IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1574/10/12/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Friday 27th 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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Friday, 27 January 2023

(9.30 am)

MR JUSTICE MARCUS SMITH: Mr Kennelly, good morning.

MR KENNELLY: Good morning. Ms Abram has allowed me to respond to the two points which were raised yesterday by the tribunal before she continues her submissions. The first of those two points is the point raised at the very end of the hearing yesterday by the president. Are we stuck with "undertaking" being included in the definition of person, or is it open to you to, in effect, put a blue line through it in an appropriate case.

It is open to the tribunal to draw a blue line through it where appropriate, for two main reasons.

First, as I will show, it is a well established principle of construction that, even if the words "unless the contrary intention" appears, even if those words aren't express, the same result should be achieved as a principle of statutory construction anyway.

In this case, in any event, reading the Interpretation Act and section 59 as a whole, one has those words expressly.

So if I may, I will go, first, to section 59, which actually I never showed the tribunal yesterday and for which I apologise.

MR JUSTICE MARCUS SMITH: Not at all.

MR KENNELLY: It is in the first authorities bundle, behind tab 13.

This is the definitions section of the Competition Act in force. Go over the page to page 129. We see the definition of "person" and it provides:

"'Person', in addition to the meaning given in the Interpretation Act 1978, includes any undertaking."

MR JUSTICE MARCUS SMITH: Yes.

MR KENNELLY: So we are directed then to go to the Interpretation Act 1978, which

is in the same bundle of authorities, behind tab 4. You will find the definition of "person" there in schedule 1, behind tab 4, at page 29.

"Person ..."

It is just above the second hole punch:

"Person includes --"

Forgive me, sir, it is page 29, the definition of person is two-thirds of the way down the page.

MR JUSTICE MARCUS SMITH: Yes, I have it.

MR KENNELLY: "Person includes a body of persons, corporate or unincorporate."

But then you need to go back to section 5 of the Interpretation Act, which is on page 24 behind the same tab.

MR JUSTICE MARCUS SMITH: Yes.

MR KENNELLY: And this provision applies to the schedule as a whole:

"In any Act, unless the contrary intention appears or is an expression as listed in schedule 1 to this Act, are to be construed according to the schedule."

The words "unless the contrary intention appears" applies to all of the definitions in the schedule, and in my submission the cross-reference in section 59, the fact that section 59 refers you back to the Interpretation Act necessarily incorporates this proviso.

MR JUSTICE MARCUS SMITH: Well, that is the question. I mean, I am entirely with you up to that point but it does seem to me that we would want to be pretty careful about disapplying the words "in addition". I mean, the question is, is it simply adding the words "undertaking" into the definition in the Interpretation Act? In other words, it says for the purposes today, person includes a body of persons incorporate or unincorporate or an undertaking, in which case your point I think has some force.

If, on the other hand, it is saying, and I must say I think that is the natural reading of

this section, it is saying you look to person in the Interpretation Act but, by the way, in addition, it is an undertaking.

MR KENNELLY: Yes.

MR JUSTICE MARCUS SMITH: So that is -- I am not sure there is much more you can say about it. That is the difficulty I think.

MR KENNELLY: Indeed**.** There are two responses in my submission to that. The first is the principle of construction against absurdity. If one reads it in that literal way, section 59 would mean person includes a body of persons corporate or unincorporate unless the contrary intention appears, but person always includes undertaking, even if the contrary intention appears. My first point is that can't be parliament's intention.

In any event, I mentioned at the beginning this principle of statutory construction and I have handed up an extract from Bennion, it is the latest addition of Bennion and it is section 18.8.

You will see in the heading the learned authors say:

"Acts sometimes provide expressly that a definition applies ‘unless the context otherwise requires or unless the contrary intention appears’. This wording is unnecessary as the same result is achieved whether or not it is included."

And certainly in very clear terms by reference to detailed authority and in the middle of that passage, the comment, one can see:

"A statutory definition does not apply if the contrary intention appears, regardless of whether the definition includes express provision to that effect."

MR JUSTICE MARCUS SMITH: Mr Kennelly, I quite take that. I think the question there is just how absurd or bad the inconclusion of undertaking in all circumstances is. Just to foreshadow, I am not going to throw it at Ms Abram nor am I going to throw it at you but I am going to throw it at Mr Jones because I have a provisional

sense of how section 26 works, which I think it would be fairest to invite Mr Jones to push back on because it results in an outcome that I think you would possibly like and he would probably not like.

But some of the steps and the reasoning are such that I think you will certainly want to reply on it. But I will keep that marked at the moment because I think it is right that Mr Jones gets first touch of the ball because I am anticipating pretty significant push back from him and that is why I am articulating it. I want push back.

MR KENNELLY: I understand.

MR JUSTICE MARCUS SMITH: But you may then think in light of that articulation of a way of reading section 26 that in fact the absurdity point resolves itself.

MR KENNELLY: I understand.

MR JUSTICE MARCUS SMITH: You may well not say that but we will leave that for later.

MR KENNELLY: I am grateful. Just to -- I had to show you Bennion anyway.

MR JUSTICE MARCUS SMITH: No, I am very grateful.

MR KENNELLY: The concern about contrary intention is addressed in my submission here and finally on this point, and again we apologise for not having brought this to you before, because you have never seen the reference in Hansard to where this was introduced, this definition, and that is the second document. Because I mentioned yesterday the inclusion of the word "undertaking" in the definition came relatively late in the legislative process, it wasn't in the original bill. One can see again about two-thirds down below the second hole punch Lord Simon of Highbury moving the amendment to change the definition of person in the way we have been discussing. The minister said:

"The noble lord said: 'My Lords this is a technical amendment which provides that in the interpretation of Part I of the Bill “person” is to include any undertaking.'"

And he mentions then the fact that the prohibitions are modeled on articles 85 and 86, which apply to undertakings.

"Words in the bill such as 'undertaking' are to be interpreted by reference to EC law. However [and I rely on this], it is not appropriate for all of the provisions of the bill to be drafted in terms of undertakings."

So again echoing what I have just said; it was never parliament's intention that every reference to person would include undertaking unless the contrary intention appears. That is all I will say about that point.

The second point that I wanted to address you on was Mr Cutting's question about whether in the other cases any extraterritorial provisions were in play. In the KBR case itself the underlying prohibition of the offence did have extraterritorial effect. We get that from the KBR judgment in the Supreme Court. I will just trace through where we get that from. Just to go back to the KBR judgment in the Supreme Court, that is in volume 3 of the authorities bundle, paragraphs 2 and 3 of the judgment of Lord Lloyd-Jones, that is on page 2119.

Paragraph 2, we see a reference to an investigation into the affairs of Unaoil, a Monaco-based company, and in paragraph 3 we are told that the investigation underlying this case was an investigation by the SFO in the UK into the activities of Unaoil, which we are told is a Monaco-based company. And then the underlying offence that gave rise to that investigation was described in more detail in a related case describing the very same investigation, which we have handed up to you. We know this case describes the same investigation because the divisional court in KBR said so in paragraph 5. We have that if you need to see it. There is no dispute about that. So the Unaenergy case gives a fuller description of the same investigation to which the KBR case relates. You see that at paragraph 5 of the judgment of Lord Justice Gross in Unaenergy. Go to paragraph 8, you see it is

an investigation into Unaoil. Paragraph 8, the primary subjects of the SFO investigation are these various British nationals of Iranian descent residing in Monaco and the first claimant is a holding company of the Unaoil Group. It was into Unaoil's activities that the SFO was investigating. It was investigating pursuant to the provisions -- this is to Mr Cutting's question -- at paragraph 5:

"On 22 March 2016 the SFO commenced the investigation with which this matter is concerned pursuant to section 1(3) of the Criminal Justice Act 1987. The investigation was commenced because the SFO suspected that offences had been committed namely, offences of corruption under section 1 of the Public Bodies Corrupt Practices Act 1889, corruption under section 1 of the Prevention of Corruption Act 1906, [And then] conspiracy to corrupt under section 1 of the Criminal Law 1977 Act, ... [And then this] conspiracy to enter into corrupt transactions outside the UK contrary to section 1A of the Criminal Law Act 1977 and offences of bribery under sections 1 and 6 of the Bribery Act 2010."

We have already seen separately under the Bribery Act there is extraterritorial effect. So the offences in issue did have extraterritorial elements in the KBR case.

I am happy to answer any questions on those points before -- if there aren't any I will sit down.

MR JUSTICE MARCUS SMITH: Thank you very much. Ms Abram, before you start there will be a fire alarm at 10 o'clock. It is not a real fire alarm, don't rush for the door at once, but you will probably want to pause your submissions while it goes on because it is incredibly loud.

MS ABRAM: Sounds like a good idea. Thank you, sir.

On timing I anticipate being done within or about within time, but just for the avoidance of doubt, I was meant to stop at 10.30, if I do go past 10.30 we would accept Mr Jones should still have the full amount of time for his submissions and we

would be squeezed on reply rather than Mr Jones being squeezed at all.

Submissions by MS ABRAM (Continued)

MS ABRAM: We were in ground 1 and I was on my third section of five, focusing on the indicators of parliamentary intention. I was going to have six points about parliamentary intention, I had addressed the express terms of the Act and I had addressed the contextual background materials, the travaux. So I will turn to my third point.

That addresses the CMA's argument that the substantive prohibition in the Act and the penalty provisions have some degree of extraterritorial effect, can be directed to undertakings abroad and therefore the same scope should be accorded to the investigative powers.

You heard what Mr Kennelly had to say yesterday about the true nature of that extraterritoriality but for the purposes of the submission I am going to make I am fighting the CMA on their own turf, so assuming for this purpose that the powers have all of the scope that the CMA say they have. I still say that it is demonstrably incorrect that the investigative powers were intended to have the same scope as the substantive and penalty powers.

That is because at the time the 1998 Act was enacted all the other investigative powers were clearly territorial domestic in scope and I would just like to show you those. That is authorities bundle 1, tab 12.

So section 26, which is the first power, is at page 72.

That is section 26 with which we are familiar. If you flick forward to the next few pages you will see that all the other investigative powers that follow, 27, 28, 29, relate to the entry of premises either without a warrant or with a warrant. And this taps in I think to the point the president was making yesterday about types of extraterritoriality or I might suggest perhaps a spectrum of extraterritoriality. Clearly

it wouldn't be suggested, couldn't be suggested that the CMA would ever have the power to go to BMW AG's offices in Munich and enter those without a warrant, that would be extraordinary extraterritoriality. So --

MR JUSTICE MARCUS SMITH: Well, I mean let's be clear what we are talking about here. I mean, you are absolutely right it would be remarkable to read section 27 as permitting the CMA to door step BMW or VW in their own home jurisdiction. But if parliament has decided that it was going to give the CMA that power, one can imagine the eruptions of political problems that would emerge, but if parliament were to say: you can do this whatever German law says, we don't care, you can do this, then they can do it. It is really going to the strength of the articulation of the extraterritoriality that matters. You can certainly take it that we would require a high degree of express articulation in something like section 27. Power to enter premises without a warrant. It is as extreme as it gets in this sort of context.

Of course, as you say, section 26 is not as extreme and so one might say that the language needs to be less forceful in order to achieve that extraterritorial effect. I am sure that is a point you will be making.

The other point, though, is that if one has a combination of provisions in the Act, section 26, section 27, section 28, and some are extraterritorial because they are less offensive to comity and some are not extraterritorial because they really are offensive to comity, then one would expect that sort of distinction to be drawn in nuances in the language. So I am not I think expressing entire agreement with you that section 26 needs to have the sort of forceful extraterritoriality enunciation that section 27 clearly would have for the reasons we have discussed, but one would expect, reading the statute as a whole, for that difference to be reflected in the wording so that you would know that one has got a different scope to the other.

MS ABRAM: I am very grateful for that intervention, sir.

Before I answer it may I just address a point that Mr Frazer made yesterday and which I anticipate may be on his mind in this connection, which is that when the CMA go to premises in the UK under section 27, they are entitled to demand any documents that are accessible from those premises, even if they are held abroad. BMW don't demur from that and I hope that was clear from the way that I answered the president's questions later in the afternoon. If a person has chosen to establish themselves in the UK by having premises here and if documents are accessible from those premises where they have a permanent establishment, I absolutely accept that the CMA should be entitled to get them. BMW accepts that. Of course that is not the facts of the case, which is why we are here.

I say that either that is not true extraterritoriality because you have brought yourself within the UK by establishing yourself, or in answer to or to tap into the president's point at the start, it is on the spectrum of extraterritoriality, it is far down the scale from going to Munich and getting the documents from there.

MR JUSTICE MARCUS SMITH: Just to put a bit of flesh on that general point, let's suppose person A has a cloud platform which is present in Ruritania and all they do is down and upload documents from a terminal in the United Kingdom to Ruritania. If that is something that an employee in person A can do from a terminal, then that is fair game. There maybe questions about the lawfulness of it in terms of whose account is it, but if it is person A's resource, and an employee would be doing nothing more than their usual business, then it is accessible.

MS ABRAM: Provided that person A is established in the UK. Now --

MR JUSTICE MARCUS SMITH: Yes, that was my assumption.

MS ABRAM: Yes. If person A's employee was just passing through the UK on holiday or happened to be here while transferring between two flights, I don't say that

they have submitted themselves to the jurisdiction of the UK. That is your scenario 3 and Mr Kennelly addressed that yesterday. But subject to that, yes.

MR JUSTICE MARCUS SMITH: Well I mean, yes, you are absolutely right to raise it.

Let's take -- this is the problem with technology but let's take an employee of person A, person A being extraterritorial for this example. So the employee is going through Heathrow Airport on the way to somewhere else and they have their laptop with them and they are served with a notice and told, "Right, you have the laptop here in Heathrow Airport, plug in your details and we will download the cloud", you would say that is not within the section 26.

MS ABRAM: I would. We are then in the zone of Ms Akerson in KBR happening to be in the UK; I mean, actually being here because she was here for a meeting with the SFO, and that is not enough to bring them within the jurisdiction.

MR JUSTICE MARCUS SMITH: I am not sure I like these labels but it is personal jurisdiction but not subject matter jurisdiction.

MS ABRAM: It is. I respectfully agree that is a helpful guide but not entirely unslippery itself.

MR JUSTICE MARCUS SMITH: No. I am afraid lawyers for very good reason prefer paper to data for exactly that reason.

MS ABRAM: Yes. We are learning to grapple with data.

MR FRAZER: Just so I understand the answers to the questions you anticipated I was going to ask, well done, had there been a section 27 visit and the documents under the control of BMW AG had been accessible even though BMW was not established in the UK but the documents were accessible through the computers of BMW UK, which was established, you wouldn't demur from the CMA's ability to access those documents. That would be within its powers, according to your

response. Is that right?

MS ABRAM: Yes, that is right. I say the touchstone is as in part 31. I totally accept the president's point that we need to have a clear delineation of what can and can't be done. Of course there is fluffiness around the edges. Questions about whether you are in an airport really illustrate that. But essentially yes, if BMW UK is entitled to call for those documents, we BMW don't demur from the idea they should be able to give them to the CMA.

MR CUTTING: I am slightly struggling with a bit of the logic here, maybe I am just being a bit slow. The Ms Akerson case in KBR was a problem because the SFO were purporting to serve the document by serving on her as an individual.

The section 26 issue with the employee passing through the airport is that the CMA may not be seeking information on the undertaking but they may be applying section 26 against a person in the jurisdiction. Since on your analysis we don't think about undertaking when we use the word "person" in section 26, then it must be that section 26 applies to an individual or a corporate. So why can't it apply to the transiently present employee at Heathrow?

MS ABRAM: Because the transiently present employee has done nothing to bring themselves within the jurisdiction of the UK.

Now, of course there is personal jurisdiction in the sense that they are in the jurisdiction to be served with the notice, but why should that individual, just by virtue of being in the UK, be required to produce their documents from abroad? They are no more relevantly in the UK than Ms Akerson.

MR CUTTING: No, they are more relevantly. Ms Akerson was only in the UK as an officer of the company and the SFO was seeking to serve the company. Section 26 can be used to execute searches in relation to persons. So that is the difference with Ms Akerson's position it seems to me.

[Fire alarm goes off]

MR JUSTICE MARCUS SMITH: Saved by the bell, Ms Abram.

MS ABRAM: Saved by the bell.

(Pause).

I say there is no difference because a company is a legal construct, right. It only exists through people and through premises. Ms Akerson is as much a personification of the company as the employee is in the other example. So I say there is no relevant difference.

MR CUTTING: I wonder though if the answer may lie in the difference between a valid service, and I appreciate that is a nuanced thing in this context because we are not really talking service, we are talking about less formal notices, but let's call it service anyway. What, having served someone, you can compel them to do. So take the employee of a company, the company being extraterritorial out of the jurisdiction, the employee transiently coming through.

Now, you might put the notice on the employee because they are physically present in the jurisdiction but you can equally, because it is informal, actually email the notice to the company abroad. So that can't make a massive difference.

I suspect the answer is if you have the employee in the jurisdiction and you hit them with a notice, then it may be that their transient presence affects their documents, the ones that they themselves own, if that is the scope of the section 26 notice. But I struggle I think to see how that can be used to bootstrap yourself up into the entire documentation which is not owned by the employee. The employee is merely the route by which one gets at the company and I don't think one can allow the fact that an employee is a little bit more mobile than a corporation to answer the substantive question of what is produced.

It is a difficult borderline but I think I would be uncomfortable in having a situation

where an employee is effectively constrained from coming into the UK because they might be nailed with a notice that is intended to be much more widely in ambit embraced in documents which the employee can only access as an employee of an extraterritorial corporation.

MS ABRAM: Well, that is the absolute heart, isn't it, of the distinction between personal jurisdiction and subject matter jurisdiction. And also of course the distinction between a person who is transiently passing through where these questions arise and a person who is genuinely established here. These questions aren't unique to this bit of the law. I mean, we all recollect the freedom of movement cases where we were always drawing these distinctions when they formed part of our law.

MR JUSTICE MARCUS SMITH: It doesn't arise here but there may be a very important distinction between separate legal personality. I mean, if the person served at Heathrow Airport was a sole trader and not a company that was extraterritorial, the argument might be much harder to draw between personal or subject matter jurisdiction. That is not for today but I can see it raises harder questions.

MS ABRAM: Well, it is not for today. I think in substance it is very close to the example though that Mr Cutting gave and I would still say that because a company can only -- because it is a legal fiction and can only act through people, there shouldn't be a difference in the way a company's directors like Ms Akerson are treated and the way a sole trader should be treated. If I as a sole trader choose to go to another jurisdiction, I would expect to be treated, if one thinks about comity from the other side of the coin, with the same degree of respect, mutual respect coming from the UK as a director of a company if I had incorporated my practice and I was a director instead of a sole trader.

Of course there are difficult examples around the edges but I hope that is a principled distinction that enables the law to be workable and consistent with the authorities and indeed right.

MR JUSTICE MARCUS SMITH: Well, the short answer is we probably don't need to go there. For my part I think I do see a big distinction between corporate personality which entails a degree of respect and a deliberate decision to act simply as a natural person. You know, your attributes as an actual person, well they are pretty portable.

MS ABRAM: I hear that. I think I probably can't take the point any further.

MR JUSTICE MARCUS SMITH: You are not agreeing.

MS ABRAM: I am not agreeing for the reasons I have given and it is not this case so we don't need to go there. It is perhaps a future difficult case where a cartel between sole traders becomes the subject of section 26 notices, not competition barristers.

I am conscious I haven't answered your two questions which you asked ten minutes ago, because I wanted to address Mr Frazer's question first.

So those were the points about the differences between section 26 and 27 to 29.

So what I say, I make a negative point and a positive point. The positive point is that the fact that sections 27 to 29 are purely domestic in scope isn't something that I say is determinative of the scope of section 26. It is Lord Lloyd-Jones at paragraph 29 in KBR, it is a pointer. It provides some support for my client's case as to the scope of section 26. That is as high as I put it.

But the point that I do really hammer home is a negative point, which is that the CMA definitely aren't right to say that the scope of the substantive powers is the same as the scope of the investigative powers, because the scope of the other investigative powers is domestic. That, I hope, addresses that central buttress of their case.

My fourth point, if I may move on, is the CMA's reliance on the powers of the EU

Commission. Now, the suggestion appears to be that parliament in 1998 intended to confer like powers on the CMA, DGFT, as the Commission enjoyed. So the CMA refer to the scope of the powers of the Commission, the way they ask RFIs as inspiration for what parliament should have intended the CMA to do. That is not correct. I am going to unpick a key difference in the statutory scheme, but before I do that I am just going to show you how the Commission acts.

So we can use the RFI sent in this investigation to BMW AG, which is at BMW 1, tab 4, page 104.

This is the document that we are asked not to read out --

MR JUSTICE MARCUS SMITH: Yes. We will read it to ourselves where necessary.

MS ABRAM: I am very grateful. You will see in the top right-hand corner of the page it is addressed to BMW AG and there is the usual lengthy introduction and the substantive RFI actually starts on page 108.

MR JUSTICE MARCUS SMITH: Yes.

MS ABRAM: There is a description of the subject matter of the investigation, which isn't relevant for these purposes.

On page 109, halfway down the page, you see there are two questions. So that is the real RFI, questions 1 and 2 there. The section on which the CMA relies and in respect of which I am seeking to get my retaliation in first is the box at the bottom of the page. I am not going to read it out.

MR JUSTICE MARCUS SMITH: We will read it ourselves.

Yes.

MS ABRAM: So the point is BMW AG is being asked to provide information on behalf of the whole undertaking and we accept that. We accept that the Commission considers that its powers entitle it to ask a person in the EU for information about the whole of that person's undertaking even if that information isn't within that person's

possession, custody or control in the terms we would use in domestic law. So the Commission thinks that it has the right to ask a subsidiary to go out to its Japanese parent company and get information and bring it into the EU.

I want to show you how the CMA say that maps across to this case. That is defence footnote 31, so we are in BMW 1 still, tab 12A, page A361.

So at the bottom of the page, footnote 31:

"Ie In the present case, adopting the Commission's approach, the CMA could have held BMW UK responsible for providing all information held by the BMW Group: that would have avoided making BMW AG a named target of the notice but in practice it would have the same consequences."

MR JUSTICE MARCUS SMITH: Yes.

MS ABRAM: So to start with the good news, we agree with the CMA that the equivalent of the Commission's approach in this case would have been for the CMA to demand that BMW UK, so a legal person in the jurisdiction, should be held responsible for answering the section 26 notice on behalf of the whole undertaking, whether or not it had the information, on pain of a penalty. So we agree that is the map across.

But the UK legislation would not have enabled the CMA to do that. That is because the CMA wouldn't have been able to enforce the requirements because it is established in English law, has been established since before the Competition Act came into force that if you don't have information, you don't have access to it, that is a reasonable excuse for not providing it.

MR JUSTICE MARCUS SMITH: Yes.

MS ABRAM: You will recollect that reasonable excuse is a defence under section 40A to a penalty, it was a defence under section 42 when it was a criminal offence as well.

That principle that not being able to get information is a reasonable excuse for not providing it has been supported by House of Lords authority since before the 1998 Act. I don't think I need to take you to the case but let me tell you where it is in the bundles. It is In re Arrows, which is in the further authorities bundle, because clearly you needed a sixth authorities bundle, sorry about that, tab 1 of that bundle and the key extract is at page 104 of the report, page 31 of the bundle, just above G. So 104G.

So exactly the same, same words, reasonable excuse and the House of Lords says, Lord Wilberforce says not being able to produce the document is a reasonable excuse for not producing them. It is presented as completely clear.

By choosing to use the same words in section 42, and then subsequently section 40A, parliament excluded the possibility that the DGFT, CMA, could do what the Commission does. So it is absolutely clear, I say, that parliament didn't intend the DGFT to be able to obtain information in the same way as the Commission obtains the information. I say again that disposes of the CMA's reliance on what the Commission does, the Commission's practice as an indicator of parliamentary intention, because parliamentary intention was clearly the opposite.

Moving to my fifth point on parliamentary intention, I would like to address other means by which documents could be obtained.

When the Competition Act was enacted in 1998 it is common ground that regulation 1762, which is what we call the first regulation, the predecessor of the modernisation regulation, didn't empower the CMA to get documents from the Commission or other NCAs or to ask another national competition authority to go and do a search. So they didn't have the power under European law to do what they later got the power to do under the modernisation regulation.

Now, of course that doesn't mean a regulator could never get relevant documents,

and it is interesting and noteworthy in this case the CMA haven't said they are unable to investigate this infringement, unable to exercise their powers, unable to take a decision because of an inability to get documents because of BMW AG questioning the lawfulness of the notice. And there may in an individual case of course be a UK company, documents held in the UK, you sometimes have leniency or immunity applicants who cooperate and voluntarily provide documents. All sorts of different ways the CMA will get documents. But I see the hesitation on your face, Mr Frazer, and I don't shy away at all from the absence of --

MR FRAZER: You misread my face.

MS ABRAM: Sorry about that.

MR JUSTICE MARCUS SMITH: The thing is you actually never know what an entity not susceptible on your case to the section 26 jurisdiction might have. It might have, you know, all kinds of important stuff but because only they hold it you don't know. You are not shying away from the point that even if this is hugely destructive to a CMA investigation, they don't get it.

MS ABRAM: I don't shy away from that. Specifically, I don't shy away from the absence of other routes to get these documents at the time the Competition Act was enacted.

MR JUSTICE MARCUS SMITH: No, indeed, but that is an ameliorating of the thrust of your point, which is, even if it holds an investigation below the waterline, there is no ameliorating effect whereby we can adjust the borders or parameters of section 26 to embrace those documents. So I think you are going to have to be ready to embrace the hard case because I am quite sure Mr Jones will be pressing that. In other words, if this is really, really damaging to the CMA, then tough.

MS ABRAM: I don't shy away from that.

MR JUSTICE MARCUS SMITH: It may not be, it may be that there are ways around

it but we have to address I think the extreme case.

MS ABRAM: So there are two possible explanations in theory. Either section 26 was intended to operate extraterritoriality to fill the gap that might otherwise exist, or the lack of alternative routes wasn't an issue because extraterritorial effect wasn't envisaged, wasn't identified as a need by the legislator.

I say the second explanation, there was no identified need for extraterritorial effect, is much more likely, particularly given that the scheme deliberately doesn't adopt the same approach as the Commission. So if parliament had rejected the Commission's approach but nonetheless wanted to achieve extraterritorial effect you would really expect the legislation to make that clear. Instead what you have is parliament rejecting the Commission's approach, porting across from the 1980 Act essentially a power which I showed you yesterday in section 3(7) that the CMA say was purely territorial in scope, and it is suggested it was somehow imbued overnight with extraterritorial effect. I say if that had been parliament's intention, particularly where they weren't doing what the Commission does, they would have said so.

MR JUSTICE MARCUS SMITH: Yes.

MS ABRAM: That conclusion is also supported by the fact that there is no evidence that the DGFT or its successors have thought they had a power to use section 26 extraterritorially or they have ever sought to use it in that way.

Now, that point was something you looked at yesterday in the context of the EU between the coming into force of the Competition Act and the modernisation regulation which came into force in May 2004. But it actually applies not just in that context which is within the EU but also to the whole of the world, the documents across the whole of the rest of the world outside the EU for the whole period since the Competition Act came into force in March 2000.

So during that period the CMA couldn't have gone to the Philippines and obtained

documents using the modernisation regulation. It is not suggested, well we have used section 26 instead, and I say that is really significant.

What they have done instead, totally understandably, is they have gone out and tried to negotiate new ways of getting those documents, including the recent MMAC with the US, Australia and New Zealand.

So to try and bring that point together, of course after the modernisation came into force before Brexit the CMA could have got these documents under the modernisation regulation and now it no longer has that power. Brexit has deprived the CMA of an ability to get documents it would previously have had. The most fundamental point in a sense that I want to make is that it is for parliament to consider whether that gap should be filled and, if so, how. So I respectfully submit that the question for the tribunal isn't whether the CMA could obtain documents from different routes if section 26 isn't available but whether in 1998 parliament intended section 26 to be available for this purpose.

So the sixth and final point I just want to address under this section of my submissions I can take very shortly. It is the CMA's argument that section 126 of the Enterprise Act 2002 supports its view that a penalty under section 40A can be applied to a foreign person. So this is an argument only about the scope of section 40A and not an argument about the scope of section 26.

The argument is that section 126 provides for a section 40A notice to be served at the principal office in the UK of a foreign company or by email, and therefore it must also be possible for a section 40A notice to be served on a foreign company that doesn't have a principal office in the UK.

Now, it is common ground that the section says nothing about service on a foreign company without an office in the UK.

We say that, if anything, the fact that section 126 deals with a foreign company with

an office in the UK but not with foreign companies without offices in the UK, if anything that is unhelpful to the CMA. So again I am not saying this point is determinative of the case against the CMA, I am just saying that the point that they pray in their aid is at best neutral and at worst unhelpful to them because the section doesn't deal with what they want it to deal with.

That is what I wanted to say about parliamentary intention and I would like to address safeguards very briefly.

This is paragraphs 50 to 53 of our reply and you will recollect, just taking a step back, that the point is that it is more likely that parliament will have intended legislation to operate extraterritorially if there are safeguards on the operation of the power. We can see from KBR --

MR JUSTICE MARCUS SMITH: If, for instance, section 26 had said you do not have to disclose information which it is not lawful to disclose by reference to the local jurisdiction, local jurisdiction being defined as anything outside the UK, that would be a pretty telling point against you. That is the sort of thing you are talking about, is it?

MS ABRAM: Yes. I am sorry, sir, could you repeat that?

MR JUSTICE MARCUS SMITH: Suppose section 26 said it is a reasonable excuse not to provide information if the provision of that information in response to the notice would infringe the laws of a local jurisdiction, the local jurisdiction being anything outside the United Kingdom. That is not saying it is extraterritorial but the implication is obviously that it is.

MS ABRAM: I am sorry, I heard you the wrong way around before. Yes, I can see that would be unhelpful.

It doesn't matter whether it would be fatal to my case. I don't think I would accept it would be fatal to my case because of the point about what happens if BMW UK could call on documents that are held in Japan, for example, that are relevant ex

hypothesi. I would say that the CMA can do that and I would say that doesn't connote that section 26 is extraterritorial, but it would be unhelpful.

MR JUSTICE MARCUS SMITH: I am not suggesting any of these points are going to be in and of themselves decisive either which way but let's put it this way, I think we both agree you would have some work to do if there was such a provision in section 26, and there isn't.

MS ABRAM: Yes. I think that is fair, sir.

Could I show you paragraph 45 of KBR. I will be short on safeguards, I am conscious of time. I just want to show you paragraph 45 and make one point orally. It is authorities 4, tab 72, page 2131.

Paragraph 45 at the bottom of the page, I just want to pick it up just above letter H of "critical". This is Lord Lloyd-Jones talking about not the safeguards in the statutory scheme that was being relied on in KBR, but the safeguards and the alternative means of getting the documents in that case.

"Of critical importance to the functioning of this international system are the safeguards and protections enacted by the legislation, including the regulation of the uses to which documentary evidence might be put and provision for its return. These provisions are fundamental to the mutual respect and comity on which the system is founded."

Then:

"It is to my mind inherently improbable that parliament should have refined this machinery as it did [which was in subsequent statutes], 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 the courts or authorities of the state where the evidence was located."

So drawing that out, there are really three safeguards being identified in that statute:

regulation of the use to which evidence can be put, provision for its return, and involvement of judicial authorities or prosecuting authorities on each side of the divide on the requesting and receiving states.

The CMA rely on various matters as to safeguards and we have addressed these in detail in paragraph 53 of our reply. I don't want to repeat that material but I do just want to make one overarching point which relates back to the CMA's position that I identified yesterday, that it doesn't even need to send a section 26 notice to a person for it to be required to produce documents. So the point that it is enough just to send it to a member of the undertaking that is properly equipped to deal with it.

MR JUSTICE MARCUS SMITH: Yes.

MS ABRAM: What I say is that is about as far as you can imagine a system with proper safeguards or a system that is founded on mutual respect and comity in the terms of Lord Lloyd-Jones in KBR. In my submission, if you are choosing between an interpretation under which the person that is subject to a legislative obligation is said not even to need to be told about it before they are required to comply, and told that the legislation is extraterritorial on that basis, actually further discussion of safeguards is really otiose in those circumstances. It is not a system with proper safeguards on the basis of the CMA's case. But we have addressed the CMA safeguards and we say that they aren't comparable to KBR or the other cases relied on and we say they are not actually safeguards at all for the reasons we have set out in writing.

I just want to pull together what I have said on ground 1 and then address grounds 2 and 3 very briefly. So I will go over the hour but we will take that time off our reply.

On ground 1 we start with the presumption that a statute is not intended to have extraterritorial effect. It is common ground that that presumption is especially strong

in this case because of the suggestion that parliament intended to criminalise non-compliance abroad. I say that the exorbitance of that jurisdiction, the terms of KBR, would be all the more exorbitant in this case because of the point that I have just made about the CMA saying it doesn't even need to give notice to the party that is the subject of the obligation in order for them to commit a criminal offence.

So I say that the starting position is the highest imaginable presumption against extraterritorial effect, against the CMA's proposed interpretation. So turning to parliament's intention in the light of that, we have no express indication in the 1998 Act that section 26 is intended to have extraterritorial effect; not a single document in the legislative context to support the CMA's position; despite the existence of documents saying the DGFT's powers should be strengthened in various other respects, despite the fact that parliament was porting forward a power from earlier legislation which we are told was purely territorial without doing anything to indicate that the scope of it had changed, in circumstances where the other investigative powers were clearly territorial in scope only, domestic only, sections 27 to 29. So the key stone argument that the investigative powers must have the same scope as the substantive powers falls away, and the CMA faces the challenge of arguing that the section 26 power was intended to be wider than any of the other powers. We know that parliament didn't follow the means by which the Commission would obtain documents from outside its territory, from outside the EU, and so on ground 1 what we say is that in all those circumstances there is no evidence that section 26 was intended to have extraterritorial effect and there is a heap of evidence to the contrary.

That is what I wanted to say on ground 1. I will move on briefly to grounds 2 and 3, if I may, unless there is anything else I can assist with.

MR JUSTICE MARCUS SMITH: Thank you.

MS ABRAM: I am very grateful.

So I am going to start with ground 2. I am not going to spend time on the standards of review. We are now in the world of an appeal rather than a question of law so the different threshold applies there. It is common ground that the law is as set out at notice of appeal paragraphs 26 to 28. But on the substance of ground 2 I am now at paragraphs 54 to 61 of our reply.

So the argument is, even if the CMA had vires to require BMW AG to produce documents under section 26, it shouldn't have imposed the penalty on BMW AG because there was a reasonable excuse for not complying. In a nutshell my argument is that it is difficult to imagine circumstances where it is more reasonable not to comply than the present circumstances, where the CMA is seeking to use its powers extraterritorially for what seems to be the first time, more than 20 years after the relevant statute came into force, where a very recent judgment of the UK's highest court seems to go against the CMA's interpretation, so finding a very similar provision does not have extraterritorial scope, and where the courts have before this case never considered whether the powers in question have extraterritorial scope but would shortly be asked to do so in the context of the VW claim for judicial review.

So in my submission it was eminently reasonable in those circumstances for my client to want to be satisfied as to the lawfulness and the vires of the CMA in doing what it is claiming to do.

It didn't just put its head in the sand and refuse to comply, instead it said to the CMA: look, this is a really difficult issue of law which obviously needs to be considered by the courts. Let's talk about how to get this in front of the court so we can get the question resolved. In the meantime, BMW UK complied with the notice and my client BMW AG has made clear that if the question of vires is resolved in the CMA's favour, of course it will comply as well.

It is also important to underline that this isn't really one sided, the CMA also has a keen interest in ascertaining the scope of its powers and it is important, doubtless important to the CMA as a responsible regulator to make sure that it is acting lawfully. So really, in my submission, this is not an appropriate case for a penalty at all. It is a case where the parties should be working together to bring an important question of law to the courts in a constructive and cooperative way, in an adult way, and there shouldn't be any question of a penalty on my clients.

Now, I just want to pick up a point that has been very recently made by the CMA because otherwise I won't have an opportunity to respond to it. That is an argument that, following the amendments, you will recollect, that we made to our case, which were to delete various references to German law and some points on legal advice which it was suggested waived privilege, we didn't accept that, but it is suggested that now there is no evidence of why BMW didn't comply and no way of testing whether that was reasonable, the reasonableness of its beliefs. That just isn't factually right and I wanted to show you just a couple of bits of correspondence to show and to make that good.

MR JUSTICE MARCUS SMITH: Well, Ms Abram, I don't want to get too far into what the local German jurisdiction does or doesn't do. My feeling is, given that we are much more interested in the legal point, that if and to the extent we are troubled about a breach of local law because section 26 has an extraterritorial effect, for my part I would rather we addressed those questions after we have given a ruling on what actually section 26 means, because I think that will almost necessarily shape the point you want to bring.

We have the point that section 26 doesn't oblige the asker, the CMA, to ask about local constraints. So for my part, unless you really want us to see this stuff because it makes a difference, my sense is that we can deal with this later on.

MS ABRAM: I am really grateful. I want to make two points if I may. The first is that I am not inviting the tribunal to make any finding about German law, you will be relieved to hear doubtless, and nothing I say goes to that. All I say about foreign law is that when you send a section 26 notice to a company in a foreign jurisdiction, it is totally reasonable for them to want to check out whether the notice is consistent with their domestic law, all the more so when there is such a recent authority suggesting it might not be valid at all. That is all I say about German law.

MR JUSTICE MARCUS SMITH: Yes. I think both sides can take it that we are not I think going to be assisted in argument about whether there is or is not a prudential concern by either VW or BMW in terms of breaching local jurisdiction. We see the relevance of the point but frankly I am not sure it assists us on why we are really all here --

MS ABRAM: Yes.

MR JUSTICE MARCUS SMITH: -- whereas, the answer to the question of why we are really all here may very well inform what we need to know about the local jurisdiction in terms of the effects it has on the non-compliance, if there has been non-compliance, with the notice.

MS ABRAM: I absolutely hear that.

The point that I was making actually goes to whether BMW was genuinely concerned about English law compliance and the CMA's case is higher, is put higher than I think you may be giving credit for, sir. The position is that they currently don't accept that there is evidence that BMW were concerned about whether the notice was problematic in the light of KBR. We say that the correspondence with the CMA establishes that we absolutely were concerned about that and that is why we are all here. That is the only point I make.

MR JUSTICE MARCUS SMITH: I think we have it.

MS ABRAM: I am very grateful.

So, second point the CMA makes on ground 2 is that if it accepted legal uncertainty as a reasonable excuse in this case, it would have to accept it as a reasonable excuse in every case. That is at odds with the CMA's own guidance, which says that reasonable excuse is determined on a case-by-case basis. I won't take you to the guidance but we have given the reference at reply paragraph 58.

We say the CMA is perfectly entitled under its guidance and as a matter of fairness to differentiate between some trumped-up point designed to avoid compliance and a genuinely serious point of law based on the highest judicial authority, and this is clearly the latter.

MR JUSTICE MARCUS SMITH: Ms Abram, this goes straight back to Mr Kennelly's point about jurisdiction versus discretion. What we are deciding is whether there is jurisdiction. If you lose and there is jurisdiction, then there is a whole nest of points on which I think we would want further assistance about what would be and what would not be a reasonable excuse. So we remove after the event the uncertainty about English law territoriality, but all that does is it raises the reasonable excuse points, which will be seen in a different light, there being jurisdiction on the English, UK side of the equation, but a question which I repeat I am really very anxious not to get into, just what the implications of a valid English law notice is to a company incorporated and territorially situated in another jurisdiction.

MS ABRAM: May I be really straight about why we are pressing these points now.

MR JUSTICE MARCUS SMITH: Yes.

MS ABRAM: It is a really practical concern about the daily penalty. So the current status is that, subject to the tribunal's order, and the terms of that have been agreed between the parties overnight --

MR JUSTICE MARCUS SMITH: Yes, we will make those orders when we get

a chance to see them at lunchtime.

MS ABRAM: We are very grateful, of course. We are subject to a daily penalty of £15,000 a day. That penalty at the minute, the clock will start ticking again as soon as the tribunal gives its judgment, so the clock could start ticking on the penalty before we have had a chance to persuade you of the force of our arguments on ground 2.

MR JUSTICE MARCUS SMITH: I think you can take it, which is why it is horse before the cart, the horse is the jurisdictional question, you can take it that we are not going to be unmindful of the difficulties.

Now, how we do it is a matter that we will debate but we are certainly not -- let's assume you lose on the jurisdictional point, the one thing I think you can take we are not going to do is we are not going to say it is 15,000 a day from hereon. My initial thinking, but it is very much initial, is that you would certainly get a week's grace before it started again. But that may not be enough either.

I think we would want to hear the parties on that rather than in anticipation of what we may or may not decide, try and work out what we are going to do. So you can take it -- and, Mr Jones, if the CMA wants to push back on this, I would be very surprised if you did, but we will want to look at the landscape as we have decided it in the jurisdiction question and there will be issues that we will want to be satisfied upon before we suddenly say "Right, it is going to be a penalty".

MR JONES: I understand, sir. I think my learned friend and I had both been proceeding on the basis that we would also be addressing you on grounds 2 and 3 today, but does it follow that we shouldn't and we should park that?

MR JUSTICE MARCUS SMITH: I think we made clear in our letters that we were happy to hear, subject to the importance of ensuring that everyone has as much time as possible to devote on ground 1, because I do think ground 1 is the dog that is

wagging the penalty tail. You know, we are ten minutes over already. You may not need all the time you do but I suspect you will and I certainly think that you should not be unduly troubled by 2 and 3.

As I say, we will decide it if we can, but the more we are talking about it the more it is clear that we are going to have to have, depending on the way the question goes, further probably submissions on paper as to what we do to the BMW side of the case.

MR JONES: Yes. I understand. I am grateful, sir.

MS ABRAM: May I just in that case make one final point which goes only to ground 3 and it interrelates to the order that the tribunal made yesterday.

So we are really grateful to the tribunal for raising the point about the daily penalty pending the judgment, but the same argument applies with equal force to the whole period, since the penalty notice was issued and served.

MR JUSTICE MARCUS SMITH: That we will come back to. That I don't think is a matter that we are in issue on today and I do think that really does depend on how we see the construction operating. We quite deliberately did not schedule an interim relief hearing, we instead went for the expedited hearing that we have had today. That means you have paid, whether you get it back or not, I am very happy to talk about it but not today.

MS ABRAM: I am very grateful. That is all I wanted to say.

MR JUSTICE MARCUS SMITH: Ms Abram, thank you very much.

Mr Jones, I sort of flagged that I had something that I wanted to express to you and what I am going to suggest is I go through the points that I have to make for you to listen to, that we then rise for the mid-morning break to enable you to think about it.

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: Then you can take whatever course you wish in

terms of how you address it.

What I want to do is articulate what I suppose is best called a provisional view that I have reached on construction. It is probably rather less than a provisional view but let's call it that for the sake of argument.

I wouldn't normally articulate this but, given this is a point of law, I think you should have every opportunity to push back in a granular way on what I am saying.

Also I think you should not get the impression that this is a common view of the tribunal, we have not had enough time to discuss this. I think you are more likely to see a shaking of heads than an enthusiastic nodding from my colleagues when I go through this. That simply underlines the tentative way in which I am putting this to you. So I am going to put it quite forcefully but it is pretty sensitive.

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: We start with the Interpretation Act meaning of "person", unembellished by the added undertaking into the definition. So section 26 we have referring to "any person". Let's, for the moment, park the addition of the undertaking but just view "any person". Whether that person is a natural or legal person, we have a strong line of cases that even though any person is a widely drawn group of people, that does not, in and of itself, do enough to override the presumption against extraterritoriality.

In other words, any person does not, looking at the case law, mean that if you send the notice to a Ruritanian person, they are entitled to say, nothing doing, we are outside the territory.

Now, you will want to address me on that but that is, as it were, your harder case. You, for quite understandable reasons, want to focus on the undertaking. But I am going to come back to this line in relation to any person excluding undertaking because I think in an odd sort of way we end up in a circle about this.

Moving on, then, to the question of the addition of the undertaking into the definition of person.

Now, you will have seen the exchange that Mr Kennelly and I had this morning about the extent to which we can mess about with or put a line through the addition of undertaking. Provisionally, and Mr Kennelly may want to push back on this, it does seem to me that it would be pretty hard for us to say that we don't very much like the insertion of "undertaking" into the definition of person. It has been expressly added in. I accept that if there is massive absurdity we probably could put a line through it, but I think it would be quite a bold tribunal that did that.

That being said, the insertion of "undertaking" into a definition of what is a person does give rise to something of a problem, because it does seem to me that it is a mixing of apples and oranges. It is not a necessary condition of an undertaking that it or parts of it necessarily have personality.

Parts or indeed the whole undertaking may have but it is not a necessary condition. Undertaking I think we are all agreed is an economic and not a legal concept.

So, although we clearly have to give effect to it, it is in the Act, it is added into the definition, it is, I would suggest, a remarkably odd provision.

It is in light of that oddity that I am going to put a hypothetical scenario to you.

Let's suppose an undertaking that comprises 1,000 persons of varying kinds and sorts. They could be natural persons, they could be legal persons, they could be subsidiaries or parents of persons in the group, but what we have is 1,000 persons of one sort or another, all over the world.

They are all, and this is a simplifying assumption, they are all holding documents responsive to a CMA section 26 request and, to make it even easier, they are all holding documents which are unique to themselves. So there is no question of duplication. The CMA, in order to progress its investigation, actually wants a positive

response from all 1,000 entities. So there is no escape to say, oh, someone in the jurisdiction can provide what someone outside the jurisdiction can provide. They all have something unique to give to the party. That is a simplifying assumption to make the questions that I am going to ask harder edged.

So, the CMA needs a response from all 1,000 persons and we have removed problems of relevance and duplication from the example.

Let's suppose the CMA addresses its notice to person 1, the first in the 1,000, and to the other persons forming part of the undertaking of which person 1 is a part. So there are, if you like, in language two addressees; person 1 and the persons comprising the undertaking of which person 1 is a part.

At this stage I am creating a fairly explicit link between the economic and the legal. What I am saying is that when one says: I would like the undertaking to respond, what in law one is saying is: I would like the persons who fall within the economic umbrella of undertaking, I would like these persons to respond. Because simply addressing the undertaking in the abstract is, in legal terms, when one needs an addressee of the notice, to the lawyer meaningless. It may also be meaningless to the economist but it is certainly meaningless to the lawyer. So I have created a bridge at this point between the economic understanding of undertaking and the legal implications of it. And what that means in my hypothetical example is that the notice becomes addressed to person 1 expressly and persons 2 through 1,000 by the use of the reference to the undertaking.

We have already assumed that person 1 is in the jurisdiction and, so far as person 1 is concerned, there is no extraterritorial effect. Obviously person 1 is going to have to provide, unless there is some other reasonable form of excuse, the documents responsive to the section 26 notice in its own possession. I think that is the easy case.

Person 1 must also I think provide documents in its control or power. We came quite close to discussing that with Ms Abram this morning.

If in the group of undertakings persons 2 through 10 are all 100 per cent subsidiaries of person 1 and if there is no form of independent constraint on persons 2 through 10 in doing person 1's bidding, then person 1 is going to have to provide those documents as well. In other words, it is going to have to go not just to its own filing cabinets and extract the documents, it is going to have to say, because they are in its control, it is going to have to say to persons 2 through 10: open your own filing cabinets, bring me your documents, I am telling you to do it and unless you have some sort of lawful objection you are going to have to provide it and we will provide them on to the CMA.

Now, that, I am going to suggest, and again this is something for Ms Abram and Mr Kennelly to push back on if they wish, I am going to suggest that that is true whether persons 2 through 10 are within or without the territory.

To be clear, a constraint like the German GDPR would bite because, let us take person 2 as a hypothetically German entity but 100 per cent subsidiary of person 1, if person 1 makes a request saying: I own you, produce these documents, and person 2 comes back and says: well, ordinarily that is absolutely fine, you own us, you can direct us, but unfortunately there is a local German law provision which prevents us from doing this, well then person 2 could not lawfully respond to person 1's order and person 1 would say that in its response to the CMA's section 26 notice: we have asked, we haven't got, here is why, it is a reasonable excuse.

Now, none of this is achieved through the use of the reference to undertaking in the definition of "person". I think all of this that we have been discussing so far derives from addressing the notice to person 1.

So let's take the remaining cases, persons 11 through to 1,000 to whom person 1

cannot give orders, or who won't lawfully be able to comply with those orders if they are given. For example, they are parent companies, they are subject to a confidentiality constraint, there are all sorts of reasons why they all say: get lost, can't do it.

What is the effect then of addressing the notice not only to person 1 but to the persons comprising the undertaking of which person 1 is a part? What I think, and what I am putting to you for response, the undertaking addition adds is this. It seems to me that a necessary part of any section 26 response would be for person 1 to explain where it has gone for its documents and what it has done and what it has not been able to do by way of production. So person 1 would in the first instance have to explain the position regarding persons 2 through 10, the case we have already discussed. As regards persons 11 through to 1,000, where person 1 cannot command the documents, my suggestion is that person 1 is there obliged to list those entities that it considers to be part of the undertaking, in other words it has to say: in addition to persons 2 through 10, we are within the same undertaking as persons 11 through to 1,000, but I am afraid we can't produce anything because of the nature of the relationship.

I am also suggesting that, because person 1 is really the only person who knows the other entities within the undertaking, it is also obliged to convey the notice to those persons. That is because, although person 1 is the only person who receives the notice, the notice is addressed to the other entities comprising that undertaking.

So that, in and of itself, is quite a big advantage in the CMA in terms of making the section 26 notice a very effective weapon. You don't just get the addressee in person 1, you are actually addressing persons 11 through to 1,000 at the same time.

The consequence of that is that persons 11 through to 1,000 are themselves obliged to respond to the section 26 notice, provided they are lawfully subject to it.

So my thinking, and what I am putting to you and to the other parties for push back, is this. If persons 11 through to 500 are within the territory, then they are personally liable to respond to the notice. Person 1 I am assuming can't make them respond but, without the CMA doing any more, they have themselves got to respond to the notice. That is the easy case because I am assuming that the notice being rendered to persons 11 through to 500 is not having any extraterritorial implications.

Let's turn to persons 501 to 1,000 and let's assume that all of these are outside the territory. It seems to me that they can quite lawfully do nothing in response to a notice which, hypothetically speaking, I am going to assume person 1 has sent to them. The reason they can quite lawfully do nothing, and I would hope there would be constructive engagement but that is a hope not a requirement, the reason they are entitled to do nothing is going full circle right back to the any person point that I began with, which is that the words "any person" does not extend, without clearer wording, to the extraterritorial case. So, in short -- and I apologise for the length of this -- in short, what the insertion of "undertaking" does is it expands the list of addressees but it doesn't do anything more than that.

Now, I do apologise, I have taken up a lot of your time. What I am going to suggest is, first of all, that we rise now until 11.10 am, but secondly, you consider that you have a run through until 1 o'clock and then we will add the 15 minutes it has taken me to articulate by resuming at 1.45 pm rather than 2 o'clock.

MR JONES: Thank you very much.

MR JUSTICE MARCUS SMITH: That way we can --

MR CUTTING: Sorry, I just wanted to add a gloss, if I may, for all of you to think about, which you might have had anyway. But it is in relation to persons 501 to 1,000, who are legal persons outside the territory. I would like some consideration of the duality of, or the potential duality of, those persons' status. Because, as well as

being legal entities outside the jurisdiction, on these facts they may also be part of an undertaking present in the UK. That raises the question, which I think is quoted in Gorbachev, of whether the legislation is then dealing with foreigners when they are in the UK.

MR JONES: Yes. I am very grateful. Thank you.

MR JUSTICE MARCUS SMITH: I am not sure you should be but I am very grateful to you for your patience.

MR JONES: Forewarned, sir.

MR JUSTICE MARCUS SMITH: We will rise until 11.10 am and we will resume then. Thank you all very much.

(11.00 am)

(A short break)

(11.10 am)

Submissions by MR JONES

MR JUSTICE MARCUS SMITH: Mr Jones.

MR JONES: Sir, I agree that it is very helpful to start when one looks at extraterritoriality by putting aside the undertaking point, just parking that, and thinking first about how the principles on extraterritoriality would just apply in particular in the case of a company. One could complicate it by looking at natural persons but particularly focusing on the case of a company.

If we just consider the CMA's narrow case for now, I am going to come back to the wider case, which is the CMA could impose section 26 notices on any person anywhere, but if we just focus on the narrow case. Looking at the position of a company, sir, you highlighted the example of a company in Ruritania in which, if one were to apply the KBR approach, one would say, well the CMA can't obtain documents held overseas by a company in Ruritania.

So that is one example. Then at the other extreme one would say, what about a UK company? Of course that kind of company could be subject to a section 26 notice including for documents held overseas. That is common ground between us. That has been made absolutely clear.

So you have these two extremes with Ruritanian company at one end and UK company at the other, and one can then chart various points between those extremes and the difficult scenarios, which I am going to come to in some detail. I have tried actually to map them out on a spectrum and say things about each of them.

MR JUSTICE MARCUS SMITH: Just, I do apologise for interrupting again, but the subsidiary argument is in a sense an instance closer to your UK end. So if you have a UK company that simply happens to buy a warehouse in Ruritania in order to source documents because that is cheaper for document management, then notice to the UK company gets the warehouse documents.

If you choose to structure yourself so that the warehouse is owned and run by a service company which is a subsidiary of the UK person but is in fact a Ruritanian entity, then my thinking is the same applies?

MR JONES: Well, that is -- could I come back to that.

MR JUSTICE MARCUS SMITH: Of course.

MR JONES: The subsidiary point I do agree, although I also agree with my learned friend's approach to that, which is the reason why if one is only looking at companies, the reason why the notice on the UK company would cover the foreign subsidiary is not because of any sort of undertaking or group-type point, it is simply because as a matter of fact the UK parent would be able to acquire the documents from its subsidiary. So all the normal principles of corporate personality would still come in.

So if you posed the opposite question, imagine a parent company with a UK subsidiary, if the UK subsidiary couldn't obtain documents from the parent then it wouldn't work, so you wouldn't be able to get these Ruritanian documents.

MR JUSTICE MARCUS SMITH: Absolutely agree. Yes. We are singing from the same hymn sheet.

MR JONES: So that is the sort of corporate position.

The question then would be, sir, as you said, you introduce the undertaking and you have to ask where does this fit in. That is the basic question. Sir, my simple answer to that is that an undertaking which is present in the United Kingdom, the closest analogy on that spectrum is to a UK company or perhaps to a foreign company doing business in the UK. I will come back to both of those and look at them in detail. But that is the closest analogy. It isn't at all the Ruritania -- that is the other end of the spectrum. That is not a good analogy nor an undertaking which is in the United Kingdom.

We are at the end of the spectrum where there is either no presumption or a very weak presumption against extraterritoriality. That is the UK company with documents overseas. I will look at KBR and what it says about that, but there is a non-existent or weak presumption against extraterritoriality there.

I say that if there is a presumption at all it can be overcome for all the reasons that I will go into.

MR JUSTICE MARCUS SMITH: Mr Jones, let me say that I think, as you have framed it, I am largely in agreement and I don't think that, actually, as you have framed it, BMW and VW, of course it is for them, will be pushing back that hard. I think what is the critical question is not the force of the presumption but the way in which you have analogised the economic concept of undertaking into a legal concept of persons who are susceptible of being notified.

The one thing you can't do without some kind of translation exercise is simply say: I am sending a notice to the undertaking. That, I think, is meaningless to the lawyer. The way I framed it was I used the undertaking in the example as simple a shorthand to list the persons in it.

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: You are saying I think something different.

MR JONES: That is where we disagree, sir, yes.

MR JUSTICE MARCUS SMITH: Exactly. But I think you are going to have to help us on how one achieves that form of translation.

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: And that, I think, will in turn affect the extent to which the presumption does or does not engage. Because frankly the presumption is not one that is to be read like a statute, it is to be read by reference to what it does abroad, because we don't want to tread on the toes of foreign jurisdictions. We are all about comity but comity is, you know, fuzzy, not a tight concept.

MR JONES: Yes.

Sir, that is where we get to the real meat of this and that is why I have been emphasising the nature of an undertaking because that is actually what is at the heart of this.

Is an undertaking something with what you could actually call legal personality? I know that is putting it high but I will show you why I have said that. Is an undertaking something which you can actually say has legal personality for the purposes of the Competition Act?

Or is it something much woolier, not in some respects as real as other persons which are listed in the Act, so that this court has to erect the barriers within the undertaking.

That, sir, is why I am going to start, after that introduction, part 1 of my submissions,

if I can call it that, will be the undertaking. That is the crucial starting point.

For the purposes of that, I will just assume that we are only talking about the UK. So assume away any extraterritoriality for the purposes of part 1.

Part 2 I am then going to turn back to extraterritoriality and the spectrum and the different scenarios and so on that we were just discussing.

On the question of undertakings, sir, I am going to take this in three stages. First, in light of this discussion which we have just had, I am going to make some comments on legal personality because that is a really important contextual question.

Secondly, I am going to look at the Competition Act 1998 and just look at what it says on its face about undertakings.

And then, thirdly, the heading is practicalities where I am going to address the question of how these obligations take effect against undertakings and what the learning is on that topic.

So those are my three stages.

Firstly, then, legal personality. As I have already hinted, one does need to be rather careful what one means by this. Sir, you may have seen in one of my learned friends' skeleton arguments a reference to what Mr Justice Cranston said when he described an undertaking as a "legal fiction". Now, that is an arresting image but of course every non-natural person is a legal fiction. Indeed, in the very first line of his speech in the seminal case, which we mercifully don't have in the bundles, I have to say, on corporate personality, Salomon v Salomon, which is 1897 AC 22, Lord Halsbury in the first line famously called companies an artificial creation of the legislature.

Now, some legal persons have more of the characteristics of a natural person than others. So clearly what we are getting at here is that companies, for example, can be parties to private litigation, they can bring private litigation. I accept that is not the

case with undertakings. But having legal personality and, as it were, capacity in one context does not dictate the approach in other contexts. There is a case which is in the supplementary bundle, and I apologise for that, it only came to my attention after the other documents had gone in, but it is actually a very important case on this subject. It is in the supplementary bundle, please, and if we can pick it up, the case starts I think page 38.

MR JUSTICE MARCUS SMITH: This is Hamilton, is it?

MR JONES: No, it is the R and L.

MR JUSTICE MARCUS SMITH: Oh yes, sorry, got it.

MR JONES: So what this case is actually about is whether an unincorporated association could be liable for a criminal offence. You will see immediately that it is a very interesting analogy because of course unincorporated associations are often said to have no legal personality. That is something which you learn as a first year law student. That is true in a lot of senses, they can't -- if you think you have contracted with your local golf club, you haven't, you have contracted with its members or its officers or you haven't contracted with anyone. We all know that.

But, we have also seen that the actual definition of "person" in the Interpretation Act includes persons unincorporated. So we know they can be a person and section 5 of that Act provides the definitions apply unless the contrary intention appears.

So the question in this case was whether an unincorporated association which was in fact a golf club could be liable under the Water Resources Act for causing pollution to enter a local watercourse. There was then a secondary question about whether the officers could also be liable.

The Court of Appeal gives a single judgment and could I take you first please to page 42 where it is discussing legal personality.

MR JUSTICE MARCUS SMITH: Yes.

MR JONES: In which at paragraph 12 the court starts:

"At common law an unincorporated association is to be distinguished from a corporation which has a legal personality separate from those who formed it or manage it or belong to it."

Then further down:

"At common law, as the judge succinctly held, an unincorporated ...(Reading to the words)... separate from its members. It is simply a group of individuals linked together by contract. By contrast a ...(Reading to the words)... connected with it."

MR JUSTICE MARCUS SMITH: Bear in mind you cited Salomon v Salomon, Salomon v Salomon is a seminal authority because it marks the transition or the point in time when it was recognised that there was a separate person compared to the old joint stock conditions where there was personal liability and an inability to shield, for example, the assets of the shareholders and the corporation from litigants.

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: So I am not disagreeing at all with your characterisation of how corporations are seen, but Salomon v Salomon is itself a major departure from the law as it was understood before that case.

MR JONES: Yes, but because the Companies Act had made it so. That is my point here, is that we look at what the legislation provides and that is what the case was, that is why I am going to R and L. All they have is the Interpretation Act, and it is true that all of these non-natural persons actually at their heart have human beings, I mean even the definition of a company in the Interpretation Act is a body of persons corporate, so there is always something else under the surface of a legal person.

But the point is parliament can make these otherwise amorphous groups of persons, of other legal persons, of natural persons, can make them persons with legal personality for the purposes that they have been created, and one has to look at the

legislation to decide whether in that particular context they have sufficient personality.

MR JUSTICE MARCUS SMITH: What you are saying is that my effort at translating the economic nature of the undertaking into a legally comprehensible list, in other words what I have done in my thesis to you, is look at the economic list, translate that into a list of persons. You are saying that occurs at an altogether earlier stage by virtue of the addition to the Interpretation Act and that at that point when one has incorporated the undertaking into the definition of person, you have done the translation at that point and my expansion, as it were, of the list doesn't need to be done because --

MR JONES: That is what I am saying.

MR JUSTICE MARCUS SMITH: Yes.

MR JONES: So we will look at the Competition Act in more detail but of course -- I am focusing on section 59 because that is the bit which we are concerned with, but actually the substantive provisions of competition law only apply to undertakings. So it is not as though this is a sort of footnote point in the scheme of competition law. It is obvious these are the persons which competition law has in its sight. It may seem amorphous and economic but that comes out of the line of authorities from Europe which explain what an undertaking is. It is not a concept unfamiliar to the law.

Going back to this judgment, paragraph 13 is important:

"It is an apparently simple legal dichotomy ...(Reading to the words)... conceals a significantly more complicated factual and legal position."

Then:

"As to fact, many unincorporated ...(Reading to the words)... treated as more than the sum of its members".

Essentially.

Then at 15:

"As to the law, it no longer treats every unincorporated association as simply a collective expression for its members and has not done so for well over 100 years."

There are references there to various statutory provisions in the unincorporated association context.

On the question, then, of the Interpretation Act and how it applies here, you will see at paragraph 18 that the judges' conclusion rested on the -- and he held that the club was a person. The Court of Appeal agreed. He rested his conclusion on the definition of person in the Interpretation Act. At paragraph 20 the argument revolved around whether there was a contrary intention.

There is then a discussion of various cases in which, in summary, criminal statutes were held to apply to unincorporated associations. The point about those cases was there were always various other clues in the statutory language that it would apply to an unincorporated association.

The issue here was that there was no such clue. There was just the Interpretation Act. If one goes then to paragraph 29, so it is just above 30, picking it up at B, this is the conclusion:

"Whether or not it be true that the presence of differing kinds of statutory provisions in some Acts has inhibited ...(Reading to the words)... in their absence, the definition of the 1978 Act is of general application. To assert that a contrary intention appears from the absence of a specific statutory provision ...(Reading to the words)... we conclude the judge was right in his first decision. The prosecution of the club was permissible in law, the definition of person applied and no contrary intention appeared."

So the court there gave effect to the statutory language, unincorporated associations do have legal personality for these purposes.

The court then goes on to discuss whether officers could be liable and decides that they could in fact because they were all individually to be treated also as maintainers of the tank.

MR JUSTICE MARCUS SMITH: I mean, we are coming quite close to the sort of service provisions one gets in the case of partnerships. So a partnership, no separate legal personality, it is an association of natural persons and in some cases legal persons in their own right, and the liability when it comes to civil liability is individual, it is joint and several, not as an entity, but you can, for instance, shortcut the need to serve all of the partners by serving the partnership entity itself. That is the kind of shortcut which stops somewhat short of what we are doing here. I mean here the question that immediately arises is, suppose you prosecute the unincorporated association and you find them guilty and you decide that there is going to be a custodial sentence, how does that work?

MR JONES: That is a fair question and that arises whenever you are prosecuting companies because -- obviously companies are prosecuted a lot. They can't be incarcerated.

The fact that you can't put someone in prison doesn't mean that they can't be prosecuted.

MR JUSTICE MARCUS SMITH: No, my concern here is you could put everybody in prison.

MR JONES: I am going to come back to that, sir. I wouldn't accept that because there isn't a provision to put I think the individual natural persons in an undertaking in breach of criminal law. But I will come back to that particular point.

MR JUSTICE MARCUS SMITH: That is why I raised the partnership question, because what you get there is, suppose you have a partnership of 500 people, I can serve one entity, all 500 are joined to the proceedings, and then when the litigation

goes on, if the partnership is found to be liable for whatever amount, then all of them are subject to that fine if they were partners at the relevant period.

I quite take your point that the idea of applying that to the criminal prosecution of an unincorporated association where you have 500 people who are part of the unincorporated association, you say, we are prosecuting the unincorporated association, someone is going to jail because it is a really serious thing, you do have a problem.

MR JONES: Well, if you wanted to send someone to jail and you were only prosecuting the unincorporated association, you wouldn't be able to, you would have to be able to prosecute the members.

As I said, in this case on the facts of this statute, the Court of Appeal says actually you could also prosecute the individuals. That is because an unincorporated association is nothing more than a group of individuals. So I mean it is a different topic in the judgment which I didn't go on to, but it is a separate point that isn't true of an undertaking. An undertaking is not defined as a collection of different legal entities, it is itself a legal entity regardless of its legal form. Sir, the practical difficulties which arise, that was the Crown's argument in this case. If one looks back at paragraph 21, the essential argument which was being made was that there would be too many practical difficulties. There is no provision for adapting the procedure of a court to a non-natural person, so how would you take a plea or commit them or enforce a penalty?

But it is notwithstanding those difficulties the court says that one can prosecute the unincorporated association.

I should also point out, sir, in light of the partnership reference that -- I mean, of course there are various different interventions by statute which enable one, as I have said, to treat different what become legal persons as legal persons in certain

contexts. I mean, of course, there are now partnerships with legal personality, which there didn't use to be. But, sir, the position, generally speaking, obviously remains that partnerships don't have legal personality and yet, paragraph 26, criminal liability of a partnership.

What all of these cases have in common is that one looks at what parliament actually intended and who parliament intended to treat as a person for the purposes before the court.

MR JUSTICE MARCUS SMITH: Yes, it is interesting the example in 26 is a strict liability defence, because there is a tie in between entity liability and strict liability in that if you have a strict liability that is operating solely by reference to an act rather than a state of mind, be that negligence, recklessness or intention, then it is much more efficient and clear to nail the entity, whether it is legal or not, because it is doing the act, rather than look at something where if you are talking about negligence liability you are going to have to start probing whose state of mind in terms of a natural human being feeds into the corporate liability.

MR JONES: But, sir, that is true as far as it goes. It is a particular problem when you are looking at entities which are by definition comprised of other persons. So that is a particular problem for an unincorporated association because by definition that is a group of people who might have different thought processes.

It is also a particular problem for a partnership because that is by definition just two or more natural persons.

It is not a problem for a company, even though that is a body of persons, as I have pointed out, because one has rules of attribution of knowledge and so on and so forth.

In my submission, it can't be a problem for an undertaking because we know from the Act that parliament talks about undertakings acting intentionally or negligently.

You see that when you get to the penalty provisions. So there must be a way, parliament has said, to look at the state of mind of the undertaking, and what is normally done is one borrows the principles from corporate liabilities essentially is how it is ordinarily done.

So, sir, that is a point which arose there but isn't a point which, in my submission, applies to undertakings.

MR JUSTICE MARCUS SMITH: I think moving to a more fundamental question about how you are running this argument, my thesis to you was I think put on the basis of an implication that there was a unitary understanding of what is a person. What you are saying is, no, that is as much a question of construction --

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: -- as is the question of extraterritoriality.

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: In other words, sure I can use my understanding of legal and natural personality as a starting point but I must, when I am looking at the statute, be very sensitive to what the statute says in the particular context where it is saying it.

MR JONES: Yes, that is right, sir. I am going to turn to the statute next but could I also add this so you know where I am going, which is when we come to look at the case law, which is my part 3 or section 3 of part 1, there have of course been a lot of cases in which, to put the point very simply, groups of companies have sought to erect barriers between companies within an undertaking. That arises in the context in particular of who you are imposing the penalty on and jurisdictional questions in private damages claims.

So this point that we are grappling with, which is the relationship between the corporate identity and the undertaking, has been grappled with in a lot of cases and,

at the risk of dramatic oversimplification, the answer is look at the undertaking. I am going to show you that, in particular Sumal, which really tidies up a lot of these points and makes absolutely clear, it is clear anyway but makes absolutely clear, that competition law is concerned with undertakings.

You address the penalty and you address the decision to a legal or natural person, a different type of legal or natural person, that is the practice that has emerged and that I think is what gives rise to a lot of the confusion here where the CMA accept you can only go against a legal person. Well, I am going to come to that but that is a practical way of enforcing against a person who is recognised to the court's system, if I can put it that way. It would, as you have said, sir, extremely difficult to name an undertaking. I am going to deal with that in more detail.

What you are doing always is holding the undertaking liable through one of its other organs but you are holding the undertaking liable at all times.

MR JUSTICE MARCUS SMITH: Remind me to push back on that when you come to it.

MR JONES: If you need reminding, sir, I will do it.

Can I look at the Competition Act next. As I said, I want to go through this looking at what it says on its face and what that means for undertaking. So starting then, it is in tab 13, which is volume 1. I want to pick it up at page 88.

Just very quickly on section 2. We of course know this applies only to undertakings and associations of undertakings. Whilst here I wanted to remind you, I know you have it well in mind but just to point out the territorial scope provisions. There is one in 2(1), which is that it must have the object or effect of affecting competition within the United Kingdom. And then additionally there is section 2(3), which is the prohibition only applies if the agreement et cetera is or is intended to be implemented in the United Kingdom. So those are the substantive territorial

limitations.

Page 90, again just you of course have this in mind but 18, just to remind you, the territorial link is at the end of subsection 1. If it may affect trade within the United Kingdom.

In terms of enforcement, I am going to stick firstly with the substantive provisions, how are they enforced, if one goes to page 107 there is the heading "enforcement".

Section 32 says that directions may be given to any person. Such person or persons as the CMA considers appropriate.

Now, of course I say, well -- I will come back to this, but the definitional section makes clear that that includes undertakings. But there is another reason we know that it must include undertakings. I think Mr Kennelly said this doesn't include or can't include undertakings, but not only can it on its face but if you look at section 34, "enforcement of directions":

"If a person fails without reasonable excuse to comply with a direction, the CMA may apply to the court for an order ..."

And then at (b):

"If the direction related to anything to be done in the management or administration of an undertaking requiring the undertaking or any of its officers to do it."

So clearly that enforcement power can be used against an undertaking.

Penalties, interestingly, can only be imposed on an undertaking, that is section 36. If a penalty is not paid, then the final enforcement step is to recover it as a civil debt. That is section 37, again from the undertaking.

So we know from this that undertakings, only undertakings, can breach competition law. We know that undertakings can be subject to penalties, we know that undertakings can have penalties recovered from them. We know all of that because the Act says so in terms.

We then come to the investigatory powers. These are very precisely drafted, each apply to a different target, but if one goes first please to section 26, the power to require documents and information to be provided applies to any person. So that is wide. And I am going to say that is deliberately wide. I will come back to that.

In contrast, section 26A, power to ask questions applies to an individual.

MR JUSTICE MARCUS SMITH: Just for answering later, is there anything to be read into the failure to reference undertaking rather than person in 26? Why is --

MR JONES: Yes, there is. What it is is you can get it from an undertaking or from a natural person or from a company or from an unincorporated association. That is what is to be read in because that is what the definition makes clear.

MR JUSTICE MARCUS SMITH: It is a widening rather than a narrowing.

MR JONES: I will come to that Hansard extract, which actually makes, clear contrary to what was suggested, it is widening not narrowing. That is why you would use person. It makes absolute sense you would want here to be able to get documents from a wide range of persons, obviously including the very person who you are going to be investigating, which is the undertaking, but you might also want it from a different company. So that is what one reads in.

At sections 27 to 29 there are the powers to enter business and domestic premises. The scope of each of these different investigatory powers, as I say, is differently but precisely defined.

Of course we have the civil enforcement provisions now at section 40A, so page 116.

This, as you know, applies to persons.

Now, sir, just on the basis of these statutory provisions and before I look at the case law and undertakings, it is in my submission plain that section 26 power and indeed the related section 40A power can be applied to undertakings. I am going to give

you six quick reasons for that.

The first one is that it is what the Act says. That is section 59. You had a discussion, sir, with Mr Kennelly about contrary intention and could one, even though the Act doesn't refer to the possibility of there being a contrary intention, could one say there is a contrary intention here? Now, sir, can I add this caveat, which is that I only saw that Bennion extract just before it was read out and I note that what is relied on in Bennion for that suggestion is a series of very old cases in a footnote, most of which look like they pre-date by a long time the Interpretation Act. So if I may I will reserve the right to come back on that after lunch if there is anything more to say on it. But in broad terms, as a general proposition, we of course accept that in the exercise of statutory construction, if there were a strong contrary indication, then you would have to give weight to that. One could in a particular case say it can't be an undertaking here. Of course one could say that.

But where you have a provision like section 59, and where there isn't a reference to contrary intentions applying, you would in my submission need something very forceful to displace the clear language of section 59. There is, as I will go on to explain, there is nothing which comes remotely close to that.

So that is my first point, what the Act says.

My second point is, as I highlighted when I went through them, the enforcement powers have been very clearly crafted. Section 26 applies to any person, 26A applies to individuals. The search powers then apply to premises. So I say that careful thought has been given to the scope of 26 and it clearly covers the persons as defined in the Act.

My third point is that this makes good sense. It obviously makes, as I have said, good sense for that power to apply to undertakings given that they are the persons to whom the substantive provisions apply.

Fourthly, and as to the argument which I think is made against me that one in some ways cannot impose obligations of this nature on undertakings, I think I have emphasised we know that that can't be right because parliament has done exactly that on the substantive provisions. So it just can't be right that an undertaking can breach competition law and be penalised for it and have a civil debt against it but you can't ask it to provide documents.

Fifth, it is, with respect, very difficult to work out what Mr Kennelly's alternative reading of section 26 is. When he made submissions, what he said was section 26 means "legal person". Well, the first thing that comes to mind there is what about natural persons? I mean, Mr Kennelly didn't address those but presumably one would have to accept that one could seek documents from natural persons. So it can't just be legal persons.

One might also then say what about unincorporated associations, they are in the definition of person.

MR JUSTICE MARCUS SMITH: Just take the natural person. You would be able to go for, let's say, the retired chief executive no longer part of the company who, Joe Biden like, has kept documents in his garage to be produced. He is no longer within the control as an employee of the company but he has a filing cabinet and there is material in there. You can send a notice to him or her and the documents will be producible.

MR JONES: Yes. The answer to that is yes, but there is this sort of sub-answer, which is one can see that there might be an argument in that context about whether he really does have those documents in his capacity as a natural person, and the company might want to weigh in on that.

Now, one doesn't need to resolve that question here and now.

MR JUSTICE MARCUS SMITH: Yes.

MR JONES: It applies to natural persons because we can posit a much easier scenario of natural persons having knowledge of anti-competitive conduct, not because they have a filing cabinet they shouldn't have but because they have been involved in them, for example, and kept it on their phone or something like that. So it clearly does apply to natural persons. Whether it applies to natural persons keeping documents they shouldn't really have is a separate question.

Coming back to Mr Kennelly's analysis, I think what he must really mean is section 26 applies to all natural persons, all other persons as defined in the 1978 Act, but not undertakings. In other words, he just wants to write out undertakings even though that is the one thing parliament has expressly put in in section 59. In my submission that clearly doesn't work.

The sixth point is this Hansard extract.

Could I go back to that, please.

It has been moved by Lord Simon. He says it is a technical amendment:

"As your Lordships will be aware from our earlier discussions of this bill, prohibitions are modelled on Articles 85 and 86, which apply to undertakings, and, as a result of Clause 58, words in the Bill such as “undertaking” are to be interpreted by reference to EC law. However, it is not appropriate for all of the provisions of the bill to be drafted in terms of undertakings."

I think my learned friend maybe paused there as though that was suggesting that some provisions shouldn't apply to undertakings but if you go on you will see it is actually the opposite:

"For example, clause 20 provides that persons may apply to the DGFT for guidance or decision about the application of chapter 2 prohibition on their conduct. The applicant may seek to argue in that application that the chapter 2 prohibition does not apply to it because it is not an undertaking."

So just pausing there, they want it to apply to persons who are not undertakings. That is clear. But then it goes on:

"But there may be undertakings that are not regarded by our legal systems as persons."

That is the other side of the coin. They clearly do want undertakings to be included:

"We therefore felt that we should make clear the amendment that a person is to include any undertaking."

So they are expanding the scope of the definition to make clear that it includes undertakings, not to write them out of certain sections of the Act.

That was part B or section B of part 1.

Section C is practicalities. How do obligations which are imposed by legislation on undertakings, how do they take effect against undertakings? Sir, if one thinks back to the R and L case that I started with, one might say parliament has treated undertakings as a legal person for these purposes, so we should, as it were, simply give effect to that directly by enabling decisions to be addressed to undertakings, enforced against undertakings as such, undertakings could come to court to challenge them.

Now, one can immediately see that that would give rise to a series of other difficulties and challenges, because our court system is not designed to deal with an undertaking.

In fact, the approach is to say that regulators can address the decision to, and indeed enforce any penalty against, the natural or legal persons within the undertaking. But the important point which I emphasise is that when that is done, you are always holding the undertaking liable and these legal persons are being used as no more than a mechanism for doing that.

Can I look at Mr Justice Cranston in Crest Nicholson. That is volume 2 of the

authorities, tab 46, please.

MR JUSTICE MARCUS SMITH: Yes.

MR JONES: I want to go to --

MR CUTTING: What is the tab?

MR JONES: I think it is tab 46. It is page 1139 actually that I want to go to.

MR CUTTING: Thanks.

MR JONES: If one looks at paragraph 32:

"While it is to an undertaking that an infringement of competition law is imputed, for the purposes of imposing a financial penalty it is necessary to address the penalty to a specific natural person within the undertaking."

Now, I just want to pause there because that of course is absolutely right and it is what I have been saying. You are addressing it to a legal or natural person, another legal or natural person, but the penalty is in fact being imposed on the undertaking. We know for sure that what Mr Justice Cranston was talking about was a penalty which is imposed on an undertaking. The reason I say that is that this case concerned a penalty or in fact a potential penalty, it hadn't yet been imposed, which were it to be imposed would have been under section 36, which, as I have shown you, can only be imposed on undertakings. So he can only have been talking about a penalty on an undertaking which is then addressed to one of the other persons.

As I have explained, the same would be true under section 40A where one can impose a penalty on any person, including an undertaking.

Now, that is an obviously important point and to a certain extent some of my learned friends' comments proceeded on a false understanding, because it has been suggested that the CMA has in some way accepted that penalties under section 40A can only be imposed on other legal people. That then is the basis for an argument that therefore section 26 must only be capable of being imposed on other legal

people. That is not correct. We have not accepted that. What we have accepted is that you address them to another legal person but we don't accept that they can only be imposed. That would be flatly inconsistent with the statute and it is not what the judge says there.

MR JUSTICE MARCUS SMITH: It is here that you get again the translation difficulties, as I have called it, of the economic concept into a in this case legally enforceable penalty. I think really your point is that it is a bit like Whac-A-Mole. You have the same problem differently framed cropping up here, there and everywhere. Another instance where it is obviously an issue is where you are commencing a standalone private claim against an undertaking that has breached competition law in some way.

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: You don't commence proceedings against the undertaking.

MR JONES: No.

MR JUSTICE MARCUS SMITH: You commence proceedings against an entity that is susceptible to, in this case, hypothetically, the jurisdiction of England and Wales.

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: And then you bring in, to the extent they are foreign entities, as necessary and proper parties the other part of the undertaking if you wish to do so.

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: It may be that the claimant wishes to do so or it may be that the defendant wishes to do so because they want contribution from the other entities.

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: But your point, and I am articulating this so we can get push back from whoever wants to push back, your point is that the unit of currency, as it were, in all of these things is the undertaking.

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: Life would be a lot easier if we had a statutory definition of undertaking within a registered office and a person to communicate with. We don't have that, you accept that.

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: So one has this translation difficulty which, as I say, has many shapes and sizes. And that leads to the point where you started, which is this is all extremely context sensitive.

MR JONES: Yes. That is right.

Sir, the private damages context is a really interesting one for this. Because what one does, if one is acting for the claimants, and typical example there is a Commission decision holding European head co to have breached article 101, is, sir, as you have said, you look for a UK subsidiary and you sue the subsidiary.

Now, the subsidiary actually is going to be liable for damage caused by the undertaking. There is no question about that. They are all, every legal entity is going to be jointly and severally liable. The reason for that is they are all part of the same undertaking.

That is the first point.

Secondly, over the years the arguments which have emerged in the courts in this country have revolved around what has been characterised as a sort of attribution of liability argument in which it has essentially been asked, well, we understand that if a subsidiary is involved in a cartel you can impute that to the parent company essentially, ordinarily, but what if a parent has been involved in a cartel, can you

impute that to the subsidiary?

That obviously has been referred to here often as the Provimi question, the extent to which one can do that.

That is a question which is framed in corporate law terms because it is a question which is looking at this undertaking as though it is a series of different companies and what one has to do is impute liability between them. To an English judge, to an English legal mind, that is what it sounds like.

Indeed, if one looks at what Mr Justice Cranston goes on to talk about in paragraph 32, he is talking about imputation not in a private context but it is the same point, he is talking about imputation of responsibility between different legal entities.

But, when the European cases talk about imputing responsibility between different legal entities, what they are actually talking about is whether or not those different legal entities are in the same undertaking.

MR JUSTICE MARCUS SMITH: That was where I was cavilling about your penalty point. If you take the decisive influence question in terms of whether you can impose a penalty on the parent of a subsidiary that has been involved, is the reason one has got a decisive influence test less a question of, as you say, corporate law analysis and more a question of trying to define the outlines of the undertaking?

MR JONES: That is all it is. That is what Sumal makes absolutely clear. Because just to jump ahead slightly, the answer to the Provimi question in short is we now know you can sue the English subsidiary. You don't even have to be able to allege it was actively involved in the cartel. What you have to be able to show is it is part of the same undertaking and that is the end of it.

Sir, the question which has often been put is, well is that fair? Because what if you have a huge corporate group with a subsidiary which has absolutely nothing to do

even with the industry where the cartel is. That was a question which obviously featured strongly in lots of these cases.

But, sir, the answer to that is that one has to be careful when you define the undertaking. That is also explained in Sumal. Actually this has some parallels to the tribunal's judgment which you will remember in the Sainsbury's case where you were looking at the nature of the undertaking there. Totally different context but bank, supermarket within the same undertaking. So you may recall that what the tribunal says in broad terms is, well, you have to look at the facts and see whether they really are acting -- they might be in the same group but are they really acting in this particular context together as a single entity?

That, if I may say, was absolutely right but that is what the CJEU has now said in the case of Sumal. Different contexts but the answer to qualms about fairness in suing different companies is they may not be in the same undertaking just because they are in the corporate group. That is not an argument which has been raised here but if they are in the same undertaking that is it, they are all liable.

I say they are all liable, let me caveat that. The undertaking is liable and they can all be, as it were, on the hook for the undertaking's liability. One doesn't go further and start dicing it up within the undertaking.

Now, I said that these discussions about imputation are really about are they in the same undertaking. You actually see that in the quotation on paragraph 32 where it is sort of quoting from Itochu:

"The fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of its conduct being imputed to the parent company, especially where the subsidiary doesn't independently determine its own conduct on the market."

Then it goes on to talk about the 100 per cent presumption and so on.

It is concluding at the bottom there decisive influence and making clear that where

you have decisive influence they are jointly and severally liable.

They are all the tests for being in the same undertaking. So what is often called imputation is often the European court's way of asking whether they are in the same undertaking.

Let me go to Sumal because it makes so many of these points with such clarity. It is in tab 90, which is volume 5.

The context is the trucks cartel, which so many of us have come to know and love. Mercedes-Benz, one of the participants in that, it is head company is an addressee of the decision. Sumal sued the Spanish subsidiary for damages. And if we pick it up please at page 2917.

MR JUSTICE MARCUS SMITH: Yes.

MR JONES: You will see at 38 -- I should say a lot of this is just repeating what has been in earlier cases so most of this is not actually new and there is the usual references to the other cases, but it is a helpful summary. 38:

"The concept of the undertaking within the meaning of article 101, which constitutes an autonomous concept of EU law [I interpose: and now of our own law] cannot have a different scope with regard to the imposition of fines by the Commission as compared to actions for damages."

So fines and private actions have the same approach to an undertaking.

At 39:

"It is clear from the wording of 101(1) that the author of the treaties chose to use the concept of an undertaking to designate the perpetrator of an infringement of competition law, who is liable to be published by application of that provision, rather than other concepts such as those of company or legal person. Moreover, the European Union legislature used that concept of undertaking to define the entity on which the Commission may impose a fine to penalise the infringement of EU

competition rules."

It goes on to say that, in 40, it is talking about the infringer who has to provide loss is, at the end of that paragraph, an undertaking or association of undertakings which has committed an infringement:

"In doing so EU competition law in targeting the activities of undertakings, enshrines as the decisive criterion the existence of unity of conduct on the market, without allowing the formal separation between various companies that results from their separate legal personalities to preclude such unity for the purposes of the application of the competition rules."

Then at 42:

"When such an economic unit infringes article 101 it is for that unit, in accordance with the principle of personal responsibility, to answer for that infringement. In that regard, in order to hold any entity within an economic unit liable it is necessary to prove that at least one entity belonging to that economic unit has committed the infringement such that the undertaking constituted by that economic unit is to be treated as having infringed. That fact is recorded in the decision of the Commission."

If you then go down in 43 to E you will see that:

"Where it is established that the parent company and its subsidiary are part of the same economic unit and thus form a single undertaking within the meaning of article 101 it is therefore the very existence of that economic unit which committed the infringement that decisively determines the liability of one or other of the companies making up that undertaking for the anti-competitive conduct of the latter. On that basis, the concept of an “undertaking” and, through it, that of “economic unit” automatically entailed the application of joint and several liability amongst the entities of which the economic unit is made up at the time the infringement was committed."

Over on 47 you will see:

"Therefore the same parent company --"

I apologise, I should in fact -- 46 makes the functional point. So 46 is the point which I was making, I called it a fairness point, but one has to look functionally at the subject matter of the agreement at issue is what is said in 46. Then at 47:

"Therefore the same parent company may be part of several economic units made up, depending on the economic activity in question, of itself and of different combinations of its subsidiaries all belonging to the same group of companies. If that were not the case, a subsidiary within such a group could be held liable for infringements committed in the context of economic activities entirely unconnected to its own activity and in which they were in no way involved even indirectly."

That is the point I was making about fairness.

Then just down at the bottom, 50:

"Therefore, there is nothing to prevent a victim of anti-competitive practice from bringing an action for damages against one of the legal entities which make up an economic unit and thus the undertaking which, by infringing article 101(1), caused the harm suffered by that victim. Consequently, in circumstances where the existence of an infringement of article 101(1) has been established as regards the parent company it is possible for the victim of that infringement to seek to invoke the civil liability of a subsidiary of that parent company rather than that of the parent company."

Now, it has been said that one might adopt a different approach for procedural steps rather than the substantive liability. I say that there is no basis for taking that approach.

My learned friends have highlighted, at least in their written cases, what is said in the procedural regulation about this and I just want to look at that to make sure I have covered it off. It is in page -- I don't have tabs, I apologise, I need to work out which

tab this is. It is page 2319, so it is tab 79, which will be in volume 4.

MR JUSTICE MARCUS SMITH: Sorry, which page again? I have the tab.

MR JONES: 2319.

MR JUSTICE MARCUS SMITH: 2319, I am grateful.

MR JONES: We are looking here at the old procedural regulation but I think actually the provision is the same in the new one, so this is the 1962 regulation. Article 11 on page 2319 is the request for information which covers documents in the European scheme.

MR JUSTICE MARCUS SMITH: Yes.

MR JONES: A point which has been highlighted, as I say it is maybe just in writing but it was given quite a lot of emphasis so I want to pick up on it, it is article 11(4) where it is said:

"The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or of associations having no legal personality, the persons authorized to represent them by law shall supply the information requested."

So what is said is, look, that is suggesting that there are these other persons who need to supply the information and that is different to the substantive requirements.

But, sir, clearly in my submission 11(4) is additive to the other provisions of 11. So if you look at 11(1) you will see that the obligations fall on undertakings and the same is true of 11(5) where the undertaking can be subject to a decision and be required to produce the information.

So, 11(4) is additional but it doesn't replace what is plainly an obligation falling on undertakings.

MR JUSTICE MARCUS SMITH: Just considering your overarching theme of practicality --

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: -- would you agree that there are actually two aspects to practicality? One is, as it were, the enforcement aspect where you have to deal with the mismatch between the economic concept of undertaking and its legal manifestation, as it were. So you have somehow got to translate what is an economic concept into a vindicatable right. You have to get the right people in front of the right organisation so that they can demand what they want. That is sort of one aspect which you are quite rightly addressing us on.

Is there in parallel with that a due process question that you have to ensure that, because of this mismatch or difference of understanding between the economic and the legal, that when you are undertaking the translation process, you have to make sure that the legal entity that is drawn in by the practical need to implement the economic understanding is properly protected by law in that they have the right to be heard and a right not to be bothered when there is, well, say an extraterritorial question. How far is that something which is as much embedded in the need to translate as your effectiveness point that you are understandably majoring on?

MR JONES: Sir, I think the answer is clearly undertakings need to have the protection of due process et cetera, which I think is the underlying point which would arise in that context. But if one is, for example, just to take a hard-edged case of this, proceeding against a legal entity as liable for the undertaking's failure to comply, that legal entity is there as a representative of the undertaking under this scheme. So, if the question were to go a step further and say, well could that legal entity say: I have a reasonable excuse and my reasonable excuse is the other legal entities within the undertaking won't let me have the documents, they say they are overseas, they are not giving them to me, the answer to that is no. Because you are not pursuing the legal entity, you are pursuing the undertaking and that is the basis on which that legal entity is before you. So, sir --

MR JUSTICE MARCUS SMITH: No, I see the force in that. Let me give you a different example where I think the answer might be harder. Let's go back to our standalone civil litigation.

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: And the claimant joins the legal person that is a part of the undertaking that it is susceptible to the jurisdiction of England and Wales because that is the easy thing to do and they have enough deep pockets. That person then drags in entities from elsewhere. So they are all part of the undertaking --

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: -- but they are all separate legal persons.

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: You wouldn't be saying that an admission of liability by one undertaking, by one legal person, part of the undertaking, could bind another legal person allegedly part of the same undertaking.

MR JONES: Well, I think I wouldn't be saying that.

MR JUSTICE MARCUS SMITH: No. Why wouldn't you?

MR JONES: Well, the practical reality there is you would only have to go against the one who has made the admission, so it is not something which one would --

MR JUSTICE MARCUS SMITH: Okay, suppose the one who has made the admission has 60 per cent of the money to meet the claim and you do really want to go for the rest of the 40 per cent against the person who hasn't admitted it, so the admission does matter. Give it a hard edge.

MR JONES: Can I think about that a little bit.

MR JUSTICE MARCUS SMITH: Of course. These are very difficult questions.

MR JONES: My immediate reaction would be this. Clearly we have made some

compromises with, as I have explained, the fact that in this system, in common with other European systems, we don't have a process for bringing undertakings before the court so compromises have been made, in particular that one names normally a company and that is the person who then pays. If you had to enforce it, you would enforce it against that company in that sense.

So the question really is would you make this further compromise and the reason it is a difficult question is that you are positing a situation where you are in litigation, so you have a legal person who has been drawn into litigation, as I have put it, a compromised starting point. So if that person were then to make some sort of admission, there would clearly be an argument that it shouldn't bind other persons. I would have to accept that.

But whether that be the end of it, can I think a little bit more about that and come back to it.

MR JUSTICE MARCUS SMITH: Please do. You obviously understand why I am asking the question but let me lay it out there so you absolutely have an understanding of where I am coming from. It seems to me that of course there is a formal answer that you have different legal persons in front of a court, they are all part of the same economic thing, which is also why they are before the court, but one needs to make the legal process work and no court is going to like the idea of one party speaking for another party --

MR JONES: No.

MR JUSTICE MARCUS SMITH: -- in proceedings. I mean, irrespective of how you get them before the court, we just aren't going to do that because it is not fair.

The same thing, not precise analogy but the same thing of course applies to the extraterritorial question where the reason I was putting my, as it were, expansion of the undertaking into legal persons and then applying the any person extraterritoriality

question to each person on that list was because that was giving weight, whether it is too much weight is a point for debate, it was giving weight to the fact that you don't really want to be bothering a legal entity that is abroad on grounds of comity with the request that has legal teeth, even though it is part of the same undertaking.

Now, your answer is, no, I am approaching it from the wrong end of the telescope. You have to start with the person that you say is the undertaking.

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: You do the translation earlier on, as you have been submitting, and certain consequences follow.

Now, I see that but I don't think that diminishes the extraterritoriality concern that arises in the sense that just as we don't like extracting admissions or, rather, we don't like applying admissions more widely than is appropriate, so too we don't like, even if it is under the guise of the same person, we don't like interfering in the affairs of foreign states because we respect foreign states and we don't, without good reason or clear direction, and those two are not the same thing, we don't do that.

So in a sense what I am really saying is you are going to be able to be quite short I think on the presumption and the areas of extraterritoriality. Where I think we are needing to spend our time is on precisely how this translation process works, which is what we are doing. But that is why I think the admission point is actually quite a good example because it is well away from extraterritoriality but is well into the values question that actuates what courts like this are prepared or not prepared to sanction.

So the example is nothing to do with extraterritoriality but it is to do with proper process. That is I think the hook I am putting on the extraterritoriality point, how far that sort of values-based approach translates.

MR JONES: Yes. They are very different is the short answer.

MR JUSTICE MARCUS SMITH: They are very different, I accept that.

MR JONES: Can I just explain why. If you just take the question of extraterritoriality generally in relation to undertakings, we know that a UK subsidiary could be fined for conduct overseas by the people in its undertaking. It could be fined for that.

It might have had nothing to do with that, but if it is part of the same undertaking, so it was active in that industry, nonetheless it can be fined.

So you are already, when you get into questions of territoriality and undertakings and companies, accepting that there is this cross-border element. Not only can they be fined, they can have it enforced against them. Not only that, they can be sued, as, for example, Sumal in Spain.

So the issues which arise generally are quite different in my submission to the very specific question that you have put to me on admissions, but the difference is, just to be very brief, the difference is just about the court process. The reason -- I will think further about the admissions point, but the reason it is a very difficult one is because it builds on the presence of a party before the court, which, as I have said, that is the compromise that has been recognised. That is the compromise that has been recognised. So it is a further step on that trajectory. It is quite different though from extraterritoriality in other contexts.

MR JUSTICE MARCUS SMITH: Well, I see that. And another point you can make, and I suspect you will be making, is that the process of investigating a suspicion of anti-competitive conduct rather colours the need to have a broad rather than a narrow ability to investigate, because you are not investigating a sure thing. If it was a sure thing you wouldn't be investigating. You are investigating something which may or may not exist.

So I have that point in mind.

I think the reason I see a close analogy than you are willing to concede, and I don't

criticise you for that at all, is that there is a question of due process in each case in the sense that I would be quite troubled by a process that brought in a foreign entity which might, for instance, be, in complying with the UK rules, putting itself in breach of its own domestic rules without that process in some way being susceptible of proper challenge.

Now, it may be that the answer is you have a wide jurisdiction but there is an ability to JR an unreasonable use of that jurisdiction. Which Mr Kennelly addressed yesterday. And it may be that the answer is Mr Kennelly's point that to place too much weight on a review of a discretion in relation to a power is to disadvantage those who don't have the resources, not a question here, but who don't have the resources to mount a challenge and therefore needs to have a bright edge which says, I am sorry, I can see that there is very good reason why the CMA wants to look at things going on abroad because undertaking is an international thing, but I am sorry, unless there are safeguards built into the process which are proportionate to a small undertaking, you are going to have a bright line restriction on your jurisdiction. I think that is how it sort of plays out.

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: It is not in any way a precise analogy of my admissions point, it is more a much broader due process, fairness point to the target of whatever it is that you are proposing to do unpleasant things to.

MR JONES: Yes. Well, sir, that is very helpful. Can I attempt a short answer to that and then I will come back to it.

MR JUSTICE MARCUS SMITH: Of course.

MR JONES: I will come back to it in the context of territoriality where some of these points become a bit fuller.

To take the question of foreign laws, which is a good example for due process

reasons, that actually doesn't depend on anything about an undertaking. The reason I say that is my learned friends have agreed that we could require a UK company to produce documents held overseas, so it is perfectly plausible that a UK company might need to say, well, these documents are held in a particular country and we can't provide them to you for the following reasons. I know I am not quite on your point and I am going to come to the point but just to situate it slightly.

MR JUSTICE MARCUS SMITH: I will shut up.

MR JONES: Now, it can arise in any context and there can always be a defence which is the reasonable excuse. We can't provide it because of the foreign legislation. That would be a defence to a penalty and also be a way to challenge the exercise of discretion in the first place if the CMA hadn't looked at it closely enough and so on and so forth.

One then introduces the notion of an undertaking and you ask, well how does it apply there and is there a sort of separate due process concern. In my submission there isn't. Because if there is a foreign company within the undertaking which can't produce documents, the answer can still be: we can't produce the documents because there is this foreign blocking statute or whatever it is.

If there is some internal tension it wouldn't only be the UK -- I am assuming here you imposed the requirement on a UK entity just for the sake of discussion, but it wouldn't only be that entity which could JR the CMA, the foreign entity would clearly have standing if it were part of the undertaking being required to produce documents to do that.

So there wouldn't be a separate due process problem. There would always be a way for the undertaking and indeed individual entities within it to mount a challenge if they needed to.

MR JUSTICE MARCUS SMITH: But I think you are saying the challenge is, as it

were, a two-stage challenge in the sense that the first touch of the ball is the notice going to whoever it goes to.

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: The response is either to comply, in which case the question doesn't arise --

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: -- or to say, sorry, can't provide it for this reason.

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: Now, the CMA will either say, I don't accept that, or they will say, we do. If they do then the question again resolves itself. If they don't, it is at that point that judicial review comes in.

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: So I think what you are saying is that the concerns that we are obliging, you know the small entity that is part of an undertaking to incur massive costs, occurs a long way down the line because the first response is simply in a letter saying: I am worried about local law, I may put myself in breach with, let us say, criminal sanctions, I am afraid I can't give you what you want. That would just be in correspondence.

MR JONES: Well, yes, sir, but just to -- what would happen in reality there if there is a small company, a foreign company saying, we can't comply -- I mean it rather depends who you have sent the notice to in the first place. If we assume you have sent the notice to the UK company, the UK company is going to give you a response and the response is going to be: we can't give you the information from Ruritania for these reasons.

Now, I have made the point that the Ruritanian company could come and JR the CMA but just in reality that isn't what would happen --

MR JUSTICE MARCUS SMITH: But also you could -- I am not saying you would, but you could I think on your understanding or your submissions on the law, you could send the notice direct to the Ruritanian company --

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: -- and say, I would like it.

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: And then you go through the response.

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: Can't provide it, local problem, JR if the CMA persists and the local company is concerned about that persistence.

MR JONES: Yes. That is possible. If it is an undertaking present in the United Kingdom that would fall within my main argument and, yes, I accept that one could require the Ruritanian company directly and they could come and appeal. All of that is right.

The reality of these cases is, as you see here, the regulators want these documents. It is not they are playing games, I know you have this in mind, sir, but some of the scenarios put by my learned friend are rather far fetched. The CMA is not going to send notices to people who aren't going to be able to respond. And similarly, if one looks here at the fact we have the German companies here not the UK companies, now on my approach the CMA could have continued to target the UK companies. Of course it could. It could have held them liable for the undertaking. The practical reality is that it was the German companies which were standing in the way because they were saying, we are not going to give our UK subsidiaries access to the documents. They are the ones at the heart of all of this. So they are the ones who have been subject to the notice and who are here before the Tribunal.

That is an important indication that in practice what happens is you target the people

with the documents, with the deep pockets. The idea that you are going to be going after some small company in Ruritania rather than German head co is just not something which would happen in practice.

MR JUSTICE MARCUS SMITH: No. To be clear, I am quite sure that the CMA seeks to discharge its functions responsibly and efficiently, but just as I think I was putting to Ms Abram, in a very different context, I don't think one can when one is talking about the jurisdictional limits of the regime allow those limits to be adjusted on the basis of an assumption that everyone is going to be behaving like a good chap. I think one has to have in mind the potential extremes of the regime when one is talking about jurisdiction, even if there is a control in terms of process further down the line. I accept of course there is a link between the two, but one does I think have to have in mind that if one has a very expansive regime which is in theory capable of embracing the world, then even if that is going to be conducted in the most responsible way possible, that is not a complete, it is at best a partial answer to the problem.

MR JONES: Put like that I agree. It is not a complete answer. So you put to me it is a partial answer, I would say it is quite a good answer because clearly one needs to test the limits of these regimes but one also needs to do that realistically and not let the tail wag the dog. One might have a concern about what would happen in the Ruritanian example. A small company with lots of documents, a presence in the United Kingdom but for some reason limited means to judicially review.

So I am not saying that is irrelevant but one does need to keep in mind that it is clearly not this sort of situation which is going to arise in most cases and the regime needs to be, yes, sensitive to the extremes but also effective in the majority of cases which the CMA has before it.

Sir, I may have departed somewhat from my path. Let me just take stock.

MR JUSTICE MARCUS SMITH: Entirely my fault. Do take stock, Mr Jones.

MR JONES: I want to go back to the question of whether the approach to undertakings is different in the context of procedural obligations. That is where I was. I just wanted to show you one other decision on this. It is the Suez decision. This is the Google translation that we have. It is in volume 5 of the authorities bundle, tab 93, page 2929.

MR JUSTICE MARCUS SMITH: Yes.

MR JONES: It is pre IP completion day so section 60A of the Competition Act applies, and it is a decision which should be taken into account.

The context here is that there had been a search by the Commission of some premises, a seal had been placed on a door to show whether or not that door was opened, and you will see at paragraph 5 that essentially the door had been opened, the seal was broken.

It was attached to a door in LDE's office and LDE was a subsidiary of Suez. You will see at paragraph 7 that what the Commission then did was to take proceedings against LDE and Suez. If we go forward please to page 2942.

You will see at paragraph 76 that is the conclusion that there had been a breach. There is then a heading "imputation of the offence". In paragraph 77 it is said that it was addressed to Suez Environnement as well as the companies under its control.

There is then a discussion about the extent to which Suez was actually involved in this breach. But then there is a statement of principle, and this is what I rely on, at paragraphs 88 to 91.

Could I just pause and invite the Tribunal to read that rather than reading it out.

MR JUSTICE MARCUS SMITH: Yes, of course.

(Pause).

Yes, thank you.

MR JONES: So we say that the approach is the same for procedural as it is for substantive obligations.

I want to come lastly under this broad heading to a question which we have already had several exchanges on but the proposition that the logic of the CMA's position is that it could impose an obligation on every company in an undertaking without bringing the notice to their attention and then, as it were, penalise any legal entity within the undertaking. That is an extreme version of what has been said.

Can I deal with that in stages. If we start with the sending of the notice to the undertaking. Now, of course a notice has to be properly brought to the attention of the person who it is being sent to. So it would have to be properly brought to the attention of the undertaking.

Sending a notice to a small subsidiary and saying that that is notice to the undertaking could of course be open to the charge -- it would depend on the facts but it could of course be open to the charge that you haven't brought it properly to the attention of the undertaking.

I do say one does need to keep in mind the practical reality here, which is that the regulator -- I accept, sir, the point which you have put to me about the scope of this -- but just as a matter of practicality what the regulator is trying to do here is to bring these things to the attention of the right people so that the documents can be given.

Now, if one then goes to the next stage, if the notice is brought to the attention of the undertaking, is there then a practical difficulty? So once the German companies here had seen what they were being asked to do, was there a practical difficulty because other companies in the group hadn't been asked? The answer to that is no. The undertaking is by definition a single economic unit so it can easily coordinate its different branches.

You have seen the notice which was given by the Commission, and I am going to

come back to that and look in a bit more detail at the Commission's practice, but in broad terms the Commission does exactly this. It sends notices to a particular company and asks them to respond on behalf of the whole undertaking.

That is presumably what the companies here before you today have done in relation to the notice which they have received from the Commission.

There is, if I may say, an air of unreality about some of these submissions because it has been said that hundreds of different companies might need to respond. Well, firstly, keep in mind that these requests concern particular subject matters, so a regulator will be interested in a particular potential cartel, for example, and they will be asking questions about that industry, about the area that they have reason to suspect infringing activity took place in, about trade associations, for example, one might make quite specific requests for information about communications with trade associations. And in a group with 900 companies, hundreds of them, I would hazard, would have nothing to do with what is being asked about. So it is not impossible that one might think, let's ask our financing company or internal logistics or manufacturing companies some of these questions, but most of these cases do not involve inward-facing activity like that. They are mostly to simplify somewhat but mostly what you are going to be asked about is sales people and communications with trade associations and the like.

So that is the first point.

The second point, in any event, is that it is well known that, in management terms, large companies tend to be organised in ways which do not correspond to legal forms. So, whilst it is true that if you ask a company for documents, they might suddenly say, well, we had better write and ask the other companies in the group, we are going to send them a formal letter and ask whether they can possibly give us the documents and we will have our set of lawyers and they will have their set of

lawyers and we are all individual people, the day to day management of these groups plainly does not take place on that basis. You wouldn't have a group of 900 companies with 900 officers and 900 different sets of employees.

MR JUSTICE MARCUS SMITH: You don't need to press very hard on that. If you take a different context, any kind of note issue where you have various banks and entities, most often you will find that certain of these entities actually have no employees at all; they are legally distinct but they kind of sit there and someone else is obviously pulling all the strings because they have actually no human brain at all.

MR JONES: Even those with brains -- I have had the experience, and I am sure others have, of saying, "who is your employer?" "Sainsbury's". "Well, who within Sainsbury's is your employer?" "Don't know". The contract might just say Sainsbury's. You then realise Sainsbury's is a corporate group of hundreds of companies and you need to work out who it is.

So, even when the companies are active and have people doing things for them, the management structure doesn't correspond.

MR JUSTICE MARCUS SMITH: Accepting both that and the discretion in how one enforces, or how initially one applies section 26 being a matter of discretion -- accepting both those things and assuming you are right on section 26 -- presumably this would work as a way of getting documents and actually having a reasonable means of enforcing?

Let's take our Ruritanian company, part of the same undertaking as a UK company; so they are one undertaking but they are unrelated in the sense that one can't, as a matter of corporate structure, compel documents from the other.

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: For reasons of prudential convenience, the CMA notifies the UK company of its section 26 notice in the investigation and asks for

certain bits of information, but actually zones in on the Ruritanian company for the provision of certain documents which the Ruritanian company has and chooses to respond in that way.

Is it possible, in the event of the Ruritanian company telling the CMA it is not going to get anything, without reasonable excuse, for a penalty to be imposed for that breach on the UK entity?

MR JONES: Yes. Well, yes, but to be clear you are actually imposing the penalty on the undertaking.

MR JUSTICE MARCUS SMITH: No, no, that is how you do it. Absolutely.

MR JONES: Yes. Absolutely.

MR JUSTICE MARCUS SMITH: But I wanted to translate, again, that answer into the corporate speak that, in a sense, is the lingua franca of tribunals.

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: Yes.

MR JONES: The point about the management actually goes a little bit further, because it is often difficult to know even which company would own particular documents. This goes to practicality the other way. I mean, if one is saying you need to delve into the undertaking and work out where all the lines are between different corporate entities in the undertaking and then see which documents each of those own, that will be a very -- in many cases -- complex, perhaps impossible to answer ultimately given the complexity, question.

I was taking it in steps. The next step then is penalties. Sir, it is right to say, and we do say, that any legal entity within the undertaking could be made responsible. So the undertaking is the one which would be subject to the penalty but you could address it to any legal entity.

That, as I have said, is very well established. We looked at Sumal, talking about

private damages but it is building on the cases in penalties. They are all treated as bodies of the undertaking.

My final point on this was to reiterate a point I have already made in the course of our discussions, which is that the regulators take a pragmatic approach. Whilst they could have gone against the UK entities here, they have not done that. They have gone against the entities which, in practice, are the ones who are putting up the fight.

Sir, I see it is 12.50 pm. I now am going to turn to part 2, which is territoriality. I don't know whether you would like to take an earlier adjournment now or for me to make a ten minute start on that?

MR JUSTICE MARCUS SMITH: Do you have preference?

MR JONES: I would prefer lunch, I think, sir.

MR JUSTICE MARCUS SMITH: Very good. Then that is what we will do.

We will certainly resume at 1.45 pm, do you want us to resume a little earlier than that?

MR JONES: No, I think 1.45 pm should be --

MR JUSTICE MARCUS SMITH: Very good. We will resume then at 1.45 pm. Thank you very much.

(12.52 pm)

(The short adjournment)

(1.45 pm)

MR JONES: So part 2 then, territoriality.

Clearly in terms of the analysis which one applies there is a two-step process. The first step is to ask does the presumption apply on the particular facts before you? And related to that, if so how strong is it?

I put it that way because we know from KBR, from paragraph 30 of KBR, that it is a flexible presumption, it might apply strongly or weakly to different situations.

So the first question is always that, does it apply and if so how strongly?

The second step, if it does apply, is it rebutted by the legislation and the context, the purpose, the other provisions of the legislation?

Of course, this second step, just by its nature, is going to depend very heavily on the legislation in issue, so one could have different answers for different types of legislation, different pieces of legislation.

The first step is really the one where, in my submission, one can draw assistance from different cases because when you are asking how strong the presumption is you can look at how it has been treated in other cases. That is what I am going to focus on in the first of my three sections.

So territoriality I am going to deal with in three stages again.

First one is to look in general at the presumption against extraterritoriality in the various scenarios involving obtaining documents overseas. So I am going to start with that and I will in that first section just consider companies. So put aside undertakings. Back to where we started so what you put to me earlier on.

So, start looking at the presumption, just talking about companies.

My second stage is to ask how does the principle apply to section 26 in relation to an undertaking which has a presence in the United Kingdom?

The third one is how does the principle apply to section 26 in relation to a company which is not present in the United Kingdom? Of course that is my more muscular case, if one can put it that way.

So firstly then the presumption against extraterritoriality. I have produced a hand up which I hope is helpful and which will set out many of these different scenarios.

(Document handed).

You will see, looking at this, that down the side there are two rows which deal with the location of the documents, whether they are in the UK or overseas, and then

along the top, broadly speaking, the location of the company going from -- I tried to put them on a spectrum, from on the left a company with no relevant UK aspect; on the right, a UK company with no relevant foreign aspect is how I have put it. Then I have picked up the different stages in between.

In each of the boxes I have put forwards my submission on how weak or strong the presumption is in each of these cases.

Now, just to be absolutely clear, I should stress, this is just dealing with the presumption. That is what I am dealing with under this first heading. Of course if one asks the different question, does section 26 apply in these contexts, the CMA says yes to all of these because where the presumption arises it is rebutted. That is later though, that is my fall back case, I will come to that later in my submissions. I just wanted to emphasise this for present purposes is only about the strength of the presumption.

MR JUSTICE MARCUS SMITH: Yes.

MR JONES: I have dropped in also references to the tribunal's four scenarios in the letter. Clearly they were actually dealing with a natural person but by and large that seemed to me not to make any difference to the analysis. Save in relation to scenario 3, which doesn't appear on that matrix, it appears instead in note 3, because that is the one which concerns a natural person on holiday in the United Kingdom. So I have made a short comment about that in note 3 there.

Just going through this table, I can perhaps deal with row 1 quite quickly. Row 1 is documents in the United Kingdom. Of course this doesn't arise here in our case. The only case which I know of which really addresses this head on, this type of scenario, is the Gorbachev case, which concerned third party disclosure of documents in the United Kingdom by an overseas trustee.

I have given the reference there to the two critical paragraphs in which I say the

Court of Appeal made clear that concerns regarding extraterritorial in that context should be given no or very little weight. Then I have said, therefore the presumption in that particular case is weak or non-existent.

Because that is true, I say, of A1, it must be true of all the others, because all the others come closer and closer to the United Kingdom until you get F where it is plainly non-existent as a presumption.

The more interesting questions concern documents which are held overseas. Box A2 is a completely foreign company with documents which are being held overseas. Clearly, there, there is a strong presumption against extraterritoriality. That is essentially KBR. Or at least it is clear from KBR, because actually KBR is B where you have a foreign company with an officer in that case passing through the United Kingdom. But that made no difference.

Can I just pick that up, just to show you why it made no difference. It is tab 72, KBR, which is in volume 4, page 2134.

I just wanted to look at paragraph 54.

This is where the court is addressing the temporary presence of the officer. Just picking it up above E:

"However, to my mind the fact that in the present case the July notice was served on Ms Akerson when she was induced to travel to the United Kingdom to attend a meeting with the SFO in London is not a material distinction. The intended recipient of the notice was KBR Inc and it remains the case that the SFO in seeking disclosure of documents situated abroad from a company incorporated in the United States which had no fixed place of business in the United Kingdom and did not carry on business here."

So the reasoning there is that the presence of an officer didn't change, essentially, the fundamental feature that this is a foreign company with no fixed place of

business in the UK and not carrying on business here.

Maybe leave KBR open because I am going to come back to that in a moment.

Back on my spreadsheet, one could, in my submission, draw a line after A and B, because I say that for C, D, E and F the presumption is weak, tending to non-existent over on the right-hand side.

If we start with F2, so we have a UK company talking about its overseas documents. This is the situation which is discussed in paragraph 30 of KBR. I want to look at that because it is a very important paragraph. It is on page 2126.

You will recall that the divisional court, they explain here in 30, had essentially endorsed a submission that the section must involve what was called at least an element of extraterritorial application and that the jurisdiction for which it contends can be founded on this. The reason that it was thought to have "an element of extraterritorial application" was because it was essentially conceded that it would apply to overseas documents held by a UK company.

Then if you pick it up just above G:

"However, first, it is questionable whether in the hypothetical situation the legislation is given any material extraterritorial effect. A UK company would be required to produce here a document it holds overseas. It would simply be required to bring that document into the jurisdiction in order to produce it. 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 hypothetical example."

So that was F2.

Then, back on the table, E2, this is the UK company with a foreign parent or subsidiary, and we have already had this discussion, but just to reiterate the answer is the same, the answer is the same, it is just that there will be a factual question as

to whether or not that UK company has access to its foreign parent or subsidiary or other group companies' documents. That is all. So it wouldn't be a route to obtain them unless it had access to them.

We then come to D2, which is an overseas company, or a foreign company, present in the UK. Of course there are different ways of being present, it could be a place of business or conducting business here.

I say that in this scenario the presumption would also be weak. I rest that on observations which are made in several of the cases and the first one is KBR, which we already have open. Can I go first to paragraph 26, please, in which the court emphasises that it is not concerned with a foreign company which has a registered office or fixed place of business or which carries on business here.

That point, we have already seen, is then reemphasised at paragraph 54, which was the one I took you to a moment ago.

We know from 54 that that is an important consideration, because it is the distinguishing feature in relation to the presence of the officer.

So we have that in KBR.

We then, in the Jimenez case, which is tab 63. So that is volume 3. I want to go to paragraph 14, which I think is page 1718.

MR JUSTICE MARCUS SMITH: Yes.

MR JONES: Actually, this is summarised in the Clark case, which we don't have in the bundles, but this has everything I need there, which is, picking it up at D:

"The point was made by Lord Scarman in his speech in Clark v Oceanic Contractors, which concerned liability of a non-resident company for PAYE deductions from the salaries paid to employees working on oil pipelines in the North Sea. Under the Finance Act the company was deemed by reason of its activities there to be trading within the United Kingdom ..."

So just pausing, in other words it had a form of presence in the United Kingdom or was deemed by the statute to have a form of presence:

"... and the pay of their employees working there was made subject to schedule E income tax. The House of Lords held the company was liable to deduct PAYE and Lord Scarman said this:

"'Put into the language of today the general principle being there stated is simply that unless the contrary is expressed enacted or so plainly implied that the courts must give effect to it, the United Kingdom legislation is applicable only to British subjects or to foreigners who by coming to the United Kingdom, whether for a short or long time, have made themselves subject to British jurisdiction. Two points would seem to be clear. First, the principle is a rule of construction only. And, secondly, that it contemplates mere presence within the jurisdiction as sufficient to attract the application of British legislation. Certainly there is no general principle that legislation of the United Kingdom is applicable only to British subjects or persons resident here. Merely to state such a proposition is to manifest its absurdity. Presence not residence is the test.'"

Then actually they go on to make another point which is a different topic that I will be coming on to later but while we are here, you will see that in the next paragraph, still within that quotation from Lord Scarman:

"The Income tax Acts impose their own territorial limits. Parliament recognises the almost universally accepted principle that fiscal legislation is not enforceable outside the limits of the territorial sovereignty of the kingdom. Fiscal legislation is, no doubt, drafted in the knowledge that it is in the practice of nations not to enforce the fiscal legislation of other nations. But in the absence of any clear indications to the contrary it doesn't necessarily follow that parliament has in its fiscal legislation intended any territorial limitation other than that imposed by such unenforceability. Indeed, British

tax liability has never been exclusively limited to British subjects and foreigners resident within the jurisdiction."

So that is my Jimenez reference which, as you see, is in reality a Clark reference.

The third one on that table is Gorbachev. That is tab 74 in volume 4. I want to go please to page 2179.

MR JUSTICE MARCUS SMITH: Yes.

MR JONES: Again, this is a reasonably high level discussion, it is at paragraphs 53 and 54 is what I want to look at. It is just a discussion again of the origin of the principles that we are talking about. 53, what is being emphasised is that the principle doesn't apply to any exercise of authority over foreign nationals but rather, in italics there in the third line, "illegitimate usurpation of authority over foreign nationals".

So then at 54 the relevant question in that case is whether the legislation in question concerned with carriage by air not within the scope of any international convention was:

"... not simply whether such legislation may take effect in relation to extraterritorial carriage by air but whether it is subject to any limitation arising from the presumption that parliament is not to be taken by the use of general words to legislate in the affairs of foreign nationals who do nothing to bring themselves within its jurisdiction. Implicitly, therefore, legislation which affects foreign nationals who have done something to render themselves subject to the jurisdiction of the United Kingdom does not, or at least may not, infringe the principle of territoriality. Such legislation does not amount to the usurpation of an illegitimate authority over such foreign nationals."

I go to those cases because they are all of a piece in saying that having a presence in the United Kingdom, to put it at its very lowest, will make a difference to the

strength of the presumption in any particular case. But I do go further than that, I say the presumption if it applies is weak, in particular because of how that is handled by the Supreme Court in KBR, whereas I said it was part of the reasoning when they looked at the presence of the officer.

Now, sir, I have put in that box, D2, which is the one we are in, "contrast Mackinnon". That is because Mackinnon is different and it is a case which in my submission, to put it bluntly, sits rather uncomfortably with the more recent authority.

If we have a look at it, it is in tab 27, so volume 1, and I want to look at page 409. 409 is the start of it.

You will recall this is the case about an application for an ex parte order for documents from an American bank which was not party to the litigation, so it was a third party disclosure application. Now, this American bank had a UK branch and that is why I have put it in box D2, because it clearly had a form of presence in this country.

Mr Justice Hoffman discharged the order and you have already been taken I think to various passages in this in which his Lordship talks in general terms about the undesirable extraterritoriality of such an order.

I have said it sits somewhat uncomfortably with the more recent cases. Could I make a few comments about that.

Firstly, the decision in Mackinnon does not proceed by asking whether there is a presumption applying to the legislation and, if so, how strong that presumption is, so it doesn't follow the approach to statutory construction that the Supreme Court in KBR follows.

Secondly, although the judge talks about jurisdiction, you can see from the decision that he actually does consider that he has jurisdiction and he goes on to consider whether to exercise it. Sir, you see that if you look at page 425, at the bottom of 425

there is a reference to jurisdiction. Then on the very next page the judge says:

"I confine this to the question of whether this can be regarded as an exceptional case justifying the making of an exorbitant order."

So this isn't a case in which the territorial scope of the Bankers' Books Evidence Act 1879 is decided in the way that the later cases decide the territorial scope of legislation. It is a case which is about the exercise of discretion on the assumption that there is jurisdiction.

Thirdly, there is a very strong emphasis on the special position of banks when one actually looks at the reasoning in this case. We can pick that up at page 421.

If you look at D on 421 it says:

"Banks are in a special position because their documents are concerned not only with their own business but with that of their customers."

Just pause there. The documents here were about customers in New York. So they are in a special position:

"They will owe their customers a duty of confidence regulated by the law of the country where the account is kept. That duty is in some countries reinforced by the blocking statutes. If every country where a bank happened to carry on business asserted a right to require that bank to produce documents relating to accounts kept in any other such country, banks would be in the unhappy position of being forced to submit to whichever sovereign was able to apply the greatest pressure."

The judge comes back to this repeatedly. If one looks at page 423, please, between D and E, the judge is there discussing a case which held that one couldn't get documents overseas held by an English bank. The judge endorses that and he says:

"As I have already said, banks are in a special position."

We know that that can't be right more generally. That is conceded here. An English

company with overseas documents can be required to provide them. So as I have said, he is focusing on banks, and again on 424 at C, this is the summary of the conclusion on this section:

"Grossman's case decides that an order in respect of documents held at a bank's foreign branch or head office should not be made save in very exceptional circumstances."

And that is then, you have seen already the judge goes on to ask whether there are exceptional circumstances.

So, sir, for those reasons I do say the Mackinnon case does not provide an answer to this box D2. The correct answer from the other authorities which I have shown you is that there would be a weak presumption in that situation.

The only box which that leaves me is C2, which is the agent question. This again is a difficult one because there doesn't, as far as I can see, seem to be any authority on it. The way I answer it is this, that an agent would seem to be carrying out the foreign person's business. If they are an agent of that foreign person they are carrying out their business. So on that basis we would be in the same position as D2, where I have said the presumption would be weak.

So this the overview. Now, there is a further question to raise, which is how do criminal provisions affect the strength of the presumption? The short answer is clearly if non-compliance with the request is a criminal offence, then in respect of foreign persons that will affect the strength of the presumption. So if you are criminalising a foreign person for not cooperating, then that will strengthen the presumption against extraterritoriality. Can I just show you this though in KBR again, so back in tab 72, at page 2133.

Paragraph 50 is the quotation from the Supreme Court in Perry and the court there, as you know, spoke in very strong terms about it being 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.

The focus there is on citizens because we are talking about natural persons in that particular case.

Now, you will see at 51:

"In the course of submissions before us Lord Pannick suggested ..."

Lord Pannick here was for KBR:

"... that this reference to a breach of international law should be read as referring to a breach of comity in the sense of non-binding usage. While it may be correct that not every case in which legislation confers powers to impose obligations on foreign persons abroad under pain of criminal sanction would necessarily constitute a breach of international law, there is nothing to diminish the force of this pronouncement as to the effect of the presumption against extraterritorial effect in the domestic law of the United Kingdom, which is founded on both international law and comity."

So I draw that to your attention only because there was a little bit of a softening of what is said about international law arguably but the emphasis is always on the strength of the presumption in English law. So it may ultimately make no difference quite how one describes the international law position but it is not expressed quite as forcefully as it was in Perry.

That was part A of my submissions. I want to turn next to how the principle applies to section 26 in relation to an undertaking which I say is present in the United Kingdom.

MR FRAZER: Mr Jones, just before you go on looking at your table and applying it to the case before us, are you placing BMW AG and VW AG in the D2 box because they are present in the UK through a subsidiary?

MR JONES: That is exactly where I am going next. The short answer is I will say it is more like box F2 but at worst it is D2.

So if we go back to where we are, if we pick up F2 first, and before we even look back at the legislation here, my learned friends have accepted that one could give a section 26 notice to a UK company requiring it to produce documents held abroad. So there it is not only that the presumption is weak but it is accepted that one could do it.

Now, that is very important because Ms Abram said when she was describing my case, she sought to characterise my case as being that extraterritoriality is somehow introduced via the word "undertaking" and what was said was the introduction of the word "undertaking" can't be a sort of back door route to bring in extraterritoriality. She went through the 1997 consultation to show there wasn't any intention there to change the territorial scope.

But you will see immediately that is not a proper reflection of my case, because my case is the degree of extraterritoriality which applies to a UK company in these various scenarios also applies to undertakings. The question, which I am coming to shortly, but the question is, how do you draw the parallels between the undertaking and the company? That is the real question. It is not that I am suddenly introducing a new approach to extraterritoriality, it is simply that one needs to make sure that one draws the right parallels.

Now --

MR JUSTICE MARCUS SMITH: Mr Jones, if one was to try to make the interpretive loopholes that we need to jump through easier, is it a good test to say, look, let's look at the definition of persons in the statute and pretend that one has expressly included in section 26 a definition of person that excludes undertaking but one says any person and/or any undertaking, so you separate it out, and then you have, but

incorporated in the Act, an articulation of the EU concept of what is an undertaking. In other words, what one is doing is in one instrument importing the EU law.

The reason I am doing it is because speaking entirely for myself, and it is probably my fault, one is in danger of losing the force of EU law because it isn't in the Act. It is incorporated by reference.

If one were to take that somewhat artificial process, and I am not suggesting adding anything in by way of registered office or anything like that, I am simply saying one would include a definition in line with EU law as it to what an undertaking was, I think the point that you are making, which is highly contentious, the point you are making is that when you construe a statute so written, you are ineluctably driven to an extraterritorial effect because you have expressly incorporated into the Act something which is defined not by reference to territory but by reference to economic linkage.

MR JONES: Well, sir, I would put it differently. The reason I would put it differently is that the territorial questions which arise, arise anyway for UK companies, and so although -- and indeed for overseas companies, as on this spreadsheet. So that is why I say that the question really is how do you draw the analogy for the purposes of the presumption against extraterritoriality, where does it fit in on this table?

It is not that introducing the concept of an undertaking introduces a different form of extraterritoriality. It doesn't. If you treat undertaking as a person in the same way as all other persons are treated, it doesn't actually change the approach to territoriality, it just imposes a new person to whom these presumptions have to be applied.

MR JUSTICE MARCUS SMITH: Well, yes, but I think that is simply dressing up the problem that we have, which is that the nature of an undertaking is, like it or not -- I don't like it but there we are -- undertaking is not a conventional definition of person. It is something which is altogether more wide ranging, amorphous and linked not by

the sort of legal structures that we are used to, which your very helpful table addresses, the linkage is altogether non-legal and I think that is the problem.

I am very comfortable talking about a UK company subject to section 26 because it is a UK company being obliged to disgorge the documents that it holds in Ruritania, whether that is in a warehouse owned and controlled by it or whether that is in a warehouse owned and controlled by a subsidiary of it, I am absolutely relaxed about that because I have a nice analytical framework which is very closely tied to corporate legal persona structures.

So you will certainly get hard cases like where Ruritanian law precludes the subsidiary from complying with its head office diktats, but these are individual hard cases, they don't affect the analytical problem.

What you are doing or rather what the Act is doing and you are telling us what the Act does, it certainly augments the definition of person but I think in doing so it actually -- well, yes, I think it does rewrite it. I think it is introducing a form of persona that is not susceptible to the usual sorts of constructive process that we are engaged in. That is really where your submissions have been going generally speaking. But I think it does mean that things like your very helpful table are less helpful in this context than they would be in others because we are in an apples and oranges situation.

That is why I was playing a mind game of inserting actually what an undertaking is into the Act, in a sense to force myself to be intellectually honest. It is very easy to say we are talking about an undertaking and to go to EU law. It may be an exercise we should require all the parties to do is to say, if we were to rewrite the Act to make express that which is incorporated by reference, what would it look like? And we go about construing that.

MR JONES: Yes. I would for my part be very happy to do that. The definition which

one would include on undertaking, which hasn't been I think disputed by any of us, would be focused on the single economic unit concept. One doesn't need -- one can write it in as a thought exercise but where the thought exercise takes you ultimately is to say this is a new kind of person. I think that is what you put to me, that this is a new person. I agree with that, that is where it would take you, but you don't need to write it in.

MR JUSTICE MARCUS SMITH: Don't get me wrong, Mr Jones, I am not saying it ought to make any difference in terms of the outcome. I am postulating it, I suspect because of my own intellectual weaknesses in this area, that it is something that we are in danger of missing because it is very easy just to look at a half phrase that is inserting this concept. Of course it is all clear in EU law, but when one is interpreting something, I think one's mindset is somewhat differently engaged when one has in black and white the words of the Act, or the hypothetical Act in this case, than when one simply has floating there: oh by the way, when you look at person just make sure you think about undertakings as well.

MR JONES: I entirely see. And we will try and put something together in case it is of use.

MR JUSTICE MARCUS SMITH: Because you see, I would be quite interested in whether there was actually a consensus if you tried this exercise between the parties, because I suspect there will be less of a consensus than one might think, because although in EU law we all think we know what undertaking means, if you try to put it down in three sentences in a definition in black and white, you will find that there will be quite legitimate arguing about the wording, because when one is construing statutes one does zone in on individual phrases, and that may be the problem of statutory construction where one has an incorporation by reference.

I think it would be a helpful exercise but I think it is something that the three of you

should engage in separately rather than collectively, because otherwise I suspect you will come to a degree of forensic blows, which I don't want to encourage.

MR JONES: We will absolutely do that.

Of course, the context is the Act has to be construed in accordance with EU law, undertaking is an autonomous EU concept, has been for a long time, parliament intended it to have that meaning. The only reason I say that is because I think my learned friends and I agree on the definition because I think we have agreed in the pleadings, but if it turns out that in the course of the discussion my learned friends come up with all sorts of complexities when one tries to draft it, I will say it doesn't matter because parliament has said there is a concept of undertaking and we have to give effect to that.

MR JUSTICE MARCUS SMITH: I entirely accept that. We can't rewrite the Act in the way I am suggesting beyond as a forensic exercise to assist judicial reasoning. At the end of the day the Act says what it says.

MR JONES: Yes. If I could pick up on a couple of other points that arose in the course of that discussion. It is a new kind of person, I agree with that.

It is not susceptible to the usual court process, well I agree with that but could I just emphasise that problem has been resolved. That was the thrust of my submissions this morning, is that these issues that we are grappling with about the meaning of undertaking at least have been grappled with in many other cases, and the answer has been you hold the undertaking liable by taking proceedings against one of its members.

So those kinds of complexities, in my submission, have been resolved.

We then come to the point which is, because it is a different beast to a company, is it analogous to any of these situations that we see in the cases? If so, how?

Now, the key distinction in my submission is that you can say, and, sir, I think you

mentioned this in your remarks, you can say of a company where it is registered. So we can have on this sheet what I have called a UK company and you can have a foreign company, so that is something which you can't say in the same way of an undertaking.

That said, it is also true that companies can be present in more than one country. That is the importance of D on this table, because that is a foreign company present in the United Kingdom.

Now, the analogy though if you think about where undertakings fit in on this spectrum, I have said they are closest to F. An undertaking in this country is closest to a UK company. Now, there might be push back on the basis that, well if it doesn't really have a UK office, is it really a UK undertaking? So you can see that it might nudge a little bit along the spectrum but it is not D because it is not a foreign undertaking either, because if it is present in more than one country it is just a multinational entity.

So, when you try and draw the analogy, this is in my submission a helpful starting point. We have to look at the cases which we have which deal with companies and we end up somewhere between D and F as an analogy, and in any event, as you see on the bottom row there, I say that the presumption in any of those cases is weak. So the presumption in respect of an undertaking present in the United Kingdom is going to be at most a weak presumption against extraterritoriality.

MR JUSTICE MARCUS SMITH: No, I mean the trouble is -- sorry, I am going back to the importance of persons. What we have is a defined person that is I am suggesting an odd type of person. There are other ways of attracting binding legislation to foreign entities without having a definition like an undertaking. I mean take, say, the Modern Slavery Act 2015, which says -- it is not in the bundle, but it says that where you have to provide an annual statement of what you are doing to

eliminate slavery and human trafficking, that obligation applies to:

"A body corporate wherever incorporated which carries on a business or part of a business in any part of the United Kingdom."

Now, there you have a different way of capturing extraterritorial entities. You don't care where they are incorporated, what you care is the effects that they are vesting in the United Kingdom. If they are carrying on business in the United Kingdom then you are captured for the purposes of this obligation.

Now, that is one way of doing it, it is not the undertaking way of doing it, because what you can do is you can capture a body corporate that has nothing to do with the United Kingdom but is part of an undertaking that does have part of its business in the United Kingdom, like our Ruritanian entity. It can be part of an undertaking that is in the UK. Because it is part of the undertaking you say, you say you won't do it but you say that renders it susceptible to a section 26 notice in its own right.

MR JONES: Well, yes.

MR JUSTICE MARCUS SMITH: And that is a consequence of not doing business in the UK, which is one jurisdictional peg to deal with the problems of extraterritoriality. You have a different route for doing it but that brings in a legal persona that actually is sitting there on its own in Ruritania having no linkage beyond the undertaking with the UK.

MR JONES: Yes. That is what I say.

MR JUSTICE MARCUS SMITH: No, absolutely.

MR JONES: The short reason for that is that undertakings are the central person in competition law and they are different to companies. So the Acts which you read out -- I apologise, when you read it out first of all I had thought it was saying that different companies outside in the group could be required to do it, but maybe I misheard.

MR JUSTICE MARCUS SMITH: What it was saying was a body corporate wherever incorporated which carries on business in the United Kingdom --

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: -- is -- all I am saying is there are many ways of killing a cat, and this is one way. The undertaking point is another way.

The critical thing is what does undertaking mean.

Now, I took you when you started to my provisional thinking and my way of dealing with the meaning of undertaking was, as it were, to take a kind of Microsoft menu based approach where you have at the top of the menu bar "undertaking", you click on that and you get a list of legal persons and natural persons that are in the undertaking, and then you apply the usual extraterritorial rules to that list.

Now, your response to that, and I am completely alive to it, in doing that one is losing the essence of what an undertaking is. What I am doing is I am imperfectly translating the EU concept in that I am being extremely and unduly rigorous in what I am throwing out.

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: But that approach does make the extraterritoriality question a good deal easier because all I am doing is saying I have translated the undertaking into a list of persons, section 26 applies to any person, these are all persons but the extraterritorial rules apply by reference to persons as traditionally understood, which you say is not what the Act says, and you are right about that.

MR JONES: Yes.

So the CMA could ask any company to give it a list of associated companies.

MR JUSTICE MARCUS SMITH: It could. I agree.

MR JONES: I say that because the approach which, sir, you suggested doesn't, in my submission, actually lend any weight to the word "undertaking". What it in fact

does is reads the Act as applying only to companies and then emphasises that the CMA could ask one of those companies to give it information about other companies. The CMA can do that anyway.

So, sir, those are the submissions on the undertaking but that I think is --

MR CUTTING: I wonder if I can have a go.

One of the issues I think comes up here is that the concept of the undertaking that has your presence in the UK, because an undertaking can be comprised of different legal entities, if we think about your table, obviously the undertaking that has the subsidiary in the UK fits nicely within but the Ruritanian example that the president talks about, the Ruritanian subsidiary of that undertaking, actually on your analysis falls under the whose documents may be overseas, actually triggers a completely different presumption. I think that is one of the issues that comes up in the context of either glossing or dealing with this question of extraterritoriality, is that you say, well, look, undertaking is nicely there and it may be present in the UK and that gets you home, but in terms of the enforceability of the person against whom the notice is given or the fine is given, we are talking in the context of an undertaking you can have subsidiaries against whom the presumption may be weak, but in the Ruritanian case you have subsidiaries against whom the presumption is very strong. That causes a bit of a tension in saying, well you just do it by reference to the undertaking.

MR JONES: Well, the short answer to that is that is because companies and undertakings are very different. If one were only looking at companies, one would get the result on this table, but when one adds in undertakings, you get to a different result.

But --

MR CUTTING: You then have to get to the question of enforcement and notices, which must be against a person. That is clear in EU law as well as anything else.

But that is troubling me, the issue about you directly going against the Ruritanian company.

The example I have alighted upon is, imagine that either VW or BMW had a subsidiary in Ruritania and in that subsidiary they had access to the full IT suite but Ruritania had no rules on workers' councils or employment protection or GDPR.

MR JONES: Yes.

MR CUTTING: Your analysis suggests that the CMA can bypass the issues that they would face going against AG or UK by serving the notice on the Ruritanians. That is quite -- I mean --

MR JONES: I am not sure I follow the example.

MR CUTTING: That is quite exorbitant, isn't it, in that jurisdiction.

MR JONES: Is the suggestion that there would be an Act which would prevent the Ruritanian company from producing documents --

MR CUTTING: Imagine there is no Act.

MR JONES: But there is an obstacle to the German company providing the same documents.

MR CUTTING: Yes. But the Ruritanian IT systems are open.

MR JONES: Where are the documents, in Ruritania?

MR CUTTING: Imagine they are in Ruritania or accessible via Ruritanian IT systems.

MR JONES: Then yes, you could require those to be provided. Yes.

But you wouldn't be breaking any law, there wouldn't be any defence to that. It is hard to see what the difficulty would be with that, if I may say so.

MR CUTTING: It might be quite extraterritorial here. It is the issue I am struggling with.

MR JONES: That doesn't depend, if I might say, on the question of Ruritanian law

or not --

MR CUTTING: No, no.

MR JONES: -- because that could arise anyway. You could have that in any situation where you go against a company.

MR CUTTING: I understand that. I am just trying to establish how far your case goes in relation to the extraterritoriality and the operation of these presumptions. You say the fact it is an undertaking completely bypasses the strong presumption in category A2.

MR JONES: Well, it is not that it bypasses it, it is that you are talking about a person present in the United Kingdom when you have undertaking --

MR JUSTICE MARCUS SMITH: Yes. I think this exchange, it is very helpful and informative to me at least, rather demonstrates that one has to be quite careful in parsing the effect of the presumption against extraterritoriality in a tick box way, because at the end of the day the point about the presumption is that you need to look at the end result. I think what Mr Cutting is saying that it would be quite curious if you had a situation where there is an inability in the UK part of the undertaking to produce these documents because it can't access them, there is an inability in the German part of the undertaking to produce the documents because although it has access, it is not permitted by German law to produce them and so has a reasonable excuse, but that in the Ruritanian entity, because it has access but has no constraints in terms of dealing with it, these things are produced even though the UK company can't produce them and the German company shouldn't.

Now, that is entirely consistent with your articulation of undertaking, completely works, but the end result is one of extreme exorbitance.

It may be that that is the end result. But I don't think we are particularly assisted by saying, well, actually it fits in a box where the presumption is not very great when

one is talking apples and not oranges. The fact is, as we have all said several times, undertakings are different beasts and so whilst of course we are very interested in cases where the presumption has been regarded as strong or weak, we are not in Kansas anymore, we are somewhere else.

MR JONES: The only additional comment I would make on that is that, as I said earlier, lots of these different legal persons consist of other persons. So one could posit similar situations in relation to a group of individuals who formed an unincorporated association. Now, that association would obviously be a person against whom the CMA could proceed but so to would the natural persons who are part of it.

There would not necessarily be an identity of territoriality between a scenario in which the CMA goes after individuals and goes after the unincorporated association. You would treat them each as a person and you would apply the rules, the presumptions to the person who you are targeting.

It is similar in a way to a company which, as I have pointed out, is also a group of persons corporate but of course one doesn't tend to go after individuals in companies.

So, the fact that going after one type of person, an undertaking leads you to a different outcome to where you had got to if you had gone after companies is not, in my submission, determinative of this.

MR JUSTICE MARCUS SMITH: No, I think, Mr Jones, to be clear none of this is determinative. I don't think there are bright lines at all, I think there are signposts which unfortunately for us are rather pointing in different directions but that is the nature of what we are faced with.

We have on the one hand, for instance, the desirability of attaching documents necessary to an investigation, and on the other hand we have extraterritoriality as

a problem. I think all I am saying is that the table you have articulated is a very helpful starting point but it is by no means an end point, even as regards the weight of the presumption that is engaged, because the nature of the presumption and its effect is context sensitive in terms of the, in this case, nature of the person that you are talking about.

MR FRAZER: Can I just pick up on that, Mr Jones, because I think that is a very useful point that has just been made. I like your table very much. I think there is a column missing and I think that column is a foreign company with a UK subsidiary (same undertaking). And that I think is where the nature of the discussion has been going. Although the presumption is obviously context specific as the president said, I would be interested to know what you would have written in that column in line 2. The reason I am asking is because I am being very literal and that is much closer to the facts we have in the case here. So it would be a foreign company and, more specific than column D, foreign company, UK subsidiary, both in the same undertaking.

MR JONES: Yes, I understand. The answer to that is it would be the same as column A. It would have to be the same as column A.

MR FRAZER: Strong presumption against?

MR JONES: Yes. We are looking here at companies. I know you said same undertaking but if we just look at it in terms of imagine away the complexities of the undertaking, which I think is your question --

MR FRAZER: No, I am imagining that in as well. So I am incorporating the idea of undertaking that has just been discussed but the object of the section 26 notice is a foreign company that has a UK subsidiary which is in the same undertaking.

MR JONES: I see. I apologise. Can I just try and clarify this then because I think I might be tangling this up in knots.

This table was directed deliberately at companies. I am only saying this, sir, to explain why I give the answer I just gave to you, which I will come back to in a moment.

The direct answer then if it was an undertaking and we are asking about the ability to target the undertaking, is that the presumption would be weak, because that is the situation which I am saying is analogous to essentially somewhere between D and F. So targeting the undertaking, if you can do that, if I am right that you can target the undertaking, it would be as regards the undertaking a weak, in my submission, presumption.

Can I go back and explain why I answered it the way I did. I think it might help clarify because this is where you get the real schism that we're discussing.

If you can't target the undertaking and can only target the companies, and we take, sir, your example of foreign company with UK subsidiary, that would slot in here somewhere between A and B.

MR FRAZER: Yes.

MR JONES: So you would have a strong presumption there against extraterritoriality. That is why I answered the way I did. But that really highlights what I am talking about and the difference between them and the importance of adding undertaking as a person.

MR FRAZER: Let me ask a follow up in that case just so I understand it. A little while ago before we misdirected you and took you everywhere, you said you assured us that the insertion of undertaking didn't really affect the question of extraterritoriality, it was there in any event and the concept of undertaking would have no impact on that. I think that is how you started.

Now, just testing that against what you have just said, you are saying if we are just looking at it company by company it would be between A and B, ie strong

assumption against, but the fact that the undertaking is there changes your conclusion, as you say.

Now, I just want to marry up those two submissions.

MR JONES: Yes. It is because the principles are always the same, you just apply them to a different set of facts. Where I started was saying that my learned friends accept that -- they accept F2, that if you have a UK company with foreign documents then there is a weak or non-existent presumption.

So if you -- and I don't know how far they might go in accepting D and E, but as you go along that spectrum there are degrees, if you like, of extraterritoriality.

That was why I started by saying it is not the introduction of the concept of an undertaking that introduces any notion of extraterritoriality, that is there already. When you introduce the concept of an undertaking you just have to decide, as it were, where it fits in to these existing principles which anyway apply.

MR FRAZER: I see.

MR JONES: As I said, it absolutely will affect it, that is of course why we are here. It will affect the outcome obviously on the facts, it will very much affect the outcome whether you can target the company or the undertaking. But my point, to be clear, is it doesn't actually affect the principle. One just has to apply the principle consistently to this new person.

MR FRAZER: I understand, thank you.

MR JONES: I was going to turn next to the -- I grouped them into nine points which have been made regarding purpose and so on and so forth of the Act. So if I turn to those now.

These can be seen as the reasons why, to the extent that there is a presumption, it would be rebutted. But, sir, I should say I hear what you say about the strength of the presumption and perhaps it is not the most helpful way of looking at it, after all

this is all about statutory construction. These nine points could be approached through a different lens, they could be approached more generally through the lens of how do we interpret this statute and how do we think about what extraterritorial reach parliament would have wanted it to have.

MR JUSTICE MARCUS SMITH: Yes. I think that is a very helpful way of putting it. I think you can take it that we have well in mind the operation of the presumption in the ordinary case.

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: I think you can go pretty quickly on those points because we know where the battle lines are drawn.

I think where you might want to spend some time if you need to, because we also have this point in mind, is that when one is dealing with a new case, whereas I have suggested the statutory construction or statutory meaning of person has been radically re-engineered -- not a problem for you because that is what the statute says -- the operation of the presumption can't be applied in line with the pre-existing case law without careful reconsideration, because the cases articulating the presumption have been dealing with a different case.

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: That is all I am saying about the usefulness of your table. It is very useful. It would be extremely useful if we weren't talking about undertakings. Because we are talking about undertakings, of course you may be right that analogising undertaking to a company means that the presumptions are as per your table, but that question of whether one can analogise in that way, just reading across the earlier cases, I am not sure is a given.

MR JONES: I understand. I think that my answer to that will be incorporated in my nine points, sir. I am grateful.

The first point is purpose, the purpose of section 26. I think it is agreed between us that the purpose was to improve the effectiveness of investigations. I make the very simple point that, since the CMA is investigating undertakings, it makes very good sense for it to be able to get hold of that undertakings document wherever held.

Now, I have mentioned a few times that it is common ground the CMA can do that when investigating companies based in the United Kingdom and I say by the same token it would make sense for them to do so when investigating undertakings in the United Kingdom. Indeed, all the more so since they are the very things which can breach competition law.

That then links to my second point, which is the territorial scope of the 1998 Act and the substantive provisions of the 1998 Act.

To be clear, I am not saying here -- I will do when I get to the more muscular case -- I am not saying now the scope of the territorial provision is the same as the territorial scope of the procedural provisions. I am only concerned for the moment with an undertaking which is present in the United Kingdom.

Nonetheless, I do draw some support from the territorial scope of the substantive provisions in this way.

We know that parliament gave careful consideration to the territorial scope of those provisions, and in particular in section 2 we know that parliament intended that it would apply to an agreement which may have been made outside the United Kingdom but which is implemented or intended to be implemented in the United Kingdom. That is clear on the face of section 2.

That was clearly an important decision by parliament and if one asks the question in those cases where an agreement is reached overseas and then implemented in the United Kingdom, how would it be implemented in the United Kingdom, how does that come about that you have an undertaking reaching agreement overseas and

implementing it in the United Kingdom, the most obvious answer, not the only answer but the most obvious answer would be that the corporate group has a UK subsidiary.

I do say that it would be odd in the face of that to say that the UK subsidiary, which may have done no more than implement, could be made to produce documents but not the undertaking. Because parliament clearly had well in mind that the undertaking might be elsewhere as well as in the United Kingdom, that is what the prohibition applies to and it surely, in my submission, intended the powers to apply to those undertakings as a whole.

My third topic, my third point is other powers available to the CMA.

There is no other way for the CMA to get hold of these documents. MoUs have been mentioned. The CMA has a basic MoU with the competition authority in China and it has a form of cooperation agreement with Mexico and that is all. BMW has referred to a framework for agreement, recent framework for agreements. That is in BMW's volume 1, tab 10. We don't need to turn it up, I will just tell you, I don't think this will be controversial, that simply contains a model agreement for potential future negotiation between parties. It is also a new document.

MR JUSTICE MARCUS SMITH: Not in place at the moment.

MR JONES: Not in place at the moment.

MR JUSTICE MARCUS SMITH: That being the case, if the CMA were to approach the German regulator and explain the situation and ask very nicely for assistance, what would the response, if you can answer that question, of the German regulator be? Would it be "can't help you" or would it be a "we will think about helping you"?

MR JONES: Can I just take instructions on that, I don't want to give an incorrect answer to that, sir.

(Pause).

Take it in stages. The EU -- your question was about German authorities but can I start with the Commission.

MR JUSTICE MARCUS SMITH: Well, yes, there is the umbrella.

MR JONES: The Commission doesn't have a gateway to share documents, so the gateway which is running a parallel investigation could not share documents with the CMA if asked.

Germany, I am told we don't know whether the German authority if it were conducting an investigation could share documents. It doesn't arise here because the German authority could not conduct an investigation because the European Commission is conducting an investigation so it has occupied that space. So whether in a different case, German or in another case, some other national regulator might theoretically have the power, we don't know.

MR JUSTICE MARCUS SMITH: Just to be clear, in terms of the Commission's position, A it excludes German competence, but B there is no discretionary wiggle room in the Commission. It is a binary you are either within the gateway or you are not.

MR JONES: That is our understanding.

MR JUSTICE MARCUS SMITH: And you are not. Okay.

MR JONES: So there is nothing at present with the EU. I described the agreements which are in place, a couple of MoUs, but there is nothing with the EU.

You joked about it dawning on you that 2003 was after 1998 when looking at that regulation, can I confess it took a while for that penny to drop with me too but there is a reason for that, and the reason is BMW make big play of regulation 1/2003 in their written submissions and talk about how this case is all about filling a post-Brexit gap and so on, and it is put so forcefully that it is not until one realises the predecessor to 1/2003 didn't have these cooperative arrangements in them that one sees, as you

saw yesterday, the point actually doesn't work because the 2003 regulation doesn't inform the interpretation of the 1998 Act.

Now, Mr Kennelly sought to reposition the point slightly in light of that and essentially the point that he made was a subsequent Act can inform, can show what was intended by the original. That is the sort of gist of the point.

But of course we are not talking here about subsequent legislation, so whilst it is true that if parliament passes legislation subsequently then one can look at that to cast light on what it meant originally, the same clearly doesn't apply to a subsequent regulation produced by a different legislator.

That may be why Mr Kennelly was then at pains to say perhaps the UK took the position in discussions over regulation 1/2003 that the CMA or the OFT needed these powers. The short answer to that is perhaps it did, perhaps it didn't, we simply don't know, there is no evidence either way of that. So one really doesn't get anything out of regulation 1/2003.

I should correct a point which was I think made, which was it was said that the CMA has conceded that it hasn't for 24 years had to make section 26 requests to foreign companies, and I think both of my learned friends made that point. I am not sure what was the basis for that. If the CMA has ever said that, we will have to apologise because it is not right. We had tried to make clear the CMA's understanding of its powers, which is as I have described it to you, and as far as we are aware the CMA has always acted consistently with that understanding, including before Brexit when it couldn't have used 1/2003 to get documents from US companies so it had to use these section 26 powers instead.

So as a matter of fact that has been the practice.

MR JUSTICE MARCUS SMITH: Let me give a sort of indication to all parties that I am not sure this is an area that is particularly profitable for anyone to explore. I am

grateful that you have all made these points but the fact is when one is construing primary legislation, of course the sort of public factual matrix matters but the more elliptical or vague it becomes, the less helpful and more misleading it is. It is very helpful that we have the material but the more you are saying we don't really know what the thinking was, we haven't got any debates in parliament, we don't have any travaux préparatoires that we should be looking at, well all of this is an indicator that it will be pretty surprising if these points made a difference to our outcome when we have legislation that is there to be construed in light of some pretty clearly articulated law as to what an undertaking means in EU law.

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: I hope that is a good indicator.

MR JONES: Sir, that is helpful. I will come to a couple of small points but I will do them quickly even though they are unlikely to tip the balance. I will canter through a few of that type of point.

Just on the question of the CMA's practice, that is precisely why although we have said that in order fully to give effect to the enforcement powers of the CMA it should be construed in this way, we never thought it was necessary or appropriate even to give evidence on how often it was used and anything like that in practice. That is why we didn't go down that road, we just made the argument in principle, which I think is really the only way one can look at it because one is after all talking about parliamentary intention. Parliament wouldn't have known at the time how often the CMA was going to use that power. I am not using that as a positive point, I am simply making sure what was said was corrected.

My fourth point is enforcement. Quite some emphasis was placed on the point of enforcement.

Mr Kennelly's main point is a power of the kind for which the CMA contends couldn't

be enforced and that he said was a strong indication that the CMA's position cannot be right.

MR JUSTICE MARCUS SMITH: Yes.

MR JONES: I have three answers to that. The first is even if it were right to say that it can't be enforced, that would not be determinative on the scope of section 26. This is a point which one can see in KBR, if we can go back to that, please, tab 72. It is I think it is paragraph 29.

MR JUSTICE MARCUS SMITH: Yes.

MR JONES: Over the page in 29 you were shown, picking it up above C:

"Clearly this method of enforcement could not have been envisaged to apply where the addressee and the documents are outside the jurisdiction."

They are talking about a warrant to search premises and so on:

"Moreover, impracticality of enforcement is a particularly relevant consideration when determining whether a statutory provision has extra-territorial scope. This may, therefore, provide some support for the submission of KBR. [But then this] However, while the intention behind a provision in a statute needs to be ascertained by looking at the statute as a whole it does not follow that all provisions in the statute have the same territorial ambit."

And there is a reference there back to Jimenez.

I showed you and we were looking at Jimenez, the Clark extract.

"[The sections] do not necessarily prevent the extraterritorial application of section 2(3), notwithstanding the fact that the enforcement procedure for which they provide would not be available."

So it wouldn't be determinative.

My second answer is I am of course talking here about an undertaking with a presence in the United Kingdom, so in that scenario it is hard to see why there

would be any sort of enforcement problem. It would have assets in the United Kingdom if one had to get to enforcing against the assets.

MR JUSTICE MARCUS SMITH: Just pausing there, let's put a bit of meat on that particular bone.

Let's suppose we have an undertaking comprising a UK subsidiary and a Ruritanian parent, both part of the same undertaking.

The CMA sends a section 26 notice to both, so it is the same notice both companies identified seeking the same documents. The UK entity says, well, don't have anything because they are held by Ruritania and we can't ask for Ruritanian documents. So very much the situation here.

The Ruritanian entity says, not providing, and there is an argument about extraterritoriality which, let us say, is lost in that because they are part of the same undertaking and because that undertaking by its UK leg has a presence in the jurisdiction, you are perfectly entitled to send a notice to Ruritania and say, give us the documents.

Now, let us then suppose that the Ruritanian entity goes a little bit further than simply not complying and disregards the offences specifically referred to in the notice under sections 43 and 44 of the 1998 Act and merrily goes about quite intentionally shredding the documents that are the subject of the notice.

Now, you are not going to get the Ruritanian entity under the criminal law under section 43, but it does seem to me to follow as a logical proposition that you are going to be able to proceed against the UK entity under that same section because "person" in section 43 includes "undertaking".

So, two questions. First of all, is that right?

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: And secondly, if that is right, doesn't that indicate

a kind of reverse extraterritoriality where the misdoings of Ruritania are vesting themselves in the conviction and no doubt -- what is it, yes -- imprisonment not exceeding two years or a fine or both, we are talking pretty swingeing criminal sanctions on the UK entity.

MR JONES: Well, yes. Imprisonment of course wouldn't apply.

MR JUSTICE MARCUS SMITH: No, unless you roped in the UK director. I am sure I could create a scenario where it did but let's talk fines.

MR JONES: It might be difficult because there are provisions relating to officers of companies if you are targeting a company but if we are talking about undertakings, there isn't a provision for that. That, in my submission, is because undertakings are not legal forms known to have legal officers, it is regardless of legal form. So there isn't a way in which you could criminalise --

MR JUSTICE MARCUS SMITH: So no prison.

MR JONES: No prison.

So the example which you have then given me is the undertaking commits a criminal offence. The important point there is it is the undertaking.

MR JUSTICE MARCUS SMITH: Yes.

MR JONES: And we then have the question, how would you enforce a criminal sanction against an undertaking? I have said in our pleaded case that that is a moot point. I will say more about it but it is a moot point. Whatever the answer is ultimately here maybe doesn't make any difference but I am going to talk through the options because one shouldn't just assume the answer to this. It is actually a very difficult question which, as far as I am aware, hasn't ever arisen.

One possibility would be to do what the Court of Appeal has done in the case of unincorporated associations and say actually in the criminal sphere one could bring an indictment against an undertaking, this is a kind of person which has been

recognised in law and this is the way that we are going to do it. Now, that would bring all sorts of follow on problems about how one enforces penalties and so on and so forth, so one can see there are good reasons not to do that and instead to do what has been done in the civil penalty context, which is that you name one of the other legal entities of the undertaking.

The important point there, and this is where I say although it is a moot point it doesn't affect my ultimate answer either way, you are only prosecuting them as the representative of the undertaking, so it is always going to be the undertaking which is liable. And that would have possibly a particular significance in a criminal context, because in the civil context of penalties, no one says: please don't name me on the decision because it is the undertaking not my company. They are going to have to pay the fine anyway and it doesn't make a big difference whether you name the undertaking or the head company, which is normally what is done.

You could see one might say in a criminal context: I don't want my company to be named, or if you are going to name me, make clear it is as representative of the undertaking. And doubtless the criminal courts would be very alive to that and there would be ways of making sure it is clear that the entity which has been prosecuted is the undertaking, all be it that, in your example, the local company subsidiary would be the one answerable for it.

So that is how one would do it in the criminal case.

Now, in the civil case, sir, as you pointed out yesterday, penalties can be enforced as the civil debt. That is true both of the substantive penalties under section 37 but it is also true for breach of section 26, because section 40A, read with section 115 of the Enterprise Act, has the same provision. So 40A, I think it is subsection 9 incorporates section 115 of the Enterprise Act, and section 115 of the Enterprise Act says the same thing, which is that you can enforce the penalty as a civil debt.

If you were enforcing you would end up having to get a judgment as a debt. That is mentioned I should say in a case which I think is not in the bundles but Lindum Construction [2015] 2 AER 177 at paragraph 93.

So you would get a judgment, a debt judgment, and depending where the foreign company is you might be able to enforce it. If you have an agreement with Ruritania and if Ruritanian courts recognised debt judgments of an English court, you would go there and you would enforce it.

Now, I accept you might not be able to but we are not in the territory of being able to say this statutory provision is unenforceable or would be unenforceable against undertakings or against foreign companies. It might or it might not be. In the same way as when the CMA imposes any substantive penalty on a foreign company it might or might not be enforceable, but one doesn't say therefore they can't do it.

Ms Abram took to you the DTI document, can I pick that up please, it is in BMW volume 1, tab 16.

Sorry, I see the time actually, I wonder whether we should pause for the shorthand writer. Perhaps maybe three minutes, I will finish on enforcement, maybe that would be a good moment.

MR JUSTICE MARCUS SMITH: Very good.

MR JONES: Thank you.

MR JUSTICE MARCUS SMITH: Which tab?

MR JONES: 16.

MR JUSTICE MARCUS SMITH: 16, I am grateful.

MR JONES: You were shown page 545.

MR JUSTICE MARCUS SMITH: Yes.

MR JONES: I make a very simple point here, which is the last line of this is:

"Enforcement will be against businesses established in the UK or against UK assets

of businesses which engaged in a prohibited agreement implemented in the UK."

This is clearly assuming in this context that the business in question is established here or has assets here. It is not saying if one were to penalise an undertaking which is not established here or doesn't have assets here, you simply could not enforce it. It doesn't make that point.

On the question of what is meant by business, this document is actually quite careful never to say undertaking or business. It talks about agreements but never refers to persons. But it is in my submission clear from a couple of clues that "business" really is talking about whoever is ultimately going to be subject to the prohibition. If you look, for example, on page 534, the bullet point halfway down, you will see a reference to associations of businesses, which obviously then becomes associations of undertakings. So they are talking about undertakings with assets in this country.

Sir, that is enforcement and that is probably a sensible moment to pause for a short break.

MR JUSTICE MARCUS SMITH: Very grateful, Mr Jones.

One minute on just where we are going in terms of timing.

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: How much -- well, first of all, what is the length of reply that BMW and VW feel they need as opposed to what they have agreed to have?

MS ABRAM: Can we come back to that after the short break, please?

MR JUSTICE MARCUS SMITH: Yes. We are certainly prepared to sit longer because we have indicated that but I think 5 o'clock is the absolute latest that we can run to because I am afraid the law of diminishing returns will set in in terms of the attention we can give to points. Equally I am sure you will both bear in mind that

a granular list of disagreements with what Mr Jones has been saying isn't going to help us. We know there is a lot of disagreement. The area where I think we are likely to be most assisted is on this translation into an alien world of the concept of undertaking and that is I think the driver of where this case goes in terms of outcome and, to be clear, it is not easy, it is something that I am thinking very hard about, as we all are. We have no real idea where it is going so that is the point to hit, I think. You may have other things that you feel need correcting but I wouldn't go for the granular, because I think we will pick that up when we are writing the judgment.

We will rise until 3.28 pm. That is ten minutes. Until then.

(3.19 pm)

(A short break)

(3.28 pm)

MR JONES: Sir, I may need to speed up. I am also going to try and cut things. Hopefully I will strike the right balance between those two. We think we are on time but we will see how I do in the next half hour.

I was going through my nine points, the fourth was what I called enforcement. I perhaps should have called it civil enforcement because my fifth was criminal enforcement, which we have now covered in the course of that.

The sixth one, which I am going to spend a bit of time on because it is an important topic, is the approach of the European Commission. The Commission's relevant power, both under the old 1962 regulation and under regulation 1/2003, is similar to the CMA's and it is similar also in that it doesn't have any express territorial scope on the face of the legislation.

There are four documents to look at to see how the Commission at least understands its approach.

I will take them chronologically. The first one is in BMW, volume 2, starting at tab 21.

It is a 97 page document about how to deal with the Commission and if one goes forwards to page 907 you will see at the top of that the relevant description:

"The Commission has only limited powers to obtain information from firms situated outside the EU. Under international law the Commission is not empowered to conduct investigations outside the bounds of its territorial competence if they would impinge upon the national sovereignty of the non-member country in whose territory it was purporting to act. Accordingly, on the spot inspections of firms based in third countries are out of the question"

We agree, and if one were to draw parallels of course we would agree with that.

"In such cases the Community can and does send out requests for information ..."

Just pausing there, Community does think it has power to send out requests for information.

That is important.

"... but it cannot impose sanctions if a firm fails to comply."

Well, it can't impose sanctions. They don't explain why they have reached that opinion that they can't impose sanctions, it may be that the way of enforcing sanctions by the Commission is different to the civil debt route that we have here. Nonetheless they are not saying they can't send out requests. What they go on to say is this:

"One option open to the Commission is to direct a request for information to a subsidiary of a non-EU firm which is based in the EU."

That fourth point is very important because if there is, as the Commission here thought, some sort of a problem in imposing sanctions to a company outside the EU, the obvious work-around if there is an EU subsidiary would be to address the requests and indeed any penalty to that subsidiary. That only works because they are part of the same undertaking, because what you would of course do would be to

ask the EU subsidiary for all documents held by the undertaking anywhere in the world. That is why this is an effective work-around for the Commission in light of its own view of its enforcement powers. That is what the Commission does and that is the second document I wanted to show you.

MR JUSTICE MARCUS SMITH: That is only implicit in this, isn't it --

MR JONES: Yes, only implicit in this. We will see it is what the Commission does. I want to go to the case of Siderca, which is in the authorities at page 2925, which I think will be the last bundle of authorities. So it is tab 91, which is volume 5.

MR JUSTICE MARCUS SMITH: Yes.

MR JONES: So page 2925 you will see action brought by Siderca. This action was withdrawn by Siderca so we don't have a judgment, it is just an action brought by Siderca. The reason we are going to it is to show you that this is what the Commission did and it was threatened to be challenged here, although in fact it never was challenged. You will see on in the second column there the applicant claims the court should annul in whole or in part the Commission's decision of 6 October 97 addressed to Siderca SAIC.

MR JUSTICE MARCUS SMITH: Yes.

MR JONES: Then over on the next page you will see:

"The contested decision, addressed to [various people], ordered the addressees to answer certain questions within 30 days. The decision, by asserting jurisdiction over a parent company by virtue of its 47 per cent shareholding in a European company violates this principle."

So that was the argument.

I simply show it to you to show you that was the practice of the Commission. This, as I say, was withdrawn.

There was another one we have also found, 2927, called Chi Mei Optoelectronics,

which is essentially the same kind of situation. That was also withdrawn so we don't need to go through it. I thought it was important for you to know the issue has arisen but not been pursued.

So you will see from that that so far in this chronological survey of the Commission, subject to that point about sanctions, the Commission's approach is the same as the CMA's in the sense that it is treating the undertaking as one entity and it simply addresses the request, and if necessary the sanction, to one of the undertaking's corporate entities.

The only difference which was expressed in that 1997 document is that the Commission seemingly thought it wouldn't be able to impose a sanction on an overseas firm.

Now, I have said that the reason for that, the Commission's view of that, was unclear but even that has now shifted and that is the fourth document I want to go to. It is page 2953 in this bundle, so towards the back. It is a document which the Commission produced for the OECD in 2018 and what I want to look at on page 2953 is paragraph 16 where it is said:

"The Commission may send RFIs to undertakings located inside and outside of the EEA. In practice, however, the Commission has so far refrained from enforcing procedural fines or periodic penalty payments on companies outside the EEA."

Then it goes on to reiterate:

"Effectively use its investigate powers, the Commission frequently resorts to sending the RFI to an EU subsidiary [et cetera] ..."

So the development there is it is no longer saying we can't do it, we couldn't enforce fines, it is just saying the Commission has so far refrained from doing so.

So that was my sixth point, which was the approach of the European Commission.

My remaining points are somewhat shorter. The next one is section 27.

Section 27 is the provision relating to inspections of premises.

MR JUSTICE MARCUS SMITH: Yes.

MR JONES: One simple point which is made is, well, the CMA couldn't use this to go to BMW or VW's premises in Germany. Obviously that is right. It is correct of any regulatory scheme. But as we know, and we see in KBR, paragraph 29, one can approach different sections in different ways, different statutory provisions in different ways. A provision which is talking about a coercive power to enter premises is very different to one which is talking about obtaining documents. And critically here, the closer comparison one could make with section 27 is the point that under section 27(5)(e) the CMA can require information stored in electronic form which is accessible from the premises. Ms Abram agreed that would include documents stored anywhere, including outside the jurisdiction. Which really it would have to be because otherwise it would be impractical because of course documents are stored on cloud servers, a lot of people don't know where their documents are stored, very often they are stored in several different locations, it can be difficult even to identify a location.

So that is actually the analogy with section 27 and that is what is helpful from that provision.

My next topic --

MR JUSTICE MARCUS SMITH: Just to interject there, you are helped by the fact that the primary parts, the operative parts of section 27 don't use the word "person", they use the word "premises".

MR JONES: That is right. The territorial scope in section 27 in a sense isn't about the scope of a person, it is about the premises.

MR JUSTICE MARCUS SMITH: No, but if, for instance, it had said any officer of the CMA is authorised in writing by the CMA to do so, may enter any person's business

premises, I think you might have a little bit of work to do in reconciling sections 26 and 27 because you would be saying persons means persons plus undertaking.

MR JONES: Yes, I see.

MR JUSTICE MARCUS SMITH: The implication would be -- so to that limited extent you don't have work to do that you might otherwise have to do. That is the sort of point I meant, in reading the sections as a whole one looks for potential bumps in the road, and this is a bump which, rather like Sherlock Holmes' dog, doesn't exist.

MR JONES: Yes.

My next topic is safeguards. Again, I can take this very quickly, we have already covered I think most of this ground.

I emphasise three points. The first is that at least for present purposes all I am talking about is the power to apply section 26 to undertakings present in the United Kingdom. So there is a clear nexus with the United Kingdom.

Secondly, there are strong safeguards regarding the use to which documents may be put. That was originally in section 55 of the Competition Act, now contained in section 245 of the Enterprise Act.

Thirdly, there are of course ways of challenging the CMA's conduct, we have discussed those, but one can appeal to this tribunal on penalty and of course one could judicially review, and both of those things have been done here.

My final of my nine topics is the question about the possible breach of foreign law and, again, I can deal with this very briefly because it has come up in various guises already.

It does occasionally arise as a problem. I have made the point that it arises both in respect of companies in the United Kingdom and other persons. To be clear, if you genuinely cannot comply then that may well be a reason not to issue a notice or if it is issued, it might be a defence to any penalty.

To be clear, it doesn't really arise here on these facts because the only party which was relying before you on a foreign law point, BMW, isn't relying on it any more. Anyway, even when they were actually relying on it, it wasn't actually a completely freestanding point about German law, it was all about how they didn't think they could comply with section 26 under German law, because they thought that section 26 didn't permit the notice to be given in the first place. So it was always parasitic actually --

MR JUSTICE MARCUS SMITH: This is why I brought Ms Abram to a more abrupt halt than she wanted, because it does seem to me this sort of question is going to be best articulated when we know the answer to the primary question.

MR JONES: Yes. Albeit, sir, that question actually doesn't arise any more because it is not a pleaded issue any more.

MR JUSTICE MARCUS SMITH: No. Let's give a little bit more flesh on how we are going to approach this. Let's suppose you succeed and we say that the notice does apply. We have already said that there would be a period of grace for both parties but particularly BMW to consider their position. We would I think want to have BMW have the opportunity to articulate in extremely clear detail and to have the time to do that, what problems they would have in complying with a notice which on this hypothesis we would be saying bit against BMW AG. Now, how long that will be required for I don't know, but we would want, I think, to not have the resumption of daily fines until BMW could properly take into account the shifting of the tectonic plates in favour of the CMA. To be clear, we wouldn't want them to be sitting on their hands, and I am sure they wouldn't, but we would expect problems in compliance to be identified for the CMA's benefit as much as anyone else's swiftly and without the concern of an immediate resumption of sanctions.

Now, that is something which we debate after we have handed down judgment

rather than before. So --

MR JONES: I understand. I also don't want to spend your time debating a topic which doesn't arise now. Can I just make clear just so I have put this out there, that is not an argument which is open to BMW. So it is not that we are going to get, in my submission -- we will have to address this at the end, but if BMW loses on its ground 1, it has its ground 2, it has its ground 3, of course they will need to be resolved; it doesn't have as part of ground 2 German law compliance, it has abandoned that. It does haven't an opportunity, in my submission, to raise a new point when it thinks about it afterwards. We can come to it afterwards but that will be the CMA's position on those issue.

MR JUSTICE MARCUS SMITH: We can come to it afterwards and we will in the tail end of our judgment, if it is necessary, make clear what we are expecting both parties to do, but we are in the difficult situation, assuming you succeed -- I mean, if you don't succeed the problem evaporates. But assuming the CMA succeeds, we would not want a misunderstanding of the law to prevent a proper articulation of a proper objection in light of the law having been articulated to be foregone.

Now, there are all sorts of questions about past penalties, future penalties which we can debate going forward, but we would want to have a situation where, having resolved an area of genuine difficulty, and this is an area of genuine difficulty, we did not have a sense in foreign entities that having taken a point that is a difficult one, then getting hit by a £15,000 a day fine. So I think the stay question will resume in some form but after we have handed down judgment, because frankly until we have done so there is really no mileage in doing this. And it may be there is a pleading point that is open to you but I am not at this stage massively sympathetic to that.

MR JONES: Sir, can I make this suggestion, then, which is just as a practical matter. We were discussing earlier the extent to which the tribunal will want to hear

from us on grounds 2 and 3. You very helpfully indicated it may well be that you would be able to reach a decision without us coming back or we may have to come back, and Ms Abram made some submissions on that basis.

Ground 2 in fact incorporates an argument which is distinct from ground 1 and could be addressed fully in oral submissions today, which is all about essentially the extent to which thinking that there is legal uncertainty is a reasonable excuse. That could be addressed in full today but I apprehend, sir, tell me if this is wrong, that you would prefer for that not to happen. My suggestion is therefore that whereas Mr Howell was going to address you on grounds 2 and 3 it sounds as though it might be more sensible for us to leave that entirely to be looked at in the round.

MR JUSTICE MARCUS SMITH: I think that is exactly where I have, perhaps in a more subtle way, been going. I don't think we are going to be helped in answering that question because I think there are going to be a whole series of points on 2 and 3 and possibly on the JR which we will want to debate after you have got the answer to the key question.

MR JONES: That is very helpful. It is easier for us to know not to say anything rather than say a bit, so I am grateful for that.

MS ABRAM: May I say something very short which I hope will help rather than hinder. Ground 2 as it stands at the minute is a backward-looking ground in respect of the period while the law is uncertain and so we would still want to make that argument regardless of what you find on ground 1, but if you are against me on ground 1 and the CMA had vires to issue the notice, we won't be making some new version of ground 2 based on German law because our argument on German law was always contingent on the notice being ultra vires to begin with. So it is not going to expand, subject just to one point, which is that the reason that we withdrew the German data protection arguments was to enable the backward-looking bit of it to be

determined today. So there may be a need for argument about that.

MR JUSTICE MARCUS SMITH: We are not going to close that out. All I am saying is that if there were to be, assuming jurisdiction, a point that BMW AG and indeed VW AG might be put in breach of German law, then we would want to know about it before we slap a penalty on you. That is all I say. We might still put a penalty on you, let me be clear, but we would want to know what we were doing before we did it.

MS ABRAM: Very grateful.

MR JONES: That brings me then just to my final of my three subpoints under part 2, which is my alternative case.

How does the principle apply to section 26 in relation to a company which is not present in the United Kingdom?

Again, I can take this reasonably swiftly for reasons I have already touched on, which is that it is just different versions of essentially the same points.

But just to run through it swiftly, analytically we start by looking at the strength of the presumption and I think I have made clear that the presumption would be strongly engaged in this case. It would be strongly engaged, including because of course we would be looking at when you think back to the start of the Competition Act, criminalising conduct by an overseas person, I fully accept that. In contrast to where you have an undertaking present in the United Kingdom where on my approach you are not criminalising a foreign person, you would have been criminalising a person present in the United Kingdom, which is very different.

So I of course accept that you would have a strong presumption to displace.

The question would be whether it would be displaced by the context, provisions and history of the legislation. The CMA says that it would be. I will just run through the four principal reasons if I may. There are also some points just to emphasise the

differences between this and the undertaking approach.

Firstly, the purpose.

I have emphasised the purpose of section 26 is to give the CMA effective investigatory powers. That, in my submission, would be seriously hampered if the CMA could not obtain documents from persons overseas. And the gloss that I want to place on this and the reason I have come back to it is that actually this first reason would apply with even greater force if I am wrong about the undertaking argument. Because if I am wrong about the undertaking argument and the CMA can't obtain documents from undertakings present in the United Kingdom because of some argument relating to the nature of an undertaking, then in practical terms there would be an even greater need for it to obtain documents from persons overseas.

That is my first point. My second is to emphasise again the lack of any other means of obtaining the documents.

Thirdly, I again draw support on the territorial scope of the chapter 1 and chapter 2 prohibitions. Again, this is a slightly different approach because on this more muscular approach I would emphasise that parliament has turned its mind to the territorial scope of those provisions and the investigative powers will be most effective if they do correspond precisely to those substantive provisions.

Now, there is a distinction here between this case and KBR, because in KBR the power to obtain the documents was in one Act, the Criminal Justice Act, whereas the substantive legislation at issue, bribery and corruption, was in a different Act.

So one couldn't argue that because bribery had these extraterritorial dimensions, the investigative powers should be seen to be coterminous with that. That is an argument which would apply here though. The argument would be parliament has turned its mind to these questions.

Fourthly, I emphasise the safeguards, but of course I have already done that and

I won't go back through them.

Sir, members of the tribunal, those are my submissions, unless I can be of any further assistance.

MR JUSTICE MARCUS SMITH: Mr Jones, we are very grateful to you. We unsurprisingly have no further questions, we have plagued you quite enough throughout the course of your submissions and we are very grateful.

Mr Kennelly.

Reply submissions by MR KENNELLY

MR KENNELLY: Members of the tribunal, by way of reply I will begin very, very briefly by replying to the last three points Mr Jones has made on the more muscular case.

He made three broad points. First, he said even if he is wrong about undertaking, the reference to any person or person should mean any person anywhere in the world by reference to documents anywhere in the world in order to ensure effective implementation of the chapter 1 prohibition. That was the same argument made by the SFO in KBR and it was rejected. The tribunal have well in mind that in KBR the conduct, the prohibitive conduct was a bribery investigation by Monogest Company Unaoil which involved bribing officials in Iraq and that conduct involved UK nationals. It was extremely foreign and in order properly to investigate it one might have great sympathy for the SFO in needing documents not in the United Kingdom to get to the bottom of whether there was a legitimate basis for the payments made to the Iraqi officials by the Monogest company. Notwithstanding that the Supreme Court said no.

The second point Mr Jones made was the lack of other means for the CMA to get documents. As my learned friend Ms Abram said, that is a matter for parliament.

The third point he made was territorial scope. That parliament has legislated for the territorial scope of the prohibition in section 2(3) of the Competition Act. Again, KBR, the same point could have been made. Mr Jones says, well in KBR there were two different statutes in play. In my submission that makes no difference at all. The powers under the Criminal Justice Act which were being construed were designed to ensure the effective enforcement of statutes with extraterritorial effect. If that was a good point now it would have been a good point then.

I will move on then if I may to the undertaking issue and the judgment in R and L. I will take to you that briefly. Mr Jones placed quite a lot of reliance on it so I want to go back to it to distinguish it really from our case. It is in the supplemental authorities bundle behind tab 2.

If the tribunal goes first to paragraph 16 of the judgment and the analysis of the law on unincorporated associations, the tribunal will see that straightaway the legislation in relation to unincorporated associations is different from the legislation in relation to competition law in relation to partnership in particular, and so, for example, some unincorporated associations can by legislation make contracts, sue and be sued in their own name and commit criminal offences. That is over the page, page 43 of the bundle, just by A.

The issue of practicability and practical enforcement came up in that case and it is mentioned in paragraph 21. Mr Jones said just as it was found to be practicable here in R and L, so too it is practical in our case. Very, very different. It is plain from this judgment, and common sense, that with unincorporated associations such as these one will have a list of members, one will have a committee that will be an easily identifiable person responsible. Not at all the case in relation to undertakings, as I will come, because that is fundamental to our case on the difficulty with undertakings.

Then finally it was found that in this case, in R and L, it was possible to prosecute an unincorporated association and impose a criminal penalty, a fine on it. We see that in paragraph 29 on page 46. The means of an unincorporated association were directly relevant to fixing the fine on conviction, but it is the law in this country that whatever Mr Jones' submissions, the ultimate fine that is imposed for breach of the chapter on prohibition is imposed on a person. The undertaking is liable but a person must pay. That is a very important difference from this R and L judgment.

The fundamental difference, and this is the core submission that I make in reply on the question of undertaking, is the difficulty Mr Jones faces in elevating the concept of undertaking to something with legal personality. This goes right to the mismatch that the president has mentioned on several occasions.

Although Mr Jones tries to elevate it and give it the characteristics of something with legal personality, it just isn't possible. The concept of an undertaking is not at all analogous to that of a corporation or even a corporate group. It is a fluid concept and necessarily so. Mr Jones referred to a single economic unit which might suggest some coherence akin to a corporate entity, but we know that is not correct from the very authority that he showed us in Sumal. An undertaking depends, in respect of a particular practice, it depends on unity of conduct in the market, an analysis of degrees of influence as regards that practice. No formal links are required between the persons or parties in the undertaking, still less any legal links. The links between them may be completely temporary and informal. The question is, are they pursuing a specific economic aim for a sufficient period of time? That will vary on the circumstances, it will vary from time to time.

In fact, Mr Jones himself acknowledged that even a corporate group with strict lines of ownership between parents and subsidiary may not be an undertaking for the purposes of a particular infringement.

It is completely unsuitable, we say, therefore, for section 26, since among other things it may be impossible to ascertain until the infringement is properly understood who actually is in the undertaking.

The president will recall in the interchange case, in fact before Visa Europe merged or was taken over by Visa Inc, the European Commission and the European courts defined the relevant undertaking as including all the banks which were participating in the Visa scheme. On Mr Jones' analysis that means that a failure by HSBC in Hong Kong to comply with the section 26 request could be laid at the door of NatWest in the UK. NatWest could be made liable for a penalty by reason of HSBC's failure.

MR JUSTICE MARCUS SMITH: You agree, assuming you are wrong on undertaking, with the analysis of section 43, namely that the Ruritanian breach can be vindicated and penalised against the UK entity?

MR KENNELLY: Yes, it must follow indeed. That, we say, is a powerful reason why it can't possibly mean that.

Bearing in mind then that very fluid and difficult concept of undertaking, and that is why, just before I move on, we would also be interested to and would welcome the opportunity to express what I have just said in writing to identify for the tribunal just how difficult -- I think the word is amorphous, the word used by the president to the concept of undertaking. It may be given a shorthand label but identifying what the undertaking encompasses is an extremely difficult concept and it will vary from time to time. It is often a central issue for dispute in the infringement investigation itself.

Moving on then to the text of the Act and coming back to section 26 and responding now to what Mr Jones said about that.

Could I ask the tribunal again to turn up section 26, because the difference between what I was trying to submit in opening and what the president outlined this morning

as a provisional view may not be that different.

If one goes to the Competition Act in force, in section 26 the point here in relation to the blue pencil is whether in section 26 it is appropriate to include the word "undertaking" instead of "person" or in addition to "person" in section 26. Just for the avoidance of doubt, I wasn't suggesting that the word "undertaking" be blue penciled in section 59, it is in this context that I would urge a more limited interpretation.

If one focuses here on what is actually happening:

"For the purposes of an investigation under section 25 the CMA may require any person to produce a specified document or information which it considers relevant."

And at 2:

"The power conferred by subsection 1 is to be exercised by a notice in writing."

Now, I think the CMA must accept that that notice has to be delivered to or addressed to, and I use that in a neutral sense, a person, to a natural or legal person.

That is why we say that the word "person" in subsection 1 again must be a natural or legal person. And that works in the context of an investigation into an undertaking, because since the notice has to go to a person anyway and it is going to a person who, in the opinion of the CMA, is able to help them, for example someone they believe is in the undertaking, there is nothing to stop them saying to a person: we are investigating you because we believe you are in an undertaking with other people and we want to ask you lots of questions about the undertaking and your role in it and the role of others, and all of those questions about the undertaking can be asked but they must be asked to a person for this to work.

That is our short point on the construction of section 26 and it may be that if -- well, whatever the tribunal makes of my primary submissions, at the end of all of this, we would have no objection to the tribunal's provisional view as expressed this morning.

Where that gets to at the end, and it is a treatment of extraterritoriality, would satisfy our concerns.

Moving on then to -- sorry, before I move on, on that question of addressing a section 26 notice to a legal person -- by legal person I mean legal or natural person, I use it as a shorthand for a natural or legal person -- that is also vital for due process. Because of the amorphous fluid concept of an undertaking, the notice must be addressed to a person in order for that person to have notice of it and have their due process rights respected.

That is again a short point which we have made at length now to the tribunal.

The next point is practicability and Mr Jones here was answering points raised by the tribunal about the mismatch between the economic concept of an undertaking and the legal manifestations, in particular in relation to due process. How is he to ensure that the potentially hundreds or thousands of other members of the undertaking bound by this notice with criminal penalties will have their rights protected?

That is a very important point, because Mr Jones accepted, in fact he positively asserted, that one legal entity in the undertaking may be responsible for the faults of others. It is not open to one person in an undertaking to say by way of reasonable excuse, I couldn't get the documents from HSBC Hong Kong. As part of the undertaking that legal entity targeted by the CMA is liable, just as the one is in Hong Kong or Alaska or wherever else.

That leads to obvious injustice because if it is not just one undertaking that is in the frame by virtue of the breach by another -- sorry, one person in the undertaking. If one person in the undertaking breaches the order, all the other legal persons in the undertaking are potentially liable by reason of the CMA's argument, even in circumstances where they have not had the notice drawn to their attention, in circumstances where criminal penalties may be imposed on them.

Mr Jones did not shy away from any of that in his submissions.

Now, that is even worse when one considers the fact that in foreign jurisdictions there may be laws which prevent compliance with a mandatory order like a section 26 notice. Mr Jones' response here was, well don't worry, the CMA will be responsible, we will exercise discretion in how we deal with that problem, and those are possibly points to be raised by way of a defence to a prosecution or a civil penalty sought by the CMA.

But those are all ex post protections. They weren't good enough in KBR or in SOCA v Perry and they shouldn't be good enough here. That doesn't come close to the kinds of safeguards that are required in the case law to accommodate extraterritorial application of state power.

You have my point that judicial review is no alternative for proper safeguards. That obviously needs to be brought by a person with interest, needs to be brought according to very strict timetables and it requires notice. Mr Jones admits that those subject to penalties may receive no notice of the section 26 notice itself or indeed of the application for a penalty under section 40A.

It is curious that the CMA sticks to this position notwithstanding the obvious problem with its due process rights for those caught by it.

It does beg the question what is behind it and it may be the CMA's concern is this difficulty, this difficulty in identifying within an undertaking who is actually in it, is one that can then be shifted to the addressee of a section 26 notice. But that is simply not good enough. If this notice is a mandatory Act backed by criminal penalties, those who are subject to it and subject to criminal sanction need to be identified. It is both the breadth of who may be caught and the criminal sanctions, the lack of notice, and the complete uncertainty as to who is captured that renders this unsuitable for extraterritorial application.

Moving on then to Mr Jones' next point, which was that they would be careful in a selection of companies who would represent the undertaking and, again, they would choose companies that were likely to have documents. Again, that isn't a safeguard. That is wholly within the gift of the CMA. He wasn't accepting he was obliged to do that, the CMA was obliged to do any of that, that is simply something they would do by way of good practice and doesn't come close to the safeguards required in the case law.

I will move on then to extraterritoriality, the table which Mr Jones my learned friend handed up.

This table needs to be reviewed quite closely and I will ask the tribunal to look at it. I will ask you to go first to column E, UK company with foreign parent or subsidiary. That is obviously close to the facts of the VW UK, VW AG situation. It is said there that the presumption against extraterritoriality is weak or non-existent for documents held overseas. It is a curious submission but it depends on note 2, and note 2 says that the presumption is weak or non-existent, and I refer you to the italicised and underlined section, "only if the UK company has a right to obtain the documents". It is not in dispute if the UK company can obtain the documents. But that is not our case at all.

Moving then to the next column on the left-hand side, a foreign company present in the UK. Again, it is said that for documents overseas the presumption is weak. Mr Jones was rather coy about what presence means in this context. There was a suggestion I think in his reference to the Gorbachev case that somehow Volkswagen AG brought itself into the jurisdiction. But putting the undertaking point to one side, there is nothing to suggest that VW AG brought itself into the jurisdiction. The subsidiary here, VW UK, isn't sufficient, we know that from KBR. And similarly the column on the left, the foreign company with agents, that can't be the subsidiary.

In KBR even the UK subsidiary closely linked to the investigation wasn't sufficient to suggest carrying on business in the UK and so again that doesn't displace the presumption.

Touching briefly on the authorities he mentioned, he mentioned Jimenez, he relied on that heavily in his written pleading also. I think that was to suggest somehow that even in respect of foreign companies and foreign documents the presumption was not as strong as we suggested.

Could I ask the tribunal just to go back to that. That is in my volume 3 behind tab 63, go to page 1719, the passage that was read to you by Mr Jones. Sorry, 1718 is where he began.

MR JUSTICE MARCUS SMITH: Yes.

MR KENNELLY: He was talking about mere presence within the jurisdiction being sufficient. And that was noted even in relation to Income Tax Acts. But he didn't read to you the last sentence of that paragraph, which was the position summarised by the House of Lords in Westminster Bank Executor v National Bank of Greece. It is at B on the left-hand side on page 1719:

"The Income Tax Acts themselves impose a territorial limit, either that from which the taxable income is derived must be situated in the United Kingdom or the person whose income is to be taxed must be resident here."

Then he took you to Gorbachev and Mackinnon and again suggested that Mackinnon was an outlier. But of course the tribunal has seen that Gorbachev approved Mackinnon between paragraph 65 and 68 of the judgment of the Court of Appeal, except in fact in relation to the very point that Mr Jones is making. They noted that in Mackinnon Mr Justice Hoffman assumed that he had the jurisdiction but exercised discretion not to exercise it. That, the Court of Appeal found, was odd but relied on the general thrust of what Mr Justice Hoffman said in Mackinnon, which

was that these kinds of orders should not be made extraterritorially. That was the bit that was approved specifically by the Court of Appeal.

In any event, we don't need Mackinnon for the purposes of our submission. We rely on KBR, Supreme Court, and SOCA v Perry.

On the critical point of criminal sanctions, the implications of criminal sanctions in ascertaining whether there is extraterritorial effect, Mr Jones had no response to our submission on SOCA v Perry. He had no answer to that except his point on undertaking. All his eggs really are in that basket. That is his answer to all of this and it is very simple, a very simple point. By virtue of the word "undertaking" all of the foreign persons in the undertaking, wherever they are, are equivalent to United Kingdom companies. And he said so. He said VW AG is in his box F2. It is equivalent to a UK company and therefore its documents can be seized just as if it were incorporated here.

That is a radical extension of the territorial scope of the Act. One would expect to see something to support it in addition to the simple addition of that word "undertaking" in section 59 because its implications are obvious. It is even if the concept of undertaking were strictly defined and definable, that you could have extraordinary implications for the territorial powers of the CMA, but in circumstances where the concept of undertaking is extraordinary fluid, impossible to pin down even for the CMA at the stage of investigation, it is highly unlikely that parliament intended it to be extended so far where criminal sanctions existed for a failure to comply. It is equivalent therefore to any person anywhere in the world. The plain implication of Mr Jones' submission based on undertaking is that person through the device of undertaking means any person anywhere in the world who may be part of an undertaking under investigation, as in the CMA believes to be part of an undertaking in an investigation. That is the equivalent definition that was rejected

in all of the authorities, the high authorities we took you to, and that is the word "undertaking" cannot carry such a burden in view of its wide ranging and amorphous scope and where there is no proper legal linkage between persons involved in it.

Its fallback position was even if is not equivalent to a UK company, it is certainly not foreign because it is part of an undertaking. VW AG. But that is an unreal submission. Whatever spin is put on it, at the end of the day VW AG is a foreign person being ordered to do something in Germany where there is a risk of breaching German law. VW is not under the control of any UK person. It is not doing business here in any sense such as expressed in the Modern Slavery Act or the Enterprise Act. Of course those are statutes where express provision is made for extraterritorial application to companies doing business here. VW AG is no more present in the United Kingdom that KBR Inc was in that case. Undertaking is ultimately a device to say all persons are caught, and that is a massive, as I say, extraterritorial extension for which no evidence is available to suggest that was parliament's intention.

Mr Cutting's point that he put to Mr Jones about the exorbitant possibilities we respectfully adopt and the example given isn't an unreal one. VW could easily have outsourced IT functions to Ruritania. Hopefully VW would do that in a jurisdiction with decent data protection controls but one cannot assume that in every case, and it would allow a form of forum shopping by the CMA as by way of its exorbitant exercise of this jurisdiction.

On Mr Jones' nine points Ms Abram will address you in detail but I wanted to pick up on three points in particular. The first was the territorial scope of the Act and the disconnect which I suggest exists between a substantive prohibition and the investigatory powers, and I repeat the point I made about KBR, that same disconnect was in that case and there is no reason why, for reasons of respecting territoriality, that disconnect can't exist.

The second point I wanted to make was about enforcement. The point here again is that obvious injustice will arise if the CMA is correct. Mr Jones said the question of whether enforcement was possible or not was moot, but it is not moot. We know that whether something can be enforced effectively is directly relevant to whether we imply extraterritorial effect into the statute, that is we are directed to ask that question when seeking to imply extraterritorial effect.

And in this case if Mr Jones is right, if one member of an undertaking breaks or breaches section 41 or 42, all the other members could be found criminally liable. He, as I say, doesn't shy from that. He suggested the answer might be that criminal liability would only be raised as against the undertaking itself. Now, this is the very first time that has ever been suggested by anyone, anywhere. Never in my career have I heard someone suggesting that an undertaking could be found criminally liable. There is no authority for it, there is no suggestion it has been contemplated by anyone anywhere and it not a suitable basis to suggest section 26 should be given the extraterritorial effect that Mr Jones urges.

On the civil case, this is my final point, Mr Jones suggested a civil debt could be enforced, that under section 40A a civil penalty could be imposed and then recovered as a judgment debt which might be enforceable outside of England. He put it very, very carefully. He said it might be enforceable, it might not be. I made the submission in opening that as a matter of public international law, debts which are grounded on public law or penal statutes are not enforceable under the general rules of conflicts of laws. I didn't understand that to be contested but I do have -- and I am happy for Mr Jones to respond on this because when I heard him say it I asked for the authority to support what I put -- this is in Dicey.

The short point is the same one I made in opening, that certainly in this country the courts have no jurisdiction to entertain an action for the enforcement, either directly

or indirectly, of a penal or other public law or anything founded on the act of a state. I rely on the beginning of 8-002:

"It is a well-established and almost universal principle that the courts of one country will not enforce the penal and revenue laws of another."

Mr Jones has not suggested anything to support his argument that a debt founded on a penal or public law statute could be enforceable anywhere and in those circumstances we suggest the tribunal shouldn't place any reliance on it.

Unless I can be of any further assistance I will hand over to Ms Abram.

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

Reply submissions by MS ABRAM

MS ABRAM: I am very grateful. I am going to be able to be short, I am not going to repeat anything Mr Kennelly has said and he has done lots of the hard lifting for me. I am going to make four points.

The first is that we can see from other bits of the Competition Act that person as it is used in the Competition Act doesn't always include undertaking. I would like to show you section 28. We can look at the version as it is now but it has been in there since the start, so authorities 1, tab 13.

MR JUSTICE MARCUS SMITH: Yes.

MS ABRAM: Section 28 is on page 98 and we all know, if we didn't before this hearing, it is power to enter business premises under a warrant. If one turns over the page to subsection 4 it says:

"Any person entering premises by virtue of a warrant under this section may take with him such equipment as appears necessary."

MR JUSTICE MARCUS SMITH: Yes.

MS ABRAM: So that person is clearly a representative of the CMA, most likely a natural person, it is not an undertaking. So person in the Competition Act does not

always mean undertaking, sir.

In my submission, that really reinforces the points that Mr Kennelly made earlier in respect of contrary intention.

MR JUSTICE MARCUS SMITH: Yes.

MS ABRAM: The second point that I would like to make goes to the point that Mr Jones made about whether one member of an undertaking could be made responsible for providing information on behalf of the whole undertaking. That is really the central edifice of the CMA's position, that you can write to BMW UK, for example, and it could be held liable for not producing all of the information regardless of whether it has it or not. I hadn't understood until Mr Jones' oral submissions today that that was his position. It is inconsistent with the terms of the Act as enacted.

So if we go to authorities bundle 1, tab 12, page 80.

MR JUSTICE MARCUS SMITH: Yes.

MS ABRAM: This is section 42 of the Act as enacted and we all know that is gone. That was the original criminal offence section. So 42(1):

"A person is guilty of an offence if he fails to comply with a requirement imposed on him under section 26 inter alia."

42(2) is the really important one:

"If a person is charged with an offence under subsection 1 in respect of a requirement to produce a document, it is a defence for him to prove that the document was not in his possession or under his control and that it was not reasonably practicable for him to comply with the requirement."

Now, what that means is if the person who is charged with the offence doesn't have the document, it is a defence to the criminal liability. That can be read in one of two ways.

Mr Jones' submission was, in my submission, extremely adventurously that a person under 42(2) could include an undertaking. Now, I respectfully echo what Mr Kennelly has said, one has gone through the looking glass at that point. There has never been any suggestion that an undertaking could be charged with a criminal offence. There is no basis to suggest that was in parliament's contemplation at the time of the Competition Act. That is point 1.

Point 2, let's give the point the benefit of the doubt and let's imagine that the first person in 42(2) could be a person or an undertaking, or a person including an undertaking, that debate doesn't matter for this purpose. Let's imagine it could be a person including an undertaking, you then read on:

"If they are charged with an offence under subsection 1, it is a defence for him to prove that the document was not in his possession or control."

Now, if the point, if the legislator's intention had been you can charge a legal person with the offence but actually it would only be a defence if he could show not only that he didn't have it but that no one in the undertaking had it, that statutory provision would not have said what it says. It would have had to have additional words in it.

So in my submission that is directly inconsistent with the whole of the CMA's undertaking case.

For my third point I would just like to make a point about the facts of this case. We heard a lot from Mr Jones about the CMA as a responsible regulator and the circumstances in which it would and wouldn't exercise its power, who it would and wouldn't send notices to if it had the power as suggested by the terms of its case. I would just like to remind the tribunal in that context of the facts of this case, which are that the section 26 notice was addressed to BMW UK and AG but not sent to AG, and the section 40A notice, the penalty was sent to BMW AG. So this case is actually an object example of a regulator sending a penalty notice to someone they

haven't directly told about the obligation they say that the entity has to comply with, and its intention with the various points made about how the CMA would conduct itself.

I don't blame the CMA for that but what I do say is that it reflects the fact that one needs to look at what the possible consequences of the reading that the CMA contends for are, rather than assurances as to how a regulator might or might not act.

MR JUSTICE MARCUS SMITH: Fair enough. I think one has to bear in mind, when weighing that point, the uncertainty both sides have been labouring under about how these things work. I think for our part we would be minded to see the practice in this case through a lens of considerable generosity to both sides, and not to extrapolate from any errors or mistouches of the ball which might have taken place in this case how either the CMA or any target of investigation would behave in the future.

MS ABRAM: I wholly hear that. I am just about restraining myself from saying that precisely the same points apply to the fine as against BMW AG. I won't labour that point, I sense I will be pushing my luck. My Lord, you see the point.

MR JUSTICE MARCUS SMITH: We will come to that.

MS ABRAM: The final point I want to make is, on the basis that I am wrong about everything I have said so far and "person" does mean undertaking, does that mean there is no extraterritoriality if the undertaking has a presence in the jurisdiction? I just want to make two sub points about that, without repeating anything Mr Kennelly has just said, which I respectfully agree with and endorse.

The first is that it is really helpful in this connection to think about what the Commission does, its practice. Of course, the Commission is the executive body, the enforcement agency, from the entity where the undertaking concept was born, and the Commission is the body whose practice is relied on, is prayed in aid in this

connection. You saw from the documents that Mr Jones took to you that the Commission doesn't, in practice, do what the CMA has done in this case, which is apply a penalty to an entity outside its territory.

MR JUSTICE MARCUS SMITH: Yes.

MS ABRAM: The second sub point that I want to make on that is that the effect of the undertaking with presence in the jurisdiction point on Mr Jones' submission as to the strength of the extraterritoriality presumption was remarkable, because it shifted him all the way across the boxes of his table from a strong presumption to a weak presumption. In my submission, that isn't right. The undertaking concept, even if Mr Jones is right about the way it is to be read in, it can't have that kind of magical transformation effect, because no other concept would have that transformational effect in the context of reading the legislation.

If you think about the other bits of legislation where they use "any person" for example, what the courts then have to do is look at the facts of the case to see whether the type of person on the case is the type of person that is envisaged in the statute. So, even if the legislation does mean any undertaking, the fact that the undertaking has got a member in the UK isn't kind of a get out of jail free card, it still necessitates a long, hard, cold look at the facts, which in this case are that a German company was asked to produce documents in Germany.

MR JUSTICE MARCUS SMITH: I think, Ms Abram, you are reframing the exchange that we had with Mr Jones regarding the usefulness of the table. The table, to be clear, is very useful when you are talking about companies but my present thinking is that, let's suppose we were to reach a conclusion that it was possible, through a section 26 notice, to require a Ruritanian entity to disgorge Ruritanian documents, and indeed to then proceed criminally against the UK entity if the Ruritanian documents were shredded in Ruritania. Whether or not one can fit that into the

schema of presumptions in the table, it seems to us that we would be derelict in our duty, and most unwise having half an eye on the Court of Appeal, to say this was not a case of extraterritoriality. I think what we would instead be saying is that this is a case where there are extraterritorial effects and we wouldn't be held to reach that conclusion by the construction of the statute.

I think that is how we would see it.

I am not saying anything beyond we don't want to shove under the carpet what the lay person on the Ruritanian omnibus would say was quite clearly an extraterritorial thing, even if, looking at the technicalities of English law, it isn't.

MS ABRAM: I would respectfully agree, sir.

Unless I can assist any further, that is all I wanted to say.

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

Mr Kennelly, you are rising?

MR KENNELLY: Sorry, there was just one last housekeeping matter. The tribunal was asking whether two separate judgments would be required and we saw your preference for one.

MR JUSTICE MARCUS SMITH: Yes.

MR KENNELLY: From Volkswagen's perspective, because of course it is a different case, it is a judicial review --

MR JUSTICE MARCUS SMITH: It is.

MR KENNELLY: -- we would respectfully suggest a separate judgment for Volkswagen. We would hope -- obviously, it is a matter for the tribunal -- for the court and the tribunal -- and we would hope that wouldn't duplicate your work or make it more burdensome. But since we are asked to express a preference, that is the preference we express.

MR JUSTICE MARCUS SMITH: That is very helpful. Do you have a particular

reason why? The only reason I ask is because, when this cropped up in Sportradar, I was pretty firmly of the view that separate judgments would be required because, in effect, the issues for the CAT versus issues for the High Court were actually distinct. Here, the point of law question is very much duplicated. I appreciate that there is the hurdle of permission for JR, which is different, but I don't think there are going to be any surprises as to where that one is going to go in terms of our decision. So --

MR KENNELLY: There is no major reason. There isn't a complete overlap between the two cases; we may get our judgment more quickly, ultimately, because of the other issues with BMW. That is not a massive concern. But if -- sorry, may I just quickly take instructions on that last point, in case I have missed something.

(Pause)

There may be a concern about the form of the jurisdiction, to ensure that the separation between the administrative court and the tribunal is clear.

I am not asking the tribunal to do anything that will inconvenience it but we were asked to express a preference.

MR JUSTICE MARCUS SMITH: You have quite rightly come back. I mean, the reason I am probing that is because, inevitably, if one has two judgments, there are going to be differences between them. The last thing I want, unless there is actually a genuine difference between us, is for that to cause a problem for any appellate court. Clearly, were we to reach divergent views then you would get separate judgments.

MR KENNELLY: Yes, of course.

MR JUSTICE MARCUS SMITH: That, I very much hope, is not going to be the case.

What I had in mind, thinking about this, was to make absolutely clear that, if there was a single judgment, we would probably use the language "we" but I would make

absolutely plain that, on the judicial review, "we" means "me".

MR KENNELLY: Yes, indeed. We are obliged.

MR JUSTICE MARCUS SMITH: We will bear in mind the preference. I have to say the reason for the preference is something which would obviously be something that I am -- these are difficult questions and duly noted.

Ms Abram, do you have any particular preference?

MS ABRAM: No preference.

MR JUSTICE MARCUS SMITH: No preference at all.

Mr Jones?

MR JONES: Sir, I think we would prefer one judgment, for maybe obvious reasons.

MR JUSTICE MARCUS SMITH: Well, I think it is neater. But we will bear in mind the preferences that have been expressed.

Well, it remains for me to thank you all for your very considerable help. It will come as no surprise that we will reserve our decision and we will get something to you as soon as we possibly can. Thank you all very much.

(4.45 pm)

(The hearing concluded)