidentiality in a full and complete way, and of course we will do so by the end of the week. It would not be appropriate, in our submission, for the Tribunal to entertain FCA's request in these circumstances. We would ask rhetorically: what if, in relation to some or all of the 21 documents, we have a good justification?

The third point is that quite apart from the question of

principle that the court cannot be satisfied at this stage that FCA has a valid point, there are also issues of proportionality. It will be a very costly exercise indeed to go through a de novo exercise for between 1,500 and 1,900 documents when the real dispute in terms of pressing urgency seems to relate to 21 documents.

Now, we haven't bottomed out the full set of figures, but this will take several weeks and will almost certainly cost a six-figure sum. The cost, of course, will be drastically increased by the requirement put forward by FCA that there should be a justification for confidentiality on every single document. We know that that is not something which forms part of the current Confidentiality Order and it is not something that FCA itself have proposed to do.

Indeed, FCA has been extremely vague. All that they have said, if we can again go back to 634, one will see -- does your Lordship have the part where it says "as to the impediments"?

MR JUSTICE JACOBS: I'm on 634. Which paragraph on 634? Yes, okay. I have it. I have that paragraph, "as to the impediments", yes.

MR O'DONOGHUE: It says:

"As to the impediments to obtaining instructions, the designation of at least the 21 documents set out in annex A to this letter prevents us from taking instructions in

relation to matters raised by these documents."

So what we don't have is any reference to any of the individual documents. There is no explanation of what is the point on which they wish to take instructions. There is no explanation as to who they wish to take instructions from. There's no explanation as to why the existing people in the Inner Ring are unable to resolve these issues.

The court simply has no idea in relation to the 21 documents what actually is the impediment. It's all pretty high level and pretty vague. If this is to be used as a sort of cantilever or platform to suggest the entire exercise should be redone on the basis that that might facilitate instructions, this really falls a very long way short indeed from making good that point.

In a sense, if one goes back to 634, this is confirmed, because after the sentence I have just read out, it says:

"More generally, however, the NTN Defendants inappropriate en masse designations of the entire disclosure Inner Ring Confidential interfere with the efficient pursuit of FCA's claim."

So it really is put at a very high level of generality and it seeks to brush to one side the point that we have, for a period of some time now, been very actively engaged in a responsive manner with individual queries. We have made adjustments where appropriate. We have stuck to our guns in

other respects. The process is working efficiently well, in my submission.

The final point is that NTN's approach in this regard is entirely consistent with the terms of the Confidentiality Order in place and the Order that FCA seeks is not actually consistent with the terms of the Order itself.

The Confidentiality Ring Order, which your Lordship, for his pen, can find at A/164, it doesn't actually provide guidance as to what is Inner or Outer Ring Confidential. It gives definitions at 1.1.2 and 1.1.4. Given that there can be no suggestion that NTN has somehow misapplied the Order, because at least in the Order there are no criteria which it could have applied, rather what the Order contemplates is if a party has a disagreement over the way the other party has approached designation on certain documents, the point is then raised in correspondence bilaterally and if an issue remains that cannot be resolved, then an application in relation to that particular document can be made.

This is the approach which has been followed conscientiously by us and this approach, of course, has various attractions. It reduces the time that has to be spent by reviewers and solicitors on applying standards that can be complex and open-ended to every single document. It allows attention to be focused on those documents that will actually matter.

This is, for example, the approach that was followed by NTN when it had issues with FCA's designations, so this is the two-way street point. This included FCA's disclosure statement which was provided in a confidential format initially and, through a process of co-operation, was provided in a non-confidential form on 2 December.

So FCA is seeking to apply a double standard here. Indeed, what is notable is that the proportion of documents designated as confidential is actually very similar between FCA and NTN.

Following the further reviews undertaken by NTN in November and December, as matters stand, some 70% of NTN document disclosure is designated at Inner Ring Confidential. That's at C/589. However, this is comparable to FCA's designations. In their case, 236 out of 362 documents are designated as confidential, which is 65%. For your Lordship's reference, that is C/494, page 2.

So it does seem that ultimately, the levels of designation in terms of the Inner Ring are very, very similar between the two parties. If and to the extent issues arise in the margins on both sides, they will be dealt with actively and responsively by both sides.

A couple of final points, my Lord. If we can just briefly go back to Foundem, which is one of two points of principle Mr Harris relies upon. It's in D5 of the

authorities bundle. Now, my Lord, if I can start with paragraph 1 of the judgment, it's D/150. Does your Lordship have that?

MR JUSTICE JACOBS: Yes, I do.

MR O'DONOGHUE: Mr Harris glossed over this. The actual issue in Foundem was a somewhat bizarre point. You will see in paragraphs 1 and 2 Google sought to restrict Foundem from instructing a particular expert on the basis that that expert should not be allowed to see certain disclosure.

Mr Justice Roth notes, paragraph 2:

"Such an application might not normally be controversial."

So:

"This is an application by Foundem for admission of an independent expert to the confidentiality rings."

He says:

"Such an application might not normally be confidential."

So this is a pretty extreme case where the Defendant sought to effectively control who the Claimants could instruct as an expert by saying effectively there are documents that not even an external expert with duties to the court under Part 36 or Part 31 could see. That was the ratio of the case. So it's a rather extreme case.

You will see in that case that there weren't just Inner and Outer Ring Confidentiality. In paragraph 1, there are

actually three tiers to the ring. So there was LEO, legal eyes only, which is effectively our equivalent of the Inner Ring. Then there was an even more restrictive category in that case, the third category, RLEO, which was restricted legal eyes only. So this was a case in which pretty extreme measures were sought to be imposed by the Defendants, which were unsurprisingly rejected.

So that is the ratio of the case.

Now, at the end of paragraph 56, there is, of course, a postscript. Your Lordship will see in paragraph 56, there were complaints by Foundem about the approach that Google had taken to confidentiality. His Lordship notes at the end of paragraph 56:

"... Foundem, for its part, had made extensive designations of confidentiality in its own disclosure."

At paragraph 57:

"It is neither necessary nor appropriate for me to comment in this judgment on the particular conduct of the parties in this case ..."

And so on.

So no decision was made by Mr Justice Roth in relation to the approach to redactions. All Mr Justice Roth did, in my submission, was set out a series of principles by way of guidance, and not more than that, that should, in general, be followed.

Now, we have followed this guidance. This judgment is dated 18 March of last year, so it pre-dates the disclosure in this case. We have followed this conscientiously in our designations. Where queries have arisen, we have dealt with them individually. As I indicated, we will continue to do so this week for the 21 documents. If any further issues going forward would arise, then of course we will, in the same way as we have done for the last several weeks, actively engage with those issues as well.

So by the time of trial, in my submission, it is plain that we will have got to a situation where the set of designations of confidentiality truly are the most minimalist possible and that should be an iterative ongoing exercise.

The suggestion at this stage that your Lordship should order the nuclear option of requiring us to redo the entire thing at vast expense when the best Mr Harris can do is show you a small handful of things annexed to his skeleton simply isn't good enough.

The key point he makes in relation to those five documents is, "Oh, well, we think these are FCA documents". In some cases, that seems to be correct. Now, of course, as we have done already, if the document is confidential, which clearly it is, but happens not to be confidential viz FCA as opposed the world at large, then it will be de-designated. There is no controversy about that.

So the process is working well.

I do emphasise, my Lord, that the process here is important. I mean, to effectively raise this on 7 January and to suggest for the first time, "We want you to redo the whole thing from scratch" and to annex some documents to your skeleton at a time when they know we are actively considering the situation in relation to 21 specific documents and revert by the end of the week, it really is not a proper way to proceed for an application of this kind.

There is a clear process set out in the Confidentiality Ring Order. It has to be followed. It is a document-by-document approach. It is their order. They have agreed to this order. There really is no good and proportionate basis for forcing us at this stage to spend potentially a six-figure sum and several weeks on what is frankly likely to be a pointless and expensive distraction.

That's why we say that the application really is an attempt to divert us from the preparation of the case. We want to spend the next several weeks dealing with these amendments and disclosure issues. We do not want to be sidetracked into some expensive and pointless disclosure exercise.

Fundamentally, what Mr Harris has failed to do is to make good the point that the approach taken on particular documents is stopping him from taking client instructions.

Your Lordship has not got a shred of evidence to make good that point. It is a pretty serious charge and your Lordship could reasonably expect, notwithstanding the half-baked nature of this application, at least some evidence to make good their point being put forward. Instead, what we have is on 7 January is a twin-track approach of requesting a de novo review by way of letter on the date of skeletons and then Mr Harris annexing a small handful of documents, which we are looking at, to his skeleton and saying, "Well, there you go".

This, with respect, is a hopeless and inappropriate way to proceed and provides no good basis for the extraordinary order that Mr Harris seeks.

MR JUSTICE JACOBS: Can I ask one or two questions, Mr O'Donoghue. One of the questions that I'm interested in is whether the right process has been followed. That's one of Mr Harris' points. He says: look how this started with simply the entire disclosure being designated en masse as part of the Inner Ring. Do you say that that could possibly be justified as being the right way to proceed?

MR O'DONOGHUE: Well, it is clearly untrue. I mean, we're talking about the disclosure which has taken place. That is primarily relating to procurement documents. These are documents which are of the utmost sensitivity because they concern the commercial interactions between the parties. So as a matter of subject matter, this is exactly the kind of

documentation that you would expect would be subject to really stringent confidentiality complaints.

So the suggestion that we sort of looked at a heap of documents, waved a magic wand and said they're all confidential, that is simply not true. At every stage, including this week, we are actively looking at the general category of documents and specific queries.

Mr Harris, he has, with respect, lost over the point in relation to families, because if, as he must, accept the family documents are confidential, then to pick on a page here and there or a logo here and there and say "Well, a-ha, there you go", that is not a proper approach or reflective of a proper understanding to the disclosure exercise.

If Mr Harris wanted to make good that point, he would in addition need to show that the parent level designation was not appropriate, because it is the family designation, the parent level documentation being confidential, which drives what has occurred. If and to the extent de-designation is required for subsets of the family, we have done this. We're actively doing this. That is the correct way forward, in my submission.

To suggest that we didn't have regard to any proper approach and looked at this in a rather willy-nilly fashion is simply untrue.

MR JUSTICE JACOBS: I'm just trying to understand exactly how

this has gone on. I thought I was shown a document at the start which indicated that there had been, if you like, an en masse designation on your side. I thought that was one of the early bits of correspondence I was shown.

MR O'DONOGHUE: My Lord, yes, Mr Harris showed you a sentence (inaudible - feedback). That sentence can't be divorced from the context of what the disclosure related to. (inaudible - feedback) primarily related to what I would call procurement of negotiation documents. Those documents are intimately confidential. They concern the commercial negotiation between the parties. There would be enormous sensitivity in relation to that category of documents in general being disclosed to your counterparty.

We accept, of course, if it's an FCA document and nothing else, they can see it, but it is nonetheless confidential to the world at large. But certainly the way we have approached tenders, which truly is a disclosure which has been made, that is highly confidential. We don't resile from that in any shape or form.

So Mr Harris can't just sneak in a sentence and say, "There you go". It has to be linked to the disclosure which was ordered, which is essentially procurement and negotiation-type documents.

So it is not correct that we sort of did some kind of dump and didn't think about it ever again. That is simply

untrue. We went through the same exercise as they did, which is why we have ended up with very, very similar percentages of Inner Ring material.

MR JUSTICE JACOBS: I'm a bit puzzled. Your point is that if I look at the nature of the subject matter of the disclosure, this is inherently confidential. Let's assume you're right on that. But why should that then all go into the Inner Ring, which is how you originally did it, in circumstances where, as you have said, a lot of this material is Fiat's own documents? It seems a bit strange to me.

MR O'DONOGHUE: My Lord, we've accepted on an ongoing basis that if it's purely an FCA document, that's fine, but if it is something that gives an insight into our negotiating strategy vis-à-vis FCA or indeed any other OEM, there would be utmost confidentiality.

So Mr Harris, with respect, is looking at the wrong end of the telescope. There may be well documents which emanate from FCA and we accept that, but what one is concerned with is a series of negotiations that in principle are highly confidential, with the exception of FCA's own documents. So he's looking at the wrong end of the telescope.

MR JUSTICE JACOBS: There's then a further question about the date range. I mean, some of these documents are very old indeed. All of those, as I understand it, have been put into the Inner Ring.

MR O'DONOGHUE: My Lord, yes, but Mr Harris' sauce for the goose is sauce for the gander, because they sought to justify the inclusion in the Inner Confidentiality Ring of a wide range of pre-2013 merely material on the basis that, notwithstanding the date, it is of continuing sensitivity in terms of their approach to negotiations.

We have exactly the same concern, because your approach to negotiations -- I mean, these negotiations don't take place every week or month. They tend to be of a longer period. What you were doing even a decade ago may be of commercial sensitivity for today and going forward. We have accepted that point in the context of Mr Harris' client and he, with respect, should accept it on the other side.

MR JUSTICE JACOBS: Right. There's a point, the next point, which has arisen, which is this question about whether or not you can or should be designating documents which are in the family. I'm not sure I totally understand this.

I mean, I quite understand that if you have got an email or a letter which includes a logo, there's no basis for saying that the logo itself as part of that letter should be de-designated. It seems to me that that's a letter, assuming it was entirely confidential.

But I'm not interested in that so much as what is meant by: if it's a family, then everything counts? Is that the approach that has been taken? So let's say you had

a covering email which is, for some reason, confidential, but none of the other documents -- all the other documents are very old and they may be this, that or the other, nothing confidential about them any longer, why should those be within the Inner Ring just because the covering email for this sake contains some particularly important piece of confidential --

MR O'DONOGHUE: That's my point on prematurity. So the reason I showed you the correspondence in relation to these 139 documents, we say: well, look, first of all, can you give us the numbers, the dates numbers, so that we can identify what you're talking about?

But second and more importantly, we need to understand from them as a first step: do they dispute the point that the parent document is confidential? Because if they do, that's one thing. If they don't, it's a different question.

We have not had an answer to those specific questions. The reason I say this application is premature, quite apart from the half-baked way it has been brought, is that they need to engage and co-operate with us and provide us further information so that progress can be made.

The suggestion of making these essentially abstract declarations about families and parents and children where, as your Lordship has intimated, it may well be there is simply a misunderstanding between the parties as to

terminology and so on, this can and should be resolved between the parties co-operatively rather than running off in this half-baked way seeking these declarations.

What has essentially happened on these 139 documents is that it has fizzled out and instead, in the 7 January letter, they have picked up on 21 documents. We are engaging with those. So every time we engage, they sort of seem to come up with something new. Notwithstanding that, we are actively and conscientiously engaging.

That is the way forward. The nuclear option or these abstract declarations, in my submission, are neither justified, nor will they help advance matters.

MR JUSTICE JACOBS: Can I ask you about why you call it a nuclear option? I mean, one of the things which happens in ordinary litigation is that sometimes people are concerned about the approach to privilege which has been taken. The court will sometimes say, "Well, actually, given what I have seen, a solicitor should re-review the documents which have been designated as privileged just to have another look to make sure that the right approach has been followed". That is done.

I'm not suggesting at the moment that there should then be a document-by-document analysis of exactly why privilege has been claimed or anything like that, but why is it so expensive and time-consuming for the -- what it is -- 75% of

1,900 to be reviewed, talking about 14/1,500 documents? Is that such a complicated thing?

MR O'DONOGHUE: Well, my Lord, a few points.

First of all, we say we have done the exercise correctly from the outset.

Second, we have, over the last several months, been actively engaged in a process of ongoing re-review. That has led to progress. I mean, as Mr Harris showed you, some documents have been de-designated entirely. Some documents have shifted from Inner to Outer. So we have been actively engaged for the last several weeks in that process.

But what Mr Harris seeks now is in relation to each of these 1,500 documents, we should have yet another go. We say at this stage, that is manifestly inappropriate. I mean, Mr Harris would have to persuade your Lordship that, in relation to the overwhelming bulk of these documents, there has been a fundamental misapplication of the principle that requires the wheel to be reinvented. And all he has attempted to do is give you a small handful of documents which we're looking at and which may prove to be uncontroversial in the end.

I mean, he is a very, very long way indeed from what he needs to be showing. He would need to show there was a manifest failure on our part, and not only has there not been a manifest failure, but we have been engaged in

a process of re-review that is deep and extensive.

And the problem with Mr Harris' submission is he doesn't seem willing to take yes for an answer. We have done what they requested in relation to reviewing these particular documents. It has led to progress in some cases. There are outstanding requests in relation to 21. We will deal with those. If further issues come up, we will deal with those in the same way. And it really should be a last resort to come to your Lordship, and we're a long, long, long way indeed from anything which is remotely sufficiently well-formed to lead to the nuclear option that he contends for.

And I do emphasise proportionality: we only got this request on 7 January, but we calculated a de novo exercise will be a six-figure sum, and it will divert us from work on the amendments over the next several weeks. And that's why I do say there's an element of mischief-making in this to derail us from preparation of the case, and it is entirely premature, in my respectful submission, that your Lordship should accede to that.

MR JUSTICE JACOBS: I do take your point that the particular application seems to have come on very, very quickly, and that it may well be that you haven't put in all the material you might otherwise like to put in in order to deal with it.

MR O'DONOGHUE: We put in nothing because we had nothing.

MR JUSTICE JACOBS: So it may be that you're not really in

a position to explain to me why it would cost so much money to re-review the documents. All the documents have been gathered and someone is going to have to look at them on one side or the other, and it's a question, in a sense, of who is going to look at them again. Mr Harris's people are going to have to look at them. No doubt they have done; they're very interested in them for the purposes of their case.

MR O'DONOGHUE: Well, maybe not, because if it's not impeding them from taking instructions and they can get on with the preparation of their case, I simply don't see the practical issue.

My Lord, we simply have not had an opportunity to engage on these points. These documents were annexed to the skeleton. The de novo review was foreshadowed on the day the skeletons were due. Had this application been brought properly, we would have wished to put in a witness statement, examples of documents, an explanation of our approach and so on. And raising this at the eleventh hour in a way that does not follow the process set out in the Confidentiality Ring Order is simply not a correct way to proceed.

In my submission, a way forward might be, as we originally intended, that this would be dealt with on paper by your Lordship, if, having seen the review of the 21 documents we will provide by 15 January, FCA still considers that there is still a significant outstanding

issue. That is the correct and fair way to deal with this, rather than this half-baked way in which this has been brought forward.

There is a risk of substantial prejudice to my client and a substantial unfairness by this being bounced at the last minute.

MR JUSTICE JACOBS: Can I just ask you this: one of Mr Harris' points, and it was that it doesn't just affect him and the instructions he can take from his clients and the difficulties that might arise there; but that if you have got a much wider designation than ought to be the case, if that was the position, then it can be disruptive of the actual hearing, because there are lots more documents which are confidential which people are talking about in the evidence and submissions.

So I wanted to ask you for any submission on that, because it's tied in with your point to say: well, there should be evidence of Mr Harris' clients that they have really got difficulties. Is that a fair point, to say that I ought to have in mind how the hearing is going to run in due course, not simply the evidential problems that might exist for Mr Harris' clients?

MR O'DONOGHUE: My Lord, two points: first of all, we are continuing to work on this issue, and we will continue to do so up to and including trial. So it's not as if it's set in

stone today. And, as we move through witness statements and expert reports and deal with the bundles, I'm certain there will be further movement between the parties in terms of trying to make the trial as manageable as possible. So by the time you get to trial, I think this will almost certainly have evolved. So that's one point.

Secondly, there is, again, a risk of putting the cart before the horse, because if it is the case in relation to, say, that the bulk of the documents which we claim Inner Ring Confidentiality, that that is entirely justified, then for better or for worse the trial will have to deal with that.

And it shows the problem with this application, because, again, all Mr Harris has is his handful of documents and he wants to use that as a sort of cantilever to have everything reconsidered. And, as we sit here today, we say that our designations are for the most part justified, that's why we've made them, and that if that is the case then the trial will have to deal with that in some shape or form.

And the final point, I think I'm the only person, and Mr Leith, in this hearing who has actually done a follow-on trial, and the way one deals with confidentiality, it's not rocket science, we will all try and avoid reading out things unless we need to. And the trial I did involved, I think, a single session that was closed and there are practical ways of dealing with this without asking your Lordship to read

things, so the suggestion that the trial all of a sudden becomes unmanageable is simply not true.

And of course we've all done trials in this Tribunal where thousands of documents have been designated as confidential, and it isn't perfect, but the trial is perfectly workable. And there is a balance between these two things, and, in my submission, at the moment the balance is being appropriately struck, and it is simply far too early to say that the approach that we have taken is so defective that the baby must be thrown out with the bathwater. There is no evidence of that whatsoever, and effectively Mr Harris is asking your Lordship to take on trust that what is true of these five documents is true of the other 1,495. And there is no basis for that. There is a lot we would have wished to say by way of evidence if their contention were to be properly made and responded to.

MR JUSTICE JACOBS: All right. Okay, thank you very much, Mr O'Donoghue.

Mr Harris, do you want to say anything?

Submissions in reply by MR HARRIS

MR HARRIS: Yes, a short reply, my Lord, if I may. Can I please just show you page C/488. You asked Mr O'Donoghue specifically to address you on how and why the confidentiality designation from his side went wrong at the beginning, and for reasons best known to himself he opted not

to respond to that question. But at C/488, just to make good my point, the fifth line down --

MR JUSTICE JACOBS: Just hang on. I need to get that document. Just hang on a second.

Mr O'Donoghue, could you mute? I think you may (inaudible). Thank you.

(Pause).

MR HARRIS: Have you managed to locate C/488?

MR JUSTICE JACOBS: I have just got that.

MR HARRIS: I'm very grateful. So this was our letter just under two weeks after we received a disclosure, 6 November, and you can see in the second sentence we refer to their letter accompanying their disclosure and we point out that they "designated the entirety of that disclosure Inner Ring Confidential."

So that just makes good the point I said in my opening submissions that I thought it was all the documents or nearly all of them: it was every single document of the 1,907.

We know, of course, from the letter that I showed you that had the annex with 497 re-designations that that was completely improperly done. Because as soon as we pointed out that there needed to be a re-designation exercise, 497 of the 1,907 were immediately re-designated by my learned friend's side without demur. It was just a: "Yes, we've messed this up, so we will re-designate them."

So the entire process was wrongly done right at the very beginning, and therefore my learned friend's submission a moment ago, to the extent it could be understood, seemed to be: well, there might be a justification for having done that because there's no definition of "Inner Ring" or "Outer Ring" in the Order. But leaving aside the sheer oddity of that submission, on their own case it's not right because they immediately re-designated at least 497 as soon as we asked them to do a proper exercise.

Of course, that also gives the lie to any suggestion -- and now I'm turning, if I may, to C/494, a document you have now seen a couple of times -- it can't be right for my learned friend's solicitors to have written at the end of the second paragraph:

"In our experience this is an entirely orthodox manner in which to proceed."

That can't be right, because as soon as we said, "You've done this improperly, please do it properly," they immediately replied and said, "Oh, yes, 497 times we did it wrong." That's not orthodox, that's just wrong. And when you invited Mr O'Donoghue to address you on the relevance for this application of the fact that it was done wrong on his own client's admission at the beginning, he declined to answer that question and started talking about something else.

My second point, my Lord, is that we have already written at least five letters -- in fact, it's now more than five letters -- at time and cost and trouble on this question of disclosure, far more than we ever would have expected to write in toto against opponents who were addressing themselves to the right principles. And can I therefore show you where that arises? You have seen this document, but I want to show you again several passages from it. It's page C/634. In the middle of that page, which is our letter of 7 January, so even by 7 January -- I'm now in the middle paragraph, the one beginning, "As to the impediments..." and I'm at the penultimate sentence -- and we point out that even by 7 January we had had to write to the NTN Defendants on five separate occasions requesting de-designation of wrongly designated documents, and it's now more than that: there have been at least one, if not two more further rounds of correspondence since that date. So at least seven occasions. And that is precisely what Mr Justice Roth, sitting in the High Court, deprecated as being a back-to-front approach. You shouldn't adopt the improper process as a disclosing party of lumping everything, without reflection and on your own admission wrongly, into the most confidential ring, and then wait for five, six, seven, who knows how many times, for the other side to go to the time, trouble and cost of writing and say, "Oh, yes, actually we now de-designate to either no

confidentiality or a lesser ring."

My third point is that you yourself said, Sir, just a moment ago that the costs now of it obviously having gone wrong has to fall on somebody. Well, yes. Now, Mr Justice Roth's approach, consistent with the principles to which he drew everyone's attention in the Infederation case, is that it shouldn't now fall upon the party to whom the disclosure has wrongly been made. There is a choice, it is binary: it's either him or me. It's obviously not me when I've already shown you that the process has gone so badly wrong from the beginning by my learned friend's team's fault.

My next submission, then, is that it might just about have been different today had my learned friend been able to explain to you any reason for any of the wrong designations that currently face the court. That would be unsatisfactory because of course even by the 7th we'd written five times to try to find out what was going on, and there had been no proper explanation.

But signally, today, Sir, Mr O'Donoghue has been unable to explain to you at all why, even in the sample of documents it to which we have had further regard, there were 62 -- even in just that sample -- 62 FCA documents. You asked him to explain it and he couldn't: why are documents that originated from us or were sent to us originally, why are they now in a Confidentiality Ring such that the people who created them or

to whom they were sent can't now see them? He hasn't got an answer for that. He's never had an answer for that, so it means that the second exercise is also manifestly wrong. Manifestly wrong. And that is not ever pretended by our side to be after an exhaustive summary or search by us of the remaining 1,300-odd documents following the first re-designation exercise.

He was also unable to explain to you why there were blank documents, separate individual documents that are just blank that are in somehow the Inner Confidentiality Ring, he wasn't able to explain it. Little wonder, Sir, because there's obviously no explanation. And then he was also unable to explain to you why there were several blank tables in the Inner Ring. He's just not able to explain it. What he did say, and I noted this down because it was such a curious submission, at exactly 4.10 pm he said:

"We may have a good explanation."

Well, that's an extraordinary submission, Sir, for this reason: they have designated these documents, and in fact they now say they have done the exercise twice. So what is this explanation? They don't have one. No good for my learned friend then to say: oh, we're still thinking about it. He said three times, "It's an ongoing basis"; he said four or five times, "We're still thinking about it. Look at the 21 documents." Well, what is the explanation for these

obviously wrong designations? There isn't one. He then said at 4.41 pm:

"These are for the most part justified."

But they're not. What possible justification could there be for withholding from my clients documents that they created? It's a nonsense.

He then made complaint on, by my note, three occasions of the fact that we have designated as various levels of confidentiality documents that go back into time. You'll recall in particular he pointed to some documents in a letter about 2013. But this is a complete non-point, Sir, for this reason: first, we explained at the time, by reference to specific documents, why we had claimed confidentiality. We explained it; in sharp contrast, my learned friend's team never has done. The most that's ever been said is, on his feet today, that they might have something approaching a similar reason.

We have been pressing for this for letter after letter after letter. It's never been said before, and it's now not said by reference to any particular document. The contrast is huge. We were asked; we said, "Yes, that document and that document, they fall into this category because they are ongoing, they reveal ongoing commercial strategies and way of carrying out this business, even though the actual document is a long time ago." And that will resonate with

your Lordship, because of course, as I said before, these RFQs, there might have been an RFQ process that began in 2011, the last year of the cartel; it takes a year to finish even the process, that's 2012, and then it lasts for eight years. That was the argument we had on the last occasion. That continues, therefore, to be confidential.

But the difference between my side and my learned friend's side is we explained this all at the time, we applied our mind to it, we did it document-by-document, we set it out in writing and then the reason why this is an utterly fatal point for my learned friend is: he then accepted it; his side accepted it. So that is -- when he submitted that the process is working well, yes, it works well because we have operated the process properly; it hasn't worked well because they haven't operated the process properly. They never did the things that we did by reference to individual documents or otherwise.

Then that takes me onto his point about families, families of documents. Again, you pressed him on this point, Sir, and he has no coherent answer. The obvious approach that needs to be taken to disclosure is that you assess each document document-by-document and ask yourself whether that falls within a particular ring or no ring at all.

But can I now show you the letter that came in this morning from my learned friend's solicitors. You'll find

this at C/721, the very last page of the correspondence bundle from this morning. 721.

MR JUSTICE JACOBS: Okay.

MR HARRIS: What that says, in the third paragraph, is there's reference to various of the documents, and then the next sentence reads:

"NTN is required to disclose all documents forming part of a family of documents where one of the family is disclosable and whether or not the remaining documents would as standalone documents be disclosable."

Yes, but what doesn't happen is that, just because you have described a particular family as disclosable, and this was the example that you put to my learned friend and he had no answer to it, is, let's say it's an email, the cover email of which is confidential but then the five attachments are not confidential, it's hopeless to contend that then the five attachments should benefit from or be designated in the same way as the cover email, because obviously the former or the cover email has some confidentiality and the others don't.

And yet that is the approach that my learned friend's team has consistently adopted. It's simply wrong in principle, and that's another reason why they ought to be ordered to do this properly. It's quite shocking, actually. I've not seen this before. I mean, it really is quite shocking.

And then my learned friend says: oh, well, does Mr Harris accept that all the families are confidential? Well, it's the wrong question, because you have to do it document-by-document. But actually, no, we don't; we obviously don't accept -- this is so obvious as to hardly need saying -- that my learned friend's team has got the confidentiality designation correct even as regards the family, given that they plainly haven't understood how to go about applying confidentiality. Because if they had, they wouldn't have put into the Inner Confidentiality Ring multiple FCA documents.

I'm nearly there, Sir. That would -- moving on, then. My learned friend said a couple of times that we haven't actually even identified the documents that we say ought to be checked on a non-exhaustive basis. An incoherent submission, because my learned friend himself showed you the table of first of all 139 and then 21 documents. Incidentally, none of them have been abandoned or withdrawn. I don't know where that submission came from. We pursue all of these. And you will recall, I don't need to turn it up, but you will recall that the table had all of the document identification numbers in one by one by one. So that's a non-point.

MR JUSTICE JACOBS: Can I just ask you this. How many documents are yet to be de-designated (inaudible). Is this the 21 or

is it the 139 plus 21?

MR HARRIS: It's all of them. It's all of those: the 139 plus the 21.

MR JUSTICE JACOBS: Just remind me, where was the 139? Which letter was that?

MR HARRIS: C/589. That's the one that has the list of numbers next to the document, as indeed does the list of 21.

MR JUSTICE JACOBS: Right.

MR HARRIS: As I've said a number of times, this was never intended to be an exhaustive list.

MR JUSTICE JACOBS: No, I understand that. I just want to -- so the C/589 document, you haven't yet had a reply to that; is that right?

MR HARRIS: I'm sorry. I lost you there, my Lord.

MR JUSTICE JACOBS: The C/589, the Defendants are still going through that and working out (inaudible) is that right?

MR HARRIS: That's how we understand it, and you'll note that the letter is 17 December, so, again, this is not sprung upon them at the last minute.

MR JUSTICE JACOBS: Right. Do you have on your side further lists that you're compiling? You're obviously going through the disclosure very carefully; you have identified a large number of documents, some of which you have shown me today. Could you provide a further list? I know you said it was non-exhaustive.

MR HARRIS: Well, we would be happy that, insofar as we come across them as we progress matters, we could send them, but that's back-to-front, given the comments of Mr Justice Roth in the Infederation case. What's now become abundantly clear is that we've had to write multiple letters -- I think it's now seven -- with all that time and cost wasted. And we have had to draw it to the Tribunal's attention when, even now, it's completely obvious today that the exercise hasn't been done properly. Even today. That's my point about Mr O'Donoghue not having an explanation, even about the FCA documents, or the blank tables.

And that's not right. The burden should now not be upon us to rectify as our continued cost and expense the mistakes that have been made by my learned friend's team. So the answer is: no, we don't have an exhaustive list, and nor should we be put to the time and costs of doing it when it's so obvious that this has been mistakenly done by my learned friend's team.

And that takes me on to a closely related point that my learned friend made the submission twice that I haven't given a particular explanation about my inability to obtain instructions from every one of these documents. But that's wrong for two reasons: first of all, I don't have to identify every one of the documents full stop, because it's his team that has done the exercise wrong; but perhaps more

1 importantly, it's a misconceived question. On the principles
2 of open justice and applying Confidentiality Ring
3 designations properly from the outset, I don't have to
4 satisfy this court that I need a re-designation of a relevant
5 document because there's some particular need that I can
6 identify now, a year before trial, as to why I need some
7 particular instructions on that document, leaving aside
8 questions of privileges.
9 They are relevant documents. My client is simply
10 entitled to see them, unless there is an "exceptional reason"
11 or a narrowest possible approach that denies them that right.
12 And my learned friend simply hasn't got that. If he had it,
13 he would, as a minimum, have told you what it is today, and
14 he hasn't.
15 And it's not to be overlooked. I take the point that
16 there are particular quotations from the Infederation case to
17 which I took you are from the postscript at the end.
18 I accept that point. It wasn't part of the main substance of
19 the case. But the President of this Tribunal took it upon
20 himself at the end of that case to say that this is going
21 wrong time after time after time; it shouldn't be done like
22 this.
23 And can I just remind you of a point that's overlooked by
24 my learned friend, that at the end, in the postscript at
25 paragraph 59, he said very clearly that there is a duty upon

the solicitors to do this properly:

"... they should not necessarily be satisfied by their client's view that open inspection of a document should be restricted on confidentiality grounds."

"If solicitors have reasonable grounds for supposing that their client has made excessive confidentiality claims, they should investigate the matter carefully and discuss it with their client."

That has plainly not happened in this case. And it's not simply limited, of course, to the fact that I can't take instructions on these documents -- so well over a thousand, over 1,300 of these documents from my own clients; it's that I can't also show them to witnesses, and we're only four months away from witness statements. I can't show any of these to a single witness. Wrong in principle.

Then my learned friend says that -- I'm nearly there, this is my penultimate point -- that: oh, well, somehow there's an explanation for the conduct of the Defendants because there isn't a definition of "Inner Confidentiality Ring" and "Outer Confidentiality Ring" in the Order itself. Well, I partly dealt with that right at the outset. But that's wrong in principle. I've just read to your Lordship that solicitors, and we've been repeatedly told that these are highly experienced practitioners in this field; highly experienced practitioners in this field know perfectly well

they have to have a jolly good reason to put a document into the narrowest possible exception of an Inner Confidentiality Ring, and that's not the approach that they have adopted.

Then that takes me onto the final point, which is all of a sudden, despite the fact that this has been going on over the course of seven rounds of correspondence, beginning -- within two weeks of us being supplied with disclosure on 6 November, despite that all of a sudden we're told: "Oh, well, this will be really expensive, and I wish I had the opportunity to put in some evidence. Grossly disproportionate." Well, with respect, my Lord, that's a nonstarter. There's no evidence of disproportionality. It's never been said in the previous correspondence that they haven't done this properly on grounds of proportionality, or it can't be done properly on grounds of proportionality. That alone is fatal. But by far the most fatal point to this submission is that they say they have done this already. They say that they have done this designation properly already; in fact, they say they have done it twice.

So where is this nuclear cost? Either they haven't done it properly at all already, in which case it's not nuclear because they should have done it already and these are just costs of litigation; or they have done it already so it doesn't cost them anything to say: it's all been done perfectly properly and here's the explanation for how we've

done it. They can't have it both ways, my Lord.

That's the end of that point.

Unless I can assist further, those are the submissions, and we do invite you to make the direction that I have already urged upon the Tribunal.

MR JUSTICE JACOBS: Can I ask you: what about Mr O'Donoghue's point. The precise order that (inaudible - feedback) I think 7 January, or maybe 8 January, was it but very, very recently and (inaudible - feedback) --

(Pause)

Yes. I think Mr Harris is bouncing my comments back.

Mr O'Donoghue raised the point that this point got raised relatively recently in terms of the Order which you're seeking.

Could you mute again, actually, Mr Harris? Sorry.

He says that there's a certain amount of correspondence, but it was only last week that you said that you would be asking for what he has described, and I know you disagree, as being the "nuclear option". To what extent is it fair for me to make an order that you're seeking like this at this stage?

Let me tell you what I am thinking. Let me tell you what I am thinking. I am, at the moment, concerned about the way in which the confidentiality has proceeded. You have given various examples during the course of the quite lengthy argument about this which do trouble me in terms of the

approach which has been taken on the Defendant's side. But I'm not convinced that the Defendant has had a full opportunity to deal with all your points. And what I was thinking about was this: that you have made a lot of points this afternoon which require, I think, Mr O'Donoghue and White & Case, and perhaps the clients but principally White & Case, to review the extent to which this has been done properly. And it may be that you have got further documents that you have identified beyond those which you put in correspondence, which you could say to him: here is some further evidence that this has not been done properly. There may be a lot more FCA documents, I just don't know. But I was thinking that his client should be given an opportunity, within a period of time, either to commit to a re-review of the documents to make sure that this has been done properly; or at least to be able to explain, in the form of a witness statement to be served within a relatively short period of time, what exactly has been done and why it is that the Defendants say that everything has been done in the way in which it should have been done, as per the Google decision and the principles on which you rely. And the matter can then come back to me. It will either come back to me because there will be an issue for me to resolve as to whether it has in fact been done properly with full evidence on that; or Mr O'Donoghue and White & Case will look at it and say: well,

actually, we need to look at this again.

So that is what I'm thinking, and I wanted to -- so the reason I asked you the question was: well, hasn't this come on very quickly in terms of what you're actually asking to be done, and is my way forward a way of resolving matters in a way which is fair to both sides?

MR HARRIS: My Lord, yes, I'm very grateful. Thank you for your attention to this matter.

So the answer to your question "Is it unfair for it to have come on right now" is no, because of the seven rounds of correspondence beginning two weeks after the original disclosure. We have been leading to this, we have been asking for explanations repeatedly, time after time after time, and they haven't done it and they haven't de-designated. They haven't even de-designated, for example, the blank documents or the FCA documents. These are still designated, unable to take instructions.

But that's my first answer. Be that as it may, as to your pragmatic suggestion: yes, we accept that as a sensible way forward. So it would be either within a short period of time the review exercise, the re-review exercise, is in fact conducted and there is then an outcome. That was what we understood to be the first of the two options posited by the Tribunal. And we would say, for example, seven days, and I say that because of course Mr O'Donoghue's case is he's

already done this and done it properly, but, be that as it may, the amount of days. Or the other one that you put forward, Sir, as a suggestion was that if there's not an actual de-designation exercise, there should be a witness statement sworn and presented to the court with the possibility of an another hearing, explaining how they have done it, which of course would have to justify, the principles would then have to be applied to the documents that are currently in the Inner Confidentiality Ring, which would include, amongst others, the blank tables and the FCA documents.

If, on this latter option of witness statement containing an explanation, it turns out that they can't defend their own designations which they now say they have done twice, then the witness statements should also be accompanied by a re-designation of anything that they are no longer willing to defend, at the same time, so that we can actually get on with asking our clients, preparing our case and dealing with our witnesses.

So, in summary, number 1, it's not sprung on anyone, it's been coming for weeks. Number 2, yes, a de-designation exercise. That should be done promptly if that's the option that they take up. Or number 3, if it's to be a witness statement, that should be done promptly, again within seven days, and if it turns out they can't defend any of the

documents that are still within the ring, they should be disclosed as non-confidential at the same time.

And then we would respectfully say, so that this doesn't run away from us, we would try to pencil in a date in, say, two weeks' time when we can have this revised hearing; and great if it turns out we can take it out of the diary once the de-designation exercise is done or the witness statement is done. But what we don't want is a situation where we need a hearing in, say, two weeks' time because it's still not satisfactory, and then all of a sudden we're told there's no availability for six more weeks.

MR JUSTICE JACOBS: Do you have on your side any further document (inaudible - feedback) you consider should be (inaudible - feedback) --

Could you mute?

Can you, within a period of time, short period of time, provide a further list of documents which, as you would say, should be de-designated and which are further evidence, as you would say, of the defendant's failure to do the job in the way that you say it should be done?

MR HARRIS: My instructing solicitor is here with me today, albeit socially distanced, and the answer is: no, we can't. And in any event, if we were somehow now to be asked to do that, that would introduce further delay when it's a job that should have been done properly by my learned friend's team.

MR JUSTICE JACOBS: Anything else you want to say, Mr Harris?
MR HARRIS: My Lord, no. Thank you very much.
MR JUSTICE JACOBS: Mr O'Donoghue, do you want to say anything about my proposal? It's not quite as Mr Harris characterises it, but my idea is that there should be a period of time -- I don't think as short as seven days, but I was thinking of 21 days -- for you to decide whether or not you will perform a re-review of the documents which have been disclosed, and, if you decide that you are going to do a re-review, that that should be done quickly; or to produce a witness statement which, in effect, justifies the approach which has been taken, notwithstanding the criticisms that have been made today, and that would give you an opportunity to put forward the case which you say you haven't really been able to put forward which explains why it is that all the points that Mr Harris has been raising are not points which show that the approach has been a wrong one.
MR O'DONOGHUE: Well, my Lord, at the very least we would say that is essential. Because, I mean, the de novo review was raised for the first time on 7 January. That's the day on which skeletons were due, and that was the first time the issue of de novo review was raised. Because until then, as I showed your Lordship, we had thought we were considering in the first instance these 21 documents, and perhaps with somewhat less urgency the slightly longer list, subject to

the question of the family documents. So that's the basis on which we've been proceeding. So we simply have not had proper time to engage on the two possibilities your Lordship mentioned. So, in our submission, that is essential as a matter of fairness.

In terms of the timing, my Lord, yes, we would request 21 days to consider these two options. Quite apart from anything, we are this week considering the 21 documents, and we think that the time is essential and actually will be useful because it will allow us to make a meaningful response and to crystallise any disputes which might remain.

MR JUSTICE JACOBS: Right. Well, what I will therefore order is that within 21 days the Defendants will consider the various criticisms which have been made by the Claimant in the course of the correspondence and in the course of the preparation and submissions made at this hearing; and 21 days hereafter will either commit to a re-review of the disclosed documents in relation to the confidentiality issues, or alternatively will provide an explanation as to why such a re-review is not appropriate, notwithstanding the criticisms which have been made by the Claimants.

I won't go any further than that, but to say that if there is to be a re-review it will then have to follow relatively quickly thereafter. If there's not going to be a re-review, the matter can come back before me for a further

hearing. And it may be that Mr Harris' clients will wish to put in some evidence in relation to the response. I won't set aside a date at the moment, I think we should leave that flexible, but I will obviously make myself available at a convenient time for such a hearing. But I think we should just see how things develop.

MR HARRIS: Thank you. Can I just raise two housekeeping points, then? I'm not sure that in that exposition of the direction that you just made you said that the explanation should come in the form of a sworn witness statement, whereas earlier you had. And we would invite it to be in the form of a statement, if that's the option that's going to be taken up by my learned friend's side.

MR JUSTICE JACOBS: Yes. I'm not sure I want it in the form of a sworn witness statement. It should be in the form of a witness statement. I thought I did say that, but if I didn't, I should have done.

MR HARRIS: Sorry, thank you. Then the only other thing is: could I trouble you for 10 seconds to suggest that it be 14 days, not 21? The reason being that there's a danger that if that is then not accepted -- because hitherto, as you know, our criticism has been that this has never been done properly and they haven't engaged with the principles -- if it's not accepted and then there's, say, a hearing two or three weeks later and then things have to happen after that,

then it will begin to interrupt the timetable for the witness statements, especially bearing in mind that we actually have to show these documents to some of the witnesses. Some of them have no idea that these documents even exist.

So I would, if I could, just seek to persuade you to do 14 days instead of 21.

MR JUSTICE JACOBS: Mr O'Donoghue, could you meet a 14-day deadline?

MR O'DONOGHUE: Well, no. We would, with respect, (inaudible - audio breaks down) in this case, because we may have to go back to our lay client in respect of quite a number of documents on specific queries, and that will inevitably take time. It's simply not doable in 14 days.

MR JUSTICE JACOBS: I'm going to stick with my 21 days, but I will add this: I think that the witness statement, unless, Mr O'Donoghue, you were going to say otherwise, should come from the partner with responsibility for the case so that he is the person who actually explains if this is the line that has been taken, why it is that the approach to confidentiality is as it has been.

MR O'DONOGHUE: My Lord, yes, of course.

MR JUSTICE JACOBS: All right.

MR HARRIS: Sir, thank you very much. There are no other issues on my list.

MR JUSTICE JACOBS: Good.

MR HARRIS: Yes.
MR JUSTICE JACOBS: Mr O'Donoghue, did you have anything that you want to raise?
MR O'DONOGHUE: My Lord, no.
MR JUSTICE JACOBS: Good. Will you agree an order reflecting today?
MR O'DONOGHUE: Yes.
MR HARRIS: Yes.
MR JUSTICE JACOBS: Probably send it to my --
MR HARRIS: Oftentimes, now we're in the Tribunal, the CAT prefers to do the draft of the Order, but we're in fact in your hands. I recognise we're in COVID times. We both have very able juniors and I'm sure it can be dealt with at our end if you or the Tribunal registry would prefer.
MR JUSTICE JACOBS: I haven't discussed it with the -- I have forgotten that I'm not in the Commercial Court temporarily.
MR HARRIS: Shall we leave it --
MR JUSTICE JACOBS: I will speak to her and we'll let you know whether we would like you to do an order or whether she's happy to give you the draft, but I'll let you know.
MR HARRIS: Thank you very much. In that case, thank you very much for your attention today. Nothing further to add.
MR JUSTICE JACOBS: All right. Costs will be, because it's a CMC, will be in the case.
MR HARRIS: Yes, thank you.

MR JUSTICE JACOBS: Thanks very much indeed.

(5.21 pm)

(The hearing concluded)