IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1574/10/12/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Thursday 26th January 2023

Before:

The Honorable Mr Justice Smith
Michael Cutting
Tim Frazer
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Appellants

Bayerische Motoren Werke AG

V

Defendants

Competition and Markets Authority

A P P E A R AN C E S

Sarah Abram KC & Andrew McIntyre (Instructed by Norton Rose Fulbright) on behalf of Bayerische Motoren Werke AG

Brian Kennelly KC & Jason Pobjoy (Instructed by Freshfields) on behalf of Volkswagen AG

Tristan Jones & Richard Howell on behalf of the Competition Markets Authority

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Thursday, 26 January 2023

(2.00 pm)

MR JUSTICE MARCUS SMITH: Good afternoon. Before we begin, a few housekeeping matters.

Housekeeping

MR JUSTICE MARCUS SMITH: First of all, the usual warning. Some of you are joining us live stream on our website but, although an authorised transcript and recording are being made, no one else should be recording or transmitting or photographing these proceedings and a breach of that would be a serious contempt. I know everyone knows that but I nevertheless have to say it anyway.

Two things which are of more substance. First of all, although at the end of the day what is before us is a tricky piece of statutory construction, I thought I ought to let everyone know that I have been doing a little bit of pre-reading myself, because I think that the way a public international lawyer would see questions of extraterritoriality is a useful tool for understanding the statutory construction process. I am certainly not saying that it is a bright line that gives us the answer, but I do think that the way in which public international lawyers parse things in terms of classifying different sorts of extraterritorial conduct is a helpful tool to map out, as it were, the terrain of difficult questions that we have to address.

That is not to say that statutory construction is not at the end of the day what we are engaged in, what the Act says is what we will order, but obviously parliament would expect us to take into account the diktats of public international law. I think the problem here is there are no diktats it is just a source that I thought the parties ought to be aware I have in mind as sort of the front end of our thinking process. I wouldn't want anyone to be taken by surprise about that. I am sure you have it all well in mind, it features in the materials before us anyway.

Secondly, there is the question of the daily fine against BMW. I am deliberately raising this now because I don't want anyone to read anything into this. It is absolutely clear that we are going to be reserving our decision and we will try and get a decision out as fast as possible, but these things are difficult and all of our diaries are rather busy. It seems to us to be grotesquely unfair for BMW to be paying a fine whilst we sit there and work out what the answer is. So, subject to anything that the CMA has to say and without in any way indicating what we think of the case except that this is a difficult question, we think that the daily fine should be stayed from now until we hand down judgment.

What we do at that point will of course depend upon what the judgment is and I don't want to anticipate that either, but it did seem to us that is something we ought to at least raise for discussion now. We do it simply because if we were going to hand down a decision today, well we decided not to stay but to have an expedited hearing, BMW have paid their fines to date, that is what we intended, but we are not going to be handing down a decision today or tomorrow and that is our present thinking.

I don't know, Mr Jones, how far you want to push back on that. Obviously if you do we are delighted to hear from you.

MR JONES: I will take instructions and I won't say anything more until I have done that. In the short break this afternoon I am sure I can take instructions.

MR JUSTICE MARCUS SMITH: Thank you very much, Mr Jones. Subject to those points, Mr Kennelly over to you.

Submissions by Mr Kennelly

MR KENNELLY: May it please the Tribunal. I appear for the claimant in the judicial review with Mr Pobjoy, and Ms Abram KC and Mr McIntyre appear for the appellant in the appeal against penalty, BMW. For the CMA in the judicial review and the appeal my learned friends Mr Jones and Mr Howell.

By way of housekeeping you should have one hearing bundle in the judicial review and then the appeal two hearing bundles. Between us five volumes of authorities, four main volumes and then one recent --

MR JUSTICE MARCUS SMITH: (Inaudible) a number of authorities I must say.

MR KENNELLY: By way of the structure, I will open on extraterritoriality, then I will deal with the provisions of the Competition Act 1998 and I will deal with the CMA's case on the definition of person and the significance of the term "undertaking". I will address if I may the Tribunal's scenarios at that stage.

As for our ground 2, we note what the Tribunal said in your communication to us about the importance of focusing on the main issues of extraterritoriality, and in fact it may be our ground 2 is best addressed when we know the answer to ground 1, so we are happy to deal with that on the papers in order that the Tribunal and the parties have to time to focus on the main issues.

MR JUSTICE MARCUS SMITH: That is very helpful.

MR KENNELLY: Ms Abram will follow me and deal with the detailed background to the Competition Act and subsequent developments and she will address in detail the other factors which we say demonstrate in respect of section 26 of the Act, the presumption against extraterritoriality has not been rebutted, as well as her other separate grounds of appeal.

Before I go to the authorities the Tribunal has our basic case. In our law there is a powerful presumption against giving a state body extraterritorial powers. In this case, there is no express wording to give section 26 of the Act extraterritorial effect, and there is no basis to imply that effect.

The CMA's primary case is that there is no extraterritorial effect here at all. Their case is that "person" in section 26 includes undertaking and because the undertaking in question extends to the UK, the CMA can order anyone in that

undertaking anywhere in the world to search for and supply documents and pay criminal penalties.

If that does involve extraterritorial effect, say the CMA, that was parliament's intention.

Now, we say this is the clearest possible case of legislation with extraterritorial effect. The CMA's notice requires a German company to undertake extensive searches and provision of documents in Germany on pain of penalties. The notice ignores the German law restrictions on complying with the CMA's order and the CMA in fact admits that it has made this notice because it cannot get the documents from the company which is in the jurisdiction, in our case Volkswagen UK.

MR JUSTICE MARCUS SMITH: I think for the purposes of argument, we should all be assuming that is the case. In other words, that this is an exercise which will produce, if the CMA are right, documents which are not producible intraterritorially.

MR KENNELLY: Yes, indeed. I understand that to be common ground.

There are no safeguards, this is critical to the construction exercise, no safeguards before the CMA can exercise this purported power. But also, and equally relevant to the scope of the power, no effective means of enforcing it against a company wholly outside the UK.

We say it would be extraordinary for the CMA to have such a power and it would require the clearest legislative wording. But there is nothing close to that in section 26.

With that very brief introduction, I propose to turn to the case law and to begin with the KBR judgment in the Supreme Court.

MR JUSTICE MARCUS SMITH: That is very helpful, Mr Kennelly. Two points which I will just throw in there so that you can bear them in mind when you make your submissions. First of all, I think there is a danger in treating extraterritoriality as

a unitary concept. There are, as I think the examples that you are going to come to make clear, different sorts of extraterritoriality which we perhaps need to parse when we are considering the extraterritorial nature of the Act. For example, let's suppose BMW or VW UK have got an agent in Ruritania which holds their documents but to BMW UK's control and order. You might say that requiring the Ruritanian entity to produce those materials was extraterritorial, but I think you are accepting that in fact it is either not extraterritorial in the sense that you are using it, or if it is extraterritorial it is something that can be done. But that I think just shows the slipperiness of the concept. I hope everyone will bear in mind that when we use the label extraterritorial we ought to be extremely careful about what it is that we are suggesting can be done pursuant to that interpretation. Because some forms of extraterritoriality we are going to sit back and think we are supremely relaxed about it, other forms of extraterritorial enforcement we are going to be supremely unrelaxed about. My example just now is at one extreme where we are saying really that must be reducible. As the other extreme would be the CMA could do a dawn raid in Ruritania pursuant to, you know, powers of the Act -- well, that would require extraordinary clear language to entitle a regulator to, as it were, door step a foreign territory.

I know that is not being argued but it just goes to show that the label covers a multiple of ills.

The other point is simply this. I know that the CMA are placing a good deal of weight on the word "undertaking" and I completely understand why. But I don't understand the CMA to be saying that there aren't other ways in which they can achieve their end. In other words, I don't think Mr Jones is putting all his eggs in the undertaking basket. I think there are other ways in which you can get to the same end, even if we were to take a different view about what the significance of undertaking was.

MR JONES: Sir, yes, that is right. Most of my time will be dedicated to the

undertaking point, in part because it raises anyway extraterritorial issues, because, sir, as you pointed out those are nuanced in any event. But yes, to be clear we would as a fallback say if, for example, the Tribunal were to say that the provisions just don't apply to undertakings, we would nonetheless have a power to require a foreign person to produce documents held overseas. It is a more muscular, maybe one could call it ambitious version of the argument, but yes, to be clear we would rely on that as an alternative if we had to.

MR JUSTICE MARCUS SMITH: That was absolutely our understanding. I think the reason I raise it is because just in terms of at least my reasoning process, I am likely to start by trying to work out how the provision works without the "undertaking" word. In other words, to use the more usual case, understand what the limits of the provision are in that light, and then, from that baseline, wherever I end up, see how much heavy lifting the "undertaking" word has got to do.

Now, of course, Mr Kennelly, your point is it has to do an awful lot of lifting to get the CMA home. But it may be, and I think it is, Mr Jones' position that actually, no, what it does is it casts a light on how the provision would work in a non-undertaking situation. I just thought it would be helpful to put that out there so that you can see mentally speaking how we are looking at the question of construction.

MR KENNELLY: That is a very helpful indication of the Tribunal's thinking and we will bear that well in mind as we make the submissions on our account.

Some of those points of course will be touched upon in the cases that I am about to go to.

KBR in the Supreme Court is in the third volume of authorities behind tab 72. This will save us the trouble of reading much of the older authorities, not least because this judgment of the Supreme Court covers the earlier authorities in great detail.

It is, as I said, behind tab 72, and begins at page 2114 in the bottom right-hand

corner.

MR JUSTICE MARCUS SMITH: Yes. Thank you.

MR KENNELLY: If the Tribunal could go to paragraph 3 on page 2119. We see the parties, KBR Inc has UK subsidiaries, KBR UK, and KBR UK was under investigation by the SFO, and paragraph 4 the SFO issued a notice under section 2(3), and we will come to that, of the Criminal Justice Act 1987, issued it to KBR UK and KBR UK provided materials to the SFO but it responded that certain material wasn't held by it, it was held by KBR Inc in the US. The SFO in response to that insisted that the KBR Inc officers attend an interview in England. The SFO insisted, it says here, that it should be attended not merely by lawyers representing KBR Inc but by officers of that company and, accordingly, officers agreed to attend.

We see at paragraph 5 the seniority of the officers in question. Eileen Akerson was the executive vice president, general counsel and corporate secretary of the US company, and she is accompanied by Ms Symon, the Chief Compliance Officer. At that meeting Ms Akerson was handed a section 2(3) notice which was addressed to KBR Inc.

There is a symmetry of course with the present case in the sense that here also VW AG, the claimant in the JR, has a UK subsidiary, VW UK.

At paragraph 14 over the page, 2120, we see the terms of the provision section 2(3): "The Director may by notice in writing require the person under investigation or any other person to produce at such place as may be specified in the notice and…at such time as may be so specified, any specified documents which appear to the Director to relate to any matter relevant to the investigation."

Bearing in mind what the President just said about the word "person" and what that means before we get into undertaking, one sees right away that the words "the person or any other person", very broad language here, similar to the language used

in section 26 of the Competition Act.

Moving on in KBR, we see at paragraph 16, the section in the Criminal Justice Act that provided for a criminal penalty for failure to comply with the requirement imposed under section 2. And we see the analysis of extraterritorial effect from paragraph 21 on page 2122.

I will take this quite slowly because this is a full exposition of the earlier case law.

"The starting point [says Lord Lloyd-Jones] for consideration of the scope of section 2(3) is the presumption in domestic law in this jurisdiction that legislation is generally not intended to extraterritorial effect."

And he refers to a clear statement of this principle in the speech of Lord Bingham in Al-Skeini. And to quote just a part of that if the Tribunal skips down below H on the left-hand side, quoting from Bennion:

"Unless the contrary intention appears, parliament is taken to intend an Act to extend to each territory of the United Kingdom but not to any territory outside the United Kingdom unless the contrary intention appears and enactment applies to all persons and matters within the territory to which it extends but not to any other persons and matters."

Skipping down to the very bottom of that paragraph 21, Lord Bingham said the presumption is not in doubt:

"It appears [as Lord Walker said in Al Sabah] to have become stronger over the years."

Paragraph 22, again quoting from Lord Roger in Al-Skeini, halfway down that quotation Lord Roger said:

"It would usually be both objectionable in terms of international comity and futile in practice for parliament to assert its authority over the subjects of another sovereign who are not within the United Kingdom."

It is both contrary to national comity and futility in practice, to which I will return on the questions of the practicability of enforcement.

Then we go to paragraph 24 over the page:

"The presumption reflects in part [says Lord Lloyd-Jones] the requirements of international law that one state should not by the claim or exercise of jurisdiction infringe the sovereignty of another state in breach of rules of international law. Thus, for example, legislation requiring conduct in a foreign state which would be in breach of the laws of that state or otherwise inconsistent with the sovereign right of that state to regulate activities within its territory may well be a breach of international law. There is clearly a compelling rationale for the presumption in such cases."

Pausing there, the Tribunal has the evidence and the documentation from VW that here we say the notice does require conduct in Germany which would breach German law. I am not going to take you to it, CMA haven't disputed this, they just haven't engaged with it. Freshfields wrote a letter on 29 June specifying the various provisions of German data protection law and data telecommunications law and even German employment law which would be breached were we simply to do what we were told in the section 26 notice in Germany.

"However, the rationale and resulting scope for the presumption are wider than this. They are also rooted in the concept of comity."

I will skip down if I may to paragraph 25. None of what I am skipping is in dispute:

"The lack of precisely defined rules of international law [this is to the President's point a moment ago] as to the limits of legislative jurisdiction makes resort to the principle of comity as a basis of the presumption applied by courts in this jurisdiction all the more important. As a result, the presumption in domestic law is more extensive and reflects the usages of states acting out of mutual respect and no doubt the expectation of reciprocal advantage. Accordingly, it is not necessary in invoking

the presumption to demonstrate that the extraterritorial application of the legislation in issue would infringe the sovereignty of another state in violation of international law."

26:

"In the present case, not concerned with jurisdiction over the conduct abroad of a UK national or a UK registered company ..."

This again is an example given by the President a moment ago:

"... it was common ground between the parties that if the addressee had been a British registered company, section 23 would have authorised the service of a notice to produce documents held abroad by that company."

Similarly here, we don't dispute that if a notice addressed to VW UK and documents are held abroad by it or to its order, it could be required to produce them.

"Similarly [says Lord Lloyd-Jones], we are not concerned with the position of a foreign company which has a registered office or a fixed place of business in this jurisdiction or which carries on business here."

Pausing there, of course KBR Inc had a subsidiary in England as we saw. But the Supreme Court is careful to distinguish between KBR Inc and its subsidiary KBR UK. It is on that basis that the Supreme Court says:

"Notwithstanding the presence of the subsidiary, KBR Inc does not carry on business in the UK. The addressee of the notice KBR Inc has never carried on business in the UK or had a registered office or any other presence here."

The subsidiary doesn't count. To make that absolutely clear, the attendance by senior corporate officers at the meeting in London and the fact that Ms Akerson, the company secretary of the American company, was served with the notice on behalf of the company on that occasion does not alter this fact. Accordingly, the presumption against extraterritorial effect clearly does apply here.

I will come to this and it is relevant to some of the scenarios outlined by the Tribunal, service, personal jurisdiction is not determinative. The question is subject matter jurisdiction and I will come back to that.

So then in this case is the presumption rebutted by the language of the statute? Now, paragraph 28 we see the submissions by Sir James Eadie on behalf of the SFO. He noted, as he would, the broad words of section 2(3) and the same point is made by the CMA here.

In his submission, the words are deliberately wide:

"It confers a power exercisable against the person under investigation or any other person."

And the learned Lord Justice says halfway down:

"While the breadth of these provisions provides [between E and F] some support for the SFO's case, it is to be noted that when legislation is intended to extraterritorial effect parliament frequently makes express provision to that effect."

And he gives examples of express provision for extraterritorial effect, and where that was intended by parliament.

At paragraph 29 he says, first sentence:

"An intention on the part of parliament to give extraterritorial effect to a statutory provision may also be implied from the scheme, context and subject matter of the legislation."

And over the page he examines the circumstances, the factors that are relevant to implying that kind of effect. And just below B, it is C and the practicability of enforcement. He makes the point made by Lord Lloyd-Jones, impracticality of enforcement is a particularly relevant consideration when determining whether a statutory provision has extraterritorial scope.

Now, when he was discussing the impracticality of the judgment in that part of the

judgment he was talking about the earlier provisions higher on that page which deal with the warrant to seize documents at the premises. It is in that context he refers to impracticality.

Of course, in our case the CMA appears to accept that it can't enforce -- he is talking about a warrant in this part of the judgment and that is why he makes the point about impracticality, but in our case on this question of whether enforcement against a Germany company is practicable, the CMA appears to accept that it cannot enforce section 26 against a legal person outside the jurisdiction. It certainly suggests and it says in its detailed grounds of resistance at paragraph 58:

"Even if only enforceable domestically it is likely to provide an incentive to comply."

The CMA hasn't put forward any case to you as to how it could practically enforce a section 26 notice against a company wholly outside the jurisdiction in Germany.

They say even if it could be done domestically that may provide an incentive to comply.

MR JUSTICE MARCUS SMITH: Can I just unpack that a little bit because the penalty for failure to comply with a section 26 notice is as I understand it a civil penalty.

MR KENNELLY: Yes.

MR JUSTICE MARCUS SMITH: So by domestic enforcement, presumably you could achieve a form of service out? I mean, let's assume you could. Then you would enforce domestically against BMW AG or VW AG, depending on who is being enforced. It would be domestic but that would be a way of getting the foreign entity before the UK courts.

MR KENNELLY: It would be an administrative sanction, and I'll have to discuss this but it certainly wouldn't have been enforceable under the old jurisdiction judgments regulation. Query whether it could be enforced. It is not an ordinary civil or

commercial debt.

MR JUSTICE MARCUS SMITH: No.

MR KENNELLY: Whether it could be enforced as a sovereign Act is a very different thing.

MR JUSTICE MARCUS SMITH: Well, there is some law on this and Mr Justice Andrew Baker I think had a case which went up to the Court of Appeal at least on the extent to which foreign tax law I think was enforceable here --

MR KENNELLY: Yes.

MR JUSTICE MARCUS SMITH: -- and with a civil angle. But I think what you are saying is the analogy that I am giving of civil proceedings requires a degree of testing --

MR KENNELLY: Yes.

MR JUSTICE MARCUS SMITH: -- not only under the normal civil rules of service out, but also because it is not, as you say, a vanilla civil debt that you are enforcing, it is something which on any view is a regulatory inducement to comply.

MR KENNELLY: It's a penalty. That is the concern. Again I will check but certainly I was taught that foreign penalties weren't normally enforceable through civil proceedings in English courts, and it may well be the same in Germany.

MR JUSTICE MARCUS SMITH: That is true. I suppose my point is that are you putting at zero value the fact that the penalty in an intra-UK situation would be enforceable civilly rather than criminally?

MR KENNELLY: Yes, if the person has no establishment and no assets in this jurisdiction, then there is no enforcement at all in substance.

MR JUSTICE MARCUS SMITH: Thank you.

MR KENNELLY: So, yes, sir, I would put it at zero.

It may have some moral weight but it is not effective enforcement in any real sense

of the term.

More importantly, when section 26 was enacted, it was a criminal penalty and you will see that. That is crucial for understanding what parliament intended when section 26 was enacted. It was plainly a criminal penalty that applied if section 26 was breached. That is very important for the purposes of the public international law implications for the presumption against extraterritorial effect in this case.

MR JUSTICE MARCUS SMITH: I am sure you will be coming to this if there is anything you can say about it, but is there material that assists us in understanding why the change was made? Because that might cast some light both on what parliament thought before the change was made and what it thought the change was achieving.

MR KENNELLY: There is very little before you. We will hear from Mr Jones on that. The CMA of course has a duty of candour in the judicial review. To the extent they have documents or information which would assist us, I am sure they will be forthcoming. We will hear what he says about that. But we have no more than you have seen, which is the change is made ostensibly for reasons of more effective enforcement.

MR JUSTICE MARCUS SMITH: To be clear, Mr Jones, I don't think we are very interested in communications that don't cross the line. When one is construing an Act it is the public documentation that we are interested in. Frankly, if the CMA had got a whole bevy of communications saying, this is what we understand it to be, it is not going to help you. So we are interested in materials that go to the construction of a statute. So I am not sure how far the duty of candour takes us in this instance. I am sure you would be candid anyway --

MR JONES: I was wondering after my learned friend's submission what more we can do. Those documents my Lord has just referred to are actually in the bundles

and I will take you to them tomorrow.

MR JUSTICE MARCUS SMITH: Thank you.

MR KENNELLY: Moving on then to the question of circumstance in which one can imply extraterritorial effect. We have looked at impracticability of enforcement and that is a major point in favour of our submission in my case. Below that, an important observation by Lord Lloyd-Jones, this is between C and D:

"... while the intention behind the provision in a statute needs to be ascertained by looking at the statute as a whole it does not follow that all provisions in a statute have. the same territorial ambit."

That may well be relevant when we come to look at the different provisions in the Competition Act itself, because the Tribunal anticipates my answer to the CMA's argument about the meaning of substantial prohibitions and enforcement of those which they say mirror exactly the investigation powers in section 26, and I will address that when I come to the Act.

Paragraph 30 then, looking down to G and H, Lord Lloyd-Jones distinguishes the position of a UK company and a UK incorporated legal person:

"... it is questionable whether in the hypothetical situation the legislation is given any material extraterritorial effect where there is a UK company subject to the order. A UK company would be required to produce here a document which holds overseas. Secondly, as we have seen, the presumption against extraterritorial effect, if it applies at all, applies with much less force to legislation governing the conduct abroad of a UK company, as postulated in the example."

That echoes what we were discussing a moment ago.

Notice 31, over the page, and A:

"There is, however, greater force in a further submission on behalf of the SFO. It is clear that an intention to give a statute extraterritorial effect may be implied if the

purpose of the legislation could not effectively be achieved without such effect."

Citing Lord Sumption in the Cox case. We have a very similar submission from the CMA in this case.

Sir James Eadie for the SFO went on to submit that:

"... the territorial scope of 2(3) had to be considered in the light of the public interest in the effective investigation of serious fraud ..."

And he made the point that serious fraud is often international, has an international reach, which is why Sir James Eadie argued for this broader scope for section 2(3).

Skipping down to D on the right-hand side, Sir James submitted and made submissions about the need for effective investigation of company fraud informing the territorial scope of section 213 of the Insolvency Act. He relied on that in respect of complex frauds investigated by the SFO using powers under section 2(3).

Now, the CMA, as I said, makes the very same submission about the need for effective enforcement, the need to be able to order foreign companies to produce documents in foreign countries. But, and I will come back to this, the CMA admits that it has enforced UK competition law without any problem that they have identified for the past 24 years without ever needing to use section 26 against a company outside the jurisdiction. They have not shown any need, any gap in the effectual enforcement of UK competition law in 24 years, which would explain why, without that power, there could be no effectual enforcement of the investigation powers.

MR JUSTICE MARCUS SMITH: That point would have more force I suspect if we hadn't exited the EU. I mean, prior to the UK's exit, there was a means of enforcement through the EU Convention and so to the extent that there was an extraterritorial question within the European Union, that would be resolvable in that way.

So it may be that there is no problem point is to be read in that light. I raise it

because what you say is on the face of it a powerful point but 2016 isn't that long ago.

MR KENNELLY: Indeed. But to that point, sir, the Competition Act is enacted in 1998. These powers to which the President refers, powers of cooperation, were created under the regulation 1/2003. There was a significant gap between those two dates, during which, as far as we can see, if there were problems they would have arisen then, the CMA would have complained about them then. They were enforcing UK competition law, they didn't have the EU cooperation powers under the regulation. There is no evidence, no suggestion of any inability effectually to achieve the purpose of the legislation. That is my first point.

Separately, the fact that the United Kingdom through the council presumably negotiated, and again Mr Jones is better placed than me to speak to this, negotiated for these powers of cooperation and continues to do so post Brexit -- Ms Abram will deal with this in more detail -- strongly suggests they don't have in parallel this mandatory power simply to order a foreigner anywhere in the world to produce documents anywhere in the world on pain of penalties. Ms Abram will deal with that in more detail.

That is why we say, if you go, please, to paragraph 39 -- it is paragraph 39 now, on page 2130. We draw an analogy between the analysis of the Supreme Court in KBR, because here the Supreme Court is looking at the subsequent developments, the efforts that the United Kingdom made after section 2(3) of the Criminal Justice Act 1987 was enacted to create mechanisms whereby it could obtain information from foreign persons and even though this is all subsequent to the legislation under examination, it is relevant to the construction of the provision because it shows what the UK believed was necessary to obtain and casts light on the scope of what the UK had at the time. And that was addressed all the way

through to paragraph 45 and page 2131.

Critically, the Supreme Court draws attention to what was important in its international system of cooperation were the safeguards and protections enacted by the legislation and this was all crucial to its compliance with public international law.

The regulation of the uses to which documentary evidence might be put and the provision for its return, these provisions are fundamental to the mutual respect and comity on which the system was founded. All international cooperation mechanisms for the exchange of materials rest on similar foundations.

Then this, very bottom of page 2131:

"It is to my mind inherently improbable that parliament should have refined this machinery as it did while intending to leave in place a parallel system for obtaining evidence from abroad which could operate on the unilateral demand of the SFO without any recourse to courts or authorities of the state where the evidence was located and without the protection of any of the safeguards put in place under the scheme of mutual legal assistance."

We rely on that squarely as an answer to the submissions which the CMA makes about their suggestion, that section 26 has had this scope, breadth ever since 1998.

Then we come to the Serious Organised Crime Agency v Perry judgment, another judgment of the Supreme Court. The Tribunal will have well in mind we are dealing with cases, recent authority of the highest level on these issues. The facts of Perry are paragraph 47. The question was the scope of a civil recovery order under the Proceeds of Crime Act and disclosure orders that could be made under section 357 of 2002 Act against -- I am looking between D and E:

"... disclosure orders made against Mr Perry, his wife and two daughters, none of whom was resident or domiciled in the jurisdiction. The notices were given to Perry and his daughters by letter addressed to his house in London."

So they did have property here, that is more connected to the United Kingdom than VW AG. Then 48 between F and G:

"Section 357 empowered the judge to make a disclosure order if, in relation to Part 5 property specified in the application for the order is subject to a civil recovery investigation and the order is sought for the purposes of the investigation."

And a disclosure order authorises an appropriate officer to give any person the appropriate officer considers has relevant information. So any person may be required to give that information.

49, Lord Lloyd-Jones notes the similarity between the provisions governing disclosure orders under the 2002 Serious Organised Crime Act and the production order under section 2(3) of the 87 Act. Both confer a power to make an order in respect of any person, like section 26 in the Competition Act, and like the Competition Act section 26 when it was enacted both provide for criminal sanctions, over the page, for failure to comply with the order. And the Supreme Court in Perry held unanimously that section 357 did not authorise the imposition of a disclosure order on persons out of the jurisdiction, notwithstanding the important public interest in combating international fraud. And Lord Phillips, the President of the Supreme Court then, dealt with the point, as is said here, in trenchant terms:

"No authority is required under English law for a person to request information from another person anywhere in the world but section 357 authorises orders for requests for information with which the recipient is obliged to comply, subject to penal sanction, and subject to limited exemptions, it is contrary to international law for country A to purport to make criminal conduct in country B committed by persons who are not citizens of country A. And section 357 does not simply make prescribed conduct a criminal offence, it confers on a UK public authority the power to impose on persons positive obligations to provide information subject to criminal sanction in

the event of non-compliance."

Just like section 26 when it was enacted:

"To confer such authority in respect of persons outside the jurisdiction would be a particularly startling breach of international law."

For that reason alone Lord Phillips considered it implicit that the authority given under section 357 can only be exercised in respect of persons who are within the jurisdiction.

To the CMA's point that it is vital that they have this power because of the important public interest involved in combating anti-competitive behaviour, we see paragraph 52. The similarity between section 357 and 2(3) of the 87 Act, with which we are concerned, is striking and, as Lord Justice Gross accepted in the divisional court, the public interest considerations under the Serious Fraud Act are very similar to those under the 1987 Act. There is no doubt that the most serious public interests were at stake concerning the obvious risk of international fraud and wrong-doers outside the jurisdiction. Notwithstanding that important public interest, the Supreme Court in both cases gave the provision in question, the words "any person", territorial effect only.

If you go then please, members of the Tribunal, to paragraph 54. This is also relevant to this question of what is the relevance of notice where an officer of the company is in the United Kingdom. I touched on this at the beginning of the judgment:

"To my mind [this is above E] the fact that in the present case the July notice was served on Ms Akerson when she was induced to travel to the UK to attend a meeting with the SFO is not a material distinction. The intended recipient of the notice was KBR Inc and it remains the case that the SFO was seeking disclosure of documents situated abroad from a company incorporated in the United States which has no

fixed place of business in the United Kingdom and did not carry on business here."

Notwithstanding the Tribunal has well in mind the fact that KBR Inc had a subsidiary, KBR UK, in the jurisdiction.

Then we come to other statutory provisions, and I will deal with this more briefly, from paragraph 58. The Supreme Court referred to the Jimenez judgment in the Court of Appeal and the CMA rely on this in their skeleton.

If you go to paragraph 58(c), this was a power in HMRC to issue a notice requiring a UK taxpayer resident outside the UK to provide information. The Court of Appeal found that HMRC had that power to issue a notice to a UK taxpayer who was outside the United Kingdom. But Lord Lloyd-Jones notes important factors which influence the Court of Appeal's decision and he addresses those between D and E. He says:

"It is clear that in coming to this conclusion Lord Justice Patten was strongly influenced by two further factors, neither of which appears in the present case. The first of these is that the powers conferred are expressly limited for the purpose of checking the taxpayer's tax position and therefore meant the powers were necessarily and only exercisable in relation to someone who is or might be liable for tax in the UK and to that extent had an identifiable relationship with the United Kingdom, and a UK taxpayer is an important jurisdictional connection, I submit, with the United Kingdom. Paragraph 1 could only be given to someone who was or might be a UK taxpayer. It was that status rather than his place of residence which was the key to the availability and operation of that power. Secondly, in Jimenez non-compliance with a notice was not a criminal offence and so the presumption that a statute should not be construed as making conduct abroad a criminal offence had no application."

Ours is distinguished from that because when it was enacted it was a criminal offence to breach section 26.

To 59, he distinguishes section 2(3) of the Criminal Justice Act, and then paragraph 60 he deals with the cases of Seagull and Paramount. Again, I will move over this quickly and we will see what the CMA says about them, but Seagull concerned the winding up of a UK company. It wasn't extraterritorial at all in that case. There is no need to go to it. And a non-resident was made subject to an order, but the non-resident was an officer of that company and the power in the Seagull case applied to officers and former officers of the company. The UK company has been wound up. It wasn't any person, that is an important distinction, it was limited only to officers, former officers of the company, a much more limited provision than section 26.

In Paramount, again, when an order was made to a person outside the jurisdiction there were important safeguards which didn't exist in KBR or here. The court's leave was required before the order could be made.

MR JUSTICE MARCUS SMITH: I think you are making sort of two points and I just want to unpack them to make sure I have the significance of your submissions clear in my own mind.

One is the existence or otherwise of safeguards. So, for example, I don't think we need to decide whether the provision of these documents would result in an infringement of German law or not. The fact is that the regime doesn't require, at least on the face of it, the CMA to enquire into whether there is a breach of the law or not and that, it seems to me, is a sufficiently powerful point to bear in mind.

We really don't want to go into what the German GDPR says or doesn't say.

The fact is, it is not something which exists as a hoop that requires the CMA to jump through. So that is one point and I think you are placing some force on that.

The other thing is this is not a court ordered action. It is not like, for instance, the winding up of a foreign entity where whoever wants the order comes to court,

satisfies the court that the order should be made and does so whatever the requirements are. This is an administrative act done without reference to the court at all and I wonder to what extent you drew a distinction between, as it were, judicial acts that are extraterritorial and non-judicial acts, while obviously a very well respected and capable regulator, but not through the prism of a court order.

MR KENNELLY: I do draw that distinction. I do draw it. And I draw it in the context of safeguards in particular for the reasons that the President makes. In fact, I was just about to take you to that very point in KBR, so timing is perfect.

If you go, please, to paragraph 65 of KBR and really at the very end of that paragraph on page 2138, this is another similarity between section 2(3) of the Criminal Justice Act and section 26 of the Competition Act. If you look just above B:

"... section 2(3) confers a power not on a court but on the SFO. As a result, there is no scope here for limiting the operation of a broad interpretation or safeguarding against exorbitant claims of jurisdiction by the exercise of judicial discretion."

I pray that squarely in aid for the purposes of my submissions. I say it is exactly the same problem here with the CMA's arguments for the scope of section 26.

MR JUSTICE MARCUS SMITH: It is probably not a great parallel but thinking about disclosure requirements in worldwide freezers. Obviously the point of distinction is that it is a private party seeking the relief, but we all know there are a whole series of provisions in the standard form freezer order which ensure that there is a degree of recognition of the interests of foreign jurisdictions. And so although the power exists and is fairly frequently exercised, it is done through the prism of the court and the court will make an order on certain terms which are carefully considered, both because a freezer is intrinsically intrusive but particularly so when it is worldwide.

MR KENNELLY: Indeed. We will see -- you will be relieved to know I am taking you only to one more authority, which is the Gorbachev case, and you will see echoes of

that in that case where there was the consideration of both the scope of the power but also recognition of the fact that there were court safeguards, court ordered safeguards involved.

To be clear, sir, it is important to distinguish, and we will see this in Gorbachev, between the power to do something and then the discretion as to whether it should be exercised or not. And we are concerned here with the power. It is not, I am not saying that the CMA has the power but they have to exercise it in a prudent way; we know from the cases that in deciding whether the power exists at all for the purposes of public international law, it is relevant to ask whether there are safeguards involved before the power exists. This is relevant to the scope of the power, not to how the discretion should be exercised.

MR JUSTICE MARCUS SMITH: Yes. Because I mean I may be anticipating a point that Mr Jones will make but one could say that the way of importing controls over the exercise of the power but not its scope is by way of judicial review, the very process that VW are engaging in. So you could say, look, there is a power but you can only exercise it if certain hurdles yet to be articulated are met. But your position is beyond that, you are saying, no, those safeguards might very well exist if the power were widely enough drawn but it isn't drawn widely enough for that even to be a relevant question. In other words, your position is one of vires not one of discretion.

MR KENNELLY: Precisely so, yes. And one can see why, because the scope of the power can depending on the ability of an individual person ex post the resources and the ability to come forward and challenge it. That is why the cases tell us, and we see this in KBR and we will see it in Gorbachev, that in asking about the vires one asks whether safeguards are there before power is to be exercised at all.

Moving on then to Gorbachev, it is in the third volume of authorities behind tab 74.

I will begin if I may at page 2164. Paragraphs 1 and 2 tell us the issue in the appeal, whether an order for disclosure of documents, the judgment of Lord Justice Males, can be made against a third party outside England and Wales pursuant to section 34 of the Senior Courts Act and CPR 31.17.

And the claimant was Mr Alexander Gorbachev. He wants to obtain third party disclosure of documents held electronically by an English firm of solicitors but the documents belonged to trustees which were Cypriot companies. We see they were Cypriot companies at paragraph 3. So documents are held in England by an English firm of solicitors but the documents are owned and they are the documents of Cypriot companies.

We see the definition in question at paragraph 12 on page 2166. Again, in the quoted passage the High Court has the power to order a person who is not a party to the proceedings et cetera et cetera to produce documents. So again a person, the same broad language we have seen in KBR, in Perry and in section 26.

Then, paragraph 20, page 2168, there is a reference to the gateway that is being used to get service out of the jurisdiction. The gateway is the claim is being made under an enactment. We don't need to get into whether an application for third party disclosure was a claim or not and that is not material for our purposes.

The bit that is material for us is the analysis of territoriality and that begins at page 2170. Much as this we have already seen so I will skip over it if I may and go to page 2180 and paragraph 56 under the heading "evidence and documents". Lord Justice Males says:

"One area which has proved particularly sensitive has been attempts by one state to compel evidence or disclosure of documents from persons beyond the jurisdiction of that state. Where a witness is within the jurisdiction, their attendance at trial can be compelled, their documents can be obtained by means of a subpoena requiring them

either to testify at trial or to produce documents. But a subpoena cannot be issued against a witness out of the jurisdiction ... The issue of subpoena [skipping down a line] involving as it does the exercise of compulsory state power was described by Hoffmann J in Mackinnon v Donaldson, Lufkin and Jenrette Securities Corpn as 'an exercise of sovereign authority to require citizens and foreigners within the jurisdiction to assist in the administration of justice'."

In the same case Mr Justice Hoffman referred to objections, ironically by the United Kingdom, to orders made by foreign courts, in particular the United States, requiring British companies to produce documents situated outside the US and concerned with transactions taking place abroad. In fact, the UK went so far as to introduce legislation to assist British companies in resisting those orders that required them to do things in England in respect of documents in England, orders from US authorities. The legislation in question is quoted over the page. I am not going to take to that but I will go down if I may to paragraph 58:

As counsel submitted, "the critical concern here is the location of the documents in question. Neither the 1980 Act nor the objections to which Hoffman J referred to were directed to documents held in the United States, even by a British Company. Indeed, Hoffmann J stated the applicable principle as being that 'a state should refrain from demanding obedience to its sovereign authority by foreigners in respect of their conduct outside the jurisdiction. Their conduct within the jurisdiction is another matter. The long-standing practice of states [and I rely on this] has been to deal with the problem of evidence and documents outside of their jurisdiction by means of letters of request whereby a court in which proceedings are taking place will request a court in the jurisdiction where a witness is located to require the witness to answer questions or to produce documents."

And:

"Ms Justice Cockerill said in Nix that was the proper courteous respectful method of obtaining evidence within a foreign jurisdiction from a foreign party, which is a very sensitive topic in many jurisdictions."

Now, letters of request may not have been available here to the CMA, although the CMA will address you on other routes to obtaining documents and we will hear what they say, but the principle remains good, that the appropriate course is to seek the cooperation of the foreign authority in obtaining documents controlled by persons subject to that authority's sovereign power. To do otherwise is to trespass upon their sovereign power.

We see that in more detail in the Mackinnon judgment, which is summarised in paragraph 65 over the page, 2182.

Orders for production of documents abroad. In *Mackinnon v. Donaldson* (inaudible) the claimant sought an order under section 7 of the Bankers' Books Evidence Act 1879 requiring an American bank with a branch in London to produce books and papers held at its head office in New York. The bank could be served at the London branch, there is no issues about jurisdiction over the bank, and Mr Justice Hoffman noted there had been no London branch, the only way an order could be obtained by way of production was by way of letters of request. And over the page, and we will come back to this when we look at the scenarios sent to us by the Tribunal, the learned judge held that although the English court had personal jurisdiction over the bank, it did not have subject matter jurisdiction. There is no need to go back to Mackinnon for this but in that judgment Mr Justice Hoffman defined personal jurisdiction, there, is no dispute about the definition, as who can be brought before the court; subject matter jurisdiction is to what extent can the court claim to regulate the conduct of that person. They are not the same thing.

The learned judge said:

"The content of the subpoena and order is to require the production by a non-party of documents outside the jurisdiction concerning business which it has transacted outside the jurisdiction. In principle and authority it seems to me that the court should not, save in exceptional circumstances, impose such a requirement upon a foreigner, and, in particular, upon a foreign bank. The principle is that a state should refrain from demanding obedience to its sovereign authority by foreigners in respect of their conduct outside the jurisdiction, notwithstanding the fact the bank had been properly served in England."

If you skip down please to the next judgment referred to in Gorbachev, it is the Tucker case. Paragraph 69. In Tucker an application was made under section 25 of the Bankruptcy Act against a British subject resident in Belgium. In that case, the debtor was a British subject, the British resident in Belgium was the debtor's brother, and an order was sought against him, although he was resident in Belgium, to give information respecting the debtor, his dealings or his property.

You see at paragraph 70 it was held that the section did not assert jurisdiction over persons resident abroad, even, as we see here, UK nationals.

If you go to the first sentence of paragraph 71, Lord Justice Dillon referred to the established procedures for obtaining evidence from abroad by letters of request or by obtaining evidence on commission.

If you go to 72 you see the points of significance that Lord Justice Males in Gorbachev drew from this authority. First, the effect of the principle of territoriality was to limit the scope of the section as a matter of jurisdiction, and not merely to guide or even constraint the exercise of the court's discretion. The point I have been exchanging with the President a moment ago.

Second, the background was the absence of any power to issue a subpoena to a person abroad to give evidence or produce documents in English proceedings

meant it was unlikely to have been parliament's intention to create such a power by general words. I make the very same submission in relation to section 26.

And third, the availability of an alternative route to obtain such evidence or documents in the foreign court militated against the implication of such a power.

And finally, and I rely on this, the difficulty enforcing any order was also a material factor against any such implication.

73, there is a reference to Seagull. I mentioned that and I have described its limiting factor in KBR. Then Masri in 74, the question there was whether a rule of the CPR had extraterritorial effect to require the examination of an officer of a debtor company resident and domiciled out of the jurisdiction. Here the judgment debtor company was a British company. The question was could the officer be ordered to be examined when he was resident and domiciled out of the jurisdiction.

If you skip down, please, to the bottom to 75, in Masri, notwithstanding the fact that it was an officer of a British company, the presumption against extraterritoriality still applied when considering the scope or the rule actually made. And Lord Mance held there was nothing in CPR part 71 to enable the court to summon a third party witness, even an officer of the judgment debtor, who might have information about the judgment debtor's assets. In reaching that conclusion he had regard to Tucker and Seagull, but said Seagull was concerned with insolvency litigation in public interest in contrast of purely private civil litigation.

Now, skip ahead please to the final analysis of Lord Justice Males, that begins on page 2187. I will take you if I may to paragraph 82. Having surveyed those authorities, Lord Justice Males says:

"In a typical case where it is sought to obtain documents held abroad from a person abroad [ie our case] I have no doubt that the principle of territoriality has an important role in considering the scope of section 34."

The cases have consistently held that apparently wide and general words enabling documents obtained should be interpreted subject to that principle. The existence of the letter of request procedure and limitations to which it is subject will be circumvented in wide-ranging disclosure. However, third parties could be too readily obtained. It would infringe international comity in ways which would be objectionable to foreign states just as United Kingdom has objected when other states have sought to obtain documents here without using proper procedures. Even then limited documents can be obtained through that procedure. Then this, on which I rely:

"Such orders could not readily be enforced unless the persons against whom they were made chose to come within the jurisdiction."

83:

"However, the critical fact in the present case [in Gorbachev] is that the documents whose production is sought are located in England."

Skipping down to the bottom of 83:

"As the first instance judge put it, the fact that the documents were in England was not the result of chance. They were supplied by the foreigner to a person in England for a particular reason."

84:

"In such circumstances the principle of territoriality has little or no application. To require the production of documents located within the jurisdiction does not involve any illegitimate interference with the sovereignty of the state where the owners of the documents, i.e. the Trustees, are located. To the extent that there is any interference at all, arising from the fact that any order to produce the documents will be made against the Trustees personally, that interference is legitimate. By sending the documents to England, the Trustees have made the documents subject to the jurisdiction of the English court and, to the extent necessary, can be regarded as

having accepted the risk that, like any other documents within the jurisdiction they may be subject to production to the courts of England and Wales."

85, skipping down between F and G:

"In all the cases in which it has been necessary to consider whether an order to produce documents can be made against a person abroad, the documents themselves have been abroad."

And in those circumstances it is not difficult to see why careful consideration needed to be given to the principle of territoriality in the context of statutory interpretation.

86:

"Where the documents are here the position is very different. It is in accordance with the purpose of the legislation that documents held by third parties which are within the jurisdiction should be available to ensure a just outcome litigation and regardless of the location of the third parties themselves."

It says such documents will either have been created here or will have been sent here by a third party against whom the order is sought.

That is all I need to take you to in Gorbachev.

With those principles in mind, members of the Tribunal, I would ask you to turn to the question of statutory construction in our case.

Before we go to the text of the Competition Act itself I would ask you very briefly to look at one piece of pre-legislative material. Ms Abram will show you this in more detail. Just one document and it is the 1996 consultation document. It is in the BMW hearing bundle, volume 1, tab 16.

You see the very beginning of that document at page 136, it is the consultation document which preceded the Competition Act, issued by the Department of Trade and Industry, tackling cartels and the abuse of market power. The question of jurisdiction is addressed on page 161 on the bottom right-hand side. It is also 545.

161 is the page I am looking at and it is paragraph 2.48.

MR JUSTICE MARCUS SMITH: Yes. Thank you.

MR KENNELLY: Now this document was relied on by the CMA in its detailed grounds of resistance but it wasn't quoted in full. We see at the beginning the government considered in a white paper the appropriate jurisdictional reach for the UK prohibition. The government acknowledged that while the proposed new regime involved a prohibition drawn in terms of effects, because it was echoing the language in article 85EC as was, that did not mean that the jurisdiction should necessarily depart from the principle of territoriality and follow the so-called effects doctrine where jurisdiction is claimed on the basis of economics effects felt in a state resulting from outside that state's territory. It recognised, however, that place where an agreement is made is not always the determining factor.

Now the sentence upon which the CMA relies, they cite in their skeleton, in the DGR, the government believe therefore the prohibition should apply not only to agreements made in the UK but also to those implemented within the UK.

We saw that and we will see it in section 2(3) of the Act. But then the next sentence is highly material to the question of jurisdiction, because the document went on to say enforcement of this prohibition will be against businesses established in the UK or against UK assets of businesses which engaged in a prohibited agreement implemented in the UK.

So it is only the enforcement for foreigners with establishments in the UK or with assets in the UK, assets of the businesses engaged in the prohibited agreement. This sentence wasn't mentioned by the CMA but we are grateful for them drawing our attention to the document and I will come back to this sentence when we come to the construction of the substantive prohibitions in the Act.

So to the Act we now --

MR FRAZER: Mr Kennelly it would be interesting, I hope you are going to come to this, as to how you are going to interpret the word "businesses" in the particular case, given the importance placed by the CMA on the word "undertakings".

MR KENNELLY: I will indeed come to that, Mr Frazer, when we come to the prohibition.

If you turn to the prohibition in authorities bundle 1 and tab 13, the Competition Act which is in force, currently in force. We will start with the substantive prohibition. The CMA obviously relies on this very heavily. They say that its scope is mirrored in section 26. We say that is wrong, but even as to the scope of the substantive prohibition the substantive enforcement provisions are far less clear than the CMA submits in its detailed grounds of resistance.

Section 2, it uses obviously the term "undertaking" and it is common ground this is an economic concept which does not correspond to any legal person. It serves, among other things, to delineate the scope of liability for a substantive infringement of the chapter 1 prohibition. We see at section 2(3), over the page, a limitation that the chapter 1 prohibition applies only if the agreement decision or practice is or is intended to be implemented in the United Kingdom.

Now, this shows that a chapter 1 prohibition can catch agreements between undertakings outside the United Kingdom but only where those agreements are implemented in the United Kingdom. This is not, in our submission, true extraterritorial effect because the person, the undertaking, is doing something in the United Kingdom. Its agreement is being implemented here.

To the slippery nature of extraterritoriality and the President's observation, if it is extraterritorial, it has been carefully limited by parliament. It has very carefully delineated jurisdictional requirements. It must effect trade in the UK, the agreement, it must be have the object or effect of distorting competition in the UK and, critically,

for an agreement it must be implemented or intended to be implemented in the United Kingdom. These are jurisdictional limitations.

Here, we are not concerned with enforcement of the prohibition, this is the scope of the prohibition itself. For enforcement we need to go to page 107. We have in mind that suggestion in the consultation paper that enforcement was not intended to be made against persons outside of the UK unless they had establishments or assets in the jurisdiction. So it appears that the enforcement provisions are more limited in scope than the prohibition itself.

We see why that is by reference to the authorities that we have been looking at. If we go to section 32 and directions in relation to agreements, it says that:

"If the CMA has made a decision that an agreement infringes the Chapter I prohibition, it may give such person or persons appropriate directions."

Now, in our submission that needs to be a legal person because if the direction is disobeyed it needs to be enforced against a legal person. But even if person there includes undertaking by reference to section 59, only those parts of the undertaking that are in the United Kingdom can be directed to do anything. It is unlikely, we submit, that parliament intended persons outside the UK to be ordered to do something when there is no way to enforce such a direction.

It is possible to reconcile that -- this maybe goes to the point Mr Frazer made about businesses -- with the scope of section 2(3) because it is important first of all that the prohibition catches undertakings, but secondly, when penalties are to be imposed even if you can only impose a penalty on a person in the United Kingdom, that penalty needs to reflect the worldwide turnover of the undertaking as a whole in order for the penalty to have determined effect.

Now, paragraph 36 deals with penalties. It says:

"On making a decision that an agreement has infringed the chapter 1 prohibition the

CMA may require an undertaking to pay a penalty in respect of the infringement."

Again, the penalty is by reference to an undertaking. That is important to ensure that the full undertaking, the worldwide -- it may be worldwide -- the full undertaking with its full territorial reach is subject to the penalty but the person who pays it, the person against whom it is enforced, has to be a legal person. That is common ground. It is in the Crest judgment. I am not going to take you to, it in the authorities bundle behind tab 46.

But there is nothing to suggest in this legislation that the penalties can be imposed on foreign persons, still less foreign persons with no assets or establishment in the United Kingdom. If this is a curious submission, those of us trained in EU law sometimes assume it is an exact mirror error of the EU position. True it is the language of the chapter 1 prohibition mirrors the language of article 85 as was, but it is not true, as I will explain in more detail, there is an exact read across from EU legislation. More importantly, there is nothing from the CMA to show that penalties were intended to be imposed on foreigners, even those with no establishments and no assets outside the jurisdiction.

In fact the legislative background you have seen shows that parliament never intended to enforce even substantive penalties against foreign parties unless they have establishments or assets in the UK. That is not surprising. It reflects the United Kingdom's own strong belief in resisting extraterritorial effects.

If it is submitted that the chapter 1 prohibition wouldn't work unless the CMA could impose penalties on foreigners with no assets or establishments in the jurisdiction, that is undermined we say by the fact that parliament stuck in the DTI in that consultation document, assumed that it would work even if enforcement could only be against establishments or assets in the jurisdiction.

The fact that it has worked we infer from the fact that the CMA has never needed to

impose a penalty on a foreign company for an infringement of the 1998 Act. There is no suggestion this has had any impact on the efficacy of the scheme set up under the 1998 Act.

Just to be clear though, when I refer to that consultation document and to the President's point about focusing on person, and then you have person first of all, that consultation document pre-dated the introduction of the word "undertaking" in the bill. The consultation document doesn't tell you about what undertaking means but it does tell you about the government's intention for the scope of the enforcement provisions which then was put before parliament. There is nothing to suggest that was changed -- that intended to be changed, either on the government's side or on parliament's side.

Now, you said, sir, and of course you are right, that internal documents in the CMA speaking to their private views about the meaning of section 26 of these substantive prohibitions doesn't take the Tribunal very far. It is striking how little evidence there is before you on the question of the scope of the substantive prohibitions. That is partly because they are not really in issue before you. You are here to determine the scope of section 26, but there is very little, probably too little, before the Tribunal for you finally to determine the scope of the substantive prohibitions and the scope of the substantive enforcement prohibitions such as those under section 36 of the Competition Act. All you have are some very thin submissions from the CMA and a selection, not a comprehensive selection, of the pre-legislative material. To the extent the CMA is inviting you to make findings in relation to section 26 based on concluded determinative findings on the substantive provisions, we would submit caution in that regard, that you don't have enough and it is not necessary for you to determine it because, as I am coming to, the investigative powers are drafted differently in any event.

It is to those I now turn. Page 94 of the first volume of authorities and section 26. The purposes of an investigation under section 25, the CMA may require any person to produce a specified document or provide it with specified information. We see the same broad language, same broad words that we saw in KBR and Perry and in Gorbachev.

Then we turn to and we say there, before I turn away from it, that the word "person" means a legal person in order that section 26 can be properly enforced. We will come to section 40A in a moment.

Before we come to section 40A we see section 27.1. This is entering business premises without a warrant. Section 27.5(b) on page 97 you see creates a power to require any person on the premises to produce a document. Plainly that person isn't an undertaking. That must be a legal person. And it is relevant when we come to the penalties you see at --

MR JUSTICE MARCUS SMITH: By legal person do you really mean that?

MR KENNELLY: Sorry, probably that must be a natural person.

MR JUSTICE MARCUS SMITH: Yes, I imagine it could be more naturally a natural person.

MR KENNELLY: Yes, indeed.

MR JUSTICE MARCUS SMITH: Not at all.

MR KENNELLY: No, I meant to say natural person. Whether that is right or wrong, it is what I meant to say.

These are grouped together in section 40A on page 116.

MR JUSTICE MARCUS SMITH: Mr Kennelly, I don't want to take you out of your order but we probably should have a shorthand break at some point for the transcribers.

MR KENNELLY: Yes, I am happy to stop right now actually. We have gone past

the time for the shorthand break actually.

MR JUSTICE MARCUS SMITH: In that case we are more than happy to go on, as we indicated, for longer. 5 o'clock, is that --

MR KENNELLY: We were hoping, yes.

MR JUSTICE MARCUS SMITH: Certainly we can go until 5 o'clock. I would rather we didn't go any further but we could go longer than that if needs must.

MR KENNELLY: I am on time. We liaised --

MR JUSTICE MARCUS SMITH: You seem to be making excellent progress, I don't want anybody to feel unduly rushed because this is not straightforward.

We will rise until 3.35 pm.

(3.28 pm)

(A short break)

(3.35 pm)

MR JUSTICE MARCUS SMITH: Mr Kennelly.

MR KENNELLY: Thank you. I was moving on to penalties. In fact before I go to the penalties currently in force I need to show you I think very briefly the penalty that was in force when the Act was enacted.

That is in the original version of the Competition Act behind tab 12 of the first volume of authorities.

MR JUSTICE MARCUS SMITH: Yes.

MR KENNELLY: You see that actually -- forgive me, it is not behind tab 12, it is -- sorry, yes it is. Tab 12, page 80, old section 42. Near the top of the page:

"A person is guilty of an offence if he fails to comply with the requirement imposed on him under sections 26, 27 or 28."

There is no need to take you to the authority because the principle isn't seriously in dispute that in construing section 26 you look at the statute that was in the form at

the date that section 26 was enacted. Section 26 hasn't changed and therefore the penalties that were in place when section 26 was enacted are the penalties that are relevant for the construction exercise undertaken by the Tribunal. That is, again the highest authority, Boss Holdings. For your note it is in the second volume of authorities, tab 45 at paragraph 23.

Which is why the references to criminal penalties in SOCA v Perry and KBR are absolutely squarely relevant.

Moving on then to the current situation, the Competition Act in force, section 40A, behind tab 13, page 116.

MR JUSTICE MARCUS SMITH: Yes.

MR KENNELLY: Now, 42 was dropped and civil penalties were introduced. From my reading of the papers that was explained by reference to effectiveness. Perhaps CMA may give you more detail but it certainly isn't said anywhere in the papers is that the change somehow created extraterritorial effect or in fact engaged with the concept or issue of extraterritoriality in any way.

What we have now though is in section 40A where section 26, 26A and 27 are grouped together and the CMA accepts that the person penalised under section 40A has to be a legal or natural person. The CMA accepts that the person penalised cannot be an undertaking. So with that in mind, let's read section 40A(1):

"Where the CMA considers that a person [that is the person which is a legal or natural person, the CMA accepts] has without reasonable excuse failed to comply with a requirement on the person under section 26, 26A, 27, 28, 28A or 40ZD, it may impose a penalty of such amount as it considers appropriate."

Our short submission is the words "a person" and "the person" refer to the same person.

It makes complete sense, apart from the obvious ordinary meaning of the words, for

the same person to whom the notice was addressed to pay the penalty for his failure to comply. That is plain as a matter of ordinary language but it is also common sense.

It is common sense when one considers the alternative, which is the submission urged by the CMA.

The section 26 notice in this case is only addressed to Volkswagen UK and Volkswagen AG. The CMA says it also binds any other legal entities forming part of the same undertaking. Now, in our case those entities include more than 1,500 legal entities within the broader Volkswagen corporate group. Those entities, as we said in our evidence, are located in 91 countries and the section 26 notice on the CMA's case purports to bind all of them across the world and the CMA claims the power to penalise any of them anywhere in the world for the undertaking's failure to comply.

That would have required the clearest possible statutory wording in view of the presumption against extraterritoriality but all the CMA can point to is section 59.

Now before I go to that, just to recall the direct analogy here with the case of SOCA v Perry. Moving away from the facts of our case, the CMA's argument is that it was parliament's intention when section 26 was enacted that it could be addressed to an undertaking which is an uncertain concept for good reason under EU conditional policy. Parliament, according to the CMA, left entirely open to whom within that undertaking the notice would be addressed. It could be any entity within it, anywhere in the world, and every foreigner in his foreign homeland within that undertaking would be bound to comply with the section 26 notice or face criminal penalties. And without any requirement that foreigner in his foreign homeland have the notice actually brought to his attention. Obviously no regard to local law restrictions.

MR JUSTICE MARCUS SMITH: Just so that I understand how you say the CMA say it works, I am sure Mr Jones will tell us both if you have it wrong, let's suppose

a very large and dispersed group of legal persons that all form an undertaking have, let's say, 1,000 and one of them is in the UK.

If you send a notice to that UK entity and make it clear that it is applying not just to the UK entity but to the undertaking, say the notice is as clear as that, then all 999 other companies, plus the one in the UK, are affected by that notice.

MR KENNELLY: Yes.

MR JUSTICE MARCUS SMITH: And if any one of them, without reasonable excuse, fails to comply with the requirements then they become subject, absent reasonable excuse, to a penalty.

MR KENNELLY: Yes. In circumstances where -- and that is a scenario where there is at least an undertaking, part of the undertaking is in the United Kingdom, but even then the CMA is indifferent as to whether that notice is communicated to any of the 999, and of course that is important because the concept of an undertaking is deliberately vague, it needs to be extremely flexible in order to do its job as a matter of competition law. An undertaking does not need to have any corporate form or any corporate structure, it doesn't need to have any mechanisms for regular communication of legal notices. Notwithstanding that CMA says that it can operate just as the President has described. It is obviously, obviously unworkable and nonsensical. That is just as a question of effectiveness before we get into the violation of foreign sovereign power.

MR JUSTICE MARCUS SMITH: In order to work, given I am hypothesising a notice only given to the UK entity, it is assuming, I think this is what you are saying, that that entity will communicate the substance of the notice to all 999 other entities.

MR KENNELLY: Yes. That is the --

MR JUSTICE MARCUS SMITH: But if it doesn't, for whatever reason, then that only will serve as a get out if that is without reasonable excuse. In other words, you might

be able to say, if you are the thousandth company in Ruritania, "Goodness me, I was never told about this, terribly sorry."

MR CUTTING: "Goodness me, I am in Ruritania, I can't produce the document anyway."

MR JUSTICE MARCUS SMITH: But that would be a reasonable excuse if you weren't told by the UK undertaking.

MR KENNELLY: Presumably, yes. But --

MR JUSTICE MARCUS SMITH: That is how -- I am sure we will be corrected if that is -- that is how you think it works?

MR KENNELLY: Yes. But my point there is, and the Tribunal has this from the submissions I have made, when one looks at the scope of the exercise of state power, power that would be exercised over foreign subjects in a foreign country, potentially violation of their own laws, it is no answer to say, don't worry when we threaten you with criminal prosecution and we will listen very carefully to defences you may or may not have. The cases tell us that is not how one defines the scope of the power.

MR JUSTICE MARCUS SMITH: Mr Kennelly, I am just trying to understand how it works, I am not trying to justify it, but it seems to me it is important to understand how it is going to work in order to work out whether it is a lawful or an unlawful interpretation given the extraterritorial effect. But that is how you think it would work?

MR KENNELLY: That is my understanding, yes.

MR JUSTICE MARCUS SMITH: I quite understand your case that that is not how it works because there is no right to do it.

MR KENNELLY: May I just to make that concrete, show you the notice in this case?

MR JUSTICE MARCUS SMITH: Yes, of course.

MR KENNELLY: It is in the hearing bundle behind tab 4. It is the very beginning

page 45.

MR JUSTICE MARCUS SMITH: Yes.

MR KENNELLY: This is, as you see in our ground 2 emailed to Markus Erdmann, Volkswagen AG, and it is put very pithily by the CMA and we say revealing really the very problems that I have been submitting to the Tribunal. It says:

"This is a formal notice under section 26 requiring UK Limited and its ultimate parent company Volkswagen AG and --"

MR JUSTICE MARCUS SMITH: Sorry, Mr Kennelly I think I may have the wrong document. You are in tab 4, are you?

MR KENNELLY: Tab 4, page 45.

MR JUSTICE MARCUS SMITH: I am grateful, I am on the wrong page. Yes, thank you.

MR KENNELLY: Below the bold subject.

MR JUSTICE MARCUS SMITH: Yes.

MR KENNELLY: A formal notice under section 26 requiring the UK company that its ultimate parent Volkswagen AG and any other legal entities not specified here forming part of the same undertaking, which the CMA calls the Volkswagen Group, but as we know that doesn't refer to anything legally defined as the Volkswagen Group, that is the label CMA is giving to what may or may not be part of the --

MR JUSTICE MARCUS SMITH: It is not the Companies Act definition, it is a group circumscribed by the economic unit that is the undertaking.

MR KENNELLY: Indeed.

"... and any other legal entities forming part of the same undertaking, together, ('Volkswagen Group') to produce specified documents and/or provide specified information as set out below for the purposes of an investigation under the Act.

The Competition and Markets Authority may impose a financial penalty for failure,

without reasonable excuse, to comply with the requirements of this Notice. Criminal offences also exist for providing false and misleading information in response to this notice or intentionally or recklessly destroying, otherwise disposing of, falsifying or concealing documents you have been asked to produce."

Now it says over the page "please read this notice very carefully", but that doesn't come close to dealing with the problem, which is the one the President suggested a moment ago. It happened to be here there were about 1,500 legal entities possibly caught by this notice but it could be in another case it could be far more than that, and not defined by any readily available legal criterion, the concept of undertaking is a fluid concept designed to ensure that for a particular conduct all the economic entities involved are properly liable for the infringement.

That just doesn't operate in any sensible way for the purpose of an information request backed by criminal or even civil penalties.

That is clear I say from the language in section 40A but also from just ordinary common sense. It is a million miles from the kinds of limited focused and justified extraterritorial effects which have been upheld in a very small number of cases where extraterritorial information requests have been upheld.

MR JUSTICE MARCUS SMITH: Mr Kennelly, just a practical point. We all know that corporate structures these days can be -- not in all cases, but they can be very complex and they can be very untransparent. Is it the consequence of your construction or Volkswagen's construction of section 26 that any section 26 notice really needs to start with: please tell us the entities that are part of your group so that we can then issue a notice? Or at least define the information requests in a notice to the right companies in the group?

MR KENNELLY: They could certainly -- well, first of all they are constrained to address the section 26 notice to legal or natural persons in the United Kingdom. In

a notice to VW UK they could certainly ask detailed questions about information within VW UK's knowledge, which could include information about the broader group. And it could even help the CMA identify those other persons apart from VW UK which are properly within the United Kingdom's jurisdiction. It could use that to obtain information but only through VW UK, information properly within the control of VW UK. And to the extent that is inadequate it then has to use other means to obtain information from the courts or the regulators in the country where the other persons are located. That may be a difficult task or it may not even be possible, but that is precisely why the CMA has in the past and is currently negotiating multilateral and bilateral exchange agreements to negotiate that problem. Those agreements are necessary because of the difficulty in one sovereign state power making mandatory orders against foreigners in foreign countries. It is because of that problem that these multilateral and bilateral arrangements are necessary.

MR JUSTICE MARCUS SMITH: Just to test that a little further, and do stop me if you are going to come to that when you discuss examples, but let's suppose we have an entity which is a legal person in the UK but it has a -- well, let's make it easy or extreme, it has a 100 per cent owned Ruritanian subsidiary. Is that something which is susceptible of compulsion, the Ruritanian subsidiary, under section 26 or does it depend on Ruritanian law as to whether the UK parent can compel the Ruritanian subsidiary to produce?

MR KENNELLY: Prima facie the first question is can the documents be obtained by the UK entity. The UK entity is subject to UK law and has to do all it is required to do as a matter of UK law, and it may be that in complying with its UK obligations that puts it in breach of foreign law obligations and it may be, and again I am speculating, I may have to come back to this tomorrow, but in analogous situations a balance may have to be struck. But as Lord Hoffmann said, when you have come into this

country you have to play by the rules of this country, and one would expect the UK entity to have to do everything within its power here. The reasonable excuse may be its basis for avoiding penalties but in the first instance it would have to comply with our law and do everything within this its power to bring documents into the jurisdiction.

That is not to say if it was to put someone in breach of a criminal blocking statute, for example, in a foreign country that may override, depending on the balance of interests, the document request. I would have to come back tomorrow with something more authoritative than that. It is certainly not this case anyway. We haven't shied away from the obligations of VW UK in any way.

MR JUSTICE MARCUS SMITH: No, Mr Kennelly, that is of course right, but just as a forewarning to all of the advocates, I am afraid you are going to get quite, possibly a lot, of hypothetical examples and we are very conscious that they will not be this case but we are equally conscious that the construction that we reach needs to be workable as a general proposition.

I mean, I myself wouldn't mind a bit of messiness around the edges, but we can't I think properly reach a construction of section 26 that works in the instance here but is unworkable in other instances.

So it is in that spirit that we are going to throw you a few hard questions of salami slicing the way it goes.

MR KENNELLY: Tempting though it is for me to offer an answer right away, I think it is too important.

MR JUSTICE MARCUS SMITH: No, of course.

MR KENNELLY: I will certainly answer the hypothetical. I can see the importance of answering hypotheticals --

MR JUSTICE MARCUS SMITH: No, indeed, all I want to make clear is when we are

throwing these hypotheticals out no one you should draw any sense that we are analogising this case to those examples, we are not doing that.

MR KENNELLY: It is an exercise of construction so your rulings have to work for everyone. We completely understand that, which is why I will answer the hypothetical once I have made sure I have permission to do so in the terms that I have in mind.

MR JUSTICE MARCUS SMITH: I understand.

MR KENNELLY: As I say, these absurd and unjust consequences would require very clear statutory wording. What we have is section 59, which says that the word "person" includes undertaking, and obviously that means may include undertaking, and even the CMA accepts that not every time we see the word "person" it must include undertaking. The CMA's detailed grounds of resistance say, if there is a compelling reason for the word "person" not to mean undertaking, it would not mean undertaking, and that is a point properly made. And here there is a compelling reason not to say the word "person" in section 26 means undertaking, for all the reasons I have given.

What is left for the CMA, they have a vague argument about tracking EU law in practice. This is simply not good enough. The Tribunal obviously will have regard to it under section 60A but you are not bound by it. In any event we say the EU approach is misstated by the CMA, because the CMA says that in the EU breaches of the substantive rules are penalised in the same way as breaches of investigatory orders. That should be mirrored and is mirrored in the UK.

What that means is the CMA can demand documents from an undertaking abroad, as we have said, no need to specify a legal person, and then any legal person in that undertaking for that breach. That is not even the position, that is not the practice in the EU. Could you take up please the detailed grounds of resistance in the first

hearing bundle. This is to see the authority the CMA is citing for this very, very important, potentially --

MR JUSTICE MARCUS SMITH: Are we in the VW bundle --

MR KENNELLY: Yes, the VW hearing bundle. Behind tab 15.

I would ask to you go, please, to page 348.

For this point that procedural infringements are penalised in exactly the same way as substantive infringements and the practice is the same, the CMA cites a Commission decision, paragraph 43, that the rules governing liability for infringements of substantive rules is identical for infringement of the procedural rules. For that we look for some high authority and what do we have? We have a Commission decision, not even an official translation, a French version with an unofficial translation of a point never tested in any court anywhere. And then as to practice, the CMA has to acknowledge at paragraph 44 that the Commission has not fined a person outside the EU for breach of an information order. It sends requests but it does not penalise. In fact, as far as we are aware the Commission has never fined a person outside the EU for breach of an information order.

Now, what does the CMA say about that? They say, the bottom of 44:

"This indicates the Commission considers it has the power to extend RFIs and to impose penalties on companies outside the EEA but it has not done it."

What the CMA says is what the Commission does is it sends RFIs to companies in the EEA, requiring them to provide information on behalf of the entire undertaking and it does that under threat of penalty.

Now the CMA says over the page that, although it hasn't imposed penalties or threatened penalties on persons outside the EU, the Commission has adopted an alternative approach -- I am quoting -- which really amounts in practice to the same thing. But not at all. In one, which is the power claimed by the CMA here,

an order is made against a person outside the territory in respect of documents outside the territory. The other is pure territorial jurisdiction. They are making orders against a person, it is an order against a person in the EU and that person is under the territorial jurisdiction of the Commission. It is not the same thing at all.

Now, I am coming to the end of my submissions on this point but I will just take up at the very end the very first intervention that the President made with Mr Jones. The CMA's only sought to defend its position in reality in this case on the basis that Volkswagen AG forms part of the same undertaking as Volkswagen UK. Sure they reserve their position in their pleadings but they have not put forward any positive case that, absent an undertaking, absent the undertaking point, parliament intended that "person" in section 26 could mean any person anywhere in the world being ordered to produce documents anywhere in the world. And for good reason. Because that would be a hopeless submission in view of the authorities, the high authorities which I have taken the Tribunal to this morning. So we say if that undertaking point isn't the answer, then applying a proper interpretation of the word "person" in section 26, pursuant to the Supreme Court authority, the CMA's arguments should fail.

Moving on if I may to the scenarios. I said I would deal with them before I sat down.

I will begin with scenario 1.

In this -- by the way, we found the scenarios extremely helpful. It focused our minds and also meant we had something to cling on to. We understand the need to focus on hypotheticals in order to assist the Tribunal in reaching a construction that will work for everyone.

Scenario 1, assume a natural person A is carrying on business domiciled and habitually domiciled in Ruritania with hard copy only documents similarly located in Ruritania. But A's conduct, the natural person's conduct is such that substantial

anti-competitive effects are being felt in the UK. We say it won't surprise the Tribunal to hear that no section 26 notice can be issued against A in that scenario.

That section, for the reasons I have given, refers to a person in the jurisdiction. And even if I am wrong about undertaking, and section 26 includes undertaking within the word "person", it still doesn't allow the CMA to direct an order like that to A in Ruritania. It could only catch the entities and the undertaking that are within the territory, the United Kingdom.

As to other routes to get the information, the CMA is best placed to say. The Tribunal has the point that if Ruritania was a member state of the EU and we were too, two big ifs, there would be powers under Regulation 1/2003.

If Ruritania was a member of the Multilateral Mutual Assistance and Cooperation Framework that could be used or any other framework that the CMA would choose to negotiate for the very purpose of dealing with the fact that it doesn't have the power to issue mandatory orders of this type to foreigners in respect of foreign documents in foreign countries.

MR JUSTICE MARCUS SMITH: Mr Kennelly, just to get on the record your answer, I am pretty certain I know what it is but I think it is helpful, you just mentioned Regulation 1/2003 and the position that would pertain at least so far as intracommunity extraterritoriality was concerned in that there would be a route for one member state to obtain assistance from another member state by virtue of being in the EU, and that was the position that pertained when this legislation was put into place.

MR KENNELLY: With respect, sir, no. As I said earlier, when this legislation was put into place, that cooperation mechanism didn't exist. Regulation 1/2003 was --

MR JUSTICE MARCUS SMITH: It postdates 1998.

MR KENNELLY: By some stretch 1998. When the legislation was enacted, we

recall this -- my hair wasn't grey then but we remember what a revolution it was to introduce those powers. The OFT didn't have those powers before 2003 and the 1998 Act was well in force and being implemented by the Director General of Fair Trading. We had Napp Pharmaceutical, all those cases happened before that structure was created in Regulation 1/2003 for cooperation between competition authorities.

MR JUSTICE MARCUS SMITH: So in fact you are saying that my earlier point about Brexit is actually a red herring.

MR KENNELLY: I wouldn't be so offensive as to say that, sir. Not directly on point I would say because the legislation was so far in advance of Regulation 1/2003.

MR JUSTICE MARCUS SMITH: Okay, so in fact what was got is a post enactment adjustment, which made national regulation easier --

MR KENNELLY: Yes.

MR JUSTICE MARCUS SMITH: -- but which doesn't assist or isn't relevant to the construction of the earlier Act.

MR KENNELLY: Yes. Except in fact to say -- sorry --

MR JUSTICE MARCUS SMITH: No, no.

MR KENNELLY: Except in fact to say to the extent, I don't know, the UK was negotiating in the council for these powers and other mutual assistance treaties with Australia and the US which have survived, we would say that as in KBR and the construction of what came after section 2(3) of the 1987 Act, that shows that the OFT seemingly didn't have the power it now claims. If it was negotiating these other ways of getting information subsequently, why would they have needed them?

MR JUSTICE MARCUS SMITH: I don't want to get into deeper waters than we are in already but my understanding of Regulation 1/2003 was really it had created a devolution of community enforcement of competition law. What had formally been

centralised became decentralised so that transnational cases could be dealt with at a lower level of order in the national jurisdictions. So it doesn't say very much about what cooperation existed prior to the regulation as between EU members.

MR KENNELLY: I respectfully agree.

MR JUSTICE MARCUS SMITH: The implication of your submission is there was nothing, and I am sure that will be corrected if I am wrong, but at least you have helped me in realising that 1998 comes before 2003. I am very grateful for that.

MR FRAZER: Mr Kennelly, if I understand you correctly, slightly different scenario, let's say two Ruritanian companies are reasonably suspected of having entered into a cartel which is implemented in the UK, but they are not present in the UK. My understanding is from what you are saying that although there are substantive provisions, the prohibitions themselves are clearly intended to catch such activity, the CMA would not be able to investigate that because of the lack of any UK presence of a natural or legal person. Am I correct?

MR KENNELLY: Yes. Not through direct mandatory orders. Of course they could investigate it by reference to other companies that may be affected by the cartel within the jurisdiction. That is not to say their hands are tied. They have the section 27 powers to raid premises and they can, subject to the existence of such structures, to cooperate with foreign authorities. But they cannot investigate in that scenario. Even though the agreement is being implemented here they cannot investigate by reference to mandatory orders sent to foreigners in foreign countries to search and produce foreign documents.

MR FRAZER: So if there was no UK premises and let's say no cooperation agreement with Ruritania, that would simply limit the scope of the CMA's powers, notwithstanding the effect in the UK?

MR KENNELLY: Yes, indeed.

MR FRAZER: Thank you.

MR KENNELLY: That unfortunate outcome is precisely why cooperation agreements are entered into and why that is so important, because it is a function of the separate sovereignty of nation states, as the public international law case teaches us.

What is striking about the cases is that in Perry, for example, and in KBR, one sees situations of serious fraud which is analogous in some ways to cartel cases, wrong-doers who sometimes were directly involved in businesses in the UK moving outside the jurisdiction or operating from outside the jurisdiction and even there, notwithstanding the submissions of Sir James Eadie, the Supreme Court says no. If parliament wants to do that, we need express language because of the importance of the principle of the presumption against extraterritoriality.

MR FRAZER: That is clear, thank you.

MR JUSTICE MARCUS SMITH: Just to tease out an implication that arises out of that example, I mean the point is that one might expect there to be a correlation between the substantive extraterritoriality of chapter 1 and chapter 2 and let's assume that exists in some shape or form, which I think is common ground there may be an argument about its extent but we don't need to go there, but you would expect the process of investigation to link to that.

But I am wondering and I am really saying this so that Mr Jones can push back, because I think I know your answer, actually why should there be such a correlation? Because by definition you are investigating something which may or may not exist. I mean, in fact there is a strong argument I am suggesting that the powers to investigate an extraterritorial infringement actually need to be differently constructed, because they need to take account of the fact that the substantive infringement may not have occurred. That is what you are investigating.

So you would think that there ought to be, yes, an ability to look at things extraterritorially, but a degree of clarity about the scope of that investigation that is independent of the ambit of the infringement itself.

MR KENNELLY: Absolutely. And that is why, for example, in merger cases -- the Tribunal recalls the Akzo case against the Competition Commission. Where parliament wants the CMA to have powers with extraterritorial application ordering divestments in America, for example, it specifies that expressly. That is why the Enterprise Act at section 86 includes the jurisdictional scope not just of UK companies but foreign companies which are carrying on business in the UK. That is given that definition in Akzo v Competition Commission. It doesn't mean someone who is passing through or is just a supplier, it is for this Tribunal to find that in a particular way. That is the clarity that parliament does provide when it wants state bodies, public authorities to have those kinds of extraterritorial powers.

I am eating into Ms Abram's time, may I move on to scenario 2.

The point here is assume the same case as scenario 1 but A's documents are physically located in a lock up in King's Cross. This is difficult because one straightaway thinks that is Gorbachev. But it is actually not clear when one looks a bit more closely because again in asking if section 26 operates extraterritorially, it is important that it can be enforced effectively and that adequate safeguards are in place. And again, in this scenario if A ignores the notice no enforcement is possible, and this is where it is different from Gorbachev, there are no safeguards. Because in Gorbachev there were safeguards involving the exercise of discretion by a court and the difference between a public authority, a competition authority and the court was the one referenced at the very end, paragraph 65 in KBR. That is a relevant distinction. Whereas here the CMA under section 26 simply issues the order and requires compliance on pain of criminal penalties. So it is similar obviously to

Gorbachev but in Gorbachev it was important that safeguards were in place, permission was still needed to serve out of the jurisdiction and serve properly under the Hague Convention.

So, I can see the similarity but it is not on all fours with Gorbachev on closer analysis. In any event there is no prejudice to the CMA because in this scenario it can get the documents under section 27. It issues a notice against the owner of the lock up and takes the documents. They are hard copy documents. And that is the obvious other route.

If I am wrong about what I have just said about Gorbachev and it not being a direct read-across, and I don't make any concession about that, and section 26 would permit it, the CMA, to order a foreigner to release the documents, that is not true extraterritoriality at all because, as the Court of Appeal recognised in Gorbachev, the critical fact is that the documents were in the jurisdiction and that wasn't an accident. That is not our case at all and that is an important point to emphasise; there is a very big distinction between the scenario 2 and the facts of our case.

In scenario 3 we are told to assume the same case as scenario 1, save that A is temporarily present in the UK and is given the section 26 notice whilst enjoying a holiday in England and Wales. Probably not in King's Cross. There is nothing wrong with King's Cross. Some of us live very close to King's Cross. The answer is still no. That is the difference between personal jurisdiction and subject matter jurisdiction that we saw in Mackinnon and Gorbachev. That is the difference between who can be brought before the court and whether the court can regulate what that foreigner does in a foreign country. The fact that proceedings can be served on A doesn't mean the CMA has the power to compel A to do acts abroad. The act required is that A produces documents abroad. That is the act. And section 26 would therefore still be criminalising overseas conduct by a non-citizen,

contrary to SOCA v Perry and paragraph 94. It would need clear words like section 86 and the Enterprise Act I mentioned a moment ago. No intention can be implied because there are no safeguards, there is obviously a risk of breaching local law. And it is a fortiori if A is an employee of a legal person incorporated in Ruritania. Then we are in the KBR situation where Ms Akerson was served but that made no difference to the analysis of the Supreme Court.

Finally, scenario 4 we are told to assume the same case as scenario 1 but A in Ruritania regularly conducts business in England and Wales not through entities that A owns or controls, so not the same undertaking but through third party contractors or agents. Again we respectfully submit no. A is still outside the CMA's jurisdiction, so are A's documents. The fact that A is conducting business in the UK via a contractor or agent might be enough for personal jurisdiction, one of the gateways in part 6 of the CPR, but it doesn't give them jurisdiction to issue a section 26 notice to A. It would need, again, clear words like section 86 in the Enterprise Act.

And there are other routes. If this third party contractor is in the UK, the CMA could issue a section 26 notice against it or raid its premises under section 27 without a warrant.

Those are our brief, I am sorry, very brief answers to the scenarios. Unless I can --

MR FRAZER: Can I ask one more question. We skated quite quickly over section 27. Do you believe we are able to construe section 26 in light of section 27, bearing in mind that for a visit under section 27 there are no territoriality issues involved? So if a document is accessible, wherever it is in the world and whoever controls it, if it is accessible from the premises, the CMA has a right to collect it. Is it odd that section 27 should be so broad-ranged without any territoriality principles and yet section 26, as you say, is routed in territoriality?

MR KENNELLY: I certainly accept, Mr Frazer, that section 26 and 27 should be

construed together. You look at the statute as a whole at the time it was enacted. But section 27 also must be read subject to the principle against extraterritorial effects. Since the documents are being ordered to be produced, it is common ground I think that means a natural person is not an undertaking and that would have to be someone in the jurisdiction. And whether that requires a person on the premises to produce a document depends on whether that person is empowered to produce those documents. Those documents could be from anywhere in the world but on the face of it that is a UK entity, UK legal person ordered to produce documents within its power or control and, again, unless I am told otherwise, one would expect that to be consistent with the principle of extraterritorial application because it is an order imposed on a UK company in respect of matters within its control in the UK.

But to the extent that it interferes with foreign law because the documents may be abroad, I will have to come back tomorrow on that. That is the very same point the President raised with me earlier.

MR JUSTICE MARCUS SMITH: Thank you very much.

MR JONES: Could I just clarify, because I think Mr Kennelly just answered that on a premise that it was common ground that 27 wouldn't apply, as it were, to undertakings, and this may not affect his answer but he should know that that isn't common ground, just in case that does affect the answer. Section 27 applies to premises generally and it is actually clear from 27(3)(a)(ii) that premises might be occupied by an undertaking among other kinds of persons. So as I said, that might not affect the answer, I just thought since it is an important question and I will come back to 27, I wanted Mr Kennelly to know he had a misunderstanding of CMA's position.

MR KENNELLY: Mr Jones, right as usual to intervene but wrong as to my

misunderstanding. I was referring to (5)(b) , the person on the premises, which I said earlier in my opening had to be a natural person and it was no more than that. But we will hear what Mr Jones says in response to the broader section 27 points. Thank you.

MR JUSTICE MARCUS SMITH: Thank you very much, Mr Kennelly. Ms Abram.

Submissions by MS ABRAM

MS ABRAM: I am very grateful. Before I start properly can I raise two housekeeping points by consent. The first confidentiality and specifically the points about the Commission RFI, which I am grateful for the Tribunal's indication on. I am very happy to tell the Tribunal that everyone is happy to proceed on the basis identified by you, sir, in the letter of the other day and we do ask the Tribunal to make the direction that you envisaged in the letter.

We have agreed a form of draft order with the CMA which we think reflects your intention. I am happy to hand that up now or send it by email to the Registry.

MR JUSTICE MARCUS SMITH: Why don't you send it by email to the Registry and subject to the precise wording, I make it clear we will make an order along those lines.

MS ABRAM: I am very grateful. The other point just relates to amendments to the notice of appeal and the CMA's defence. Again, there has been a consent order on that.

MR JUSTICE MARCUS SMITH: Again, I don't think I have seen it but I am aware of its existence. Given that it is by consent, we will make the order permitting the amendment.

MS ABRAM: I am very grateful.

So with that, I move to the real deal and starting with extraterritoriality. So I pick up

where Mr Kennelly left off.

Mr Kennelly has focused on the undertaking point and I move to the argument as to extraterritoriality stricto sensu. I am going to take my submissions if I may on five stages on grounds 1, then I will turn to grounds 2 and 3 at the end, understanding the Tribunal's indication they should be very much the minor part of the hearing.

So on ground 1 first, and I will deal with this quickly, the relationship between the undertaking aspect of the case and the extraterritoriality aspect.

Then the relevance of criminal consequences for non-compliance when we are interpreting the legislation.

Third, the indicators of parliamentary intention, including the scheme context and subject matter of the legislation, which is the buzz phrase from KBR. And I will also address in that part of my submissions the points that are relied on by the CMA in favour of their proposed interpretation.

Fourth, the safeguards, the legislation claims by the CMA relied on by the CMA.

And then finally I will pull together the points on ground 1 before moving on.

So, to start then with the relationship between the two limbs of ground 1, undertaking and extraterritoriality, for your note these are the points at paragraphs 4 and 26 to 28 of our reply. So whether the CMA's case involves extraterritoriality at all and what happens to the case on extraterritoriality if person doesn't include undertaking.

So as Mr Kennelly has set out, we say that the CMA's undertaking argument is just the route by which they claim the extraterritoriality is achieved in a statute. It is a legal argument, it can't change the facts. Mr Kennelly set out the facts in respect of Volkswagen and they are materially the same for my client. So the CMA have asked a German company, BMW AG, to produce documents that are held in Germany, can only be obtained in Germany by the German company that is asked to produce them, they can't be produced by BMW UK, which also received a section --

well, which was the only party that received the section 26 notice from the CMA and which has complied with the section 26 notice. So the position is materially the same for BMW as it is for Volkswagen.

The same is also the case in respect of the penalty notice, so the section 40A limb of the case, and of course, as you know, only BMW has received a penalty because Volkswagen issued the claim for judicial review and took steps towards compliance. But the relevant point for this purpose is that the section 40A limb of the case clearly involves extraterritoriality because it was addressed to BMW AG alone. So only to a German company in Germany, asked to pay a fine from Germany.

So really what the CMA are doing is just to try and justify extraterritoriality rather than negating it and the argument that this really isn't a case about extraterritoriality at all is a red herring, I submit. That, of course, is all the more so if the CMA is pressed to rely on their alternative position, which is that a section 26 notice, a section 40A notice can affect any person, anywhere in the world, regardless of the undertaking conduit to those powers.

So then what happens if the CMA loses on undertaking, and we were very grateful for the Tribunal's clarification of the position at the outset of this hearing and for Mr Jones' clarification. We certainly accept that if the CMA lose on their undertaking point, we don't say that is fatal to their argument on extraterritoriality because we accept that they would then say that the statute is kind of independently extraterritoriality by what Mr Jones frankly called the more muscular route.

But all of the arguments on why the statute is extraterritorial are directed to the undertaking concept. So if the CMA is wrong about the undertaking concept, it is really difficult, and I hope that my submissions, the substance of my submissions will highlight this, it is really difficult to see how the CMA say that parliament's intention to make the legislation extraterritorial in effect is conveyed, if not by means of that

undertaking concept.

So not fatal to the case but quite difficult to see how the case works without the undertaking point.

Conversely, of course, Mr Kennelly has made the point that, even if the CMA are right about the undertaking point, which we say they are not, they still need to go on to prove or satisfy the court that the presumption against extraterritoriality should be displaced. So undertaking by itself is not an easy passage home.

That is all I wanted to say by way of my first point, and I want to move then to the second head of the submissions about criminal consequences for --

MR JUSTICE MARCUS SMITH: Yes, just to be clear about the more muscular version of the CMA's case, so if one puts, as it were, an imaginary blue pencil through the definition of person as including an undertaking, one is simply left with any person, natural or legal. The long and short of the argument there is that any person means literally any person anywhere in the world, that is it.

MS ABRAM: Yes. And then of course the CMA is left facing those really formidable obstacles in the case law where on occasion after occasion it has been argued any person means any person anywhere and the courts have said, no, it doesn't, absent a really strong reason why the statute has to be construed in the way argued for. Re Seagull being a case that took a different view for very particular public policy reasons connected to the UK.

MR CUTTING: Sorry, do any of those cases have underlying substantive prohibitions or rules that have an equivalent extraterritorial effect to the implementation to section 2(3)? Are they all purely domestic prohibitions to which the relevant authority sought extraterritorial investigative or procedural stuff? Because that is the difference, that is the theoretical difference here I am sure the CMA will have us spellbound for tomorrow.

When you and Mr Kennelly tell us so neatly about how extraterritoriality has been stamped down on in these cases, how many of them dealt with prohibitions or criminal offences that had an extraterritorial element?

MS ABRAM: So, you are absolutely right to summarise the CMA's star point in those terms. That is the point on which they rely. The substantive prohibition is found on the same legislation as these investigative powers. I will come on, if I may --

MR CUTTING: I am making a further point, which is that the substantive prohibition itself had an element of extraterritoriality.

MS ABRAM: I am sorry, I didn't mean to underplay that. I hear that point. I will come on if I may to explain why we know from the statutory scheme that the scope of the investigative powers is not the same as the scope of the substantive powers. If I am right about that then that link is broken, the link is severed and --

MR CUTTING: I am asking the reverse, which is the extent to which KBR and the other authorities are themselves based on purely domestic provisions, which this is not.

MS ABRAM: No, I hear that, sir. I suppose my point was in a sense a logically prior point and if I am right about that one, one severs the link between the two. But I hear the point. The answer is the different cases vary in their context. They are not all contexts where you have a criminal offence or equivalent with a document-gathering power. So, for example, if you look at Paramount Airways, that kind of case law is about a transaction in undervalue and the question is then can the legislation enabling declaration of a transaction at an undervalue catch any person anywhere in the world? So it is not --

MR CUTTING: The transaction is a domestic transaction?

MS ABRAM: In the case of Paramount Airways it was a transaction with a Jersey

bank.

MR CUTTING: Okay.

MS ABRAM: So that is one example. You also have Re Tucker, for example, where you have a bankruptcy and the question is, can any person be examined in connection with a bankruptcy, a person in that case who was resident in Belgium. And the answer was no, it doesn't include any person resident in Belgium.

So the substantive scope of the underlying rule is not always inherently circumscribed territorially, and I say here it doesn't match the territorial scope of the investigative power.

MR CUTTING: No, I understand that.

MS ABRAM: I am grateful.

So on criminal sanctions for non-compliance, the practical reason why the point matters is, as, Mr Kennelly has shown you from KBR, the presumption against extraterritoriality applies with particular force where the consequence of extraterritorial effect would be to criminalise conduct committed abroad by non-citizens. That is common ground. So the references for that are defence paragraph 77, admitting the notice of appeal, paragraph 34.

It is also common ground that, as Mr Kennelly has shown you, at the time that section 26 was enacted any failure to comply with a section 26 notice, a requirement to produce documents or information, was itself a criminal offence, and I won't take you back to it but that was section 42, you will recollect, of the 1998 Act as it was enacted. That was authorities 1, tab 12, page 80.

Finally, it is also common ground that whether parliament intended section 26 to have extraterritorial effect has to be construed by reference to the state of the law at the time the 1998 Act was introduced. So that is to say when non-compliance was a criminal offence rather than by reference to the position now, when it is no longer

a criminal offence.

So I can give you the reference to the explanatory note explaining the change in the 2013 legislation to stop non-compliance being a criminal offence, if that would be helpful. It is at authorities 1, tab 25, page 397.

You will recollect these were changes that were made in the ERRA of 2013 and the relevant bit, page 397 of the bundle, paragraph 325. Or if you start at 324, what was originally section 40 of the 2013 Act:

"... substitutes civil sanctions for the current criminal sanctions available to the CMA for failures to comply with investigations. The intention of allowing civil sanctions is to provide a more effective deterrent to failing to co-operate with an investigation. Bringing criminal cases can be complex, costly and time-consuming for an enforcer."

What that really doesn't say is, look, section 26 is purely territorial in scope at the minute, but we are going to take away the criminal sanctions for compliance to make it extraterritorial in scope as well. So the change to remove the criminal sanction definitely doesn't change the scope of section 26, one can conclude pretty clearly from that.

The starting point is that, because the CMA's case is that, when section 26 was enacted, parliament intended to criminalise a failure by a foreign company to comply with the notice by producing documents abroad, it must also be common ground that particularly cogent evidence is going to be required to displace the presumption that section 26 was not intended to have extraterritorial effect. I won't take you back to it but the Supreme Court put it in KBR in terms that, the more exorbitant the jurisdiction, the more is likely to be required of the statutory provisions to rebut the presumption against extraterritorial effect. That is paragraph 28 of KBR.

I would like to take the point one step further and submit that the evidence of parliament's intention would need to be all the more cogent in this case to displace

the starting presumption because of the consequences of the CMA's undertaking argument. So, because, as you noted and exchanged with Mr Kennelly, sir, the CMA says that it is entitled to serve a section 26 notice on one entity in an undertaking, provided that entity is properly equipped to deal with it, to expect all of the other undertakings to comply by providing an answer for it.

That effectively makes all of the other entities in the undertaking jointly and severally liable for the provision of a response, and therefore potentially criminalises, under the law as it started out, the non-compliance of an entity that was never sent a notice by the CMA.

Because this is important, I would like to show you where this point is made in the CMA's defence. It is the passage starting at paragraph 58.

If you go to BMW bundle 1, tab 12A, which is the amended defence. It is page A360.

The CMA says:

"While requirements under competition law, including to produce information, can be opposed on undertakings, it is not in dispute that it is necessary to address the penalty to a specific legal or natural person."

After the end of the quote, the CMA go on to say:

"It is well established, therefore, that a parent company can be held liable for infringing acts committed by subsidiaries that are part of the same undertaking."

Then, paragraph 59:

"Where an economic unit infringes a rule addressed to undertakings, it is for that unit, in accordance with the principle of personal responsibility, to answer that infringement. A breach of a rule addressed to undertakings automatically entails the application of joint and several liability amongst the entities making up the economic unit."

Then, the punchline at the start of paragraph 60:

"These principles apply to procedural infringements as much as substantive infringements."

So, joint and several liability amongst all of the members of the undertaking is what the CMA says the consequence of its undertaking point is.

To join that up with what they say about notice to the undertaking, that can be easily seen from paragraph 56 on the previous page. So, five lines from the bottom of that paragraph, the sentence starting "nor ...":

"Nor, if a requirement can be imposed on an undertaking as such, can there be any requirement for the notice in writing under section 26(2) to be given to every legal entity within it, provided it is sent to at least one person in the undertaking equipped to deal with it."

Now, in my submission that has a pretty extraordinary consequence. The CMA's case is that, when the Competition Act was enacted, parliament's intention was that a member of an undertaking could be prosecuted for a failure to comply with a section 26 notice which they had never been sent by the CMA.

Now, in fact, in this case, the section 26 notice was addressed to BMW UK and AG, but it was only sent to BMW UK. So the CMA's position is that parliament's intention, if this had all happened 20 years ago, was that BMW AG, a German company resident in Germany, could have been prosecuted under English law for failing to produce documents located in Germany, even though the CMA was not obliged to, and in fact didn't, send the section 26 notice to BMW AG at all.

Now, in my submission, the CMA faces a real hurdle, a real mountain to climb, in establishing that that was parliament's intention. If the presumption against extraterritoriality applies with particular force where conduct is criminalised, a fortiori it must apply with even more force where the argument is that conduct of a foreign

company abroad is criminalised without the foreign person even having been told of the obligations that they are meant to be complying with.

MR FRAZER: Ms Abrams, does it affect your argument that the notice clearly came to BMW AG's attention and AG was mentioned as an addressee of the notice?

MS ABRAM: On the facts, I absolutely accept that that is what happened. But what we are looking at here, sir, is parliament's intention. The CMA's position is neutral as to whether BMW AG, or whichever hypothetical equivalent, did in fact receive the notice from BMW AG. They say it doesn't matter. BMW AG could still be committing a criminal offence.

Now, I anticipate that what will be said against me is, well, of course if BMW AG never receive the notice, they would have a reasonable excuse, and reasonable excuse was a defence to the original criminal offence, as it still is now under the legislation. But that is no good. It can't be said, well, you can prosecute a foreign company that has never been told of its obligations, but it shouldn't trouble itself because it will have a good defence once it has been brought to the English courts.

MR JUSTICE MARCUS SMITH: Let's take the international element of out of this and let's focus on a purely domestic scenario. Let's remove the extended meaning of "person", so as to delete "undertaking", and think of the two UK -- England and Wales, let's say -- companies, one of which is a wholly owned subsidiary of the other.

The CMA serves a section 26 notice on the parent and says, I would like you to produce documents which, as it happens, are held by the subsidiary. How does the section 26 notice work in those circumstances? Is it an obligation on the parent to produce, or is it a notice that is given to the subsidiary via the parent?

MS ABRAM: So, according to the CMA, the parent would be obliged to produce the documents itself and be obliged to pass the notice on to its subsidiary to ensure its

compliance.

MR JUSTICE MARCUS SMITH: Does that only work, though, if one reads "person" extendedly to include "undertaking", or would that be -- well, it is probably more for Mr Jones to answer than you -- but "any person" rather implies just that person.

MS ABRAM: It does, sir. I am sorry, I don't mean to --

MR JUSTICE MARCUS SMITH: No, I think Mr Jones can deal with it tomorrow.

MR JONES: I thought the question may be coming to me. I do apologise. No, I will deal with it tomorrow. I didn't mean to interrupt.

MR JUSTICE MARCUS SMITH: No, absolutely. I think we will keep the sequence.

MS ABRAM: We would certainly say that that is an objective example of the clash in the words B person and A person that Mr Kennelly pointed out at the end of his submissions, and why "person" in section 40A and section 26 can't mean undertaking. Because the objection in the case that you have posited, sir, it is not one of extraterritoriality.

MR JUSTICE MARCUS SMITH: No, it is not. That is why I am giving it to you. The problems that you are quite rightly articulating don't, in that example, arise. What I am trying to work out is how, in a non extraterritorial situation, section 26 can work. I think what you are saying is, if one applies the blue pencil and deletes "undertaking", then "person" simply means the person, natural or legal, to whom the notice is addressed. Therefore, "undertaking", even in the domestic situation, has to do a bit of lifting, because, the way I am understanding the position and I am putting it to you so you can comment, is that, taking the wide meaning, the notice to the parent will embrace the subsidiary. You say that is wrong because you should simply read out "undertaking" because it is, even in a domestic situation, a problem to create in the subsidiary sanctions that it may be unaware of because the parent may, for whatever reason, not communicate the notice to the subsidiary. Is that fair?

MS ABRAM: I respectfully agree, sir, but I think I am slightly kinder to the CMA than you anticipate. If the point is that there shouldn't be obligations on the subsidiary as a result of sending the notice to the parent company, I absolutely agree. Sending a notice to the parent company, the parent company is the person, they are the person that has the obligations. But on the other hand, I don't demur -- BMW doesn't demur at all from the idea that the parent company can perfectly properly be asked for all of the information within its knowledge, and all of the documents within its possession, custody and control in those circumstances.

As in Schlumberger for example, that line of cases about part 31 disclosure, certainly BMW wouldn't demur from the idea that, if the parents can go to the subsidiary and say we want the contents of that filing cabinet because it is within the scope of the document request, just in the same way as that would be the case under a normal order for disclosure, that is a normal and reasonable thing to expect it to do.

MR JUSTICE MARCUS SMITH: But your answer is predicated on a corporate understanding of "group", not an undertaking understanding of "group", would that be fair?

MS ABRAM: Well, I mean, certainly that is the example we are discussing between ourselves. But imagine, if one may, that the parent and subsidiary are replaced by two individual sole traders, for example, who are part of the same undertaking, perhaps where one is an agent for another, as in some of the cases, but without the separate undertaking characteristic. I wouldn't regard that as making any difference. Provided that we are taking out of account the extraterritoriality point, so we are all still in the UK.

MR JUSTICE MARCUS SMITH: At the moment we are still in the UK. We will come to Ruritania in a second.

Let's reverse the order then. Let's suppose the section 26 notice is given to the 100

per cent owned subsidiary, and the documents that are responsive to the notice are actually only held by the parent. Now, in that case, do you say that the section 26 notice will have any bite? If you do say it does, why do you say it does?

MS ABRAM: I say it should have exactly the same theoretical bite as it does in respect of the parent company, which is that the subsidiary should be obliged to produce all of the information within its knowledge, and all of the documents within its possession, custody and control. If it can't get the documents from the parent company, then so be it, just as in under part 31.

MR JUSTICE MARCUS SMITH: Right. So you are taking a corporate stance, in the sense that what you are saying is that the only reason the subsidiary's documents are producible is because the parent has got control over the subsidiary which will pertain in the case of a 100 per cent owned subsidiary, or probably will -- I don't want to get into the finer details of company law. But that is not going to work the other way around. If you have a subsidiary, it is not going to have that control. It is controlled not controlling.

MS ABRAM: Well, I agree, as a statement of general principle, that is often the case. Certainly, I have known cases where a subsidiary is able to get documents, call for documents from a parent or from a sister company. That isn't this case and it all depends on the facts.

MR JUSTICE MARCUS SMITH: Yes. But the facts are questions of, at the end of the day, hard edged control. It is not enough simply to say, well, you are in the same undertaking. It may not be enough to say you are in the same group but, undertaking being an economic nexus rather than a legal nexus, undertaking in your case doesn't help us very much.

MS ABRAM: No.

MR JUSTICE MARCUS SMITH: The legal understanding may because there may

be a right to speak for the documents which will depend on all the circumstances.

MS ABRAM: Yes.

MR JUSTICE MARCUS SMITH: So moving on to bring in Ruritania at long last, your answer is exactly the same there. If there is a Ruritanian subsidiary and I, or the CMA, ask the parent in the UK for the documents, if the Ruritanian subsidiary is obliged to produce them at the behest of the parent, then the parent will be obliged to produce them pursuant to section 26. But it will only be the parent and not the subsidiary that is in breach of the provisions in the Act.

MS ABRAM: Yes. I absolutely take that position, sir.

Further, as Mr Kennelly noted, if the parent can't produce them without breaching Ruritanian data protection law, then perhaps that will be a reasonable excuse. But, subject to that, the primary obligation to produce them, if it can obtain them, bring it within its possession, custody and control, is there.

MR JUSTICE MARCUS SMITH: But the consequences are always vested in the addressee of a notice. The addressee being, in your case, the natural or legal person who is the addressee and not the wider corporate group, whether you read that as a legal group or as an economically defined undertaking group.

MS ABRAM: Yes. In my submission, that is right to give all of these sophisticated legal arguments that we are making, but it is also a matter of basic fairness that you should be told about an obligation you are asked to comply with. Not just a matter of fairness in the sense a 7-year old might use that concept, but also to say it is very unlikely that parliament would have intended to produce the result that is being argued for by the CMA, because it is not fair.

May I move on to the indicators of parliament's intention.

I want to look now at what evidence there is about whether parliament intended section 26 to operate extraterritorially. It is paragraphs 34 to 49 of our reply that I am

speaking to now.

I want to make six points about the indicators of parliament's position. I will reply, during those points, to the matters that are relied on by the CMA.

The first point is that there is nothing in the express terms of the Competition Act itself to suggest that section 26 was intended to have extraterritorial effect. In the terms of the Supreme Court at paragraph 29 of KBR, which Mr Kennelly has taken you to, we have to consider whether an intention of parliament to confer such extraterritorial effect can be implied inter alia from the scheme, context and subject matter of the legislation. That is the bit of the rubric that we are under.

The CMA's case is that parliament intended to convey this intention of extraterritoriality to criminalise conduct by non-citizens abroad, by means of a read across provision in section 59, which is a general interpretation section and contains tens of definitions. In my submission, it is just not credible that parliament's intention to displace the presumption against extraterritoriality would have been conveyed in this extremely indirect way. All the more so because of the criminal consequences; all the more so because of the lack of notice to the CMA.

In my submission, this point has all the more force because, as the CMA points out, quite rightly, factually the undertaking read across wasn't in the bill when it was first proposed, it was added in at a later stage. I say if the intention of adding in the read across had been to make powers that would otherwise have been purely domestic into extraterritorial powers, that would have left a trace in the legislation, the express terms of the legislation, in the preparatory work for the legislation. It is not credible that that change would produce that consequence without any trace.

That is my starting point.

The second point, let's have a look at the evidence in the contextual materials about whether section 26 was intended to have extraterritorial effect. Now, I want to cut

through some of these materials. You will have seen that the parties have both relied on various background materials and there is quite a bit of debate about the admissibility and the relevance of the materials. I want to cut through that by making two points. The first is that, just setting aside questions of admissibility and what is relevant to what question, the central point is that no one, no party, has been able to identify a single document suggesting that the CMA's investigative powers in the Competition Act were intended to operate extraterritorially. Whether they are admissible or not, none of the materials help the CMA.

So, actually, the Tribunal doesn't need to decide whether the materials we have relied on are admissible or whether we are right that they are inconsistent with the CMA's case, because what matters is there is no evidence to displace the starting presumption against extraterritorial effect.

I say that the absence of support for the CMA's case is particularly significant because the contextual materials do actually show that there was an intention to strengthen the DGFT's powers, as it then was, in various other respects.

The CMA's case -- and I am not going to take to you their case but it is defence paragraph 87 -- is that there are various white and green papers and consultation documents that show that parliament's intention in introducing the 1998 Act was to strengthen the DGFT's investigative powers. We say you have seen that most of those documents were irrelevant because they were produced by a different government and they didn't lead to legislation. But, actually, what is more important is that none of them suggests that the territorial scope of the DGFT's investigative powers was a deficiency that would be remedied by what became the 1998 Act.

Now, I am conscious of the time, I want to take you to the 1997 consultation document and to the 1980 Act. It will probably take five minutes to finish the point and I am in your Lordship's hands as to what you would prefer?

MR JUSTICE MARCUS SMITH: I think, given that we don't want too much of a rush tomorrow, why don't you conclude those points.

MS ABRAM: I am very grateful.

So, the 1997 consultation document. This is the document that enclosed the draft bill that became the 1998 Act, so I think everyone accepts that it is a relevant document. It is at BMW bundle 1, tab 17. There is a table of proposed changes at page 617.

MR JUSTICE MARCUS SMITH: Yes.

MS ABRAM: It says, "key differences between the current and new regimes". Three quarters of the way down the page you see, in the left-hand column, "investigation", and, under the column that says "current regime", "limited investigatory powers". Then, under the second big column, "proposed new regime", "strong investigatory powers including forceable search or entry powers".

So, I respectfully agree with the CMA that the purpose of the Act was to strengthen the DGFT's powers in identified respects.

Lets have a look at what the changes are. You can see that at page 639, paragraph 8.1.

MR JUSTICE MARCUS SMITH: Yes.

MS ABRAM: The document is identifying here various powers it is said the DGFT needs to have:

"The DGFT needs adequate powers of investigation to enable him to enforce the prohibition. The bill therefore includes the following provisions."

One can read down the list:

"DGFT can enter premises, inspect and copy documents; DGFT can use force to enter premises when necessary with a warrant; obstructing the DGFT in various ways will be a criminal offence, including deliberately supplying false or misleading

information."

And there is the point on legal professional privilege.

Then it says:

"These provisions are set out in clauses 24 to 28 and 39 to 40."

Now, what is now section 26 is one of the clauses referred to at the bottom of that paragraph. So it is what was clause 25 referred to in that paragraph. You can see that at page 668.

MR JUSTICE MARCUS SMITH: Yes.

MS ABRAM: I don't need to take you through the detail but you see at first glance that clause 25 is now section 26.

So the CMA says, look, parliament wanted to strengthen the DGFT's powers, and they are right. The various ways in which parliament wanted to do that are identified in this consultation document. It identifies the new intended powers. What it signally doesn't do is say it needs to be extraterritorial in scope.

MR JUSTICE MARCUS SMITH: Yes.

MS ABRAM: I would like, just to polish off that point, show you the previous power, which is at authorities bundle 1, tab 3. I am sorry, Mr McIntyre rightly corrects me it is tab 5. Thank you.

This is the Competition Act 1980, which was one of the predecessors, you will recollect, to the 1998 Act. You see, section 3:

"Preliminary investigation by a director."

Subsection 1:

"If it appears to the director that there may be an anti-competitive practice, the director may, in accordance with this section, carry out an investigation."

Over the page, section 3.7:

"For the purposes of an investigation under this section, the director may, by notice

in writing, require any person to produce documents specified by the director."

So the key point here is that the CMA say that extraterritoriality was introduced by the 1998 Act. It says:

"These powers are purely domestic, section 26 is extraterritorial in scope."

It is very curious, if that is the case, that there is no trace of, we are having a parallel power but it is going to be extraterritorial in scope. That would have been clearly signalled if that intention to make that change had been part of the parliamentary intention.

So I say that addresses the CMA's argument -- it is defence paragraph 67 to 71 -- that strengthening the previous powers before the 1998 Act was something that necessitated and was reflected in extraterritorial scope of section 26. That is just not borne out by the documents.

I will stop there for today.

MR JUSTICE MARCUS SMITH: Thank you. Just a couple of points before we resume tomorrow. We will resume at 9.30 am.

MS ABRAM: I am very grateful.

MR JUSTICE MARCUS SMITH: Something not for answer now, but I got a sense, and I may have misunderstood, in which case you can correct me overnight, that there was some kind of ability to disapply or read out the extension of the meaning of "person" as to include "undertaking". If one looks at section 59, it says, as we all know:

"In this part, 'person', in addition to the meaning given by the interpretation Act, includes any undertaking."

So you then look at section 19 of the interpretation Act in tab 2 of the bundle, and all that says is that:

"In this Act, and every Act passed after commencement of this Act, 'person' shall,

unless the contrary intention appears, include any body of persons corporate or unincorporate."

So, I quite accept that a contrary intention could eliminate reading in to mean "person" any body of persons corporate or unincorporate, but I don't see how it can extend to the inclusion of "undertaking" in the 1998 Act.

My sense of those two provisions is that we have to read "person" as including "undertaking". That may be infelicitous or not, I am sure everyone has something to say about that, but it is not an option to say, as we have been discussing just to understand it, that we can blue pencil it out. I think it is a helpful thought experiment but, unless you correct us tomorrow morning, my reading of these provisions is it is in, for better or worse, and we have to live with it.

Subject to that -- and Mr Jones, don't worry if you don't have an answer but do you have an answer to the stay of the penalty?

MR JONES: Yes, sir, we do. I discussed it with my learned friend. We agree that, given the concern which would otherwise arise about the penalty arising during the course of these proceedings, that would be sensible. So we have discussed that and I think it might be my learned friend's court to come up with the draft order, but between us we will get one to you, sir.

MR JUSTICE MARCUS SMITH: I am most grateful. I wouldn't want us to think that every time we delay a day in getting our judgment out it is costing BMW £15,000. That seems to us to place an undue burden on us to get it out fast. Whilst that is our intention, I don't think we want that additional pressure on our consciences. So thank you very much, Mr Jones. Much obliged.

9.30 am tomorrow morning.

(5.10 pm)

(The hearing adjourned until 9.30 am the following day)