IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1436/5/7/22 (T)

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Thursday 29th September 2022

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

BETWEEN:

Allianz Global Investors GmbH & Others

Claimants

v

Deutsche Bank AG London & Others

Defendants

A P P E A R AN C E S

Marie Demetriou KC, Colin West KC and Ben Lewy (On behalf of the Claimants)
Kieron Beal KC, Simon Atrill and Emily Neill (On behalf of the Defendants)
Sarah Abram KC (On behalf of the Defendants in Case No. 1430/5/7/22 (T))

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Thursday, 29 September 2022

(10.30 am)

Housekeeping

MR BEAL: May it please the Tribunal, I appear this morning on behalf of the defendants in this matter. My learned friends Simon Atrill and Emily Neill, to my left, appear for the defendants with me. My learned friends Marie Demetriou KC and Colin West KC and Ben Lewy appear for the claimants, on my right, and Sarah Abram KC appears for the original defendants, in the middle.

MR JUSTICE JACOBS: Before we start, good morning to everybody in court. Various people have joined on the live stream. It is open to members of the public. Can I just start with the customary warning: these are proceedings in open court. An official recording is being made and an authorised transcript is being produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings, and breach of that provision is punishable as contempt of court.

MR BEAL: As is customary in this Tribunal, I am going to address your Lordship as "Sir".

MR JUSTICE JACOBS: Good.

MR BEAL: Unless you would like me to adopt the High Court form of address.

MR JUSTICE JACOBS: I am sure you will slip into it.

MR BEAL: In terms of housekeeping, I hope, Sir, you have the core bundle, five hearing bundles, one of which is labelled "confidential", but which I will not be turning up at all.

MR JUSTICE JACOBS: I have a hard copy of the core bundle, which I have been using. I have the other bundles on the screen. You have kindly given me the authorities bundle in hard copy as well, yes.

MR BEAL: I am grateful.

This is the defendants' application for the listing of the preliminary issue. As you have seen, the application notice itself is in hearing bundle 1, tab 1, page 1. It simply says we are applying for a preliminary issue. Perhaps more meaningfully, there is a draft order in core bundle 3 --

MR JUSTICE JACOBS: Shall I just tell you what I have looked at? It might be helpful. I have read the skeletons twice, quite carefully, to try to understand what each side is saying; sometimes I have been interested in a particular authority or point; I have looked at one or two references; I have looked at the order that you are seeking; I have looked at the three witness statements.

I read those witness statements, but the last witness statement, which is the response witness statement, I read quite quickly because it seemed to me, to some extent, to be covering grounds which are in the skeletons, and I didn't have enough time to go through that at all carefully. So if there are particular points in that witness statement, and indeed the others, that are going to be important, then you may have to take me to them.

MR BEAL: What I was proposing to do, with your permission, is give a quick overview of the case by reference to the case memorandum. Then make some submissions on the law by focusing on the key authorities. Then have an analysis of the pleaded case on limitation within the pleadings, to have a brief overview, a tour de raison of the key submissions on the underlying evidence to establish what we say is a good arguable case on limitation. Then to make submissions as to why it would be just and appropriate in this case to have a determination of limitation as a preliminary issue.

MR JUSTICE JACOBS: Probably most of the introductory materials you can deal with quite quickly. I am interested in the argument as to why it is appropriate

and why it is not appropriate.

I am particularly interested in some of the case management issues, bearing in mind not just this case, but the other case which I am concerned with.

MR BEAL: Yes.

MR JUSTICE JACOBS: So, in terms of timing; have you agreed timings with your colleagues?

MR BEAL: Yes, I am hoping to be sat down by 12.30/12.45, all being well, which I hope will allow my learned friends ample time to respond and leave me 15/20 minutes to respond at the end of the afternoon.

MR JUSTICE JACOBS: Very good.

Application by MR BEAL

MR BEAL: Can I make three important preliminary observations?

Firstly, this is not a determination of the limitation defence itself and, therefore, this Tribunal is not, we respectfully submit, being invited to conclude that the limitation defences would fail. The issue is: is there a good arguable case on limitation sufficient to justify directing a preliminary issue?

We say, with respect, the suggestion that the limitation defences would fail in whole or part is a bold one in circumstances where the claimants accept, as they must, that the statutory period of limitation, the primary period of limitation of six years has expired, that the burden is on the claimants to plead and prove the section 32 case. It is unclear to us to what extent they actually address that clear and head on, but they should. The claimants have in fact chosen not to offer a positive case in their pleaded reply on limitation.

So the primary position is limitation has expired. There is no positive case advanced by the claimants as to why section 32 avails them.

The second preliminary observation I wish to make is that this is, with respect, not an opportunity to scope out detailed case management directions.

We, of course, accept that there are two sets of proceedings that raise similar issues, and this Tribunal will have a weather eye on making sure that those proceedings can be managed to the extent they need to be, with regard one to the other. We recognise that. But this is not, with respect, a CMC hearing. This is not an application for specific directions for case management and, therefore, we respectfully submit that, with fairness, those particular issues can't be determined today.

Thirdly, whilst we have mapped out future directions for the progress of the preliminary issue and we have given an indicative timetable, you, Sir, may think that given time constraints it is better to decide the point of principle and then worry about the dates by which things are done in due course, but I am in your hands as to whether or not you would like me to flesh out more fully precisely what we have in mind.

MR JUSTICE JACOBS: Well, I can see the broad parameters of what people are saying. I think even on your case it will take approximately a year to get to the stage of a hearing; on the other side's case, they say two years. It maybe somewhere between those two. But I don't think we need to spend any time on the detailed directions of how it will work because you are broadly agreed, even on your case, that it is not simply a legal issue, this. It will require disclosure, witness statements, possibly expert evidence. I know there is debate about that.

MR BEAL: Yes. About the expert point, but everything else is correct.

MR JUSTICE JACOBS: Yes, okay.

Just on your second point, you accept that when I am looking at this as a case

management issue, this whole question, I do have to bear in mind that there is a parallel proceeding where I am the chairman where, for example, factual issues are going to be gone into as between the claimants and those defendants?

MR BEAL: Yes. I accept that in due course it will be necessary to work out a sensible means of managing both sets of proceedings, and nobody wants to see the risk of conflicting decisions or inconsistent judgments, or anything else.

But my overall submission is that it is certainly not beyond the wit of the CAT, with its extensive case management powers, to do that.

My submission is that is not for today because you would need to hear from each of the respective parties on precisely what case management directions were needed. There has not been any application for consolidation and, therefore, it puts the cart rather before the horse to let case management considerations in unconsolidated proceedings drive whether or not there should be a preliminary issue.

In our respectful submission, the right way of looking at things would be to say: is it just and appropriate in this case to have limitation determined?

If yes, then we have a system put in place which makes sure that the aims and sensible case management of both sets of proceedings can be accommodated.

Because we say, with respect, there is no insuperable obstacle to having a trial of limitation as a preliminary issue, and enabling -- if that is unsuccessful -- both sets of proceedings to catch up with one another to the extent necessary. It simply requires active case management, which this Tribunal frequently does.

MR JUSTICE JACOBS: I know I am going to ask a few questions as we go on. But how is it going to work?

If I order a preliminary issue, and it is going to take a year or two, what is going to

happen to the other case?

I know you say I don't have to decide that, but does it continue? In which case, the CAT is going to be concerned with all the factual allegations from 2003 to 2013; does it stop? What do you say happens?

MR BEAL: We respectfully suggest that the other case is unaffected by the preliminary issue.

MR JUSTICE JACOBS: Right.

MR BEAL: The reason for that is that we are not suggesting that the cases be consolidated at this stage.

The original proceedings have a different factual matrix on limitation.

The proceedings in that case were started in 2018, which, on any view, is within 6 years from the date of the Bloomberg article, in June 2013, where a very large stone was thrown into a very small pond in the FX market.

There are therefore different considerations in the original proceedings on the question of limitation. There has not been sought, as I understand it, a preliminary issue on limitation in the original proceedings.

So the reality is that it has been a conscious decision by the claimants to start two sets of proceedings in circumstances where there are different limitation issues in each and it is, therefore, unsurprising that those different limitation questions are going to be resolved differently. It is entirely conceivable that you could have an appropriate determination of limitation in one set of proceedings where it wouldn't be appropriate for the other.

I am not here to express any view on whether or not limitation is an appropriate preliminary issue in the original proceedings. It simply has not been asked for.

MR JUSTICE JACOBS: No, no. Your position is that the other proceedings continue unaffected.

MR BEAL: Yes.

MR JUSTICE JACOBS: So I have my CMC in February/March, whatever it might be. February, I am hoping, or January. I make some directions there which are appropriate in the context of that case, which may involve a final determination of issues of liability, quantum, including limitation and everything else.

Meanwhile, your preliminary issue goes on. You are outside that. That is all happening independent of you; is that right?

MR BEAL: My understanding is that the window for the CMC in the original proceedings is fixed to run from 13 February.

MR JUSTICE JACOBS: It's not. It is a bit sticky, but January, I am hoping for.

MR BEAL: That's three months away.

MR JUSTICE JACOBS: Yes.

MR BEAL: We are already then into a three month time-frame within a twelve month window, we say, for the sensible management of the limitation issue.

With the greatest of respect, I don't think that the original proceedings are going to be tried within a year. I think that would be unrealistic.

I don't know what the time estimate is for the original proceedings, but we have put a time estimate on the full liability and quantum trial in this case of anything from five to six months, which seems to me to be a realistic estimate given, for example, the *Trucks* litigation in this Tribunal and similar timescales that have been adopted in very complex heavy litigation in this Tribunal in other cases.

With that in mind, we respectfully suggest that limitation can be dealt with. If, after that, these proceedings need to catch up with the original proceedings, then so be it.

In terms of what happens in these proceedings, that would be a matter determined by whether or not limitation is directed. If limitation is directed, we would

respectfully suggest limitation is dealt with. It is then compartmentalised.

If, as we say, the limitation defences succeed, then there is nothing to case manage because there is no longer a claim to be joined with the other one; if limitation doesn't succeed, then we will need to see to what extent the scope and nature of the claim is different, who the parties to that claim might be. But all that is not for today.

The issue is: is it realistic to think that the cases could, if necessary and appropriate, be caught up?

The answer we say is: yes, it is.

MR JUSTICE JACOBS: It is going to be quite difficult to catch up, isn't it? If the other case is running in a normal way and your limitation case is running on a parallel track, with no connection between the two cases, then, in practice, it is going to be difficult for there to be some sort of consolidation because your limitation point is going to take at least a year, maybe a bit longer, there may well be appeals, looking at some of the issues which have been raised and the arguments. There are some fairly meaty points here, it seems to me, on the law, which people are arguing about, so that might take another year.

In the meantime, the other case is going on. Therefore, the practical effect of what you are proposing is to make it much more difficult to consolidate, even though your case on the facts is precisely the same in terms of liability, leaving aside limitation, as the other case.

MR BEAL: Can I just deal with a couple of those points, Sir?

MR JUSTICE JACOBS: Yes.

MR BEAL: With respect, the suggestion that there will be an appeal come what may is not one necessarily that holds good because, of course, so much of the section 32 case law requires one to find facts of what the claimants knew or

should have known, and that reduces the scope for appeals.

The law has been settled in the Court of Appeal in *Gemalto* by the application of the Supreme Court's preliminaries test in *FII*, therefore that legal issue has been resolved.

There is a suggestion that CJEU's judgment in *Volvo* changes that. I will hope to show you why, with respect, that's not right, because all Volvo does is re-establish the principal that effective EU law protection of rights can require limitation periods in certain jurisdictions and under certain legislation to be dealt with differently. But that issue has been resolved by the Court of Appeal in this jurisdiction, in *Arcadia*. The section 32 regime has been found to be compliant with effective protection of EU law. So that issue is a smoke screen.

We are then in a position where --

MR JUSTICE JACOBS: There are other legal issues. Take, for example, your case, that it is sufficient to have knowledge against conspirator A and B even if you have no knowledge of the involvement of conspirator Z. You say time runs against conspirator Z. That is a big point.

MR BEAL: That is a legal issue, but it may be that we don't end up in an outcome where that particular issue is determinative of what the limitation defence is.

One can speculate that there might conceivably be points of law which aren't decided which could conceivably give rise to an appeal.

MR JUSTICE JACOBS: Yes?

MR BEAL: My submission to you, Sir, is: given the extensive nature of the factual enquiry that will be undertaken, in terms of working out who knew what, when. These sorts of cases do not routinely go on appeal, and if they do go on appeal, some of the points of principle have already been determined *Gemalto* and *FII* and therefore, one might think that the landscape is relatively well established

in terms of the legal principles to be applied.

MR JUSTICE JACOBS: Another point which seems to me to be a big point in this case -- I am saying this because it seems to me I am not going to get anywhere near trying to decide who is right or wrong on this sort of point -- but if you take the argument about whether benchmarking is different to spread, and whether knowledge of benchmarking is sufficient to run limitation in relation to spread -- I am paraphrasing, telescoping, you know what I mean -- that is a big point, isn't it, that could well go on appeal?

MR BEAL: That would be a point that is determined on established principles as to what constitutes a cause of action. Then evaluative findings as to what the preliminaries test required in the context of press reports of conspiracy, collusion, in the FX market.

When we go through some of the material, you will see, Sir, that in fact the bid/ask aspect of the collusion that is targeted by these claims was something that was pointed out in the US proceedings and something that was then expressly referred to in the letters before claim, back in 2018, before any of the 2020 disclosure was made.

Of course, it is the claimants' case that it was only with that 2020 disclosure that they were able to bring these claims.

So if, in fact, one looks at the facts, and the bid/ask manipulation allegation was already being freely deployed, as we say it was, then the 2020 disclosure cannot have affected that.

MR JUSTICE JACOBS: It was not being freely deployed in 2013 or 2014.

MR BEAL: There was reference to bid/ask manipulation in one of the US class action pleadings, prior to November 2014.

MR JUSTICE JACOBS: Right.

MR BEAL: I will take you to it.

MR JUSTICE JACOBS: All right. But there are other issues which seem to me to be substantial -- attribution of knowledge of people who have left one company and have joined another. Not a straightforward point, it seems to me.

MR BEAL: On the law, we obviously have *Meridian* and all the post-*Meridian* case law on the attribution of knowledge and agency for corporate knowledge. So the principles are well established.

In terms of plugging those principles into the facts, that is what the Tribunal does routinely. Whether or not that would give rise to a ground of appeal, query.

Sir, can I deal with your overall concern that somehow the original proceedings will be ready to go to trial and these proceedings will not be? That seems to be what is driving your concern.

MR JUSTICE JACOBS: It is one of the concerns, yes.

MR BEAL: Yes. The reality is if these proceedings have a good arguable defence on limitation, that good arguable defence is going to have to be adjudicated upon at some point.

If, for these defendants, that adjudication takes place -- just for the sake of argument, all the proceedings are consolidated, you have 14 banks before this Tribunal for over six months accumulatively, and at the end of that procedure there are three weeks' worth of argument on limitation, then very, very substantial costs and time has been spent by eight defendants, who, the facts will establish, had established limitation defences to the entire claim.

With the greatest of respect, that is not a fair, just or proportionate result. Because we are essentially made to go through the very considerable time and expense of fighting an entire case on liability and quantum only to find out the entire thing was statute barred from the off.

So that's the position my clients find themselves in. They are at risk of having to fight this very, very heavy piece of litigation for that entire period, only to find at the end of it all that none of it was necessary because, in fact, the claims were always statute barred because the claimants have not pleaded and proved, at this stage, a section 32 case.

So that is the reality of the position.

There are two ways of dealing with that: (1) you say, "Tough", to the eight defendants who have limitation defences, in the interests of managing unrelated proceedings -- or not unrelated, but unconsolidated proceedings, and proceedings the claimants have consciously chosen to bring in two tranches.

Or you strip out the limitation issue, case manage it, so it can be dealt with effectively and speedily, as speedily as possible, have limitation determined. Then take steps to case manage the proceedings together, if necessary, so that you don't end up with the risk of inconsistent decisions or findings being made in one that will not then be transferred or adjudicated upon in proximity to the other.

We respectfully suggest that's a more sensible way of approaching it. Unless it can be said, at this stage, that it is going to be simply impossible to do that, then fairness dictates that one should have the limitation issue stripped out.

MR JUSTICE JACOBS: The only safe way of avoiding inconsistent findings on that course would be to stay the original proceedings. Otherwise there would be a substantial risk that they will have advanced sufficiently quickly before the preliminary issues had been resolved on appeal and one would, therefore, be left in the position where you were outside that hearing. That doesn't seem to me to be a sensible approach.

It may be a difficult approach --

MR BEAL: The risk of the original proceedings being listed for substantive trial next

year is slim to non-existent. If you don't have a case management procedure up and running until late January/February, whenever it may be listed for, and if there is still, as I understand it, a lot of work to do from the claimants, in terms of pleading and proving their case on loss, giving the further particulars of infringement I understand are being delivered tomorrow, and so on.

If that is all still to take place, and then you still have not come to witness statements, expert evidence, witnesses of fact and so on, it is, in my respectful submission, inconceivable that substantive trial will be listed before 2024.

MR JUSTICE JACOBS: That sounds a perfectly sensible submission.

The question is: if I go down your route, am I going to be able to enable your proceedings to catch up?

Because I think you are proposing you don't want to incur all this expense of preparing for trial, therefore we put everything on ice while we deal with your preliminary issue before me, and possibly if there is ever an appeal. Then when that is known, you might have won or you might have lost, if you have lost, you try to catch up with the other proceedings. You have not served your witness statements; disclosure may be a problem. You have not done your expert evidence, all the rest of it.

MR BEAL: There is a hybrid solution that doesn't involve us incurring time and expense fighting a substantive liability case and substantive quantum case, which is to put in place procedural directions to enable the claimants to get to a position where they are ready to plead and prove their case in our case. That is then on their time and expense; limited time and expense for us.

Then the directions, if we are unsuccessful in the limitation defence, can then be made on us to catch up with the counterpart evidence and material that needs to be served. That's one way of squaring the circle.

But, today, with respect, is not about case management of how the proceedings will look; today is about our application for a preliminary issue to be tried. So we do end up with a position where, in a sense, worrying about what the consequences might be too much could lead to a position where this court, this Tribunal, is not actually doing justice to the defendants' own application which is before you today.

It leads to a position which I have indicated, whereby if I persuade you that we have a very good, arguable case on limitation, we are simply sitting there waiting to deploy it until 2025, in a six month trial, when it is dealt with in three weeks' worth of evidence and submissions right at the end.

With the greatest of respect, that doesn't seem to be a very fair or just outcome for my clients.

Can I please take you through -- I suspect you have a good overview of the case. Of course, your Lordship has previously dealt with some of the case management issues. Could I perhaps turn to some of the case law on limitation, just to refresh the Tribunal's knowledge of the key principles?

MR JUSTICE JACOBS: Yes.

MR BEAL: Could we please turn in the bundle of authorities to bundle 1, tab 18 [sic] page 65, the Paragon Finance case.

This was a mortgage fraud case against two firms of solicitors.

MR JUSTICE JACOBS: Which tab did you say it was?

MR BEAL: Tab 8, page 65.

MR JUSTICE JACOBS: This is on burden of proof, isn't it?

MR BEAL: It is.

MR JUSTICE JACOBS: I am not sure I am going to get a great deal of help going to burdens of proof at this point.

At the end of the day, I know there is a limitation argument that you are advancing. I have very detailed skeletons and submission from the other side, saying how they are proposing to deal with your case and why it is not. So it may be that in this case there is going to be some further pleadings and so forth, but I am not going to decide whether or not there should be a preliminary issue with all that consequence by reference to precisely how points have been pleaded. I don't think it is sensible for me to look at it that way when there are substantial arguments on this on both sides, so far as I can see.

MR BEAL: Sir, I am expressly not inviting you to determine limitation one way or the other.

MR JUSTICE JACOBS: No.

MR BEAL: But I am inviting you to recognise that we have a very good arguable case on limitation. It is sufficient, frankly, to have a good arguable case, not a very good one.

I am inviting you to draw the conclusion that the limitation case is sufficiently strong and stands a sufficient prospect of being a complete answer to these claims that the sensible case management of that issue is, therefore, to allow that issue to be determined immediately, rather than kicking it down the road to the end of the road; in substantive, lengthy, costly proceedings.

MR JUSTICE JACOBS: Subject to anything Ms Demetriou tells me, I think I can proceed on the basis that you have an arguable limitation defence. That limitation defence may be stronger on some aspects of the case than it is on others. That's the impression I have. It is certainly the impression gleaned by just having looked at what people are saying, over the course of the half day or so that I have been reading into it.

I think we should all proceed on the basis that there is an arguable case that you have,

and there is an arguable case the other side has. The question is: where do I go from there?

MR BEAL: Can I perhaps short circuit things slightly in the light of your indication?

MR JUSTICE JACOBS: I know Ms Demetriou says in her skeleton there are certain -- I have forgotten what her phrase is now.

She has several points which she says are going to happen anyway, come what may, and she relies on the position of the three banks which maybe did not have quite as much material out there concerning their involvement, SG and RBC, and she has her point about spread versus benchmarking. So she says that those points are going to carry on anyway.

I can't decide now whether they are going to carry on anyway. She has a reasonable case that they might well carry on anyway, but I can't decide any of these things now, and I can't say for sure she's going to win on that. That's the way I see it at the moment. She can persuade me otherwise, but I don't think I can say at this hearing that either side is going to win for sure on anything. Can we proceed on that basis?

MR BEAL: What I am seeking to persuade you is that the limitation case is sufficiently strong that it is worth the candle of having it determined sooner rather than later.

MR JUSTICE JACOBS: So you say it is not a useless limitation case.

But it is not so strong that you could apply to strike this out. That's why you are doing a preliminary issue, because you recognise that there would be considerable difficulties in a reverse summary judgment or strike out, which is why you are not going down the route; is that fair?

MR BEAL: We say, on strike out -- it is one of the best points that the claimants make, frankly, which is: if you are so confident of your limitation case, why haven't you applied to strike us out?

I will tell you why not. At the moment, it is strikeable. The reason it is strikeable is because when we come to look at the pleadings on limitation the claimants have simply refused to give any particulars of actual or constructive knowledge, notwithstanding that the burden is on them.

I can pass up to your Lordship a decision of Chief Master Marsh where a strike out was considered appropriate because the claimants had not advanced a positive case on limitation.

MR JUSTICE JACOBS: I am not dealing with strike out now. You might have a strike out case in due course, if they don't do it.

MR BEAL: The problem is this: if we applied to strike out on the basis the pleadings are deficient, the claimants' next step will simply be to amend their pleadings to put something up which passes muster. In which case, the whole exercise has been a waste of time.

MR JUSTICE JACOBS: Unless your case is so strong on the facts, if you like, that you can say there is no realistic prospect of success, leaving aside the technicalities of the pleading, saying: this is just a slam dunk limitation point that I can strike out to get reverse summary judgment.

Which wouldn't require a three-week hearing with evidence; it would be a couple of days. But, at the moment, you are not going down that route.

MR BEAL: We are not going down that route, no, that's true.

We are conscious that in, for example, the *MGN* case, which we have cited in our skeleton, the learned judge there, in the cases of phone-hacking, did not think that strike out summary judgment was appropriate on detailed questions of facts involving witness's recollections in a section 32 context.

I think it is fair to say that section 32 issues do not always lend themselves to strike-out applications, which is why we are seeking preliminary issue.

But it also have right to recognise, with respect, the burden is on the claimants. They have chosen not to plead out their case and that has consequences. Because, at the moment, as matters stand, having not pleaded a case on section 32, it is strikeable.

It is because we recognise they would simply put together some particulars to pass muster to avoid the strike out that we have in fact, in this case, sought for them to do that very exercise. So we have asked them to provide particulars of their case on section 32, and that's part of the application before this Tribunal, that they do give those particulars.

You have seen the draft order has provision for express service of pleadings on section 32, which seems to us to be a sensible course of action come what may.

MR JUSTICE JACOBS: Anyway, this is my way of trying to say to both parties: I don't really want to get into a big debate about the merits. I don't particularly want to get into looking at precisely what whoever it was said what they did in 2013 that led to everything. People can do that if they want, but I am just going to proceed on the basis that -- as you can tell from a three week estimate for a preliminary issue, there are substantial arguments on each side which could not possibly be resolved now and which the court -- at least for my part -- it is very difficult to form even a preliminary view on, as to how strong they might or might not be.

So why don't we proceed on that basis? Unless you want to go further.

I am going to stop talking. It is not fair. You develop your case.

MR BEAL: I have found in the past, if I may say so, what looks like an attractive short cut usually turns out to be an expensive long cut. But can I develop it to this extent?

MR JUSTICE JACOBS: Of course. It is just fair you know what sort of things I am thinking about and what I am interested in, but you carry on.

MR BEAL: Anyone who doesn't immediately try to grapple with the judge's concern is on to a sticky wicket, so I am very keen to try to address your concern, Sir. I would, however, like to put it in the context of what the legal test is for section 32, and what the pleadings say, at the very least, and then perhaps have a very light skip through the underlying evidence, so you can see how it has come out. It is probably sufficient for these purposes if I ask you to look at the *Gemalto* case, bundle 2, tab 40.

MR JUSTICE JACOBS: I did have a look at this. Not necessarily all of it, but I had a look at it.

MR BEAL: If you are familiar, Sir, with the *FII* preliminaries test, then I think -- it is summarised here, in this judgment.

MR JUSTICE JACOBS: Yes.

MR BEAL: So rather than going to two judgments we can simply go to this one.

MR JUSTICE JACOBS: I have looked at that *FII* case before, but I have not looked at the *Gemalto* case, but I now have.

MR BEAL: If we pick it up, please, at 1633 in the judgment of the Master of the Rolls. It was a cartel case involving smart card chips, and the Master of the Rolls identified, in paragraphs 2 and 3, two different possible tests for dealing with section 32. One was the so-called statement of claim test, and the other was the FII test adumbrated by the Supreme Court, which he suggests:

"The time should begin to run from the point when the claimant knows, or could with reasonable diligence know, it has a worthwhile claim. The claimant must know about the mistake, or in this case concealment, with sufficient confidence to justify embarking on the preliminaries to the issue of proceedings, such as

submitting a claim to the proposed defendants, taking advice and collecting evidence."

Those were the two competing tests.

Could I then, please, invite you to read paragraphs 44 to 53, at page 1644? Where the Master of the Rolls essentially says it is appropriate to apply the preliminaries test to all cases, competition cases included.

So that's --

MR JUSTICE JACOBS: I have read -- I am looking at what I have noted up. I have read through that before, I think. But it is summarised, isn't it, in 53?

MR BEAL: Yes.

MR JUSTICE JACOBS: So it is not a pleadings test; it is a worthwhile claims test.

MR BEAL: Yes.

MR JUSTICE JACOBS: At least as things currently stand. Yes.

MR BEAL: So what one needs to look at is whether or not sufficient is known or triggered about the concealment so as to justify taking preliminary steps to work out whether or not you have a worthwhile claim, such, for example, as seeking advice, seeking disclosure, if necessary, and so on.

MR JUSTICE JACOBS: The Master of the Rolls does say you have to know that there may have been a cartel and the identity of the participants.

MR BEAL: He does.

MR JUSTICE JACOBS: I think you say that it is actually an issue which is open to doubt, on your argument anyway.

At least at the moment there is authority that suggests that if you know that A and B are in the cartel, but you couldn't have known that Z was in it, time would not run against Z.

MR BEAL: The test requires you to be in a position where you are taking reasonably

diligent steps to ascertain who were the parties to the cartel. If the consequence, for example, of knowing that 14 major banks, or 16 major banks, have been identified as being under investigation by regulatory authorities is enough to put you on notice that it is a pretty wide spread allegation of collusion that is being levelled, should you be taking steps of speaking to your banks that you have been counterparties with for your trades and saying, "Please can you give disclosure of what you have been up to?" For example, in the United States, they typically seek production orders for regulatory filings, so the banks are duty bound to reveal the extent to which they are under investigation, and would then pass that information over to the potential claimant.

So it is ranging from, "Are you able to plead out a claim, at this stage, fully formed and sprung from the head of Zeus?", or, "Are you now in a position where you can take sufficient steps to put in progress an investigation into the merits of the claim, so that the concealment is no longer stopping you from doing that which any normal litigant would do."

The difference in practical terms is that rather than focusing on "How much did I need to be able to plead and what could I plead?", the focus is on "Was I on notice, essentially, that I needed to take steps to find out what was going on here?" and "What should I have done, and what would the results of that activity/conduct have been?"

So it is moving. Essentially, what the Master of the Rolls is saying here is: the whole point from *FII* of the suspension of time running for limitation is not to give claimants an advantage; it is to remove a disadvantage. As soon as you, essentially, are on notice that matters have been concealed, you have to take steps, as any normal litigant would, to find out what they involve.

In terms of what the statement of case would need to show, we have authority from

the Court of Appeal in the *Arcadia v Visa* case, bundle of authorities 1, tab 18, as to what is needed for a cause of action.

This case is involving Visa and interchange fees, one of many. One sees, at the headnote, a summary of the issues.

If we could pick it up, please, at paragraphs 48 to 49, pages 350 to 351, dealing with the test under section 32(1)(b) of the Limitation Act 1980, and adopting the judgment of Lord Justice Buxton:

"It is not enough that evidence that might enhance the claim is concealed, provided the claim can be properly pleaded without it."

Just pausing there, this was applying the statement of claim test, rather than the modified preliminaries test.

MR JUSTICE JACOBS: Yes.

MR BEAL: "The court therefore has to look for the gist of the cause of action that is asserted to see if that is available to the claimant without knowledge of the concealed material."

Then there is a reference to The Kriti Palm authority and so on.

One finds, at paragraph 51, competition claims are not in a different category for this purpose. There are many areas of law where a causes action is dependent not simply on the primary facts, but on the inferences that one can draw.

This is one such case.

In terms of what actually should be pleaded, one sees, 56 to 57, perhaps picking it up at the bottom of 55, as to what constituent elements need to be shown.

Then 56 and 57, it is plain that on a conventional application the statement of claim test, none of the four points provided by Mr Randolph on behalf of the claimants in that case satisfied the section 32.1(b) test.

What the chancellor then said, in paragraph 57 -- he had set out the critical parts of

the particulars of claim bearing on the allegation of unlawful restriction. They include the allegation that the MIFs -- that is multilateral interchange fees -- amounted to some 80 per cent of the MSC.

They created a cost element common to the acquiring banks. MIFs should not have existed or should have been set at zero and so on. Each of those allegations was sufficient to sustain a pleaded case, but there has been a restriction of competition. There also is sufficient allegation of damage to complete a cause of action.

Then, in 59:

"The precise way in which the MIFs were fixed over and above what is already pleaded in the particulars of claim is in truth no more than something which goes to the strength of the claimants' claims."

Therefore it is not necessary, nor a relevant fact for the purposes of the statement of claim test.

So what one sees in that is confirmation that the claim can be particularised at a relatively high level of generality. We see recognition, also, that anything that is essentially giving further and better particulars of the particular infringement of competition is not a relevant fact for the statement of claim test.

Just for your note, Sir, at paragraph 73 through to 75, at page 357, one sees the court dealing with and rejecting a suggestion that the section 32 regime is incompatible with a general principle of EU law as denying effective protection to it. So that represents Court of Appeal authority in support of the proposition that section 32 is not incompatible with general principles of EU law.

Can I give you an example of where a judge has dealt with and grappled with issues of identifying what could have been known and what inferences might have been drawn? That's the *ECU v HSBC* case. That's bundle authorities 2, tab 35,

page 1273.

It is a rather complicated case involving allegations of misconduct on the FX market, therefore it has a certain factual similarity with the allegations made in this case. But if we could pick it up, please, at paragraph 463, which is at page 1273.

MR JUSTICE JACOBS: Why am I looking at this case? For what proposition?

MR BEAL: The proposition is to look at the sorts of conclusions that a court is willing to draw on a section 32 case, in relation to having found out certain aspects of the claim, one can then go further and make further enquiries, and that leads to other aspects of the claim. So it is partly dealing with the spread versus bid/ask manipulation point, ie if you knew about collusion in the FX market generally, and you knew that there was collusion in relation to the spot rate, you could then ask questions and find out with reasonable diligence that conduct extended also to the bid/ask manipulation.

MR JUSTICE JACOBS: It is all going to be a question of fact, isn't it, as to precisely what the questions were?

I am not sure I am going to get a lot out of saying, in a different context, even if analogous: these are some facts the judge thought were important.

It is all going to be a question of fact in this case. Take me to the case, if you want to, but I doubt I will get very much out of it.

MR BEAL: I will move on.

Does your Lordship wish me to deal with the legal principles governing whether or not on a preliminary issue should be ordered?

THE JUDGE: I --

MR BEAL: (Over speaking) the Neuberger questions and so on.

MR JUSTICE JACOBS: Right. I have had a look at Mr Justice Neuberger's judgment, which is a very useful framework of things one wants to think about.

MR BEAL: Yes.

MR JUSTICE JACOBS: It is not an exhaustive list. For example, he was not dealing in that case with the sort of issue we were discussing earlier about having a parallel proceeding involving related issues. So that's obviously something I have to think about in this case, which he doesn't address.

MR BEAL: Yes.

MR JUSTICE JACOBS: So I think it is a really useful framework. I have looked at that. If there is any other authority -- I think that's the main authority you are interested in.

MR BEAL: Yes. It is a very helpful summary from Mr Justice Hildyard in the *Wentworth* case.

MR JUSTICE JACOBS: Where is that?

MR BEAL: I have given myself the wrong reference here, but it is bundle of authorities 1, tab 19, page 360. There are just three short paragraphs, actually, which are very useful in summarising what the issue is, starting at page 368 of bundle of authorities 1.

We see a convenient summary at paragraph 32 of what are called the "Ten Neuberger questions". Paragraph 33 confirms they are not the ten commandments, but ten useful criteria, echoing what you just said, Sir.

Then 34:

"However the caution required should not be such as to oust the use and utility of preliminary issues where, on the best judgment that can be made at the time, their direction appears appropriate. Especially as it seems to me, where there are limitation or other time bars potentially in issue, the purposes of the time bar may only really be fulfilled by early determination of its application; and/or where there points of law which it does appear could, if determined, determine

the case with considerable savings of time and cost."

We say that is this case.

Could I please -- just for your Lordship's note, the *Granville Technology* case was a case where you directed, admittedly by consent, that there should be a preliminary issue on limitation.

MR JUSTICE JACOBS: I don't really like people saying "just for your Lordship's note". I think if there is an authority people want me to look at, I would rather look at it at the hearing, rather than -- the assumption is: go off and read 35 authorities afterwards.

I had not realised I had made the order for preliminary issue, but I will just look at Mr Justice Foxton's judgment very briefly, just to see what he decided.

Both that case and Gemalto were much more confined in terms of evidence, weren't they?

I mean, they were two day hearings, I think. We are in a different ballpark here.

MR BEAL: The scope of the litigation was different because it involved a limited number of claimants, as I understand it, and a limited number of defendants.

It is very different when you have 175 claimants in 11 claimant groups, and multiple defendants in eight principal banking groups. That inevitably complicates things. It is not every competition cartel case that requires a five to six months trial. Trucks does. Some of them don't.

So one has to simply deal with what we are dealing with. Here, we respectfully suggest, the limitation case that has been raised on the pleadings by each of the banks is unassailable because the statutory primary limitation period has expired.

The burden does switch then to the defendants to establish the section 32 grounds. I would like to look, please, at how that particular issue has been dealt with on

the pleadings.

So if we pick it up in relation to the defences, there are two defences in particular that try to get their retaliation in first, and proactively try to make points that go to the section 32 issue without assuming the burden of proof.

The first is the BNP Paribas defence, which you will find at page 564 of hearing bundle 1, tab 17.

MR JUSTICE JACOBS: This is not in the core?

MR BEAL: No, sadly, pleadings are not in the core bundle.

That is going to be, then, on your screen, I think.

MR JUSTICE JACOBS: Yes. But I have to find it myself, don't I?

MR BEAL: If it is hearing bundle 1, page 559, then a "go to" search for page 559 may work. That will be where it starts.

MR JUSTICE JACOBS: Yes.

MR BEAL: Then picking it up, please, at page 564, we see a positive pleading from this particular defendant in the last sentence:

"The BNPP defendants will aver that the claimants did discover or alternatively with reasonable diligence could have discovered facts sufficient to bring the pleaded claim prior to 11 November 2014."

At page 598, we see a series of pleadings set out supporting the proposition, see paragraph 136.1:

"The claimants knew or alternatively could with reasonable diligence have known sufficient facts to enable them to plead the claim by no later than 11 November 2014."

There is then a series of points that are relied upon, and a reservation, at page 599 of the entitlement, to plead further once proper particulars are given.

The Goldman Sachs defence also has a fuller pleading of limitation. For most of the

defendants, as I said, the primary limitation period has expired. The burden is on the claimants to show otherwise under section 32, but they don't advance a positive case as such because they say they don't have the burden or obligation to do so.

If one looks in this bundle at page 390, then a different defendant, in this case Goldman Sachs, has also pleaded out a fuller limitation case, relying upon press reports, public filings, and then the relevant US proceedings.

It rebuts the suggestion that it was only with disclosure that the claimants could have properly pleaded their case. That's the 2020 disclosure.

At page 442, there is then a very detailed section of pleading:

"Where this particular defendant alleges that the claimants had actual knowledge of the matters giving rise to the allegations or could, with reasonable diligence, have discovered such matters."

That is at the top of page 443.

They then go through a series of matters which they say supports that, culminating at page 447, with a specific allegation of knowledge on the part of one of the BlueCrest claimant traders of the very conduct in question.

So if one looks at page 165.1, Goldman Sachs is relying on the transcript of a chatroom of which traders at Goldman Sachs and BlueCrest were members, which show a BlueCrest trader engaging in the type of conduct about which the claimants now complain. You will see what is being said in that transcript.

The response from the claimants to these pleadings is found in the reply, the consolidated reply, dated 23 December 2021. You will find that at page 768 of the electronic bundle.

MR JUSTICE JACOBS: Sorry, what was the page again?

What page again, sorry?

MR BEAL: 768.

MR JUSTICE JACOBS: 768, thank you.

Which tab is it?

MR BEAL: It is tab 25, hearing bundle 2.

MR JUSTICE JACOBS: Yes. Thank you.

MR BEAL: If we turn, please, to page 770, under paragraph 6.2, the claimants say that they are not proposing to plead or prove this claim on an infringement basis by reference to chatrooms and so on. Instead the claimants are in the process of developing expert models which will deal with it.

At page 776, we then find the pleading in response to limitation and the invocation of section 32. There is a reference to Goldman Sachs and BNPP having proactively pleaded facts that go to that issue.

At paragraph 24, we then see -- top of page 777 -- a denial that the proceedings are time-barred. It is admitted that the cause of action arose more than six years before the claim was started. So the primary limitation period has expired, but it is said that time stops running because of concealment.

In paragraph 25, it is then said:

The Claimants pleading herein and in relation to section 32 does not address issues of actual or constructive knowledge. The Claimants are not in a position to address such issues until such time as all the Defendants have identified the material upon which they rely so that the Claimants could have pleaded the case prior to 11 November 2014."

With the greatest respect, that simply is an attempt to cast the burden the wrong way, seeking to say: well, we are not going to plead or prove any case to actual or constructive knowledge. You have to tell us what you say we should have known.

With the greatest respect, that's not what the case law reports.

MS DEMETRIOU: Sir, just so I don't have to come back to it, could you please just read the last sentence at paragraph 24. I am sorry to interrupt Mr Beal.

MR JUSTICE JACOBS: I saw that, thank you.

MR BEAL: We then see:

"As explained above, only two of the Defendants currently address this point, instead the pleading below proceeds on the basis that the material in question is to be treated as within the actual or constructive knowledge, but without making any admissions."

I took you to the *Paragon Finance* case, which makes it abundantly clear the burden is on the claimant to plead and prove their case under section 32. This, we say, is an attempt to circumvent that.

MR JUSTICE JACOBS: What do they then go on to do? Are they dealing now with what BNPP and Goldman Sachs have said, so they are responding, saying why it is that material was not sufficient to put them on notice or give them actual knowledge?

MR BEAL: That is what they do. But they are not dealing with the more general exercise in setting out what they say their case is on actual or constructive knowledge. So they don't attempt to grapple with what each claimant knew or didn't know. There is no general averment signed by a statement of truth, for example, that none of the claimants knew anything about this alleged activity until after 11 November 2014. There is no general averment to that effect.

MR JUSTICE JACOBS: In a sense, that is at the end of paragraph 24.

But, anyway, this is all a bit of shadow boxing really, because there is not an application to strike out the pleadings.

MR BEAL: No.

MR JUSTICE JACOBS: No application for further particulars. I am interested that they have actually grappled with whatever BNPP and Goldmans have said, in terms of why they should have known things or did know things. But it doesn't really help me, I don't think, on whether or not I should order a preliminary issue, does it?

MR BEAL: What it shows, Sir, is that they have chosen consciously not to give a full positive case as to what they say is the explanation of why they didn't have constructive knowledge and didn't have actual knowledge.

There is no positive case advanced by them as to why it is said that they could not know about what it was necessary to know about at the relevant time. That has been sufficient in the case I was talking about for strike out to have been ordered in other cases.

We, of course, do have, before you today, the application for them to provide proper particulars of their case on section 32. That's part of the application that we have made. So that is before the court at the moment.

There have also been some interlocutory skirmishes on the pleading, in which a request for further information was served by the claimants and they said, essentially, "Tell us what you say we should have known", and most of the responses to that were, "It is your job to tell us what your case is on section 32", which is legally the right way of doing it.

Giving particulars of actual knowledge, we say, is, with respect, important because, as you will have seen in annex 2 to the evidence from Mr Norris Jones -- that's core bundle 4, page 122 -- there is an identification of a number of individuals, who, having previously worked for one of the defendants, then appeared to have taken employment at one of the claimants.

So there is a series of press reports found in hearing bundle 2 which essentially

provide an evolving indication of what was available in the press reports. I was proposing to give you edited highlights of that, but it seems to me, in light of the steer you have given me, that would be rather futile.

What I would like to do is to contrast the approach that was taken in this case with the approach that was taken in the United States in response to that press reporting. So I have already described the Bloomberg article as the bombshell. There was then a series of press reports that essentially made allegations that a large number of banks were swept up in the allegations of collusion in the FX markets. That's where it landed.

In contrast, with respect to the way the UK proceedings have evolved in terms of time, the plaintiffs bar in the United States acted with considerable dispatch. So a series of class actions were up and running within months of the Bloomberg article. I think the first one was November 2013.

Now, we have evidence in the core bundle from Mr Brockett of Quinn Emanuel. That's core bundle 14, page 235.

That his firm, Quinn Emanuel in the United States, was actively investigating these matters from 2013. At paragraph 4, at page 235, he says:

"I have also spoken with other large institutional investors about FX at various times since 2013. These contacts were most often times initiated by clients of the firm, or those with whom the firm has relationships, who knew generally about the FX saga. My initial conversations with those institutions involved simple overviews of the scandal.

"In most instances it was quickly determined the investor did not have a large enough portfolio to warrant further discussion. In some instances none of the issues class counsel complained of were discussed."

So he has been actively engaged in this and working in this space, as he says in

paragraph 2, since 2013. He says in paragraph 2:

"Our work has been continuous since that time. We have been formally engaged by a variety of clients for a variety of tasks."

Then he says it results in privileged client/attorney material.

Now, the significance of that is that Mr Brockett was then able to plead a case in the United States. One finds that pleading at tab 30 of this bundle.

If we could turn, first, please, to page 357, right at the end of that tab. I am making good the point that the pleading is signed off by Mr Brockett.

MR JUSTICE JACOBS: It is said by your side that this is concerned with benchmark rates, which is the title of the case not bid/ask; do you accept that is correct?

MR BEAL: This case was pleading out a case of collusion in the FX market of which the focus of that allegation was indeed the WM Reuters' rate and spot prices. It is true that there was no specific reference to bid/ask as a separate allegation of collusion, a separate particular of the collusion that is being targeted.

But there is an explanation of bid/ask given at paragraphs 35 to 37. So if we turn to page 326, at paragraph 35, it says:

"Most trades in the FX market are spot or forwards transactions."

It explains what that is.

Paragraph 36 says:

"The market's organised as over-the-counter market."

And 37 says:

"In the over-the-counter market, to initiate a foreign exchange transaction, a customer contacts a dealer indicating the currency and quantity she wishes to trade, and inquires as to the price. The dealer states the price at which it is willing to buy (the bid) and sell (the ask). The customer then decides whether to buy, sell or pass. The dealer is compensated for its services by a favourable gap between

the two."

So they are referring to bid/ask as a fundamental feature of pricing in the market.

When we come on to see, pages 338 and 339, the allegations that are in fact being made are of traders colluding with each other to change the prices of services and products being sold in the FX market.

We see, at page 338, for example, paragraph 76 is an allegation that traders would share details of the orders with brokers and counterparts, align their strategies, glean information about impending trades. Then we see the allegation of alignment to strategies through chatrooms in paragraph 77.

Paragraph 78:

"These sequencing strategies included agreements about the direction in which defendants wanted to manipulate a currency pair, when to begin the manipulation, and not trading currency in a direction opposite."

So whilst I accept that the focus has been on benchmark, the relevant allegations in fact being made are broader. They are of collusive allegations between traders in the FX market, coupled with a pleading that the FX market is substantially rewarding the traders on the basis of the bid/ask difference, the spread.

We see, at page 342, a pleading that in order to reach this stage of analysis the plaintiffs' counsel, i.e. Quinn Emanuel in the United States, paragraph 91, they have conducted a series of assessments using economic analysis and regression analysis for six major currency pairs. Paragraph 92:

"Plaintiffs economists examined trading data for six major currency pairs over a six year period."

So there has been substantial work investigating economic analysis, regression analysis, which is said to support the pleaded case. This pleaded case is from Mr Brockett.

Then what essentially happened is Quinn Emanuel's application to be lead counsel for the class action failed. Conduct of the class action, I think, passed to Scott+Scott, who are substantially behind the pleading that we then look at, at tab 31.

This is a consolidated amended class action complainant, settled on 31 March 2014. One sees that at page 435.

At page 360, the defendants are identified. They include five of the eight defendants before you in this proceeding.

At page 378, there is a pleading of the use of bid/ask as a way of making money for traders.

Paragraph 57, at page 378, refers to FX trading over the counter, meaning it is not on a centralised exchange. There is then an explanation of how customers execute FX trades in paragraph 58.

Then, at 60, the basic mechanics of how a trader earns the spread is explained. It said that the wider the spread the more money a dealer makes, thus it says:

"dealers are incentivised to quote wider bid/ask spreads. Competition among dealers, however, narrows bid/ask spread."

So competition decreases the spread and lack of competition would widen the spread; that is the inference one can draw.

In terms of what is specifically said on the bid/ask issue, and more generally, if we turn, please, to page 387. The level of the pleading, at paragraph 84, is to allege a conspiracy between traders in electronic communications in chatrooms and more generally, and colluding as to market information, knowledge and so on.

We then see, at paragraph 92, page 389, the sharing of what is alleged to be confidential customer information in order to manipulate spot rates.

Just *en passant*, at page 404, there is a reference to evidence that was given to a House of Commons Treasury Committee, in February 2014, involving the UK Financial Conduct Authority.

At paragraph 141, the pleaders are relying upon -- that is page 411 -- the pleaders are relying upon public filings with regulatory bodies to confirm that certain of the defendants are under investigation.

At page 418, we see a summary of the anti-trust complaint that is actually being advanced. It is said that there was manipulation of the closing spot rates, at paragraph 166. But it also says, in 167:

"Absent collusion, Defendants would have competed to offer competitive prices by quoting bids and ask to customers at the lowest cost for a given currency. Every purchase of the quantity of currency represents demand relative to supply ... forces that would, in a market free of collusion, determine the price."

We say that is a pleading of the consequences of chatroom collusion, as alleged, on market prices in the FX market, which is not simply spot, but also the bid/ask spread.

And the impact of that collusion is then identified in paragraph 168.

Interestingly, in order to avoid limitation issues, at page 420, paragraph 175, the plaintiffs in this action started in March 2014 say that:

"By its very nature the unlawful activity alleged here was self-concealing ... As a result and as described herein, Plaintiffs could not, and thus did not, discover that they had suffered injury prior to Bloomberg's June 12, 2013 article."

So they are pleading expressly that time only started to run with that article.

Now Mr Brockett features again --

MR JUSTICE JACOBS: Can we just pause one second? I think I have a transcriber who is working on this. I probably need to allow him or her to have a break.

MR BEAL: Yes. Now is a convenient moment.

MR JUSTICE JACOBS: It is probably a good moment. I normally say ten minutes which I think is fair. So then you can reflect on where you want to focus your remaining time as well.

(11.43 am)

(A short break)

(11.54 am)

MR BEAL: Thank you, Sir.

I am proposing now to show you how a conscious decision was taken in 2018 to pursue only some banks and not other banks, and how that has led to two sets of proceedings.

Could you turn, please, in the core bundle to tab 15, page 239?

This was a letter before claim that was sent to Deutsche Bank. It pleaded out both benchmark manipulation, bid/ask spread manipulation, which we say falls under the rubric of a price fixing allegation, collusion. It is suggested that liability can't sensibly be an issue, thoroughly good cases being deployed et cetera, et cetera, early settlement was encouraged, and so on.

Paragraph 4 in particular, halfway down, page 240:

"We set out below the basis of Our Clients claims against the banks based on publicly available information and analysis undertaken by Our Client's claims. This will necessarily need to be updated following disclosure given that manipulation occurred through Bloomberg chatrooms … However, in accordance with the overriding objective … we invite Deutsche Bank to provide our clients with all the relevant chat room transcripts ..."

It has been suggested that liability cannot sensibly be in issue.

So they were ready to pull the trigger, seemingly, at that stage, in the claim against

Deutsche Bank. Indeed, at page 281, in tab 18.

282 says:

"Should you fail to provide a substantive response by 11 April 2018, our clients will issue proceedings in the High Court without further reference to you."

Seemingly what happened in the meantime was there was then a decision taken by Quinn Emanuel to proceed against only some of the defendants, and that was against those defendants from whom they had reports were settling with the European Commission.

At page 294, it is suggested that Bank of America had engaged in unconstructive dialogue with the claimants.

Page 295, it says, by the first hole-punch:

"Based on publicly available information, it is our understanding that Bank of America is under investigation by the European Commission, … in order to ensure that our clients name as defendants only those banks that are going to be found to have infringed competition law, … we kindly request that Bank of America confirm … whether it is under investigation."

Next paragraph:

"In circumstances where your clients have outright refused to engage in any alternative dispute resolution, … there is a risk Bank of America may seek to assert foreign law and raise foreign limitation defences, our clients must take action and commence proceedings."

So, in essence, what then happened was proceedings were in fact issued, but they weren't issued against Bank of America or Deutsche Bank. They were issued against the six defendants in the original proceedings.

We can see confirmation of that in hearing bundle 4, which is on your electronic version, at page 2247, at tab 110. This is part of the skeleton argument seeking

disclosure.

At paragraph 7, page 2247, the claimants indicate that they now wish to pursue proceedings against other banks. By this stage, it is 11 November 2020, on the day of what is alleged to be the cut-off day.

We see:

"As a result the Claimants now wish to pursue proceedings against other banks which were involved in the same or similar wrongdoing."

And they identify the defendants:

"However they consider that the appropriate way to do so is by means of separate proceedings, rather than by adding those banks as additional Defendants to this case."

So we are in a position whereby two conscious decisions are made.

Firstly, a decision is taken to proceed against only some of the banks who have been identified as being responsible for alleged collusive activity in 2018. Then a decision is taken to bring separate proceedings, rather than seeking to join those defendants to the existing proceedings.

Of course, if a joinder application had been made, the issue of limitation would have had to be determined.

So we are in a position whereby there are two sets of proceedings through a conscious decision on the part of the claimants, and the issue of limitation has been parked by virtue of issuing separate proceedings.

Now, in the light of the observations you have given me, Sir, what I propose to do now is to concentrate on why it would be fair and just to direct the preliminary issue. I hope you have seen that in a sense the fact there are two separate proceedings is nothing to do with us. It is simply the way the proceedings have evolved. It is inevitable, if you have two sets of proceedings, if they are two

years apart, they are going to be on different tracks, to a certain extent.

It is, we say, worth bearing in mind in what exactly it is that case management of these two sets of proceedings might involve. On one view -- it's not for today because there has been no application -- it would be full consolidation, but that involves 14 defendant banks dealing with a mixture of liability, quantum and limitation issues, which can only be a yet further extended, longer hearing than that envisaged for this case by itself.

That will involve an investigation, to the extent necessary to do so, of a whole series of chatroom transcripts and chatroom interactions, for which most of the banks present have no direct interest. So if, for example, a chatroom features three traders from three banks persistently having chats with each other, the other 14 banks or 13 banks are not going to have a direct interest in that, insofar as the allegation is one of a chatroom by chatroom infringement, which is part of the alternative case that is being put.

In short, my submission is it becomes an even more unwieldy exercise in order to try that particular case. Given the sheer volume of material and sheer volume of evidence and so on, and expert evidence, that is going to be needed to determine liability and quantum, ordinarily one would expect a Tribunal would try to look for particular bite sized issues that can be taken off and dealt with to try to make things more manageable.

One of those bite-sized issues, we say, is limitation, because it is capable of being taken separately and dealt with.

Ultimately, in a sense, I apprehend from the interaction that we have had, your concern is: how do I fit the limitation into what the Tribunal is envisaging for the overall strategy of managing two very large cases?

Can I suggest perhaps where that analysis may land?

If you are with me that we have a good arguable case on limitation, and that the consequence of not dealing with limitation now is that my clients, with that good arguable defence, are going to have to sit behind six to nine months' worth of hearing, only to find out at the end of it all that in fact the claims against them have been time-barred throughout, I hope you are with me then with the proposition that is not fair and it is not satisfactory.

So that would suggest one does have a preliminary issue on limitation.

The question then is about balancing the competing interests that are here before you today, and how can we manage that consistently with enabling the other set of proceedings to proceed to a full trial appropriately.

The answer to that, we respectfully suggest, is that whilst case management is not for today, because this is not a formal CMC, and the formal CMC in the original proceedings is not until January or February, the position must be that we need to at least contemplate what might be envisaged, if you are of the view that it is important to look at that.

Now, what might be envisaged is that the original proceedings simply continue unimpaired. My understanding of the original proceedings is, as I have indicated, that there are a large number of steps to be gone through, still. We have not had, as I understand it, full disclosure, full particulars, expert evidence, witness evidence and so on. So, on any view, there are some significant steps to take in that.

We can then get to a position, we say, where having had the trial of the limitation issue in our case within twelve months, it is not being suggested that the original proceedings are going to be fit for trial immediately at the beginning of 2024.

If what one has in mind is a trial either at the second half of 2024 or the beginning of 2025, we respectfully suggest that quite a lot of the work that the claimants are

doing in the original proceedings can be replicated in these proceedings, to enable that part of things to be caught up.

Now, of course, it is not for today to map out a fully fledged case management process whereby there is a twin-track strategy for both sets of proceedings, but we recognise this Tribunal is either going to want to hear those proceedings back-to-back, or, in the event that there is a full application for consolidation, that will need to be considered. Of course, that consolidation application is not for now.

Cutting to the case chase --

MR JUSTICE JACOBS: Just so I understand your point, you said if there is a trial in the second half of 2024/beginning 2025 of the other case, there would be a lot of work which the claimants could do to catch up on this one. I just want to understand, without the defendants doing it all as well.

Are you saying we can do the preliminary issue -- forget about appeals, we can do the preliminary issue; if that lets us out, fine, but if we are still in, we can all be ready for a trial at the second half of 2024? Is that what you are saying, or have I misunderstood that?

MR BEAL: I am saying, with appropriate case management in place, one could be looking at a situation in which these sets of proceedings are not significantly behind the original proceedings, with active case management.

The submission I am making to you as to what can be done in the intervening period when the preliminary issue is being determined and various steps are being taken for that.

My point is, really, that there are some underlying steps which the claimants are saying they are taking, which could be taken also within that 12-month period, which don't then require the defendants in this case to spend considerable time and

money dealing with a case which may well prove to be redundant because it is statute barred.

Now, if you were with me on that, it would be open to the claimants, for example, to give proper particulars of their case, to do the expert analysis they say they need to do, to get the expert evidence in on loss, and they can take all those steps and, of course, we don't then incur any cost at that stage; that's on their time and their money.

If you are minded to say that we ought to be doing things too, then, of course, that would be a subject for discussion at a case management conference as to what might be done by us to make sure, at the very least, we were within touching distance of the other sets of proceedings. It is also important to bear in mind: the more the defendants are directed to do, the more the burden of cost and effort increases.

MR JUSTICE JACOBS: Yes.

MR BEAL: Therefore we are in the same position, where we are incurring substantive costs for a claim which may, as we say, be statute barred from the start. So there is a trade-off.

We say that trade-off is capable of being managed in due course. If, heaven forbid, we come to a position whereby having lost the limitation case and having to be caught up with the original proceedings, if at that stage there is divergence, still, in the tracks of both sets of proceedings, then one option would be to impose a short stay of the original proceedings to enable these proceedings to catch up.

That is not usually a terribly palatable suggestion, but, of course, we are only here because there was a conscious choice by the claimants to start things running two years apart in two sets of proceedings. There was no application for joinder

in the original sets of proceedings and, therefore, things have fallen out this way because of that very conscious decision by them. They decided that they were only going to go after the people who they thought had settled with the European Commission. That was their choice.

I hope I have persuaded you that on the basis of the evidence, the letter before claim and so on, that was a strategy they need not have adopted. Certainly against Deutsche Bank and Bank of America as two examples. They said they were ready to begin proceedings in 2018, but they consciously chose not to.

MR JUSTICE JACOBS: It is one factor. I do have to bear in mind that I, as the CAT, am now faced with these two cases. The claimants may have taken that decision, but I have to think about how the CAT's resources are going to be allocated.

MR BEAL: Yes.

MR JUSTICE JACOBS: And whether, if one has many, many common issues on liability, it is sensible to have a trial with one group of defendants and not the other group. That's something I have to consider, irrespective of how the claimants approached it. They may have had perfectly legitimate reasons for dealing with it the way they did at that time, but it does not bind the CAT.

MR BEAL: The original proceedings are not, in our respectful submission, at such an advanced stage that there is a significant threat of this Tribunal's ability to manage the claims in due course if it is necessary to do so.

It is true that at the moment -- it is undoubtedly true -- that they are more advanced than these ones. But quite a lot of the steps, as I understand it, that still need to be taken are steps that are within the claimants' gift. So they are steps the claimants can take in these proceedings as well.

It is a difficult submission to make, but obviously one needs to bear in mind that the

original proceedings have not proceeded terribly swiftly to date. They were started, obviously, in the back end of 2018 and there is still a CMC listed for January or February next year.

So they have not been conducted terribly swiftly, and there are still some very significant procedural steps to be taken in those proceedings.

So, as always, when it is a balancing exercise, in our respectful submission, both sets of interests need to be managed against each other. In circumstances where we say we have a good arguable case on limitation, it is only fair and just that is resolved as speedily as possible because it is determinative, we say, of the claims.

If that can be managed sensibly and at the same time as keeping the two sets of proceedings broadly aligned, capable of being joined in due course, should it be necessary to do so, then that would suggest that limitation can be ordered and can be managed.

It is only if this Tribunal were to consider it is simply impossible to achieve that, regardless of an element of compromise on both sides, in both sets of proceedings, that we say that it becomes a relevant factor to consider the case management issue.

Because the consequence of having both cases consolidated, heard together over a substantial period, is simply that we have invested a huge amount of time and money defending claims that we say are time-barred.

But, ultimately, there are mechanisms -- perhaps not for today -- whereby the claimants, and if necessary the defendants, can be directed to do things to make sure there is not a significant risk of divergence in due course.

In terms of what could be done, well, I have indicated that expert evidence from the claimants is still necessary. Further pleadings from the claimants, further

particulars of infringement are due, and so on. It may be possible to take limited steps in relation to disclosure.

But, of course, the balancing exercise is always that time and cost is being spent dealing with matters where we say we have a very good arguable case on limitation.

So, it is a balancing exercise. I mean, we are not, today, tasked with a CMC at which these issues are going to be resolved, which is why I am putting it as being: it is only if you think it is impossible to manage these on a twin-track strategy that we would be in a world where it is a relevant consideration.

If you think, with good spirit on both sides, it is possible to achieve a procedural solution which caters for the Tribunal's concerns -- and we can see to those concerns -- then that is the answer.

With discipline, it may be that the Tribunal has to direct parties in both sets of proceedings to do things they would not ordinarily want, be it slowing down or catching up. But, of course, that balancing exercise involves fairness to all sides. It may be that through a combination of slightly slowing down the original proceedings, and slightly speeding up our proceedings, you reach a happy medium where your concerns about different conclusions in different trials are allayed.

MR JUSTICE JACOBS: If I were to order a preliminary issue it limits my flexibility on case management because I have to then case manage both cases with a preliminary issue being there, in circumstances where the parties have not developed their arguments about case management and so forth. So I am boxing myself in to some extent.

You may say: well, that is fair, because this limitation issue is such an important one and we shouldn't be in this trial and all the rest of it. But it does have an impact

on the range of options which I will have on case management of both cases when, as you say, I am not dealing with case management today.

MR BEAL: Well, it is true that whatever you -- if you direct a preliminary issue, then obviously the conduct of that preliminary issue will need to be factored into whatever else is ordered.

My suggestion to you, I think, is: it doesn't mean that you simply down tools on every aspect of these proceedings or that somehow the original proceedings are stymied, because one can envisage a set of directions which don't permit that to happen.

The difficulty I have is I obviously don't have specific instructions on how to deal with case management issues for the proceedings generally, so I am, to a certain extent, speculating as to what the Tribunal might order.

My primary submission is: that is not for now. Look at the merits of the limitation defence, look at the consequences of not dealing with that limitation defence as a separate issue, and the result is undoubtedly, with respect, harsh.

The reason why it is harsh is because it leads to an extremely complex set of two sets of proceedings being adjudicated upon in full by the tribunal in circumstances where, for one of those sets of proceedings at least, limitation is a very real issue.

It is important, in my respectful submission, to appreciate that I think this Tribunal would likely wish to commit itself to a six to nine month trial of both sets of proceedings at the same time, with all the resource implications and everything else that carries with it, in circumstances where there are, as I have indicated, bite sized chunks that can be pulled off and sensibly dealt with.

Limitation may or may not be a particularly digestible bite, but it is a bite nonetheless, and three weeks is better than nine months in terms of Tribunal time being

devoted to dealing with an issue which may ultimately mean that you don't have to have a six month trial in 2025 in our case.

So, just from a CAT resources point of view, of course, there is merit in trying to identify things that may well mean that you don't have to commit to what would otherwise be a pretty unmanageable litigation of the sort that this case is involving.

MR JUSTICE JACOBS: If I didn't have a preliminary issue in your case -- and let's say I just treated your case independently of the other case -- when would your trial come on? If I was dealing with all of you and the 151 claimants, or however many there are?

MR BEAL: 175.

MR JUSTICE JACOBS: 175.

MR BEAL: Again, this is something of guesswork, but I would have thought second half of 2025, something like that.

MR JUSTICE JACOBS: Thank you.

MR BEAL: Assuming that this case proceeds more speedily than the original proceedings have, but I think it is fair to make that assumption.

MR JUSTICE JACOBS: Okay.

MR BEAL: I mean, obviously I am not privy to all the procedural steps that have been taken in the original proceedings, but given that they still have to do expert evidence, witnesses of fact, full on disclosure, it seems to me that the gap between the two has probably been narrowed to about a year as matters stand and it might be conceivably possible to expedite some of the steps that are taken in our proceedings in order to narrow that further.

It may well be that we reach a position whereby the original proceedings are put back by, say, six months, directions are enforced with the greatest degree of

discipline against us, and that is brought forward six months and the two marry up.

On any view, if the idea is to have a substantive trial in 2025, either back-to-back or consolidated, then you can accommodate, in our respectful submission, a determination of limitation as a preliminary issue, if necessary by forcing the parties to take some steps in parallel with the limitation issue, so that the jolt between limitation being decided and it being unsuccessful, and the catch up, is not too great.

In terms of what the case management might look like, well, obviously, we have had the direction from the Tribunal on umbrella proceedings. We have had the *Sportradar*-style approach in relation to management of related proceedings. I anticipate what you are envisaging is something broadly similar to that and, obviously, that would seem a sensible use of the CAT's case management powers.

But, cutting to the chase, I imagine what you want to make sure of is that both cases are, if necessary, capable of proceeding in close proximity to one another, preferably before the same panel. I recognise that. My overall submission on that is: it can be done. It may take good will on both sides, but it can be done.

But the consequence otherwise is that, of course, a real injustice will be perpetrated against my clients, who spent goodness knows how much money defending allegations on both liability and quantum, as I said, only to find out that they never should have been subjected to them because of the expiry of a limitation period.

MR JUSTICE JACOBS: That's true in all cases, isn't it? You say it is particularly so in this case, which is a very large case. But every case where limitation is raised potentially involves a party having to fight the whole case and deal with

limitation on the trial.

MR BEAL: It does. But that's why the authorities are replete with examples of the court saying: if limitation can sensibly be tried in advance, it should be.

I have not taken you to those authorities, but, for example, on section 33, it is common to -- indeed there is judicial recognition that limitation should be tried first.

The reason for that is -- in a section 33, of course, it is a discretionary extension of a limitation period for a personal injury case where the primary limitation period has expired. So it is an equitable discretionary power to extend time, and the courts have said in terms: it is very important that you try to get that out of the way as soon as possible, because otherwise it is capable of working real injustice.

That's in the *Bryn* case. Perhaps we could turn that up, it is bundle of authorities 1, tab 11?

At page 1471. Paragraph 74, subparagraph 4. It is 1471 within the report, so page 154 of the bundle. Where Lord Justice Auld, at the top of page 154 of the bundle, 1471 of the report, says:

"Wherever the judge considers it feasible to do so, he should decide the limitation point by a preliminary hearing by reference to the pleadings and written witness statements and, importantly, the extent and content of discovery."

He says then, in the end piece after the citation of Lord Justice Bingham's reasoning:

"It may not always be feasible or produce savings in time and cost for the parties to deal with the matter by way of preliminary hearing, but a judge should strain to do so wherever possible."

That's in the context, admittedly, of section 33. But the whole point is that because it is a threshold issue of limitation, in circumstances where the primary limitation period is expired, it is appropriate to get that out of the way as soon as possible.

We say the same submission can be made here on the basis that here there has been an expiry of the primary limitation period and the claimants are seeking to invoke section 32 as a reason why that should not carry the day.

Simply as a matter of sensible case management, if what is envisaged is the consolidation of one very, very large case with another very, very large case, then anything that might make that case collectively more manageable, for example by disposing of some of it or all of it, is a sensible case management step. As I have sought to suggest, the nightmare scenario where separate trials of liability and quantum are held need not come to pass.

Would your Lordship, Sir, give me a moment?

MR JUSTICE JACOBS: Yes.

MR BEAL: I am being reminded that in the *Sportradar* case, what took place essentially --

MR JUSTICE JACOBS: Have I looked at that case?

MR BEAL: No.

MR JUSTICE JACOBS: No, I am not sure I know it. I am not sure I know what *Sportradar* is.

MR BEAL: There are two separate sets of proceedings involving some patent issues and some competition issues. It is being managed by virtue of the defendants in one set of proceedings taking an active case management role in the other.

My learned friend Ms Abram, here today, on behalf of the original defendants. If it were considered desirable that we attend in an intervener capacity in the January/February case management conference, then of course we would be willing to do so and we would sort out representation for that, and attend and give such constructive help as we felt we were able to give to ensure that the nightmare scenario that you are worried about does not arise. That's essentially

the offer I am being encouraged to make, as I understand.

MR JUSTICE JACOBS: Possibly whether or not I order a preliminary issue, one question is: how is the January/February CMC going to work? And whether I should not have everybody there if I am going to make effective case management directions.

I will welcome any observations from any counsel in due course as to how that could work.

It sort of ties in, really, with some of the arguments we are having, because I am just trying to work out how these two cases are going to work, one way or the other.

MR BEAL: Yes. You will have appreciated that after you gave me time to reflect on what was bothering you, I have concentrated my submissions more closely on that, I hope.

MR JUSTICE JACOBS: Yes. You looked at the impact on the other case. That is certainly one of the things I was interested in.

Of course, the claimants also say, "Look at the impact on this case as well, of a preliminary issue". They say it is not just the other case. It is this case. With a complex factual investigation and the potential for appeals, you are putting off this case for quite some time.

MR BEAL: But the other way --

MR JUSTICE JACOBS: Irrespective of the other case.

MR BEAL: -- of looking at that is once the primary limitation period has expired, the claimants are having to invoke proactively and positively the assistance of the statute in order to stop limitation running. Where that represents an efficient case management issue that can be hived off and dealt with separately and is dispositive, we say, or on any view arguably dispositive of the entire claim, then it makes sense. That's simply a function of where we are. It is simply a function

of the limitation issues being different in these proceedings than they are in the original proceedings for all the reasons I have already outlined.

MR JUSTICE JACOBS: If I was to have a preliminary issue, would the original defendants be entitled to come along and make submissions because it potentially impacts upon their limitation arguments as well?

I mean, one of the points raised is: if I was to decide that nothing was time-barred as 2014, *a fortiori* the case that was time-barred at 2012 would not succeed, I would have thought.

But do they come along and make submissions or do I deal with their limitation issue within --

MR BEAL: The section 32 issue is, as you have indicated, a fact sensitive issue. The claimants are the same, it is true, but the defendants are different, and the timescale is different.

So what particular claimants could have known about the conspiracy, generally, will be a common issue. To that extent, I am really in Ms Abram's hands as to whether or not the original defendants would want to say something about that or take part in that, to that extent.

But the difficulty with that, of course, is that they have a very different fact pattern from us, for the simple reason that the Bloomberg article is recognised by the claimants to be the thing that put them on notice. See the express pleading in the US anti-trust litigation, which said time started to run from the Bloomberg article.

They don't have the benefit of that, because that is within the six-year period prior to the issue of the claimants in the original proceedings, that's a substantial difference.

Am I saying they could not conceivably have any interest in it?

No, I am not saying that. But whether or not they felt they need to come and cross examine the claimants' witnesses because of the risk that evidence would then be used in their trail in due course, on the limitation case, we would need to manage that particular issue, and that would be one of things we would have to think about.

MR JUSTICE JACOBS: If I were to order a preliminary issue, they might have to reflect on whether they wanted to have a preliminary issue as well, on their limitation point. That's a possibility, I suppose.

I get the impression you are sort of coming to an end and looking to see what else I am interested in. I am quite interested in this question of expert evidence.

MR BEAL: Yes.

MR JUSTICE JACOBS: Part of your case, which I have seen in bits of the pleading, quoted in the witness statement, I think, is that economic analysis would have, or should have been done or could have been done, in 20 whenever, 2013, say, which would have led to, I am assuming, all the defendants being implicated, or led to the test being satisfied in relation to all the defendants, and possibly the test being satisfied in relation to the bid/ask point, even though people, at that point, may have been focusing on benchmark.

So is this a case where expert evidence will in fact be required? Because that is part of your position on what reasonable diligence would have led to the discovery of.

MR BEAL: Our submission on that is: as a matter of fact, we have Mr Brockett on declaration saying that Quinn Emanuel had carried out economic analysis. The US class action pleadings confirm economic analysis was carried out, including regression analysis. It will be a question of fact as to what that regression analysis showed.

Does one need an expert, ordinarily, to determine when something was known or reasonably could have been known?

No, we don't. The expert evidence won't be how one goes about pleading and proving the actual underlying infringement. The expert analysis, on any view, would be limited to: what could an expert have sensibly done at that time?

So, even if expert analysis is required -- and we say it is not because, on these facts, expert analysis was conducted -- it would be a much more confined exercise in any event, logically. Because what you don't do -- see *Gemalto* -- is look at whether or not the claims were meritorious or not. You look at whether or not there was a reasonable belief that the claim was available. Was there a worthwhile claim?

What the court is not engaged in, in a limitation exercise, is whether or not the claim is good or bad. You simply focus on what information did the claimants know, and what information was available to them, with reasonable diligence.

With the greatest respect, pleading and proving the underlying economic analysis of an infringement is not part of that. To the extent that any expert evidence was necessary -- and we don't say it would be -- it must necessarily have been confined to: what could an expert have done within the time available to show what is out there?

MR JUSTICE JACOBS: There are two aspects, I think, of the point you are making. One is they did some analysis, some regression analysis, look at what Quinn Emanuel have said. It sounds as though you may be making a case to say that analysis in itself was sufficient to enable you to draw certain conclusions that are sufficient for limitation purposes.

That would require some expert evidence, because there may well be a debate about what that analysis showed or what conclusion should be drawn.

The second aspect of it is -- and I am not sure that your case is necessarily confined to this -- is to say they did that analysis, that analysis ought to have led to some other analysis. Anyway, what they did was not very good because there was so much more out there which should reasonably have been done by clever banks in their position, and it would have led to conclusions that there were problems on bid/ask, that RBC were involved, whatever it might be.

All that is going to require expert evidence, because it is part of your pleaded case and the affidavit case that this economic analysis is part of the reasonable diligence exercise; is that right?

MR BEAL: I think, probably, we see this as a much more factual enquiry as to what expert analysis was in fact conducted and what that showed.

We don't think, more generally, an analysis of what material was available requires expert evidence. It would only be on a very narrow question as to the extent to which expert evidence was in fact relied upon in the pre-cut-off period that expert analysis would be relevant.

This is dealt with in Mr Norris Jones' second witness statement.

MR JUSTICE JACOBS: Just show me what he says about that.

MR BEAL: It is core bundle, tab 6, page 192 to page 194, where he's dealing with a competition economics expert.

I think this is the witness evidence that you read slightly more --

MR JUSTICE JACOBS: I didn't look at this bit.

MR BEAL: Paragraph 51 to 54 is where this is dealt with.

MR JUSTICE JACOBS: I will have another look at that. Whatever is said here is really the --

MR BEAL: It is the thrust of my factual case and the reasons why the requirement for expert analysis is overstated.

I mean, one needs to bear in mind that this is a case where the burden is on the claimant. I can't stop them adducing expert evidence if they think it helps their case on section 32. If they apply to produce it, we would have to have a discussion as to whether it was appropriate to have expert evidence adduced. We have not made any provision for expert evidence in the draft timetable which you have seen, which is at page 199. The reason for that is we don't, at the moment, think it is necessary. But in the sense I am being asked what would my response be if an application were made by the claimants for permission to rely on expert evidence, my initial response would be it is not going to go to any of the general factual matters which put the claimants on inquiry, and nor is it going to go to what ultimately they in fact did.

So the only purpose for adducing it would be to say, well, we needed the further expert analysis we now have in order to be able to plead our claim properly. That is presumably what they will say. So to the extent that they are saying that, they would obviously seek to adduce an expert report to support that. But that is not something I can really engage with in abstract now, save to say we don't immediately see why it would be necessary.

MR JUSTICE JACOBS: You are not going to be saying -- or at least your current position is you are not saying they should have done something different in terms of economic analysis which would have led to certain conclusions. You are saying, let's look at what they did; we are not saying they should have done anything else, what they did was very good work and it led to these conclusions and should have led to some other conclusion being drawn.

MR BEAL: It is very important for me to stipulate and be quite clear about the fact that we are not responding to anything at the moment because there is nothing to respond to, so this is all somewhat hypothetical.

If the claimants were to adduce expert evidence that said, this is what we have had to prove in order to establish our case and we didn't have it at the time, and we could not sensibly have it at the time, then we will need to respond to that either by saying, so what, because you did some analysis and that was enough; or by saying actually we have a countervailing expert who says to the contrary.

But at the moment it is certainly not part of our case that we are saying there was a silver bullet out there available from an expert report that you only needed to instruct. It isn't the part of the case that we are articulating at the moment. But I do emphasise that our case will be a responsive one because the burden is not on us.

I think that probably is a way of me hedging my bets. I am sorry --

MR JUSTICE JACOBS: I think that is perfectly fair. I don't think that anybody should be committing themselves. The only question I have to think about is: is this a case where potentially I am going to have expert evidence of economic issues?

I rather think it is potentially a case where that is going to arise on one side's case or the other.

MR BEAL: I hope I have made clear; I don't think I can at this stage say categorically that the claimants cannot seek to adduce whatever evidence they seek to adduce. They have not adduced it yet so I can't really respond to it.

Is there a high risk that expert evidence will be determinative of the issue of what they knew or should have known? No, there is not a high risk of that.

MR JUSTICE JACOBS: That is a politician's answer.

It could be one element in the analysis, which is I think the way it is put in the witness evidence --

MR BEAL: Is it inconceivable that the claimants will not ask for expert evidence? No,

because they have suggested they might need it.

Is it likely that the entire preliminary issue is going to revolve around what an expert says was or was not known in 2014? No, it is not.

MR JUSTICE JACOBS: All right.

MR BEAL: I think that's the best I can do.

MR JUSTICE JACOBS: Okay, all right.

MR BEAL: Obviously, if you do have specific procedural issues that you would like my views on at this stage, I am very happy to help as far as I can. But I do reiterate that we have not really thought that this was a joined up case management conference because it is our application for a preliminary issue.

MR JUSTICE JACOBS: I am not going to make any directions as to how this case generally as a matter of case management -- or the other case -- is going to proceed. I just have to think about what ramifications there are on the preliminary issue in terms of directions that might or might not be given in due course.

The only other thing I was going to raise earlier, there was in the correspondence -- I think in August/September -- about when Ms Abram should make her submissions and so forth. I didn't really at that point have a very clear idea as to what the arguments were, and I do.

It may be best, Ms Abram, if, after I have heard from Ms Demetriou, you do then give me your 15 minutes. Then you can respond.

MR BEAL: Yes.

MR JUSTICE JACOBS: I think it is all tied up with case management and I think it is sensible I should hear from everybody. I think that is probably more efficient.

Okay. All right, thank you very much, Mr De la Mare [sic]. Thank you very much indeed.

Submissions by MS DEMETRIOU

MS DEMETRIOU: May it please the Tribunal, I am going to start with case management because we say that really is the critical question here.

Of course you are not sitting as the CMC Tribunal and of course you can't make directions, Sir, as to precisely how these proceedings are going to be case managed going forward but, after all, the application for a preliminary issue is quintessentially a question of case management; what would be efficient in all the circumstances. Frankly, the most important consideration is how it would affect the efficient case management of these proceedings.

We say that the right way of looking at it is this. We say that ordering a preliminary issue would very seriously prejudice the efficient case management of these proceedings. It would put the new proceedings on ice and either preclude them from being jointly case managed with the original proceedings, or it would result in unacceptable delay to the original proceedings. Those are essentially the choices.

We say that the court should not --

MR JUSTICE JACOBS: Can you go a little bit slower for me.

MS DEMETRIOU: I am sorry.

MR JUSTICE JACOBS: You say it would put which proceedings on ice?

MS DEMETRIOU: We say that the preliminary issue would put on ice the new proceedings, and that that would either preclude the new proceedings from being case-managed jointly with the original proceedings, or it would result in delay to the original proceedings because they would have to be stayed in some way in order that they could be jointly case-managed together. So we say those are the two outcomes if there were a preliminary issue.

We say either of those outcomes would be extremely prejudicial. The court should really only contemplate them if the defendants had some kind of, as your Lordship put it, slam dunk case on limitation.

So if it were obvious now that we are on a complete hiding to nothing because we are time-barred, then one can start to see that the Tribunal might think "Well, regardless of these case management problems, they are not going to arise because I can be confident that the limitation argument will succeed", but we are just not in that territory at all.

So I would like to deal, Sir, first of all with case management and then come on to make a few points about the merits. I do have very well in mind, and we agree, it is not for you -- you can't possibly make any decision now. But what we do say is that there are arguments on both sides, we accept the way you have put it, but it certainly can't be said that the limitation argument is so strong as to risk these very detrimental case management consequences that would ensue if the preliminary issue was ordered.

Sir, to start with the link between the two sets of proceedings, I know that you have this well in mind, but there is a good summary, if I may say so, in the original defendants' application for permission to intervene in this hearing.

Can I just show you that? It is in the core bundle behind tab 38, at page 492.

MR JUSTICE JACOBS: Yes.

MS DEMETRIOU: It is conveniently set out. It is common ground.

MR JUSTICE JACOBS: Yes, yes.

MS DEMETRIOU: So it is paragraphs 2 to 4. Here the original defendants are explaining the very close connection between the new claims and the original claims. So the claimants are almost entirely the same.

It is the same conduct, infringing the same competition laws. The claims are said to

arise from an alleged single and continuous infringement for which the claimants allege both the new defendants and the original defendants are jointly and severally liable. That is a really important point to which I will return.

So even though they have been commenced separately -- and we did at the time have a good reason for that which I can come back to -- the infringement is a single one to which both sets of defendants are jointly and severally liable for the whole infringement.

MR JUSTICE JACOBS: Can I just ask, this context of single and continuous infringement, is that a competition law concept?

MS DEMETRIOU: It is really Euro-speak for joint and several liability. So you have a single plan, as it were, and anyone that participated in that plan, if certain requirements are met, are jointly and severally liable for the whole infringement --

MR JUSTICE JACOBS: I think you say in your skeleton it is just synonymous with joint and several liability.

MS DEMETRIOU: Yes.

MR JUSTICE JACOBS: It doesn't really impact on limitation. It is not saying, well, it is single and therefore for limitation purposes it starts the moment there is any activity.

MS DEMETRIOU: No.

MR JUSTICE JACOBS: You are just saying it is a big combination that everyone has joined and they are all liable for it.

MS DEMETRIOU: Yes, that is quite right. The two things can co-exist, in the sense that you can have joint and several liability but if one defendant or group of defendants has a good limitation argument, then they would only be jointly and severally liable for the period of the infringement which is not time-barred for

them.

So it doesn't preclude a limitation defence being advanced by some but not others, but the allegation is that they are jointly and severally liable for the whole thing. So what I mean is it doesn't stop anyone coming along and saying, well, we can't be jointly and severally liable for it because the claim is time-barred against us. It doesn't preclude that argument.

MR JUSTICE JACOBS: I think I understood this, but let's take RBC. Let's just assume that there is no limitation point that they can take.

MS DEMETRIOU: Yes.

MR JUSTICE JACOBS: So they are liable for everything. Assume that, I am not saying they are. Then Deutsche, for example, might find itself liable for all of the RBC's liability.

MS DEMETRIOU: Yes.

MR JUSTICE JACOBS: Even though the direct claim against Deutsche was itself time-barred.

MS DEMETRIOU: That's right.

MR JUSTICE JACOBS: That's your analysis, anyway.

MS DEMETRIOU: Exactly.

That is very important for this reason, Sir. Let's say, for the sake of argument -- which, of course, I know you know we don't accept -- let's say that their limitation argument, the new defendants, all of them, that they were right on limitation, and that they succeeded in knocking out the whole of the new proceedings against all of the new defendants, that claim would still proceed against the original defendants. So we would still be claiming against the original defendants all the loss caused by the new defendants, because of the joint and several liability aspect.

Sir, that obviously goes to the question of whether or not there would be a saving, because Mr Beal says: if we won, there would be a saving because we would not have to appear in the trial.

That is correct, but that's looking at it from a very litigant-centric point of view. Because from the Tribunal's perspective, there would still have to be a trial determining the liability of the new defendants and the loss that was caused, because we can claim it as against the old defendants on the assumption that their limitation defence fails.

So what we say is that the shape of the trial in this matter is not really going to be affected by whether or not this limitation defence succeeds or fails, because all of the loss we are claiming against the new defendants we are in any event claiming against the original defendants which are jointly and severally liable for it. That was always the case, so that loss will be determined in any event.

So there would be a saving if they were completely successful, which we say is highly unlikely -- there would be a saving in the sense that they would not appear in the trial, with one caveat which I will come back to, but there would not be much of a saving in terms of the Tribunal's resources because the Tribunal would still have to determine their liability and the loss that they have caused, because that loss is being claimed as against the original defendants.

Sir, the caveat I was going to come to --

MR JUSTICE JACOBS: Just slow down a little bit. Let me understand. I am not sure I fully had appreciated this.

So is part of the claim against the new defendants for liability which the original defendants has? I find that somewhere in the pleadings?

MS DEMETRIOU: And vice versa. I will show it to you in the pleadings, but it is the point also made in this document by the original defendants.

MR JUSTICE JACOBS: Okay. Continue. I interrupted you.

MS DEMETRIOU: I think it would be useful to look at this. We had this document open at page 492, so I have made the point at 2(c) about joint and several liability.

Over the page at 2(d), the damages that the claimants seek in respect of the single and continuous infringement case are the same losses suffered on the same trades. So it is the same losses that are being claimed in proceeding 1 and in proceeding 2. Exactly the same losses.

So, Sir, the point is this. If proceedings 2 get knocked out, those losses don't disappear. They are still being claimed in trial 1 against the original defendants.

So we make two points about that. We say that, first of all, it goes to what saving would there be if the preliminary issue were ordered?

So Mr Beal says, well, if you ordered a preliminary issue and we won all of it, there would be a saving because we would not have to appear in a trial. We say, all right, that's true so far as it goes, but it doesn't actually address the substance, which is all of the loss we are claiming against you and the infringement you have committed would still have to be litigated, albeit against the original defendants. So it is not going to do much to the shape of the trial. It is not really going to result in much of a saving as far as the Tribunal is concerned. So that's the first point we make.

Sir, the second point we make is this: it follows, we say, almost as night follows day, that the new defendants would be brought back in by way of contribution proceedings.

Now they say that is a peculiar argument, they say in their skeleton argument. But it is not peculiar at all, because if we are claiming against the original defendants loss that the new defendants have caused, of course they are going to be

brought by back in by way of contribution claims. The original defendants are not going to say, "Yes, well, we are happy to pay damages caused by the conduct of the Royal Bank of Canada and we are not going to come after you for a contribution." That's just not going to happen.

We see in all of these contribution claims going through the courts, where there is joint and several liability on behalf of defendants, that contribution claims are commonplace. That's the norm.

Now sometimes they are determined with the trial and sometimes they are put off until afterwards, but the idea that these defendants, if they succeed on limitation, are simply going to be out of the frame is really for the birds.

So we make those two points --

MR JUSTICE JACOBS: It is possible. We don't know what will happen. They may just maintain a united front and not issue contribution proceedings against each other and leave it all later if they have gone down. We just don't know. But it is a possibility that it will happen.

MS DEMETRIOU: It is a possibility. It is a possibility.

MR JUSTICE JACOBS: Yes. I am just not quite clear still on the previous point.

Let's assume that the new defendants entirely win limitation on every point against you, leaving aside contribution: do you say they are still liable, there is still a claim against them, because of the liability of the original defendants?

MS DEMETRIOU: Not against them, but there is a claim against the original defendants --

MR JUSTICE JACOBS: Right.

MS DEMETRIOU: -- in respect of whom we are not time-barred --

MR JUSTICE JACOBS: Yes.

MS DEMETRIOU: -- for the loss caused by the new defendants --

MR JUSTICE JACOBS: Which will lead to a contribution claim.

MS DEMETRIOU: That will have to be litigated in the main trial.

So, for example, we allege that these defendants committed these infringements of competition law for which they are jointly and severally liable with all of the other defendants. If they succeed entirely, we can't pursue the claim against them but we can pursue the substance of the claim against the original defendants, which we would do.

So the claim as originally framed against the original defendants is for all the loss caused by the single and continuous infringement, including the loss caused by the actions of the new defendants.

So my point is that if the new defendants get out of it, that doesn't really represent much of a saving for the Tribunal because the shape of the trial is going to be more or less the same. We are still going to have to have expert evidence looking at all of the trades and assessing the totality of the loss, even if they are not there.

MR JUSTICE JACOBS: I quite understand the point that because of case number one against the original defendants, I have to look at everything that has happened, because there is no limitation point that is being suggested as a preliminary issue.

MS DEMETRIOU: Yes.

MR JUSTICE JACOBS: Therefore we have to look at all the detailed facts between 2003 and 2013 in relation to what was happening.

The focus of trial one, if the new defendants have gone, will be the conduct of defendants in trial one, rather than the conduct of all the new defendants who have been let out. Or is that the wrong way to look at it?

MS DEMETRIOU: Sir, with respect that's the wrong way --

MR JUSTICE JACOBS: Because of joint and several liability?

MS DEMETRIOU: It is joint and several liability.

MR JUSTICE JACOBS: Okay.

MS DEMETRIOU: So what the court will have to assess is the conduct of everyone and the loss caused by the conduct of everyone. Because we would be saying: all right, you, new defendants, have managed to get out of this because you have been successful on your limitation point, but we are still claiming all of that loss against the original defendants. So all of that would still have to be looked at -- that's our key point -- and assessed by the court.

So the court couldn't say in trial one, on this hypothesis the only trial, could not say, "Well, we are not interested anymore in what the new defendants did or the loss they caused". The Tribunal could not say that because we are still claiming in respect of that loss, in respect of those infringements, on a joint and several liability basis against the original defendants.

MR JUSTICE JACOBS: I have it, okay.

MS DEMETRIOU: So that's before we get on to our point about, well, we don't think that you have a very good case on limitation anyway. So that's, okay, let's assume, Mr Beal, that you are right, that you are going to get off scot-free; it still doesn't lead to very much of a saving in terms looked at from the Tribunal's perspective, which will still have to determine all of these points.

MR JUSTICE JACOBS: Right.

Forgive me, because I don't know any of the people on the other side apart from Gillian Hughes who was my JA, but it was Mr Beal who was addressing me, not Mr De la Mare, was it?

MS DEMETRIOU: Mr De la Mare's name is on the skeleton argument, but this is definitely Mr Beal.

MR JUSTICE JACOBS: I have been completely confused.

MR BEAL: It is very confusing.

MR JUSTICE JACOBS: If I called you Mr De la Mare, please forgive me. I had not appreciated that. Now I know you are Mr Beal, all right.

MS DEMETRIOU: That is a question I can answer with confidence, Sir.

MR JUSTICE JACOBS: Right, okay. Please forgive me, Mr Beal.

MS DEMETRIOU: Sir, that's the first point I wanted to make by reference to the helpful summary put in by the original defendants.

Of course, to add to that, you know that they also have raised a limitation defence which they are not asking to be addressed by way of preliminary issue, so that trial will inevitably have to look at these limitation issues and have evidence from the claimants as to what they knew and didn't know and so on. So there will be duplication in that sense too. But really the key point is the trial itself.

MR JUSTICE JACOBS: It is a different focus because it is two years later in terms of what the claimants knew, and that is a critical two-year period.

MS DEMETRIOU: Sir, that is correct. But we say that the limitation issue is really bristling with points of law.

I am not saying that just for forensic reasons. When we look at *Granville* and *Gemalto*, both have gone on to appeal; *Gemalto*, there is currently an application for permission to appeal to the Supreme Court.

There are key issues, some of which, Sir, you have identified already in this case about attribution and about whether you look at bid/ask and benchmark separately, and whether just because you know about one defendant that should put you on notice of others, which are really issues of law which have not been hammered out in this sphere on which no doubt the original defendants -- those issues are the same, regardless of the two year difference.

So the point you raised, Sir, a few moments ago and put to Mr Beal, which is wouldn't the original defendants want to be heard on these points, is a very good question. Because if a preliminary issue were ordered, these points of law would have to be addressed and they are points of law which would then reappear at the trial of the limitation issue in the original proceedings. So there is a good question to which it is not for me to answer as to whether or not the original defendants would want to appear in any preliminary issue, but certainly there are definitely overlapping issues.

Although there is a two year difference between the two claims, certainly in terms of overlap of witness evidence there will have to be witness evidence from the claimants saying what they knew when. So even though the focus will be two years apart in terms of the factual analysis, there certainly will be duplication of witnesses having to give evidence twice on very related matters. So we say that is another way in which there would be duplication if the preliminary issue were ordered.

But of course, really the key point is what happens with these trials?

MR JUSTICE JACOBS: Is there is a section 32 point in the original case as well?

MS DEMETRIOU: Yes. It is the same point.

MR JUSTICE JACOBS: It is the same point.

MS DEMETRIOU: The only difference is the two years. So it is the factual application --

MR JUSTICE JACOBS: There must be a section 32 point.

MS DEMETRIOU: Sir, I am just looking at the time. Is now a good time to break for lunch?

I am really in your hands.

MR JUSTICE JACOBS: It is entirely up to you. We can do five minutes on something

else or we can stop.

MS DEMETRIOU: Why don't we stop now because I was about to move on to something else.

MR JUSTICE JACOBS: In terms of timing: we are okay on timing, are we?

MS DEMETRIOU: Definitely, yes.

MR JUSTICE JACOBS: Okay, good.

So we will start again at 2.00 pm.

(1.01 pm)

(The short adjournment)

(2.00 pm)

MR JUSTICE JACOBS: Yes.

MS DEMETRIOU: Sir, before the lunch break, I was saying that the two sets of proceedings are inextricably linked.

I showed you the summary explaining that from the original defendants. We say that they are crying out for joint case management, and that it really would not be the right thing to have two separate trials in circumstances where one is looking at the same liability, the same damage and the same expert evidence.

You may recall, or you may not recall because it was in a consent order, but if you turn up please bundle D, tab 31, page 850, this was a consent order you made in June of this year pursuant to which the new defendants gave permission to the claimants to use their data for the purposes of complying with the order made by HHJ Pelling that the claimants provide further particulars of infringement in the original proceedings; not in these proceedings, but in the original proceedings.

We had sought permission to use that data. It had not been disclosed in these proceedings, only in the States. We sought permission to use the data of the

new defendants in the original proceedings, because we could not actually provide the further particulars of infringement without it because our experts were working on all the data collectively for their model.

So the permission only extends to the data that's necessary for compliance with that order, so there will have to be further disclosure by the new defendants before the claimants can produce their expert reports in the original proceedings because, as I say, the way that the claimants are going to prove their loss is by using all the data -- claimants, original defendants, and new defendants' data -- to build their model and prove their loss.

That is just one illustration that has happened so far of how linked these proceedings are.

So what we have then is a position where we say it simply would be wrong to have two separate trials. It would be hugely duplicative and it would give rise to a risk of inconsistency.

I say parenthetically: it would be quick, if there were no preliminary issue ordered, for the new defendants to catch up.

The reason we say that -- if we could just turn up the core bundle at tab 5, this is Mr Khatoun's first witness statement, at page 152, core bundle, tab 5. Page 152 of the bundle.

What he says there is, as far as disclosure is concerned, the claimants consider that the present proceedings would quickly catch up with the original proceedings. Because much, if not all, of what has been disclosed by the claimants in the original proceedings can similarly be disclosed with relative ease in the present proceedings, and the time and costs will be negligible.

The reason for that is because they have already given disclosure, the new defendants, of all this material in the United States. So, as with the original

defendants, who gave disclosure pretty rapidly because they had already given it in the US, we say exactly the same will happen here.

The position more broadly, Sir, is that as regards liability disclosure and the data, most of that has already taken place. There will have to be some further disclosure, notably from us, I think, in relation to compound interest and taxation. So disclosure has not completely come to an end, but most of it has already been given by the original defendants, and by the claimants, in relation to liability and quantum, aside from those issues of compound interest and taxation.

So, really, what we are looking at -- and I see from the submissions made by Ms Abram on behalf of the original defendants that we are really singing from the same hymn sheet, at least as far as this position is concerned -- is a position where these proceedings, the original proceedings, have been on foot since 2018, so already 4 years. We have had a trip up to the Court of Appeal already on the issue of pass on.

Really, both sides are looking for early resolution, now, of the proceedings.

We want to come to the case management conference, in January or February, seeking directions for trial. Essentially, what that is going to comprise is the rest of disclosure -- most of it has happened, as I said -- witness evidence and exchange of expert reports and a trial date. We say that there really is no problem, absent a PI, in the new defendants catching up, because of the disclosure position.

So, really, the only respect in which the old defendants, or the original defendants are ahead of them is the disclosure of the chatrooms and data. But, as I have said, that has already been disclosed by the new defendants in the States. So, really, it is very limited, the burden on them, to provide disclosure here.

So we do say, just in response to a question that you floated before the break, that it

would be sensible to have all parties at that case management conference, given, as we say, the proceedings are crying out for joint case management.

Now, if --

MR JUSTICE JACOBS: So there would be a CMC on both cases, would there?

MS DEMETRIOU: We think, for our part, that would be the sensible course, yes.

MR JUSTICE JACOBS: All right. I don't want anyone to be committed to anything because it was something I floated. People may not have thought about it, but it may be something people want to think about after this hearing.

I know this is not the CMC, but when would your trial against the original defendants come on? You say you are looking for directions; do you have an idea about when you would be seeking a trial? How long it is going to last?

MS DEMETRIOU: Sir, we don't think it is going to be six to nine months. The reason we don't think that is, as we say, primarily we are seeking to prove our case, both in terms of the particular manipulation days and in terms of quantum, by means of an expert model. So it is primarily going to hinge on the expert evidence.

For that reason we don't think it is going to be six to nine months.

I am not sure that I can, on my feet, give you a much more accurate estimate. Let me just take instructions and see if other people have given it more thought.

We don't want to be held to this, but I think the working assumption is we could be ready in 2024, and that we are looking at more like three months than six to nine months. But, of course, there will be a debate about that, I am sure.

So, Sir, on the risk --

MR JUSTICE JACOBS: 2024, does that mean the beginning, the end, middle?

MS DEMETRIOU: I am not sure. I am being told the end of 2024.

MR JUSTICE JACOBS: I understand that signal. Okay.

MS DEMETRIOU: Sir, on the risk of inconsistency, which is in a sense obvious, I just want to show you something recent from the Tribunal. Could you turn up the second authorities bundle, please? Behind tab 44A.

So this is a very recent practice direction called the "umbrella proceedings order".

MR JUSTICE JACOBS: Yes. I have looked at that. I thought that was quite interesting.

We are not quite in precisely that territory.

MS DEMETRIOU: We are not.

MR JUSTICE JACOBS: I suppose you say by analogy we are, or maybe you say it is even closer, I don't know.

MS DEMETRIOU: We say this is an even stronger case for joint case management.

MR JUSTICE JACOBS: Show me 44A.

MS DEMETRIOU: Let me show you that. You have that at 44A. If you look at paragraph 1.2, you can immediately see this relates to common issues:

"Proceedings may raise issues, concern matters, or have features that are not only particular to those proceedings, but also ubiquitous, in that otherwise unrelated Proceedings may raise or concern the same or similar issues or matters, or share features … in the context of different facts and circumstances."

Pausing there, we say we have a much more compelling case for joint case management than a case which is otherwise unrelated and raises a common issue, because these really are the same proceedings, albeit they were started in two tranches.

Then you see, at paragraph 1.5:

"To assist in the effective and consistent management of such Host Cases [those are the original proceedings. That's the terminology for the original proceedings, the individual Host Cases] (or, more particularly the Ubiquitous Matters present

in each such case.) The President may group them together under that common designation or "Umbrella". From that point onwards the Tribunal will deal with and dispose of Ubiquitous Matters in the "Umbrella Proceedings" and not in the context of the individual Host Cases."

Then you see, at paragraph 2.1, there is provision -- and following -- for the president to make an umbrella proceedings order.

If you could go in the same bundle, Sir, this was made, this practice direction, at around the same time, and I think prompted by the Tribunal holding a hearing in relation to pass-on in the Interchange proceedings. You have the judgment on that behind tab 41, in the same bundle.

If I could just show you some salient paragraphs in that. So, starting with paragraph 2, you see there a reference to an umbrella proceedings order being made on 4 July in respect of all issues arising out of the merchant interchange fee proceedings before the Tribunal, referred to collectively as the "host claims", and they are listed in the schedule.

So that records that the Tribunal has made an umbrella proceedings order in the merchant actions.

Then you have, if you could go forward to paragraph 12, you see a heading above paragraph 12, at the bottom of 1663 of the bundle:

"The perils of bilateral dispute resolution."

The Tribunal, here, is explaining, as the heading suggests, the dangers in hearing cases individually where there are common issues that arise.

I would pause again to say: of course, our case is even more extreme than the Interchange Cases, because in the Interchange Cases, one is looking at the same infringement, so the setting of the multi-lateral interchange fees. Those were then passed on in the form of merchant service charges to individual

merchants, and you then have a series of claims by individual merchants, but those claims are not in respect of the same bucket of loss. It is stemming from the same infringement, but they are different buckets of loss according to each merchant, but nonetheless similar issues are raised.

Then you see, at paragraphs 13 and 14, the courts being alive to the risk of the perils of bilateral dispute resolution and will seek to avoid inconsistency of outcome by consolidating related proceedings or hearing them together.

Then the Tribunal recognises that may not be necessary. For example, B may commence proceedings in one jurisdiction and C in another jurisdiction, but they say:

"Equally, it may be that B's claim and C's claim are commenced in the same jurisdiction, but so far apart in time that it is not practically possible to hear them together."

But, here, they say:

"The importance of a clear articulation of the relevant principles is, if anything, even more important, so as to achieve consistency of outcome."

So you then see:

"Accordingly, when framing the appropriate principles for dealing with pass on in relation to the same overcharge, it is incumbent upon the court to have regard to, and seek to achieve, consistency of outcome."

Then, at paragraph 15, without reading it all out, the point made by some of the parties was that the damages claim did not overlap. So, unlike this case, they were saying this is not a case of joint and several liability because the damages don't overlap.

But the CAT said this doesn't mean that striving for consistency of outcome, in the broader sense of deciding like cases alike, is not a goal worth striving for. You

see that above the two paragraphs which are inset.

The CAT gives two reasons for that:

"The first reason – founded in principle on the rule of law – is that it is important to the credibility of a legal system that similar cases have similar outcomes. One of the issues that competition law regularly gives rise to is that a single infringement can give rise to multiple, independent, claims that are all, broadly speaking, the same."

Again, pausing here, our case is stronger because it is the same claim. It is not different, independent claims; it is the very same claim.

Then you see:

"It is critical that such cases have similar outcomes …."

That's why, in the passages cited in the ruling at paragraph 17, the Court of Appeal indicated that cases such as the interchange fee case be heard under "one roof" in this Tribunal.

"Transfers of many such cases have occurred and the process is an ongoing one. But having a single Tribunal hear similar cases is but the first step: it is incumbent upon that Tribunal to take the necessary procedural steps to ensure the consistency of outcome in all these cases, to the extent this can be achieved in accordance with the other objectives that guide and inform that Tribunal and the exercise of its functions."

So, Sir, we say that we emphasise all these points, and we say that they arise with all the greater force in the present case because one is not looking at different buckets of loss, as I say, stemming from the same overcharge, but we are looking at exactly the same infringement, exactly the same claimants, and exactly the same loss. It is one and are the same loss.

So, clearly, the risk for inconsistency is even greater, because one is not just

concerned about inconsistency in terms of the principles that apply, but inconsistency in terms of the actual result. So one asks hypothetically: what would happen in this case if there were two trials?

So you would have the first trial against the original defendants in which the claimants are advancing a claim for the totality of the loss, including the loss caused by the new defendants. Their expert evidence will look at the many millions of trades and build those into the model, and the CAT will have to adjudicate on that claim for the totality of the loss, and will reach an outcome.

Now, the problem is that that conclusion will not be binding on the new defendants. So, even though the Tribunal will have made a finding as to the loss they caused, it will not be binding on them. So there will have to be another trial going over exactly the same territory in which the Tribunal looks again at the expert evidence.

MR JUSTICE JACOBS: I think that Mr Beal has really accepted -- he talks about nightmare scenarios of the two cases not being heard in some way jointly, one after the other or whatever. But he says: don't worry about it because there are all sorts of steps you can take to make sure that we can fit in our preliminary issue before there is any problem. Because the trial is not going to come on for some time, we can fit it all in. We will catch up. You can make sure we can catch up. The claimants can do a lot more work and, if we have lost the preliminary issue, which we hope we are not going to do, we will work hard to catch up.

Isn't that a fair summary of his point?

MS DEMETRIOU: I think that is a fair summary. So I think it is now common ground there should not be two trials. So then the question is: once you accept there is going to be a single trial the questions are --

MR JUSTICE JACOBS: I do not think it is quite common ground.

No, I don't think it is quite common ground. It is a nightmare scenario not to. But, of course, the justice of the case may require, on the defendants' case, that I have to do this because that's the only fair way of producing a result that gives effect to their limitation defence.

Is that a fair way of characterising it?

MR BEAL: Specifically on the two trials point, it is not common ground because I have contemplated two proceedings which follow one after the other in close proximity, which is not two trials, it is two separate trials.

But, obviously I recognise that it would be invidious for a judge hearing one not then to hear the second one. It makes sense to have a common panel, and one would hope that then common issues would be capable of being dealt with.

MR JUSTICE JACOBS: Okay.

MS DEMETRIOU: Sir, we do say that it is a nightmare scenario. Then the question is: what next?

So once you say: well, that's a nightmare scenario, we can't have two trials, because it is the same trial being run twice for the same loss.

What next? So the questions are two-fold. One is: can the new proceedings catch up if a preliminary issue is ordered?

We say no. We say it is clear that they cannot.

The new defendants say one year to the trial -- not judgment, but trial -- of the preliminary issue. We say it is likely to be a bit more, but let's stick with one year for the time being, plus a bit more for judgment.

The reason we say it is a likely to be a bit more is it's clear it's a pretty involved thing.

MR JUSTICE JACOBS: Yes.

MS DEMETRIOU: There will be quite a lot of factual evidence, there will be disclosure

and, also, expert evidence.

On the expert evidence, I would like to interject and make one point, which is: if you could turn up bundle C, tab 17, page 600, this is the BNPP defendants' defence.

This is what they say at paragraph 136.1.3. Do you have that, Sir?

MR JUSTICE JACOBS: I have the defence. I don't have that page.

MS DEMETRIOU: It is page 600 of the bundle.

MR JUSTICE JACOBS: Yes.

MS DEMETRIOU: They say:

"The claimants' case is that the existence of anti-competitive collusion may be proved by means of economic analysis. Such economic analysis could, with reasonable diligence, have been undertaken prior to 11 November 2014."

Now, that is not how Mr Beal put it. He said: well, we only need factual evidence because we just have to look at what you actually did.

If they are withdrawing this -- nobody has withdrawn this allegation yet, but can we just say: whether or not there is expert evidence is not a question of what we decide to plead. This is an allegation that's on the pleadings that has not been withdrawn. It goes to what expert analysis could, with reasonable diligence, have been done.

So we do say that it would be an involved preliminary issue. But we say a year is ambitious, and we say that it is likely -- or put it in a way which I think would have to be common ground, there is a real possibility that there would be appeals. So we say, at the same time, what we are envisaging in the original proceedings is a CMC early next year, whereby both parties seem to be *ad idem* in wanting to seek directions to trial and wanting to get on with this.

We say, in those circumstances, it is simply not possible for the new proceedings to

catch up with the original proceedings.

Now, Mr Beal says: well, you can do the work. You claimants can do lots of work while our proceedings are on ice.

But we are struggling to understand what that even means.

First of all, we need disclosure from them in order to progress. You have seen that play out in the consent order. We need a disclosure from them in order to serve the further particulars of infringement. As I say, our experts are going to use all data for their model.

So it is not a question of us being able to get on with it without any work being done by the new defendants. But, even if they were to say, "Well, all right, we are happy to give you disclosure so you can do your work", I am afraid it takes two to tango in litigation. Where you have directions for exchange of factual evidence and exchange of expert evidence, it is impossible to see how we can just "get on with" our bit with them doing nothing for the next year and a half or so.

So we say it is just simply not right or realistic to say the new proceedings will be able to catch up in a way that would not result in delay.

So that is the other possibility.

The other possibility is that this preliminary issue happens and the original proceedings are delayed. We say that is unacceptable. And the original defendants agree. The proceedings have been on foot since 2018. It is four years already. We all want to get on with it. It is unacceptable for there to be delay whilst this limitation -- tricky, difficult, complicated limitation -- issue is played out by way of preliminary issue.

Sir, as I said at the outset --

MR JUSTICE JACOBS: In terms of the timing, let's assume it is the back end of 2024,

when you would normally have your trial against the original defendants. If there is a preliminary issue, the earliest it could come on is October 2023.

MS DEMETRIOU: Yes.

MR JUSTICE JACOBS: You have your three week trial. You have to allow a bit of time for judgment. You might get that -- January/February. Complicated case. Maybe a permission to appeal. It is going to be -- if that's what it is, you are looking at a trial late 20 -- it is going to be tight for the defendants, assuming there are no appeals, to catch up with everything.

One possibility would be to build that into the timetable and say: let's allow for the slippage, let's allow for the possibility of appeals, so that everything can be heard together and we will see who is a party to it. So let's put it off for another year, to the end of 2025, for example.

That will allow the Court of Appeal and probably allow people to catch up. I think you say that's just not satisfactory to anybody.

MS DEMETRIOU: That's not satisfactory.

Sir, as I said at the outset, if this were, to use your Lordship's phrase, a slam-dunk case on their part, if they were standing here saying, "Look, there is really no answer to this", then one might start thinking about that. Because you would then say: well, it is a more straightforward issue, not likely to be appeals, and actually, given that they are so likely to win that we can be sure there would be a saving, it is worth taking the hit of having this prejudicial delay.

But we are simply not in that territory.

We are in a position where, as I said at the outset, even if they were to win entirely on the preliminary issue, all these matters still have to be litigated in the trial. So the loss they cause would have to be litigated in the trial. So, even that -- which we are saying is unlikely -- would not create much by way of saving for the

Tribunal.

What it would do, potentially, is save some costs for one or more -- or some of or all of, potentially -- the new defendants. But, we say, that visited against all the cons on the other side of the ledger, in terms of delay and these proceedings getting bogged down and being allowed to drift, and further expense caused by that delay, simply is not good enough. Because if they do suffer some costs which they would not otherwise have to suffer, they can be compensated for.

As against that, we say that the opposing factors are simply formidable.

We do also say that far from having a slam dunk case -- and I am cognisant of the case made by you, Sir, as to not being able to decide this now, and we agree you can't decide this now, but I do just want to address a couple of points made by my learned friend. You have our point about benchmark and bid/ask being different, so we do say: all right, you pointed to some material in the press, some press material, before the cut-off date of November 2014. All that relates to benchmark manipulation. The US proceedings all related to benchmark manipulation. Nothing at all about bid/ask manipulation.

So even if you were successful -- which we do not accept they would be -- on benchmark manipulation, then we say it is highly likely that the case on bid/ask manipulation would have to continue.

Now, what do they say to that? They say: well, it is just a detail. Whether it is benchmark or bid/ask is just a detail.

We say really that is a hopeless argument. Again, we are not asking you to determine it now, but it is just obviously wrong, and one can take a view as to whether or not it is likely to succeed. One has a feel for it.

We say it is not a detail. It is not a detail in the sense that you might have a cartel for price fixing a particular product, say smart cards, and then the court says,

"Once you know there has been a cartel, the details of the cartel -- when they met, precisely how long it was -- those don't stop time running". Different to, say: well, this is a very different type of infringement.

One can think of it this way: let's say we had pleaded, back in 2013, on the basis of the Bloomberg article, what if we had pleaded benchmark manipulation and we had said, "Oh, and plus any other type of manipulation relating to the FX market".

They would have said: "Well, what? What do you have in mind? Please give us further information as to this allegation." We would have said, "Oh, we are just hoping somethings turns up. We don't actually have any evidence."

That would have been strikeable. That allegation of any other type of manipulation would have been struck out.

Sir, this argument, the very same argument was run and rejected in the United States, the very, very same argument. So I just want to show you that. That is in the core bundle, behind tab 31.

It is the judgment of Judge Schofield.

Actually, sorry, it is behind tab 33. I have the wrong judgment. It is behind tab 33.

The argument that was run here was exactly the same as the argument put forward by my learned friends today, which is that material in the public domain on benchmark manipulation should have put the claimants on notice of enquiry in relation to bid/ask manipulation, and that was rejected.

If you turn, please, to page 462 of the bundle, you see, at the top of the page:

"Defendants argue that the Bloomberg article put Plaintiffs on inquiry notice of Defendants' alleged manipulation of the spreads, because the Plaintiffs allege a single conspiracy, not two separate conspiracies. This argument is unavailing. The article refers only to a possible conspiracy to manipulate the

benchmark rate and does not make mention of any possible manipulation of the bid/ask spreads. This article is insufficient to put Plaintiffs on inquiry notice for such activity."

Then we see over the page, 463, at bottom of the page:

"However spread manipulation claims are timely against the New Defendants because, as discussed above, disclosures regarding manipulation of the bid/ask spread were not made, nor were Plaintiffs on inquiry notice, until 2015. The lawsuit was commenced less than four years later."

Now, Mr Beal also took you to the US class action claim, behind tab 31. You will immediately see, on page 358, that the title of that claim is:

" *In Re Foreign Exchange Benchmark Rates Anti-trust Litigation*."

What he sought to do was to show you bits of this pleading which mention bid/ask spreads. No claim was advanced in relation to bid/ask spreads. Those parts of the pleading were simply explaining how trading works. It was part of the factual backdrop.

So Mr Beal took you to page 418, and relied on paragraphs 166 and 167, but they make our point.

So:

"Defendants' manipulation of the WM/Reuters Closing Spot Rates, as alleged herein, injures competition. WM/Reuters Closing Spot Rates are prices determined by FX spot quotes and trades during a window of time … thus reflecting actual market activity. Defendants' collusive conduct warped the interplay of supply and demand and caused the WM/Reuters Closing Spot Rate to be manipulated."

Then, at 167:

"Absent collusion, Defendants would have competed to offer competitive prices by

quoting bids and asks to customers at the lowest cost for a given currency."

Now, the reference to "bid" and "ask" is not, of course, a reference to there being manipulation, direct manipulation, of the prices quoted to customers. This is a point about the counterfactual in a world where there had not been any infringement of the benchmark rate. It is a completely different point. There is simply nothing in this pleading which raises an allegation of manipulation of the spreads.

Nor is there anything in the Quinn Emanuel pleading, which Mr Beal also took you to, which is behind tab 30. On that I will just show you page 354, which summarises the cause of action.

Again, the passages that Mr Beal took you to are all part of the factual backdrop explaining how trading works.

But if you look at the summary of the cause of action, on page 354, you see this, at 126:

"During the Class Period, Defendants entered into a series of agreements to reduce competition amongst themselves --"

MR JUSTICE JACOBS: What page are you on?

MS DEMETRIOU: Sorry, page 354, behind tab 30.

MR JUSTICE JACOBS: Okay. Thank you.

MS DEMETRIOU: So:

"During the Class Period, Defendants entered into a series of agreements to reduce competition amongst themselves by co-ordinating trading strategies for the purposes of manipulating the WM/Reuters' Rates for various currency pairs. This conspiracy to manipulate WM/Reuters rates caused injury because ..."

There is nothing here in the cause of action about manipulation of the spreads. There simply was not anything in the public domain about the bid/ask spread

manipulation.

The reason that we are able to plead that was following disclosure of the chat rooms in the United States. So then what happened in the US was there then was that pleading, which you could see was then the subject of Judge Schofield's judgment, raising the point about the bid/ask spreads, the allegation of bid/ask spreads.

Once we had seen that pleading, we were able to plead that against the original defendants here. That's how it came about.

MR JUSTICE JACOBS: That pleading was to 2018, was it?

MS DEMETRIOU: That pleading was 2016, I think Mr West is telling me.

MR JUSTICE JACOBS: So what about the Quinn Emanuel pleading? That was also what the other firm is pleading, is it?

MS DEMETRIOU: Scott+Scott and Hausfeld, I think, became the two class representatives.

MR JUSTICE JACOBS: Okay. Just remind me, because I have just been puzzling about this: there is no duplication as between the US proceedings and these proceedings because these proceedings are concerned with essentially what happened in England/EU and the US is concerned with what happened in the US; is that broadly what is happening?

MS DEMETRIOU: Exactly. So they are different trades. So, yes, there is no duplication at all.

MR JUSTICE JACOBS: Yes.

MS DEMETRIOU: Mr West says the chat rooms are the same, but then the claims are made respectively, in respect of different trades, depending on where the loss was suffered.

So, Sir, the second point, as you have apprehended already, we make, relates to three

of the defendants. So Société Générale, Standard Chartered and Royal Bank of Canada. Of course, none of those three banks -- it is common ground -- was party to the US class action as constituted in 2014 prior to the cut-off date. The defendants accept that.

None of the information that the defendants point to, in terms of publicly available material prior to the cut-off date, was, we say, sufficient to enable the claimants to know they had a worthwhile claim against those three defendants. So we say that it is -- I know you don't like the word "inevitable", but we say it is inevitable that the claim will continue against those three defendants.

MR JUSTICE JACOBS: It is going to be argued about, isn't it?

MS DEMETRIOU: It will be argued.

MR JUSTICE JACOBS: They say there was a bit of material, and you could have done this, and these are big players.

MS DEMETRIOU: It will be argued.

MR JUSTICE JACOBS: There are all sorts of points, but I can't say it is inevitable.

MS DEMETRIOU: No, but what I am seeking to persuade you is, as we say, on one side of the ledger, all these terrible consequences if you order the PI, and we say really you should only go there if they have a slam dunk case and they really don't. You cannot be confident there are going to be savings.

MR JUSTICE JACOBS: I am not sure I would put it quite as high as you only go there if you have a slam dunk case on the preliminary issue application because most of these preliminary issues applications might take a day or two. The judge might have no idea, when he orders the preliminary issue, what the answer is going to be. You can see each side has -- we will have a day or two, and let's see what the answer to that is.

We may be in a different territory here because I am asked for a three-week hearing

on all sorts of issues, including, potentially, expert evidence. I think that is a rather different scenario to the one the court is normally presented with.

MS DEMETRIOU: Sir, I agree with that. We also say that a key point of difference is the presence of the original proceedings, and the extremely close connection between the two.

MR JUSTICE JACOBS: Yes.

MS DEMETRIOU: So I agree with the point you have made, but we say there is also this additional point which is important.

Before I sit down, I just want to answer a couple of other points Mr Beal made.

The first relates to how this came about. So he placed some emphasis on: it was your choice to do it this way.

I just want to show you -- I think my bundles are numbered or lettered differently, but it is tab 109. So mine is called G.

MR JUSTICE JACOBS: Don't worry about going to G, just give me the tab reference.

MS DEMETRIOU: 109, page 2242.

MR JUSTICE JACOBS: Application notice?

MS DEMETRIOU: Yes. I think Mr Beal took you to the skeleton argument in support of this, which is behind the next tab. This was for permission to use information derived --

MR JUSTICE JACOBS: Yes.

MS DEMETRIOU: This is the application notice. If you look at 2242, paragraph 9, just one point here is, you see at the end of the paragraph, this addresses the point -- sorry, just before we get to this, Sir, the reason why -- and I think you will have seen this from the evidence, and also from our skeleton argument, the reason why we sued the new defendants two years later was because they were not, we then discovered, party or part of the European Commission

investigation.

You will know from the *Gemalto* case how important that is. Because, in *Gemalto*, what was said was: well, once the European Commission has carried out its investigation and issued the statement of objections which are its preliminary conclusion, that is sufficient to start time running.

So once we discovered that these defendants were not party to that investigation, we considered that we didn't have sufficient material to sue them. They were in a materially different position. So that explains why we didn't sue them at the same time.

Just on that -- and of course I recognise that there is a limit to what you can take from letters before action, but this was -- actually, since we have this open, let me deal with my point here and I will come back to that, so we are not moving around.

Then, moving forward to when we did sue them, when we did issue proceedings, Mr Beal says: well, you could have joined us with the existing claim.

He says that was a conscious decision. Well, the reason we didn't do that is set out here, in the last sentence. So while the claimant could have added the other banks --

MR JUSTICE JACOBS: Which paragraph am I looking at?

MS DEMETRIOU: Paragraph 9. The last part of paragraph 9.

Essentially, the point is this, Sir: issuing new proceedings stops time running at the date of issue, but joining proceedings stops time running once permission is granted for them to be joined.

We were concerned that in that intervening period, going back six years, there were regulatory findings which might make our position more difficult on limitation.

It wasn't because we thought there were separate proceedings. So it is not right to

read in some kind of strategic decision to treat these claims differently.

Indeed, what you see at paragraph 9 as well, in the immediate prior sentence, is:

"Case management considerations as to the New Claim are an issue that will need to be canvassed and addressed in due course if this application is allowed."

So we recognised there that was going to raise questions in relation to the case management of both sets of proceedings.

But, in any event, Sir, we say, whatever the history of all this, the Tribunal is now where it is. It has to manage these two claims, which, as I say, are inextricably linked.

In relation to the first decision, which is, "We didn't sue them at the same time because they were not party to the Commission Decision ", which is a point my learned friend disparages. Let's see what they said about it in their responses to the letters before action, which Mr Beal took you to. He relied on our letters before action.

If we go to the core bundle again, behind tab 22, on page 289, this is the response from Allen & Overy acting for BNP Paribas.

If you go on to page 291, paragraph 3.1 -- do you have that? Top of the page:

"As noted above, the Letter Before Action provides no basis to support the assertion that our client is liable to your clients. The only matters relied on are regulatory investigations and in particular the assertion … that our client is part of the ongoing investigation by the European Commission, and that it will not be able to deny liability in respect of a follow on action arising from findings of infringement by the Commission.

"It is unclear on what basis you make the assertion that our client is part of the ongoing European Commission investigation. Our client does not believe that it is the subject of any ongoing investigation, or that it would be subject to any sanction, by the European Commission in relation to FX trading. This is consistent with

the fact that no findings were made against our client by the UK Financial Conduct Authority."

They are saying, in 2018: you have absolutely no basis for your claim at all.

That's relevant, also, to the point that Mr Beal makes when he said, rather optimistically, when, Sir, you asked him: well, what are the further inquiries that the claimants could have made?

He said, "Well, they could have asked the banks". This is what happened when we did ask the banks.

If we look over the page, at 293, he said, "You could have asked the banks for disclosure", well, we did. You see their response at paragraphs 4.1 and 4.2, which is a big no.

So the idea that before the cut-off date, they would have openly given us disclosure in circumstances where there hadn't, at that stage, been any regulatory findings, or anything really at all, is really not realistic.

Sir, I have made the point about the three defendants. You have seen that in our skeleton arguments. As you say, there will presumably be a debate about that. We say it is another basis on which there is a very real possibility that these claims against the defendants will continue in any event.

So going back to the task that the Tribunal is faced with --

MR JUSTICE JACOBS: In relation to that point, you say it has to be a complete victory by all the defendants for this to be productive.

MS DEMETRIOU: We even go further.

MR JUSTICE JACOBS: You go further because of your other action.

MS DEMETRIOU: The joint and several liability.

MR JUSTICE JACOBS: I understand that.

MS DEMETRIOU: We say all this is going to be litigated anyway. We go further, we

say even if it is.

That's one of the other reasons why this case is different to the generality of cases where these applications are made.

Sir, it may be helpful to look at Merck v Merck, at authorities bundle 1, behind tab 16. Just in terms of the essential task facing the Tribunal, paragraph 18. We say this is a sensible summary. Mr Justice Nugee, as he then was --

MR JUSTICE JACOBS: What paragraph?

MS DEMETRIOU: 18, on page 289 of the bundle.

Sorry, it is not Mr Justice Nugee. It says Mr Justice Vos, at the top of the page, and Mr Justice Nugee, at the beginning. Anyway, we will try to get to the bottom of that.

Paragraph 18:

"In my judgment the ordering of a preliminary issue is bound to include advantages and disadvantages, or pros and cons, some of which are predictable and some of which are less predictable. As I see it, the task of the court in being asked to order a preliminary issue in a case such as this is, to weigh up the possible pros and cons of ordering or not ordering a preliminary issue and decide where the balance lies. When I put this or something like it to counsel neither of them demurred."

We would agree that is a sensible exposition of the task before the Tribunal today. You have to look at it all in the round and decide: what are the pros and what are the cons?

You have my submission that the cons are extremely weighty. There would be very great prejudice if these claims weren't heard together. There would be prejudice even to the new proceedings just looked at by themselves, because a preliminary issue of this nature, which is going to take time and involve lots of

evidence, both factual and expert evidence, is obviously going to delay the prosecution of the new proceedings, even looked at in isolation, to a considerable degree.

We say that is highly undesirable in circumstances where we say it is unlikely that it is going to be determinative.

Then when you add into that the very real issue of joint case management of the two sets of proceedings, and the risk of delay to the original proceedings, we say the ledger is clear.

Sir, unless I can assist you any further, those are our submissions.

MR JUSTICE JACOBS: Thank you. There is just one thing I wanted to understand, which I looked at in the skeleton and I am not sure I totally understand.

One of the points you have raised -- you have not developed it orally, and I don't think it is one of your biggest points -- is to say to some extent, on the preliminary issue you will be going into the facts relating to the infringement, or at least what people knew about the infringement. I think this arises in relation to those people who were at the defendants and then moved to the claimants.

Is that a point that is of any significance? Is there anything you want to say about that, so I understand that?

I think the other side's answer is to say: you don't have to go into the facts because you are really looking at, not whether there was an infringement, but whether there was enough material to make an allegation and so forth.

MS DEMETRIOU: Sir, we maintain the point in the sense there would be some duplication. So that is a point we maintain. I am not pretending it is the biggest point in all this because there is a much bigger elephant in the room, as it were, which is that this would prejudice the efficient case management of both trials and would delay at least the new proceedings unacceptably, but, potentially,

also the original proceedings.

MR JUSTICE JACOBS: That's very helpful. Thank you.

Good. All right. Thank you very much.

So what I suggest, you have 15 minutes, and then we will take a break before Mr Beal has a chance to reply.

Submissions by MS ABRAM

MS ABRAM: I am very grateful. I may not need the full 15 minutes, subject to any questions the Tribunal may have. Let's see how we get on.

Thank you very much for hearing the original defendants as interveners at this hearing. We are very grateful.

As I hope is clear from the written material we put before the Tribunal, our own concern at this hearing is to avoid delay to our proceedings. So all we are asking is the Tribunal -- we are not seeking to get involved in the preliminary issue question, as a matter of principle – but all we are asking from the Tribunal is to avoid making any order on the preliminary issue that would cause delay in combination with an order for some form of joint case management of the original and new proceedings.

Of course, it is said that the question of whether there should be joint case management is not decided or settled, and will not be decided or settled today, and of course I take that point.

But, from our perspective, as the original defendants, what we are keen to ask the Tribunal to do is to avoid limiting its options for the future by going down a path that risks or that would inevitably cause delay to the original proceedings, by virtue of directions that might be given or a decision that might be made today.

So I hope that is clear on the scope of what we are and are not keen to stick our oar

in, in respect of.

MR JUSTICE JACOBS: Yes. What is it you are saying about joint case management, if anything, at this point? That is something which potentially will arise and you might favour it?

You may not want to commit yourself to anything at all, but if you can just tell me what your broad position is, I think that might be helpful.

MS ABRAM: I think it is blindingly obvious, if I may say so, that it will arise and it will be a matter that you will need to determine, Sir, almost certainly at the next CMC. There will be a range of options open to the Tribunal at that stage. I don't come with instructions about which the original defendants favour, but what I can say is that many of them will require catch up by the new defendants. Not all of them, but many of them would do.

What I don't want is for the Tribunal to be faced with an invidious decision in three months' time between selecting one of those options and slowing us down, potentially by a very long margin, or rejecting those options when they might be favourable otherwise to those case management options.

So it is about not limiting your options for the future, so far as we are concerned.

MR JUSTICE JACOBS: Yes. Although you say you are neutral on this, I think in reality you are saying if I was to order a preliminary issue, it will have an impact in terms of the options which are available; is that fair?

Or am I misreading and reading too much into what you are saying?

MS ABRAM: Certainly we ask you not to order a preliminary issue if that would limit your options. It is not for me to make submissions about how the preliminary issues should be handled.

What I would like to do, if I may, is go on to address some of what we see as red flags in the possible options for managing the preliminary issue.

MR JUSTICE JACOBS: Okay.

MS ABRAM: Just before I do, though, could I just say a word about delay and about why we are so exercised about the prospect of delay in these proceedings?

Ms Demetriou and I are, as she said, very much singing from the same hymn sheet on this, unusually, given that we are opposing parties.

But, just to be clear, from our perspective, we are six global banks accused of unlawful conduct over a period of over a decade, in proceedings that have been hanging over us for almost four years now. They have, as the Tribunal has seen, been subject to enormous drift.

I am not seeking to litigate in this Tribunal today whose fault that was or how that has come to be. You are not interested in that and are not going to do anything about it..

But the facts are that the proceedings have been on foot for four years, we have not had any factual evidence, any expert evidence, there is no trial date set, we have not finished disclosure. So, in my submission, all those objective features of the litigation weigh really strongly in favour of not allowing any further drift in the original proceedings. It is an important factor to be weighed in the balance.

That's why I am concerned about delay.

MR JUSTICE JACOBS: When do you say that the trial would come on, ordinarily?

I know you don't want to commit yourself and you are going to address this in more detail at the CMC. But do you dissent from the idea we are looking at the back end of 2024? Do you say it's earlier than that, later than that?

MS ABRAM: I am not able to commit myself or any of my clients today. But what I will do, if I may, is work through what might happen in this litigation, using the late 2024 date that Ms Demetriou has given, recognising she also has not committed to that, just to see how it would affect the progress of the two

proceedings.

A little like the Tribunal, Sir, you are making a decision on the preliminary issue in something of a vacuum as to what the directions will be in the original proceedings or in the new proceedings. That's slightly the position all the parties find ourselves in as well, because we are faced with making submissions on the impact of a preliminary issue decision, determination, without knowing precisely what the impact will be, because the steps are not yet mapped out.

It is no one's fault, but it's an issue which affects everyone equally.

So could I start on that just by telling you what the differences are between where the original proceedings are and where the new proceedings are?

Ms Demetriou covered some of this, and I don't want to repeat her, but just as the bedrock for what I want to say.

The original proceedings are more advanced in terms of the pleadings. The pleadings have gone through multiple rounds of amendments in the original proceedings. Although I don't have full visibility on the new proceedings, I believe they are less advanced there.

The further particulars of infringement are imminently about to be served in the original proceedings over the next month or so. The disclosure in the original proceedings that has happened, as Ms Demetriou says, is frankly vast in quantity, but not necessarily vast in terms of the amount of work that's been required to produce it. Because almost all of it has been produced by reproducing disclosure from other contexts. You have the point, I can see.

So from the US proceedings --

MR JUSTICE JACOBS: I had to deal with one of those early applications, and I looked back on what I decided. So I understand that a lot of this has been

done in the US and is being repeated here.

MS ABRAM: That's right. In front of regulators and various other places.

MR JUSTICE JACOBS: Yes.

MS ABRAM: The reason I make those points about the differences is to respectfully agree with Ms Demetriou, that if the Tribunal were, just as a mind exercise, to make an order now for the new proceedings to catch up with the original proceedings, there can be no doubt that could be done very readily and without undue delay to any set of proceedings. Because although the original proceedings are ahead, we are not ahead by such a margin that catch up would be by any means impossible.

So then, when we come to the CMC before you in three months' time, the next steps that the Tribunal will have to consider will clearly be a bit more disclosure, which may be a bit more tailored, might require a bit more work, rather than lifting and dropping from other contexts, and factual evidence, expert evidence, and then, of course, the trial, when it should be and preparation for the trial.

So, if we imagine that the trial is in two years from now, for the sake of argument, late 2024, if you imagine, for the sake of argument, the preliminary issue takes a year to trial, and then another year for judgment and for an appeal, it plainly is not possible, in those circumstances, for the new proceedings to catch up with the original proceedings.

So that's the other extreme of the spectrum. If one is waiting for the whole litigation of a preliminary issue before anything else is done in the new proceedings, catch up is not possible, and so that would be something the Tribunal would be excluding by making an order to that effect, acting blind today.

MR JUSTICE JACOBS: That's if one assumes an appeal.

MS ABRAM: If one assumes --

MR JUSTICE JACOBS: You say it is sensible to build that into timetabling in a case of this kind.

MS ABRAM: Yes. I am just looking at it objectively, Sir -- although I am not at all *parti pris* about any of these issues, on the preliminary issue. Just looking objectively, as a competition lawyer, the limitation issues on this case are weighty, raise a number of interlocking points of law, including points about the interrelationship between EU law and English law after Brexit. It is all super interesting, at least to us it is.

MR JUSTICE JACOBS: And to me as well.

MS ABRAM: I am sure. So the prospects for appeal must be a real one, just looking at it objectively.

So, in my submission, it is just sensible to build that possibility into the way one thinks about it.

So what is proposed is that since clearly a delay of a year/18 months/two years is going to cause problems catching up, it is suggested that some steps might be able to be taken in the meantime by the claimants and/or by the defendants.

The fundamental point I would like to make about that is that the concern that strikes one, looking at it, is that if steps are expensive or time-consuming to take, and therefore it might be suggested shouldn't readily be undertaken pending a preliminary issue, they are exactly the same steps that would make it hard for the new proceedings to catch up with the original proceedings, after the end of a preliminary issue.

So, in my submission, before accepting too readily that steps can be taken in the meantime and then it will be possible to catch up, it is really important to know two things. The first is what steps would be taken and would they be any of the steps that would otherwise be a bar to catching up the new proceedings, if at

the CMC my Lord thought that was an appropriate step to take.

Second, when is it proposed that those steps are taken?

So an exercise with a much greater degree, as our economist friends would say, of granularity than has been possible today, based on the actual stages of the litigation, and of the original proceedings and the stages that would happen to trial. So that one understands, and the Tribunal can appreciate, whether catching up is actually at all realistic. So not only what the steps are, but when the steps are taken.

I am not wholly sure, but I think there was a suggestion the new defendants might be open to take increased steps or some steps pending an appeal that would not so readily be undertaken pending a trial of the preliminary issue.

One wonders, rhetorically, why that would be and what the difference would be between those two stages in a case like this, where an appeal on a preliminary issue determination must just be a real possibility.

So, Sir, I am conscious that in a sense I am coming to the Tribunal with additional problems, rather than offering solutions. It is a set of concerns that I'm offering, rather than answers to those concerns, but what we, the original defendants, would impress on the Tribunal, if we may, is that we would not want the Tribunal to proceed on a basis that it was going to be manageable for the new proceedings to catch up with the original proceedings without really understanding how the articulation between the two sets of proceedings would work, and where the objections might be to undertaking work, and where they might not be, and what the timings would be.

That's to found my basic submission: further delay to our proceedings would be wholly unfair.

That would particularly be our submission if there were an express stay of the original

proceedings. Pending a preliminary issue, for example, we would submit that would be wholly unfair and we would not want that to be the indirect result of this hearing. But, also, if there was a proposal for a sort of -- if you will forgive the vernacular -- a sort of "go slow" of the original proceedings to allow some flex in the management of the two sets of proceedings.

In our submission, the original proceedings after all this delay, and all this time, ought to be allowed to go forward to a trial in the normal course as rapidly as possible, without additional bars to that progress being imposed from outside.

So it is a question of not impeding the progress of the original proceedings.

That is all I wanted to say about case management, subject to any questions you might have, Sir.

But there are two additional questions that you wanted me to answer in my submissions.

The first is the CMC, at the beginning of next year.

Yes, we agree, everyone should be there. It is very sensible for it to be a joint -- well, a CMC at which everyone attends. Whether or not it should be a full joint CMC in both sets of proceedings might depend a little on what you decide following this hearing, Sir. But, certainly, everyone should be there.

MR JUSTICE JACOBS: I suppose, if there is a preliminary issue, then it may not be a joint CMC, I suppose, because there would be that separate track, and the assumption is that I am only giving directions in relation to the preliminary issue, which, on this hypothesis, will have been given effectively now.

MS ABRAM: That is what -- (inaudible).

MR JUSTICE JACOBS: Is that right? If no preliminary issue, then a joint CMC.

MS ABRAM: would seem like a sensible proposal to us.

MR JUSTICE JACOBS: Which you are prepared to agree to.

I should say, you may have seen correspondence, people have been asking for a date as from 13 February or something like that. I can't remember the date. It is not very convenient to the Commercial Court, so we are looking at something in January.

I think on this kind of case, whoever is attending that, whether it involves the new people or not, everyone has so many representatives that one cannot really do it for the convenience of particular counsel. So one would hope that someone could substitute, if necessary.

MS ABRAM: Yes. I hear that, Sir. I am not in a position to make submissions about when it could or should be. I don't have counsel's diaries in front of me. But I am sure that's heard by all those instructing me today.

So that's the CMC.

MR JUSTICE JACOBS: Okay.

MS ABRAM: Then you also asked, Sir, whether if you were to order a preliminary issue on limitation, whether the original defendants would want to be there. I have not been able to get instructions on that in the time available.

Certainly, I think all I can sensibly do today is say: we would not want to be shut out from being there.

MR JUSTICE JACOBS: Yes.

MS ABRAM: We would want to be given the opportunity to make submissions about it.

There are clearly different issues between the original and the new defendants, but there is also a degree of overlap on the law and on the facts. So it is something that really all the banks should have the opportunity to consider, if the issue becomes relevant.

MR JUSTICE JACOBS: Hang on, you may not ask for your own limitation issue to

be dealt with as a preliminary issue alongside it, but that's a possibility, too?

MS ABRAM: We don't ask for our own issues to be dealt with as a preliminary issue. Really, in the absence of instructions, I can't really assist any further on that.

MR JUSTICE JACOBS: All right. I know you don't ask at the moment. Whether your position might change if there was to be one is something you would consider with your clients if we go down that route.

MS ABRAM: I hear the question, Sir.

MR JUSTICE JACOBS: Okay, all right.

MS ABRAM: Unless I can help any further, that is all I wished to say.

MR JUSTICE JACOBS: Let me give the transcriber a break, and Mr Beal a chance to decide what he wants to address me on. We will start again in ten minutes' time.

(3.07 pm)

(A short break)

(3.23 pm)

Reply submissions by MR BEAL

MR BEAL: Sir, my learned friend Ms Demetriou accepted on more than one occasion that if our limitation defence was a slam dunk one, it would be appropriate, essentially, to have it directed to be tried as a preliminary issue.

Our submission is that our defence is a slam dunk one. I said in opening, at the moment, it is a strikeable claim that section 32 is engaged because no particulars are given and no positive case has been advanced. I threatened to hand up yet another authority that is support for the proposition that one could strike out in this type of case. That was the decision of Mr Justice Adam Johnson in *Goldtrail*. But it does no more than establish that in an appropriate

case one can have summary judgment on a section 32 issue. There are other cases when one could not.

But it is our submission that this is a slam dunk limitation case, certainly as matters stand. We hopefully, respectfully, contend that it will remain so.

The way that the issue has come out, in terms of the merit, is a concentration by the claimants on the overarching concept of an SCI, as covering a multitude of sins, and therefore means that there cannot sensibly be a trial of the limitation issue, because this Tribunal is going to have to adjudicate on all the underlying issues of liability, come what may.

Can I endeavour to explain why that is a misguided submission, with the greatest of respect?

Firstly, it is not accurate to say that it is, in a sense, anything to do with limitation as to what this Tribunal would ultimately be hearing.

Secondly, because, as my learned friend recognised, the fact that we have a complete limitation defence to the SCI claim may well mean that we no longer have to respond to the SCI claim, either generally or specifically, if SCI is found to be time-barred, but not the other allegations of anticompetitive infringement.

In terms of the short way of explaining what an SCI is, could I invite you, please, to bring out, in hearing bundle 3, tab 90 of the main bundle, page 1305? A decision of the European Commission in one of the chat room cases.

This one is what is called the Three-Way Banana Split decision in the *Forex* dispute.

At page 1305, the commission explains the guiding principles behind what is described as "a single agreement or a single infringement", which we have described as a single and continuous infringement or SCI.

It says in recital 97, page 1305:

"A complex cartel may properly be viewed as a single and continuous infringement for

the time-frame in which it existed."

It then says, effectually:

"Group of practices adopted by various parties in pursuit of a single, anti-competitive economic aim. The cartel may well vary from time to time, or its mechanisms be adapted or strengthened to take account of new developments."

If one then sees recitals 99 and 100, there is explanation how that concept would work, in recital 99, and there is an explanation how that concept would not apply in, recital 100.

In a nutshell, in order to establish an SCI, one has to show a common scheme, common series of arrangements, which all participants realise they are operating under the aegis of. It is a common framework to collusive or collaborative activity.

In contrast, if an undertaking participated directly in one or more of the assessments of anticompetitive conduct, but has not shown that it intended to contribute to all the common objectives pursued by the other participants, then you can't have a finding of an SCI on that basis.

Applying those contrasting principles to this case, what the commission found was that:

"The cartel arrangements in this case present the characteristics of a single, complex and continuous infringement."

"The participating traders maintained a consistent pattern of nearly daily communication where they had extensive and recurrent information exchanges pursuant to the underlying understanding and occasionally engaged in coordination of their trading activities ..."

So that is describing how they say the relevant collusive conduct was aimed at and carried on in such a way as to amount to a single and continuous infringement.

This decision was issued to a number of defendants. We see those at 1327. They are all original defendants. They are UBS, Royal Bank of Scotland, Barclays, I think Citibank -- is Citibank an original defendant? I forget. It is. And JP Morgan Chase. So five entities named there are all original defendants.

However, it is important note that this decision relates to a single chat room. It is the Three-Way Banana Split chat room. What we then have, at tab 91, is a separate commission decision on a separate chat room, Essex Express. Again, that identifies a series of original defendants who are found by the Commission to have participated in collusive conduct in the course of that chat room.

MR JUSTICE JACOBS: Which tab is that again?

MR BEAL: Tab 91. It is Essex Express. Then there is a further "Sterling Lads" one, at 94. I think the Sterling Lads one is directed at HSBC, but I may be wrong.

So what the Commission is doing is, it is not saying there is a single continuous infringement in relation to the FX sector for every chat room from 2003 to 2013. That is not what they found.

What they found is a series of collusive chats, on a chat room by chat room basis, involving the original defendants and not involving my clients, the new defendants. That is both an important point for marking a point of distinction on the liability trials between us and the original defendants. But it's also, we say, an important point for indicating where the SCI case is going.

The SCI case -- I don't think we were taken to the pleading in the end, but I may be wrong -- can I pick up the way that the case is pleaded? So we can see exactly how this SCI point is raised in our case.

In order to do so, it might be convenient to have a quick look at how overall the pleading is placed. This is in hearing bundle 1, tab 7, page 189. Paragraph 62.

MR JUSTICE JACOBS: Okay.

MR BEAL: Page 189 is a sub-heading:

"The anti-competitive conduct, communications and arrangements alleged."

We then see, in 62:

"By these proceedings the claimants pursue claims in relation to the following forms of FX manipulation."

They then separate out benchmark manipulation, bid/ask manipulation, engaging in the near continuous exchange of commercially sensitive information, using the commercially sensitive information so exchanged to pursue a different trading pattern."

It schedules out four different types of collusive conduct under the banner of "overall FX manipulation".

Paragraph 64, we see references to collusive information exchange and collusive trading.

Then, at 65, a pleading that the overall effect of this was that the traders were substituting free competition, effectively, for collusive strategies. So getting rid of free competition in the market and replacing it with something that was structured between them, so the allegation goes.

In paragraph 67, it is then said:

"The infringing conduct alleged herein therefore extends to ..."

And it sets out the four different types of collusive behaviour and the way they put it:

"Trading which took place in or was primarily arranged through certain online multi-bank chat rooms ..."

Then:

"For the avoidance of doubt both benchmark manipulation and bid/ask manipulation are particular forms of collusive trading."

So the way the claimants put their case is that these different types of collusive trading all come under the banner of what would effectively be either price fixing or information exchange, if one was seeking to characterise the cause of action from a competition law perspective.

In contradistinction to that, when one comes to explore how the claimants are in practice going to put their case on infringement, that begins at page 224. So, in a sense, that is the cause of action and, at page 224, we move on to the logically separate question of: what you are saying the infringements are? Are you saying they are a series of individual infringements or part of a single and continuous infringement taking place over a period of time?

It is fair to say, from page 224 to 225, that the claimants essentially set out why, in their view, none of this conduct was a single infringement by infringement basis for the way the claim is sought to be put. We see the concluding paragraph, at paragraph 153, page 226.

In the premises, the claimants' primary case is that there was a single overall infringement in this case which consisted of the willingness, which was acted upon and implemented, of the traders to share confidential information, as described above, and to trade on the back of that information to seek to benefit themselves and their banks.

Just pausing there, that has resonance for the limitation case because, of course, that very broad and generally articulated principle is readily capable, we say, of being discerned from the press material, including the Bloomberg article and all the subsequent material. If what is being said here is: you, the sector, you, FX traders, were rigging the market through collusive behaviour in chat rooms, that pleading was evidently available to the claimants well before November 2014.

But it then goes to say: it is not just you, the defendants. Because the way it is put is

incredibly broad. It goes far beyond the ambit of the Commission decisions that they were otherwise seeking to rely upon against the original defendants, because they say this is not simply a chat room by chat room basis; this is indeed a single continuous infringement, i.e. pre-arranged collusive conduct, on behalf of the banks:

"Traders between the banks (including the defendants) for whom such traders worked."

So the defendants are only one of a series of individual banks who are said to be in cahoots.

That pleading is important because it means that not just the defendants, the new defendants, not just the original defendants, but every bank with FX traders is said to be party to collusive conduct.

So to suggest that the Tribunal is going to have to determine all these issues and all this evidence, regardless of whether or not we come out, may or may not be true, depending on whether or not this pleading is then the basis on which this case is taken forward. But, if it is true, then that is going to have to be determined in the original proceedings, come what may.

So what happens in the new proceedings is nothing to the point. The Tribunal is already in a position where the -- I am assuming, for the sake of argument, this pleading is replicated in the original proceedings. My understanding is that it is. The original proceedings as initially pleaded simply alleged an SCI between the original defendant, themselves. They did not expand it. It is now expanded to include everyone in the sector, effectively.

If that is what the Tribunal is being asked to determine, not only is that an incredibly extensive investigation, it will inevitably involve findings in the original proceedings, regardless of what happens in our case.

I will come to deal with the practicalities of this in a moment.

The other thing to note is, paragraph 156, this is not the only way that the case is put. In paragraph 156, the claimants say if the Tribunal:

"Rejects the claimants' primary case, the claimants plead by way of alternative case that there was a series of infringements carried out by groups of traders by means of communications via chat room and otherwise. Which individual traders should be regarded as forming a group … depends on the links between the individual such traders."

So they are keeping up their sleeves, as it were, an alternative case whereby you approach it chat room by chat room and each of those, like the Commission decision, is a separate finding of an infringement.

Now, that will require all the very extensive material of chat room transactions, chat room chats, Tweets, instant messages, et cetera, to be subject to review by the Tribunal from the period 2003 to 2013. That, with the greatest respect, necessarily changes the shape and ambit of the trial that my learned friend seems to think could be dealt with, in three months.

You are going to have to go through ten years' worth of chat room activity on a chat room by chat room basis, to work out what the case is, on the alternative case. Unless, of course, the claimants in their amended pleading, decide to not pursue that part of chat room by chat room, and simply concentrate on the SCI between all banks in the sector between 2003 to 2013.

The other consequence, of course, of an SCI, my learned friend rightly said: if the new defendants have a limitation defence, they will not be liable for the losses and damage associated with what is said to be an SCI over that ten year period. Instead, the original defendants will be liable for it.

But, of course, it is for precisely that reason that we say it would be manifestly unfair

and inappropriate to keep us pegged into a claim that is going to go ahead anyway, against the original defendants, in its full glory, only to find out, after a six to nine month trial -- and I stand by the time estimate -- that in fact all these claimants were time-barred in any event.

We do say that is the real injustice that would be caused by not having limitation dealt with consistently with the case law I showed you, as speedily as possible, where it is feasible to do so.

I will come on in a moment to deal with feasibility.

But what that therefore shows is, on any view, if the claimants are right, and if there is joint and several liability for the SCI on this very broad basis, then they will establish liability for all their loss against the original defendants.

So what one is then looking at is not necessarily the Tribunal being spared an exercise. The Tribunal's exercise will be the same, given the breadth of the way the case is pleaded against the original defendants. What one is looking at is simply the question of how many defendants are in the room, incurring time and cost, in order to defend this case.

The answer is that instead of six defendants, with six leading counsel, six juniors, six sets of City law firms sitting behind them, you will have 14. On any view, that does not represent a very just exercise if, in fact, those other eight new defendants have, we say, a perfectly good limitation defence.

Turning then to -- there are a couple of points made about the strength of the limitation defence. Can I just deal with those?

On bid/ask manipulation, I have shown you the fact that the claimants' own pleading treats it as a species of the collusive conduct. If one looks, as I think I took you to, the *Arcadia* case as to what defines cause of action. The cause of action here would be collusive behaviour on the FX market, manipulating prices to the

detriment of the claimants. That is what they would have to show following the *Arcadia* formulation from the Court of Appeal.

Bid/ask manipulation and benchmark manipulation are therefore two species of collusive conduct, they are not separate causes of action. That is relevant to the statement of claim test.

As we know, in 2018, the claimants chose to proceed against only some of the original defendants on that basis, on the basis that there were two different types or two different forms, as they put it, of collusive behaviour, under the underlying umbrella allegation cause of action of anti-competitive infringement of Article 101, et cetera.

In 2018, they also chose to go against all the new defendants, but in the United States. They didn't choose to go against my clients at that time, in this country. That was not our decision.

We were asked questions by the claimants' solicitors as to whether or not we were at that stage under investigation by the European Commission and we were not.

It is true that the European Commission had investigated the sector thoroughly, and they took the infringement decisions I have taken you to. No infringement decisions were taken against my clients. So it is true that the claimants did not have the comfort of a Commission decision which they could say: that establishes liability for that chat room. But then they are in that same position now, so therefore nothing has changed.

There is a separate issue, we say -- or will be -- as and when limitation is determined, whenever it will be. There will be an issue as to whether or not the knowledge of benchmark manipulation put the claimants on sufficient notice to be able to plead the rest of it as well.

I think it was suggested I had made a hopeless submission with the idea that you could

get to one particular form of manipulation from the other, but that's exactly what happened in the *ECU v HSBC* case, which I took you to. You, Sir, indicated where was this going, what was the point I was making from it?

The point I was making from it was the very one which was intended to respond to my learned friend's submission which she then made, which is: once you have detail sufficient to be able to bring a claim on one issue, you can then get disclosure and bring a claim on the other basis in due course.

Because they are not a new cause of action, you would not then fall into the relation back issue.

All that is not for today. I accept that. I have accepted that by cutting short my opening that was going to deal specifically with this point.

I can be equally quick, I hope, on the group of three banks point, on the basis, again, that is not for today.

If I could refer you, in the second witness statement, of Mr Norris Jones. His second witness statement, core bundle, at tab 6, page 174, he makes specific references. Let's just turn that up.

Sir, I think I have given myself the wrong reference here. It is paragraphs 9 to 10, page 130.

MR JUSTICE JACOBS: That was in the previous?

MR BEAL: Yes, I am so sorry. I managed to give myself the wrong -- I had it down as 174. I don't quite know why.

MR JUSTICE JACOBS: Page?

MR BEAL: Page 130 of the core bundle.

MR JUSTICE JACOBS: Right, yes.

MR BEAL: He there deals with confirmation that there are ...

MR JUSTICE JACOBS: What is the point you want to make to me? It may be we

don't need to go to all this material.

MR BEAL: I am in the wrong hearing bundle. I am sorry.

MR JUSTICE JACOBS: But, on the three banks point, it is all the same point, isn't it?

MR BEAL: Yes.

MR JUSTICE JACOBS: My view at the moment, and it remains where it is, is this is a substantial point to be argued on the limitation issue, whether it is a preliminary issue or a substantive case, and I can't form a view on it now.

All I can say is there is a substantial point, and it may be resolved one way or the other. If it is resolved in favour of the claimants, then it has certain consequences; if it is resolved in your favour, it may have other consequences.

MR BEAL: Sir, the reason I am making this submission is because it was advanced against me as being a reason why there was not a slam dunk case. We are saying it doesn't affect the merits of the case because there is an answer to it.

I fully accept -- and that's why I cut my opening short -- that it is not for now to determine that issue. But it would be remiss of me, and these submissions to be made, not at least to seek to correct the record.

MR JUSTICE JACOBS: I think Ms Demetriou recognised that I was not going to decide any of these points.

MR BEAL: No.

MR JUSTICE JACOBS: I think I have made it clear, I think to everybody, that I am not going to form a view about how strong any of these points are.

I mean, I had a view that some points may be stronger than others, but that's as far as I am prepared to go.

MR BEAL: Sir, the next point is contribution. You have already indicated it is speculative at this stage.

MR JUSTICE JACOBS: I don't know what will happen. But it seems to me to be

a realistic possibly. I don't know that anyone -- it depends on what happens --

MR BEAL: It does.

MR JUSTICE JACOBS: But it is a realistic possibility there will be contribution proceedings between the defendants, I would have thought.

MR BEAL: I think it is sufficient for me to say that one certainly cannot rule it out at this stage, but at the same time it is not a foregone conclusion.

MR JUSTICE JACOBS: No.

MR BEAL: I do not think I need to go further than that.

MR JUSTICE JACOBS: And the contribution proceedings may come in within the present proceedings, or possibly subsequently.

MR BEAL: Yes.

MR JUSTICE JACOBS: But no one on the defendants' side has said to me: we want to make it absolutely clear, Sir, that we are not going to bring proceedings against each other, come what may.

No one has said that, and I would not expect anyone to say it.

MR BEAL: Can I then please deal with timings?

MR JUSTICE JACOBS: Yes.

MR BEAL: My learned friend Ms Demetriou suggested end of 2024 for the original proceedings. Given the progress to date, we respectfully suggest that might be optimistic.

It has taken quite a long time for the claim to get to where it is now. But, in my respectful submission, we will know fairly shortly because in the CMC, February, January, whenever it may be, the parties will, of course, have to commit to a timetable they are happy with and bring forward any suggestions for the case management of that set of proceedings.

So, in a sense, my learned friend Ms Abram is quite right. We are currently labouring

under partial information because we simply don't know what the shape of original proceedings is going to look like going forward, but there are some big steps, on any view and we shall see.

If my scepticism as to the ability to conclude this trial in six to nine months is our time estimate -- three months, is my learned friend Ms Demetriou's -- if my scepticism proves to be unjustified then, of course, if I am at the CMC in February, I will apologise. But I think we will know better once we see the timetable the parties are prepared to commit to.

But let's leave it at that for the moment.

What you have effectively had before you from my learned friends is, with the greatest respect, a not very subtle request for consolidation of the proceedings.

You have my submission that is not for today. You have my submission that I accept that the joint case management of both sets of proceedings will be upper mind in the Tribunal's collective consciousness. That's perfectly understandable.

But there has not been an application for consolidation and we are now really two years into the new proceedings being on foot. So if there was a burning urgency for these proceedings to be consolidated and catch up, one might have expected an application to have been made before now.

But it is what it is.

On any view, that two year gap and the drift is not our fault. It was a conscious decision. They issued in the United States against all my clients and chose not to issue parallel proceedings through a joinder application in the Commercial Court in the original proceedings.

There was a specific point made on the UK/US overlap. Again, this is simply to set the record straight, if I may. The answer is there is a live issue between parties as to the extent of any overlap and where that leads to, and what the legal

submissions are.

MR JUSTICE JACOBS: I was just trying to remember what it was.

MR BEAL: Yes.

MR JUSTICE JACOBS: It is not material to anything I have to decide. You don't agree with what the other side said. I am just trying to get the shape of what is going on. That doesn't need to be developed.

MR BEAL: Again, it was in the spirit of not wanting to leave something uncorrected. Of more substance and more moment, for the decision this Tribunal is being asked to make, can I deal with the issue of timing of the preliminary issue?

We have suggested three weeks for a hearing of it. We respectfully suggest that is an appropriate time estimate at this stage.

It compares, not dissimilarly, with the length of time for preliminary issues that we set out in our skeleton, page 16 of the bundle. I think it was the *Servier* case was 17 days and the *Commission Standards* case that Mr de la Mare was in was two weeks for certain preliminary issues.

MR JUSTICE JACOBS: Were those limitation issues?

MR BEAL: They were a mixture of different issues. I think *Servier* was abuse of dominance, and I think the *Commission* case was whether or not there was, as a matter of law, conduct that amounted to a device being used as a chip device for various emission standards, regulations. They were not strictly speaking limitations

MR JUSTICE JACOBS: Preliminary issues can be of any length. You can have a six month preliminary issue on liability. If you say you are dealing with liability and not quantum, it's a preliminary issue and it takes six months.

MR BEAL: Relatively early in my career, 2002, I did take part in a 36-day strike-out application brought by the SCO in the *Chagos* case. It was a very lengthy

judgment of Mr Justice Ouseley, and he found that the claims were all time-barred and/or an abuse of process..

It then went on appeal on an application for permission to appeal, and Lord Justice Sedley refused permission, and that was an end to it.

So it can be done. I accept it is more common to have short limitation hearings. But one needs to bear in mind that in the context of a trial of six months, three weeks is not disproportionately large. The sorts of limitation hearings that one might envisage, say two days, might well accompany a two-week case, a typical case.

I accept that the more complex the case, the more complex the limitation questions might be; the more parties to a case, the more complex the limitation case might be. When one is comparing like with like, one needs to compare a three-week time estimate with a six-month time estimate.

MR JUSTICE JACOBS: I don't really know what the time estimate is. Three months, four months, it may be that one says: actually, we are not going to allocate six months for this, thank you very much. Maybe you say three months --

MR BEAL: (Inaudible), but I think six months for the *Trucks* litigation next year. There were only five or six defendants, I think, in *Trucks*, so it is comparable, and a reasonable rational basis for the time estimate that we are advancing at the moment.

MR JUSTICE JACOBS: Okay.

MR BEAL: But another way of looking at this is to say: well, if you are with me that limitation is a sufficiently viable defence, and if as a matter of principle, limitation could be dealt with in a way that didn't give rise to what I rather flippantly described as the "nightmare scenario". But I was simply trying to be realistic, that frankly a Tribunal in this case is not going to want to do the whole thing

twice, without having seriously thought about whether it would be sensible to do that. I am simply, I hope, being realistic.

Another way of looking at this would be to say: if you are, in principle, with me that it would make sense in a perfect world to have limitation determined, then there is a hybrid solution by which one could cut through this. That would involve simply looking at the timetable that is set out in the core bundle, at page 199. It is tab 6, page 199.

It may or may not be generous, the time limits that are being proposed, but we hoped that they were realistic ones. We see that the first few steps here:

"Claimants to file and serve particulars of their positive case, new defendants to file and serve a single defence to respond to them, claimants to file and serve any reply."

That is timetabled to take four months.

Of course, that would take us to the CMC that you are envisaging for January. So one could direct, immediately, those steps. They need to be done anyway. They are going to have to be done anyway. It is part of our application for proper particulars to be given of the limitation case. We could then look at the next two steps. The next two steps are both disclosure relating to limitation.

Again, that's going to have to be done at some: point, whether or not limitation takes place in October 2023 or January 2025, or December 2024. Regardless of when it takes place, those steps are going to have to be taken.

My learned friend was at pains to say: there has been too much drift, we need to crack on with things.

Fine, we can crack on with things by adopting a set of directions that brings this point to crystallisation. If you are so minded, Sir, you could indicate that you think limitation is, in principle, something which is worthy of serious consideration for

a preliminary issue. We can see how things take shape and then, in February 2023, when all the case management issues are properly before the CAT, a final view can be taken.

So if you were to express the view that you were minded that limitation was a serious contender for being treated as a preliminary issue, we could take these steps now. We could get to a position whereby then, in the CMC in February, with full vision for both sets of proceedings and a scheduled timetable from both the original defendants and the claimants for the original proceedings, we could then try to plug in the preliminary issue on limitation and synchronise the timetables, so that it works.

That way nobody is labouring under any sort of ignorance or asymmetry of information as to what the shape of the litigation would look like. It would enable this time not to have been wasted, because you would issue a decision in principle as to whether or not limitation was, in principle, a good idea.

Then the only issue will be: can we come up with a set of directions, when everyone is in the same room, to make it happen.

MS DEMETRIOU: Sir, I am very sorry to interrupt, but either this is a new application being advanced in reply that we have not had any opportunity to deal with and, clearly, if this had been the way the application was put our evidence would have been different, and we would have come prepared to answer it. Or it is an application for today's application to be adjourned. I am not sure what it is, but it is very unsatisfactory this new thing is being put in reply and we have not had any chance to deal with it.

MR JUSTICE JACOBS: Let the point be made. Then, if you can, and if you do feel able to say something about it, I will give you an opportunity to say that. If you say: actually, I can't really say anything because we have not had a chance to

discuss it, or whatever.

It may be you can make a few points to me, even though you have not had a chance to discuss it. It is sort of putting off a decision, but expressing some sort of preliminary view now, as very much an alternative to what you actually want.

Your case is: I can order it and should order this preliminary issue now with directions, but if I feel a bit nervous about it, because I can't quite see the full picture, then come back to it at the CMC.

MR BEAL: Yes. The reason why this submission is being advanced -- if you heard my primary submission, which is the only issue before you today is whether or not our application for a preliminary issue to be determined and whether that application should be permitted.

What has happened is the claimants in this case have relied on a series of case management issues, and the original defendants have jumped on their bandwagon, if I can put it that way, as a reason why you shouldn't just simply view our application on its merits.

You had my submission first thing that this is not a case management conference. However, the way the submissions have developed has inevitably brought case management issues to the fore.

MR JUSTICE JACOBS: They always rely on those in Mr Khatoun's witness statement. It is very much in there, I think.

MR BEAL: We have, in any event, invited the Tribunal to direct -- see paragraph 70 of our skeleton, page 25 of the core bundle -- invited directions for separate limitations, for pleadings to be directed, come what may, and that formed part of the application that was lodged by Mr Norris Jones back in February/March last year.

So it has always been part of our case -- and I opened with it as well -- that we are

seeking these particulars. All I am saying now is: if you felt that you didn't have visibility of how everything was going to fit in, then there is a hybrid solution, which is consistent with the draft order I showed you at the beginning of my opening, page 52 of the core bundle, that there be limitation statements of case. Depending on timing, we could move on to draft direction 4 that we sought, and those are directions that have already been sought in the draft order.

But it has the strong advantage as an alternative. I mean, you had my primary case which is this: we're set to have it determined now and we will make everything else work. But if, as I apprehended, there was a degree of apprehension as to whether or not it would work and how it would plug in, and the alternative solution rather than inflicting the injustice of making us sit behind a very long case only to find out at the end, after millions of pounds have been spent on legal defences, that in fact it is all time-barred, the alternative solution is to see what can be done, in practical terms, in February, to make sure that it works.

It has the benefit of enabling this Tribunal to keep, within the armoury available to it, the sensible case management of a discrete issue, namely limitation, which could be determined as a sizeable chunk of the claim.

If the only objection is, "I am worried it can't be done", then that deserves greater exploration once the parties have been committed to a timetable.

MR JUSTICE JACOBS: I will not know much more about the preliminary issue point with some pleadings by February. I will know a little bit more about what the original defendants and the claimants envisage in terms of a timetable leading up to a trial.

MR BEAL: Yes. But, in the meantime, given the steps are sought by us and need to be done anyway, we can usefully be cracking on with doing things that are stopping the drift, bringing this case back into a sensible form.

It doesn't detract or delay anything because everyone else is waiting for the CMC anyway before any further steps are taken, and it is a sensible use of time. Something we are prepared to crack on with, and the claimants ought to be prepared to crack on with, if they are serious that they want this heard and tried by the end of 2024, if that's their suggestion.

So I don't accept this is a new point. It is a responsive point to the way that the submissions have developed and the way the Tribunal has expressed its concerns as to case management issues. It is none the worse for that.

Obviously, I have no objection whatsoever if Ms Demetriou responds. It would be quite fair for her to be given her opportunity to do so.

Would you give me a moment, Sir?

No one else is tugging my gown, metaphorically.

MR JUSTICE JACOBS: Thank you very much indeed.

Ms Demetriou, do you want to say anything else about the hybrid?

Reply submissions by MS DEMETRIOU

MS DEMETRIOU: I do, just briefly.

It is based on, we say, a misconception about the value of repleading at this stage, which we picked up -- I didn't respond particularly to this, but it is a point made by my learned friend. He made it in opening. He said that our pleading is deficient.

I showed you the claimants have squarely pleaded that they didn't have the requisite knowledge under section 32. Of course, in order to make that plea, the claimants' solicitors made the scope and nature of enquiries that were necessary to plead a case with a statement of truth at that stage. So they did carry out, sufficient for the purposes of the pleading, investigations, and they

have pleaded, the claimants, that they didn't have the requisite knowledge.

Now, what the claimants have not done to date, of course, is carry out a disclosure exercise, or an exercise of proofing witnesses, which is obviously a much more involved thing, in order to see, comprehensively, whether there is any material on which the defendants could seek to rely for a case of actual knowledge.

So you saw that we dealt with the two banks that pleaded in more detail. So we dealt with that material in our reply, but we have not done a comprehensive disclosure exercise or proofing of witnesses. You would not expect to do that at this pleading stage.

So we say that if there is going to be a repleading on limitation, that would take place after disclosure and proofing of witnesses, because there is nothing at this stage that we can valuably add to the pleadings.

So this idea that we should carry out a repleading exercise for the next four months we say really goes nowhere.

The thing that would take limitation forward, of course, is disclosure and witness statements. But then that's really just ordering the preliminary issue, because the reason we don't want the preliminary issue, one of the reasons, is that we don't want to have to do that twice. That's one of the problems with having a preliminary issue.

So we don't like the hybrid. We would ask you to reject the hybrid idea.

We also say, of course, that it was always open to the new defendants to apply for this application to be listed at the CMC, but they didn't do it.

We have responded to the application that was made. We haven't been able to respond to the new application that was made in reply. We should not effectively have to deal with the same application again, in February. So we do say that the Tribunal now knows all there is, really, to know about the limitation

defence and what we say to it, and you are able to make the case management decision now, and we say that you should, and not put it off.

It seems like a last ditch attempt to try to salvage something from this, but it is not a sensible way to proceed, because it would effectively be asking us -- placing a burden on the claimants to carry out a disclosure and proofing exercise which would be onerous and which would not otherwise need to be done now.

So we reject the alternative hybrid solution.

MR JUSTICE JACOBS: Is there an outstanding request for information on limitation which has not been responded to?

MS DEMETRIOU: No.

MR JUSTICE JACOBS: Right.

MR BEAL: Sir, Ms Abram, I think, wants to say something.

MR JUSTICE JACOBS: That's what you say.

MS DEMETRIOU: Sir, yes, in the time available, that's our immediate reaction to this.

MR JUSTICE JACOBS: I mean, this preliminary issue argument has been around for quite some time. I think it was originally going to be in the Commercial Court, before it was transferred into the CAT. Then I think --

MS DEMETRIOU: I think that is right.

MR JUSTICE JACOBS: -- it was never tied into the CMC.

MS DEMETRIOU: No.

MR JUSTICE JACOBS: Even though points were taken, I think, from an early stage about the case management problems.

MS DEMETRIOU: Yes, that's right. That's what we do say. We took these points about case management from a very early stage and, of course, the defendants could have opted to have waited, but they didn't. They wanted to press it at an early stage. They have made their application. We have responded to it,

and we say, with respect, Sir, that you should decide on it today.

Otherwise it is simply wasteful to come back another day.

We say, in any event, this idea of further pleadings is not going to take matters further forward at all. As I say, we can't usefully say anything more in the pleading. There is no extant request for information we have not responded to, and we can't usefully say anything more before we go through the disclosure and proofing exercise, nothing that is going to illuminate the Tribunal as to whether or not this is a good idea.

MR JUSTICE JACOBS: Okay, yes.

Ms Abram.

Reply submissions by MS ABRAM

MS ABRAM: Sir, I have nothing to say on what should happen in respect of the pleadings in the new proceedings. It is obviously none of my business. I have nothing to say about that.

Could I just make two related points on the hybrid proposal?

The first is that if the pleadings were to be accompanied by a decision in principle on the preliminary issue question, we are not wholly sure what the meaning of that would be in circumstances where the central issue on the preliminary issue is probably the case management question that couldn't be dealt with until January next year on the basis proposed, because the delay issues, it is said, will have come into crystallisation by then.

MR JUSTICE JACOBS: I have not quite understood.

MS ABRAM: I am sorry, I am going too fast.

MR JUSTICE JACOBS: Yes.

MS ABRAM: So the suggestion is we should have pleadings now.

MR JUSTICE JACOBS: Yes.

MS ABRAM: And now a determination in principle about whether or not limitation is apt for a preliminary issue. We wonder, with respect, whether the central question about whether limitation is apt for a preliminary issue in this case is the case management question. We wonder whether a decision in principle would add much if it was made at the present time.

So, really, the decision for the Tribunal might be whether to make the decision today on a preliminary issue, or to direct pleadings and defer all decision on the preliminary issue until next year. An intermediate decision in principle, we are just not sure what that is really, and what binding effect it would have or wouldn't have.

But, as I say, we are not *parti pris* in this; we're just seeking to make a suggestion.

The second point, a positive point from the perspective of our proceedings, is that, as I hope is clear, we really want to use the CMC in January/February, early next year, to make progress in the original proceedings. There is potentially a good deal on the agenda for that CMC.

Of course, whatever issues come up will need to be addressed at the CMC, but they must not squeeze out the issues for the original proceedings. So it is not an us rather than anyone else; it is a "we're here, too" point. I am grateful.

MR JUSTICE JACOBS: Okay.

Further reply submissions by MR BEAL

MR BEAL: I seem to be caught between a rock and a hard place here. The CMC is not our CMC. They are not our proceedings. There has been no application to consolidate.

What I have been trying to do is reflect the pragmatism that the Tribunal seems to be

showing in case managing two proceedings that are not currently consolidated and aren't currently case-managed together. There is no CMC listed for our set of proceedings as I understand it.

We have brought this application at the earliest opportunity because we think it is a sensible case management measure, because it is capable of disposing of all of the claims succinctly -- comparatively -- and it will avoid the need for eight defendants to sit through a six-month trial. That's the reason it is being brought.

In terms of the satisfactory nature of the pleadings, can I just remind you, Sir, of the way it is put at page 777 of the hearing bundle, paragraph 25, where it says in terms:

"The claimants' pleading herein in relation to section 32 does not address issues of actual or constructive knowledge."

MR JUSTICE JACOBS: What are you looking at?

MR BEAL: Page 777.

MR JUSTICE JACOBS: What document is it?

MR BEAL: I am sorry, it is the hearing bundle, bundle 3, tab 25.

Sorry bundle 2, tab 25 of the hearing bundle, page 777.

MR JUSTICE JACOBS: This is the reply.

MR BEAL: This is the reply. So this is their pleading on limitation.

They say in terms "we are not going to address issues of actual constructive knowledge; we are going to wait and see what the defendants say and then proceed on the basis of responding to that". And in the interim they then respond to the things that BNPP and Goldman Sachs had chosen to articulate.

Now you have my submission that is not a satisfactory pleading. We have sought a direction from this Tribunal that limitation pleadings be given, come what may.

So with the greatest of respect, it has always been before this Tribunal as an issue.

Clearly, my primary concern is to have limitation dealt with because it has the substantive advantages that I have identified. But the hybrid proposal is simply a recognition of the pragmatism that has been shown by the submissions before you today as to the interrelationship between the original proceedings and the new proceedings, and this is a suggested way round what is perceived to be a difficulty.

Obviously my primary submission is you don't need to worry about that because we can manage it. But if the concern is we might not be able to manage it, then this is a sensible way round that.

To be honest, it is slightly surprising to hear from my learned friend that she doesn't want to do this until they have had disclosure. It is their disclosure.

When one is starting proceedings out of time -- manifestly out of time, having delayed it two years from starting other proceedings -- it is slightly strange that full instructions were not taken from the clients to make sure that everyone knew that the primary limitation had expired, and then for one of the very real questions would be: what did you know or what should you have known, what enquiries did you take?

You might have expected that sort of information would be sought very early on when one is building a book of clients to work out why they would be starting new proceedings after the expiry of the limitation period.

I am sure, because they are a thoroughly reputable firm, that the claimants' solicitors told their clients that they needed to preserve all of the material that went to that issue because it was going to be subject to a litigation requirement to disclose.

So it is slightly strange to think that this has not been thought through and processed and addressed already. But come what may, the obligation is on them to plead their case and to prove it. The case law is clear to that effect and the directions

that we have sought enable the hybrid solution to be adopted if it commends itself to this Tribunal.

MR JUSTICE JACOBS: Okay.

MR BEAL: Sorry that was iterative, but there we are.

MR JUSTICE JACOBS: Right. Does anyone else want to say anything?

No. All right.

Well, I will consider my decision. I will not give an indication now -- at least to the extent that I have not already done so during the hearing -- of what my decision is going to be. I am going to reflect on the arguments. But I will give a decision, I hope, within a few days.

I think it is likely to be a decision on the application rather than putting off a decision effectively to the CMC. I think that you can assume that I will almost certainly give a decision one way or the other on whether there should be a preliminary issue or not.

If I decide that there should be no preliminary issue, then the CMC should be attended by everybody and it can be a joint CMC.

I appreciate that, Mr Beal, your case is a little bit behind and is not exactly in sync, but it is sufficiently there for a CMC and for directions to be given.

If I decide that there should be a preliminary issue then I am inclined to think that you shouldn't be there. I am inclined to think that you need not be there. But I am going to reflect on that, in that eventuality, and parties can address me as to whether or not it would be sensible for you to be there. But the result, I think, would be that if I said there was going to be a preliminary issue, I would be giving a series of directions on the parallel track, and then I have to deal with the original defendants in isolation effectively. That's what I am thinking at the moment in terms of how people should prepare.

I think it is likely -- I say it is likely -- that if there is to be a preliminary issue, I might say something about the pleadings or the further particulars if you like. If there is to be no preliminary issue, then I think the question of whether there should be some further particulars -- if so from which parties, whether it should be all of them or just the claimants, timing, whether it should come after disclosure and all the rest of it -- would probably be a matter which could be added to the agenda for the CMC.

That, I think, is an indication of the direction I am likely to take without actually telling you at the moment what I am going to say on whether there should be a preliminary issue.

So the upshot is if everyone can liaise with the CAT here, Sharon and Brian, about dates, because 13 February is not a good date. We can possibly do it the week before or sometime after 16 January, I would have thought -- I know there are sort of pleadings going on in your case and further particulars and everything else, but I would have thought the case is still ready enough for a CMC in January and that's not going to be such a critical thing that should move it to February. So I think we should try to do a CMC for two days, I think people are looking at.

If everyone is there -- even if everyone is there, I think it is two days. Everyone agree on that?

MS DEMETRIOU: Yes, Sir.

MR JUSTICE JACOBS: Assuming everyone is there.

MR BEAL: I have not had chance --

MR JUSTICE JACOBS: No but the best -- your reaction?

MR BEAL: It seems about right.

MR JUSTICE JACOBS: Yes.

Thank you very much for finishing within time. Thank you. I should say I found the written submissions and materials extremely well done, very helpful, thank you. Thank you very much indeed.

As I say, you will get a written reason in the next -- I am going to try -- I would say in the next few days, certainly by the end of next week, I would be very disappointed if you didn't know what the answer was.

(4.20 pm)

(The hearing concluded. Decision reserved)