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5 **IN THE COMPETITION**
6 **APPEAL TRIBUNAL**

CaseNo:1518/5/7/22

7
8
9 Salisbury Square House
10 8 Salisbury Square
11 London EC4Y 8AP

Tuesday 7th March 2023

12
13 Before:

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15 The Honourable Mrs Justice Joanna Smith
16
17 (Sitting as a Tribunal in England and Wales)
18

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20 **BETWEEN:**

- 21
22 (1) LONDON ARRAY LIMITED
23
24 (2) RWE RENEWABLES LONDON ARRAY LIMITED (formerly known as E.ON
25 CLIMATE & RENEWABLES UK LONDON ARRAY LIMITED)
26
27 (3) ORSTED LONDON ARRAY LIMITED (formerly known as DONG ENERGY
28 LONDON ARRAY LIMITED)
29
30 (4) ORSTED LONDON ARRAY II LIMITED (formerly known as DONG ENERGY
31 LONDON ARRAY 2 LIMITED)
32
33 (5) MASDAR ENERGY UK LIMITED

Claimants

34
35 v

- 36
37 (1) NEXANS FRANCE SAS
38
39 (2) NEXANS SA

Defendants

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42
43 **A P P E A R A N C E S**

44
45 Colin West KC (on behalf of the Claimants)
46 Tony Singla KC and Paul Luckhurst (on behalf of the Defendants)

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(10.30 am)

Case management conference

MRS JUSTICE SMITH: Some of you are joining us livestream on our website, so I must start, therefore, with a customary warning: an official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings, and breach of that provision is punishable as contempt of court.

Good morning, everyone.

MR WEST: Good morning.

MRS JUSTICE SMITH: Yes, Mr West.

Submissions by MR WEST

MR WEST: Yes, madam, may it please you this morning, my name is Colin West KC, I appear for the Claimants. My learned friends, Mr Singla KC and Mr Luckhurst, appear for the Defendants. I hope you have had an opportunity to consider the parties' brief skeleton arguments.

MRS JUSTICE SMITH: I have, and thank you very much for the skeletons, they were very helpful. I have also read various bits of the bundle, including the pleadings and some of the correspondence.

MR WEST: I'm very grateful. Madam, you will be aware the Claimants in this matter are the parties which own and operate the London Array wind farm. The Defendants are companies within the Nexans Group, which is a large cable maker based in France. The two Defendants who are parties to the case were, in particular, the addressees of the Commission's cable Decision from 2014. Although that's nearly

1 a decade ago now, these proceedings are brought as a follow-on claim following the
2 final exhaustion of the appeals from that Decision in July of 2020, which meant that
3 my clients had two years from that date to bring their case under the old Limitation
4 Rules because the facts arose prior to the substantial changes to this Tribunal's
5 jurisdiction in 2015.

6 By that Decision, the Commission held there had been a cartel in the market for
7 high-voltage submarine and underground power cables. So this case is concerned
8 with submarine cables. The submarine cables supplied by Nexans to the project in
9 this case were at a total value of commerce in excess of £85 million, meaning that,
10 even if the cartel overcharge was in single percentage numbers, the claim for damages
11 is substantial.

12 The Claimants' case in the proceedings is, in short, that the costs of both those export
13 cables and the inter-array cables at sea were inflated by reason of the cartel and we
14 claim the amount of that inflation as damages.

15 In order to identify and quantify a cartel overcharge, the approach which is typically
16 adopted in these cases is a regression analysis carried out by the expert economists.
17 What that means is they take the prices of projects which were commissioned both
18 during the cartel, and after the cartel, or, if the data is available, before the cartel, and
19 they compare those prices or margins or both, taking into account and adjusting for
20 changes in other elements of the pricing such as costs of metals or other materials,
21 labour costs, and so forth, to try and identify whether the cartel resulted in an inflation
22 of the price.

23 **MRS JUSTICE SMITH:** Yes.

24 **MR WEST:** Typically, what these models find is that prices were higher during the
25 period of the cartel (that's, of course, why cartelists enter into cartels) and also that it
26 takes a period of time after the end of the cartel for the prices to descend back to the

1 competitive level, which is an important point in this case, because, in this case, the
2 procurement process straddled the end of the cartel with the initial bids submitted
3 during the cartel and the last and final bids a few months after the end of the cartel.

4 But the Claimants say that there is, nevertheless, likely to have been a cartel
5 overcharge in this case for two reasons: firstly, because part of the bidding process
6 occurred during the cartel; and, secondly, because, in any event, the final bids
7 occurred during the period when overhang effects are still likely to have been prevalent
8 in the market.

9 **MRS JUSTICE SMITH:** Yes.

10 **MR WEST:** Whether that is so or not depends on an econometric analysis of projects
11 to be disclosed by Nexans in due course.

12 It's not something we are in a position to address as yet because we will need that
13 disclosure and that hasn't happened yet and isn't on the agenda for this CMC.

14 **MRS JUSTICE SMITH:** Yes.

15 **MR WEST:** The Defendants, of course, make much in their Defence, and indeed their
16 skeleton for this hearing, of the fact that the final bids in the contract post-date the end
17 of the cartel. They, in particular, point to the fact of dawn raids, which they say were
18 publicised in January of 2009. They say that means the Claimants would have known
19 that there had been a cartel, or at least suspected, and would have taken steps to
20 ensure the price was competitive. Just briefly, because this point seems to loom large,
21 there are a number of problems with that.

22 One is that, whilst Nexans, as they trumpet in their skeleton, attach a number of
23 procurement documents to their Defence, none of those documents refer to the dawn
24 raids. They haven't been able to identify any documents, it appears, in which those
25 were discussed as part of the procurement process.

26 Secondly, of course, if that had happened, if it had been raised in the procurement

1 process, the most likely turn of events would have been that Nexans would have said,
2 "Well, there was no such cartel, or, if there was, we weren't in it", because, after all,
3 that was their position before the Commission and, indeed, on the appeals all the way
4 to July 2020.

5 **MRS JUSTICE SMITH:** Yes.

6 **MR WEST:** So their position appears to be that, although they denied participating in
7 the cartel at the time, and for many years afterwards, the Claimants ought to have
8 known that that denial was ill-founded and that they were, in fact, guilty throughout,
9 even though the Claimants themselves had no knowledge of the cartel arrangements,
10 which were, of course, secret and concealed. So, as I say, that all seems rather
11 opportunistic, to put it no higher, and no less opportunistic is the suggestion that the
12 Claimants have fallen into error by not investigating knowledge on the part of the
13 individuals who were involved in the procurement process on their behalf prior to
14 commencing the proceedings because, as I have explained, it's not obvious that the
15 dawn raids are relevant at all and neither is it obvious that there are any relevant
16 documents. So Nexans doesn't appear to have been able to have found any.

17 It would at least be different, or at least it might be, if the dawn raids could be relied
18 upon for a limitation defence. So if, for example, there had been dawn raids and more
19 than six years had passed prior to the start of the proceedings in a case governed by
20 the Limitation Act so the Claimants had to show they didn't know of them and couldn't
21 have found out about them under section 32 of the Act, then one could see that might
22 be highly relevant and would have to be investigated, if it could be, but in this case
23 there isn't even an arguable limitation defence, although there is a pleaded one.

24 So in any case, the dawn raids and the debate about them does not impinge upon the
25 possibility of overhang effects. So with that by way of introduction, this is the first CMC
26 in these proceedings. The agenda for today is at tab 3.

1 **MRS JUSTICE SMITH:** Yes.

2 **MR WEST:** And is quite a limited agenda --

3 **MRS JUSTICE SMITH:** Yes.

4 **MR WEST:** -- which is the first point I make. The second point is the parties have
5 reached agreement on most of the agenda items, subject to the Tribunal. I think the
6 only outstanding point which the Tribunal actually has to decide today is whether to
7 list the trial today to take place in -- I think both parties agreed 2025. I would say,
8 however, the fact we are all here today and don't have very much to do is something
9 of a missed opportunity. The parties could have come along today prepared to argue
10 general disclosure and all other directions to trial.

11 However, under the CAT Rules, it's provided at rule 60(2), that the CAT will give
12 directions ordinarily at the first CMC for the exchange of disclosure reports and
13 electronic documents questionnaires, and will then address general disclosure at the
14 second CMC. One can see that if there is a lot else on the agenda at the first CMC,
15 particularly jurisdiction or strike-outs or other heavy applications, that makes eminent
16 sense, but, today, there are not any applications before you of that kind and the
17 Claimants, therefore, propose to the Defendants that they should agree disclosure
18 reports and electronic documents questionnaires before this hearing so it could be as
19 effective as possible but they declined.

20 So we're not in a position to address general disclosure and, since the timing of
21 subsequent steps, like witness evidence and expert reports, is likely to flow from the
22 timing of disclosure, we're not able to address that either.

23 One point just briefly on disclosure is that there isn't an agenda item today concerning
24 any disclosure from the Claimants. My friend, in his skeleton, has a certain amount to
25 say about that, but at no point did the Defendants actually propose any categories of
26 disclosure in the draft order for today, neither have they applied for any. That's why

1 this Tribunal is not making any such orders. So it rings rather hollow for my friend to
2 come along to complain about that.

3 The parties have agreed there will be a second CMC and they have also agreed it
4 should be in about three months, if the Tribunal can accommodate that --

5 **MRS JUSTICE SMITH:** Yes.

6 **MR WEST:** -- to enable these outstanding matters to be thrashed out.

7 **MRS JUSTICE SMITH:** Just on that, while you mention it, my understanding is that
8 the proposal is for the week commencing 12 June.

9 **MR WEST:** That's correct. The window, I think, is one of four weeks, but I understand
10 that that week is one where both parties are free.

11 **MRS JUSTICE SMITH:** Right. Well, I have been informed that there is currently
12 a three-day listing in that week for another case but that there will be potential for you
13 to have the hearing during that week, but the precise date will be confirmed in due
14 course. Can you tell me what the time estimate for that hearing is; is it one day?

15 **MR WEST:** I anticipate it will be a day. I don't believe the parties have discussed that
16 yet.

17 **MRS JUSTICE SMITH:** All right. Perhaps we should, just for the time being,
18 provisionally say it's going to be a day to be listed in the week of 12 June.

19 **MR WEST:** I'm very grateful.

20 **MRS JUSTICE SMITH:** Thank you.

21 **MR WEST:** There are two orders before the Tribunal which the parties are asking
22 the Tribunal to make today.

23 **MRS JUSTICE SMITH:** Yes.

24 **MR WEST:** The first is a confidentiality order which is at tab 4.

25 **MRS JUSTICE SMITH:** Yes.

26 **MR WEST:** This order, there are not any issues to decide unless the Tribunal has

1 any. This is agreed between the parties. The only point that I just mention in passing
2 is that, under this order, as generally applies under such orders, is for the disclosing
3 party, in the first instance, to apply whichever confidentiality designation it wishes and
4 there are two here. There's external eyes only and then there is the outer ring. The
5 order also provides that all of the Commission documents are to go into the inner ring,
6 so external eyes only in the first instance.

7 My clients don't think that's justified or don't think, ultimately, it will be justified. We're
8 talking about a cartel that ended in 2009.

9 **MRS JUSTICE SMITH:** Yes.

10 **MR WEST:** But rather than argue about it we have agreed to that wording and we'll
11 challenge the designations hereafter.

12 **MRS JUSTICE SMITH:** I follow that. That's no doubt pragmatic but, presumably, by
13 the time of the next case management conference, you may be in a position to raise
14 that as an issue for the agenda?

15 **MR WEST:** Indeed. If there are any disputes about it. It may be necessary to involve
16 the other addressees in the case of the Commission documents.

17 **MRS JUSTICE SMITH:** Yes.

18 **MR WEST:** That, then, is the confidentiality order. The directions order is at tab 5.

19 **MRS JUSTICE SMITH:** Yes.

20 **MR WEST:** Just going through this so the Tribunal knows what's happening here, the
21 disclosure to be given by the Defendants is quite limited. There is the Decision itself.
22 We, of course, have the public version of that which has a fair number of redactions.
23 The Defendants will have a version with fewer redactions, which they're prepared to
24 disclose, and also the contents of the Commission file documents. Those are the
25 documents made available by the Commission to the parties under investigation so
26 they know the evidence on which the Commission proposes to rely. Those are

1 typically highly relevant. You don't need to search for them because they will be
2 available on a USB stick, most likely, so, ordinarily, there is an order for early
3 disclosure of that and the Defendants here are agreed, but, because some of those
4 documents emanate from the other parties to the investigation and not the Defendants,
5 it's necessary to give them an opportunity to consider those documents and whether
6 they wish to assert any claims of prejudice or confidentiality.

7 Fortunately, in this case, that process has been gone through in relation to this version
8 of the file in earlier litigation and the Defendants have a copy as a result. So the
9 proposal is that that version, or those versions, be made available, but we are still
10 giving the third party addressees the right to object just in case they suggest that their
11 rights are engaged.

12 **MRS JUSTICE SMITH:** Yes, I follow.

13 **MR WEST:** Now, on Friday, we got a letter about this from the Defendants, which is
14 fed into what should now be paragraph 5 of this order, which I think is new -- parts of
15 it are new -- and the suggestion in this letter, which is at tab 25A, was that there may
16 be a problem under rule 102 of the rules of the CAT. That's the equivalent of
17 CPR 31.22 which says you can only use disclosure documents for the purposes of the
18 proceedings.

19 **MRS JUSTICE SMITH:** Yes.

20 **MR WEST:** The suggestion seems to be: well, these are documents disclosed in the
21 Vattenfall case, so is there an issue about that? Just addressing that very briefly,
22 I would be surprised, in a way, if there was an issue under rule 102, because these
23 are documents the Defendants had anyway. They are not documents the Defendants
24 only got through disclosure in Vattenfall because, they were, of course, addressees of
25 the Decision.

26 Now, it's true that some redactions may have been made to those versions of the

1 documents, so the versions are very slightly different to those that the Defendants
2 have anyway, but the result of that process is that those documents contain less
3 information than they otherwise would, so one is not in a position where the
4 Defendants, by reason of disclosure, know more or have documents that they wouldn't
5 otherwise have.

6 So we would be surprised if rule 102 was engaged.

7 Paragraph 5, it is proposed that the Tribunal should give the Defendant permission
8 under rule 102 if it's required. That is a bit -- it's not the way this would usually be
9 done. Usually, if you want permission under rule 102, you have to apply in the
10 proceedings in which the documents were disclosed, for the obvious reason that that
11 gives the party which disclosed the documents the opportunity to object. Of course,
12 in this case, the proposal is that the other addressees should be notified of this order
13 anyway and given an opportunity to object.

14 So although it's a slightly unusual way of proceeding, there doesn't seem to be any
15 objection to it in principle, and so we are happy to agree that wording if the Tribunal is
16 happy to make that order.

17 **MRS JUSTICE SMITH:** All right. Well, I will hear what Mr Singla has to say in due
18 course. It does seem to be a rather unusual way of dealing with matters, but if
19 everyone is agreed that it's a way forward, then --

20 **MR WEST:** Yes, and if the other addressees object, they have the opportunity to do
21 that.

22 **MRS JUSTICE SMITH:** Yes, all right.

23 **MR WEST:** So that is disclosure. Paragraph 8 concerns disclosure of some
24 pleadings. I don't believe any point arises on that. Then paragraph 9 is exchange of
25 disclosure reports and electronic documents questionnaires for next time. The date
26 appears in square brackets. I believe that is agreed, so the square brackets --

1 **MRS JUSTICE SMITH:** They can go?

2 **MR WEST:** They can go.

3 **MRS JUSTICE SMITH:** Yes.

4 **MR WEST:** Then we have the CMC at paragraph 10. Then paragraph 11 is the only
5 live issue that I am aware of which is, should the CAT list the trial today? And the
6 parties' respective positions are set out here. Our wording is in green. The CAT
7 should list the trial with the provisional estimate of three weeks to be listed in the first
8 available date after 13 January 2025. That's the first day of that term in 2025.

9 **MRS JUSTICE SMITH:** Yes.

10 **MR WEST:** The Defendants say that the Tribunal shouldn't list the trial until the
11 second CMC. That's their primary argument or, in the alternative, it should be listed
12 with a four-week listing from 29 April 2025. The explanation for that date is in the letter
13 which --

14 **MRS JUSTICE SMITH:** That is for the availability of Counsel, I think, isn't it?

15 **MR WEST:** It is, yes.

16 **MRS JUSTICE SMITH:** I saw that in the letter.

17 **MR WEST:** Yes. So, Mr Singla is not available in 2025 until April, in effect.
18 That's -- we were told that for the first time on Friday.

19 **MRS JUSTICE SMITH:** Yes. I'm going to make it clear that I'm afraid that I'm not
20 going to list something simply for the convenience of Counsel in circumstances where
21 we are at the first CMC and we're talking about a hearing in a couple of years' time.
22 So I'm afraid, Mr Singla, I'm not going to simply list it for a later date because it's not
23 convenient for you in January of 2025.

24 **MR SINGLA:** I will address you on that in due course, because there are a number
25 of points we make about whether you should fix the trial today or not. I don't know
26 whether Mr West wants to --

1 **MRS JUSTICE SMITH:** Yes, and we will be coming to that in due course.

2 **MR WEST:** Madam, when, in those circumstances, were you provisionally minded to
3 list the hearing from? Did you have a date in mind?

4 **MRS JUSTICE SMITH:** Provisionally, I would be minded to list the hearing today and
5 I would be minded to list it for the first available opportunity, which, as I understand it,
6 is going to be January of 2025.

7 **MR WEST:** I should perhaps just clarify something about that, which is that -- this is
8 explained in the skeleton -- the reason we have selected January 2025 is not that
9 that's the first available date in the CAT's diary.

10 **MRS JUSTICE SMITH:** I understand, actually, that it is --

11 **MR WEST:** Oh, it is.

12 **MRS JUSTICE SMITH:** -- having investigated it. Because that was the very question
13 that I asked when I arrived here this morning, for obvious reasons, because my
14 inclination would have been that this is delaying for quite a considerable time and to
15 list it earlier than had been proposed by the parties, but my understanding from the
16 CAT is that, although there might have been a slot in September of 2024, that would
17 have run into October and there was already a hearing going on in October and,
18 therefore, 2025 was probably the first realistic time.

19 **MR WEST:** I'm grateful, madam, I wasn't aware of that. Just to be absolutely clear,
20 we proposed January 2025, and not before, because of my availability, so I need to
21 be a bit careful about what I say.

22 **MRS JUSTICE SMITH:** As it happens, your availability coincides, on my
23 understanding, with the first available date.

24 **MR WEST:** I'm very grateful. Given your provisional view, it may be I don't need to
25 say anything about that.

26 **MRS JUSTICE SMITH:** Can you just address me on the time estimate, because,

1 obviously, we don't yet know the number of witnesses or, indeed, how many experts
2 are going to be required. The Claimants have identified three weeks. What is the
3 rationale for that?

4 **MR WEST:** It's just based on our experience of similar cases in the past which are
5 focused primarily on the expert evidence. So one has, broadly, in a case like this,
6 expert evidence and submissions taking up about two weeks in total, and then, if one
7 has factual evidence as well, that may go into a further week.

8 The dispute between the parties on this is relatively limited. It's whether it should be
9 three or four. One way the Tribunal might consider proceeding -- it might be a practical
10 way of side-stepping this issue -- would be to list for four weeks now and review the
11 matter at the second CMC --

12 **MRS JUSTICE SMITH:** Yes.

13 **MR WEST:** -- when the Tribunal may have -- may consider itself a bit better informed
14 about what's going to happen in the trial of this matter.

15 **MRS JUSTICE SMITH:** Certainly that would be one option that makes sense.

16 Mr West, can you help me - Mr Singla, in his skeleton argument, suggests that this
17 might be a case in which a split trial would be an appropriate solution. It wasn't
18 immediately clear to me that that was necessarily the case, given the extent to which
19 the issues are likely to be intertwined, I suspect, but, nevertheless, if there is a way of
20 dealing with something on a preliminary basis which could be dealt with sooner, then
21 that, obviously, is something the parties should be considering.

22 **MR WEST:** Yes. Ordinarily, when one hears the words "split trial", one thinks liability
23 and quantum, but this is a pure follow-on case --

24 **MRS JUSTICE SMITH:** Yes.

25 **MR WEST:** -- and so there are no issues of liability which are separate to issues of
26 quantum.

1 **MRS JUSTICE SMITH:** We're talking about an issue of causation, presumably?

2 **MR WEST:** Yes, causation and quantification of loss, but the proposed split, as
3 I understand it, is between overcharge, on the one hand (was there an overcharge?)
4 and, on the other hand, all other causation and quantum issues, which would be
5 primarily pass-on.

6 **MRS JUSTICE SMITH:** Right.

7 **MR WEST:** What I would say about that is the Defendants haven't yet identified
8 a mechanism for pass-on. That isn't a criticism, because they haven't had disclosure
9 about it.

10 The disclosure in relation to pass-on that concerns how the Claimants recover their
11 costs and, in particular, how the pricing is set for the power that they sell -- that's, of
12 course, what they sell; electricity or power -- and the pricing of that is set under various
13 contracts, which we will in due course be disclosing, and when the Defendants see
14 those, they will see that the price is set by reference to various indices, primarily, the
15 wholesale prevailing electricity price. Clearly, there is no link between that price, the
16 prevailing market price for electricity, at any particular time, and the capital cost of
17 building this particular wind farm. So there simply isn't a mechanism for pass-on.
18 Once we have disclosed the documents, I anticipate we will be asking them whether
19 they maintain their case on pass-on and, if so, whether they can plead it.

20 I anticipate, what's going to happen about pass-on, at that stage, is it will simply fall
21 away. Of course, I'm not in a position to make that good at this stage. I cannot shut
22 out my friend from making an application later and I'm happy that the wording of the
23 order should clarify that it's not resolving this, but, in my submission, it's extremely
24 unlikely that pass-on will need a separate trial in order to decide it at all.

25 **MRS JUSTICE SMITH:** Right.

26 **MR WEST:** So for those reasons, although theoretically I suppose pass-on could be

1 carved out, it just simply doesn't arise in this case, so it won't arise. Those are my
2 submissions about that.

3 **MRS JUSTICE SMITH:** Thank you.

4 **MR WEST:** My Lady, that's all I was proposing to say.

5 **MRS JUSTICE SMITH:** Thank you very much indeed, Mr West.

6 Mr Singla.

7

8 Submissions by MR SINGLA

9 **MR SINGLA:** Madam, I think there are two points for me to address. One is the rule
10 102 issue.

11 **MRS JUSTICE SMITH:** Yes.

12 **MR SINGLA:** Can I just say this: Mr West makes the point that this may not be
13 necessary. You understand we have done this out of an abundance of caution. What
14 we are disclosing is the version that was disclosed in Vattenfall and obviously it could
15 be said, and we want to guard against this risk, that we are disclosing in these
16 proceedings documents which were disclosed to us, so it seemed to us prudent to
17 have that provision.

18 He made a further point which was it's unusual to do it in this way in terms of making
19 this application whilst we need to make an order in these proceedings. With respect,
20 that's not correct. We have looked at this and there is authority, in particular of the
21 decision of Mrs Justice Cockerill in *Lakatamia Shipping Co* [2021] EWHC 1907
22 (Comm) and the relevant paragraphs are 64 to 66.

23 That authority, I think amongst others, makes clear that one can make the application
24 and the court can make the order in the later proceedings, as it were, so it doesn't
25 matter, I think, because everyone here is agreed and I think you've already indicated.

26 **MRS JUSTICE SMITH:** But there is precedent for it to be made.

1 **MR SINGLA:** There is and we obviously checked that, or we (inaudible).

2 **MRS JUSTICE SMITH:** All right. As it's not objected to, I don't see any reason not to
3 make that.

4 **MR SINGLA:** I'm grateful.

5 Secondly then, if I can turn to the question of trial.

6 **MRS JUSTICE SMITH:** Yes.

7 **MR SINGLA:** As you will have seen, our primary position was that it's premature to
8 fix the trial, but I want to make clear, in certain light of your indication, that wasn't
9 a violent objection. We are actually not in the position where we're looking to delay
10 the progress of these proceedings.

11 We're very confident in our position on the merits for the reasons we have outlined in
12 summary in our skeleton, but we did, with respect, take the position that it was simply
13 premature because we are not here arguing about disclosure and the scope of
14 disclosure and expert evidence and factual evidence and so on. We took the view that
15 the Tribunal might be in a better position and we would all be in a better position to
16 look at the trial date at the next CMC, but I have heard, obviously, what you have said.
17 Can I address you on the date and the duration?

18 **MRS JUSTICE SMITH:** Yes.

19 **MR SINGLA:** First of all in respect of the date, I would pray in aid in this respect the
20 fact that we are not here arguing about disclosure and the scope of expert evidence
21 and so on, and so it would be prudent, we submit, to build in some more time because
22 disclosure is going to be incredibly important in this case and we do expect significant
23 disclosure to come from the Claimants in relation to the negotiations and so on, so it
24 would be sensible to build in sufficient time.

25 If one is fixing a trial date without having looked at or thought about the directions to
26 trial, with respect, it would make sense to build in a buffer, as it were, because this

1 case, although Mr West wants to -- and you've already indicated that you're minded
2 to -- to fix the trial now, we're doing that somewhat in the abstract without actually
3 mapping out -- and this is a complicated case insofar as there may need to be more
4 than one expert on each side. There will be a number of factual witnesses and
5 disclosure, as I have said, will be important so that would be one reason.

6 **MRS JUSTICE SMITH:** I might have more sympathy with that reason, Mr Singla, if
7 I was looking at fixing the trial at a date that is rather sooner than two years away.

8 **MR SINGLA:** I understand that but the second point, madam, is availability. With
9 respect, Mr West has actually very candidly accepted that this is being done to suit his
10 availability. As regards my availability, just to draw to your attention, I have been
11 acting for Nexans in power cables litigation for several years.

12 I was involved for Nexans in the Vattenfall litigation and I am also instructed in the
13 collective proceedings. You will be aware that there are collective proceedings in
14 relation to power cables as well and, with respect, if one is looking at a trial either
15 in January or in April, in my respectful submission it's not a significant prejudice to the
16 Claimants to wait; if they're getting their wish of having a trial fixed now then it's not
17 causing any material prejudice to have a trial listed in April 2025 in circumstances
18 where otherwise Nexans would be forced to instruct different Counsel when I have
19 historic involvement and I have ongoing involvement in the related collective
20 proceedings.

21 Indeed, that could be an important issue because, madam, you will have seen there
22 is at least a potential overlap between this case and the collective action and that's
23 something we may need to address you on at the next CMC and so, with respect, it
24 would be slightly unfortunate if Nexans were put to instructing different counsel in the
25 two actions which will be ongoing. As I say, this case is being listed to suit Mr West's
26 availability.

1 As regards two other matters, so duration, we suggested four weeks. That is, to make
2 this clear, very much an estimate. We obviously haven't fully mapped out things
3 because those will be discussed at the next CMC, so it seemed to us prudent to list
4 this for four weeks. We envisage potentially calling a number of witnesses. As I say,
5 there may be more than one expert on each side, as well.

6 Finally, I do want to make this point clear, which is if you are minded to list the trial
7 now, we do wish to address you, or at least reserve the right to argue about the split
8 trial at the next CMC. It's not an application I am making today; it may not be one we
9 pursue, but I do just want to make clear that, although you're listing a trial today, we
10 don't want to find ourselves at the next CMC in a scenario where things have
11 developed a momentum and suddenly we're arguing against the default, as it were.

12 **MRS JUSTICE SMITH:** I understand that, Mr Singla, and that's really why I raised it
13 with Mr West and there would obviously be no difficulty around reserving your position
14 pending the next hearing.

15 **MR SINGLA:** I'm grateful and, to be clear, the nature of the splits we had in mind was
16 overcharge and then other issues, namely pass-on, downstream pass-on, so if they
17 did suffer any loss, did they pass that on.

18 **MRS JUSTICE SMITH:** Yes.

19 **MR SINGLA:** And then also calculation of any quantum. We obviously don't think we
20 will ever get there, but one will need to actually calculate quantum, so that will be the
21 nature of the split.

22 I'm just reminded, in relation to fixing of trial date and so on, that the Claimants in this
23 case waited until the very, very end of the limitation period to issue these proceedings,
24 so we would respectfully not accept that there is a real urgency which means that they
25 couldn't wait to April 2025 as opposed to January. So those are my submissions.

26 **MRS JUSTICE SMITH:** Thank you very much indeed, Mr Singla.

1 Mr West.

2

3 Reply submissions by MR WEST

4 **MR WEST:** My Lady, it's of course a matter for the court. From our perspective, we
5 would have been prepared to accept an April listing. I appreciate these types of points
6 about Counsel availability can come back to bite one if one takes too stringent an
7 approach but, as I say, it's a matter for the Tribunal.

8 **MRS JUSTICE SMITH:** Yes, all right.

9 I think although I wouldn't have been persuaded about the need to build in more time,
10 Mr Singla has obviously told me that he has been acting for Nexans for several years
11 and has an ongoing involvement in related proceedings. In those circumstances, I can
12 see that there is a genuine reason to make sure that this is listed for the availability of
13 Counsel.

14 Furthermore, the point he makes about the fact that this case was only issued at the
15 end of the limitation period convinces me that there is no real urgency and I'm also
16 grateful, Mr West, for your indication that you wouldn't have any objection to that, so
17 I will list it for a period of four weeks in April 2025.

18 Obviously, the question of the duration will need to be revisited at the next case
19 management conference.

20 **MR WEST:** I'm very grateful. I don't believe there are any further points arising.

21 **MRS JUSTICE SMITH:** Is that everything?

22 **MR SINGLA:** It is, madam, I'm very grateful.

23 **MRS JUSTICE SMITH:** Excellent. You will ensure that there is an agenda for the
24 next case management conference in June?

25 **MR WEST:** Absolutely.

26 **MR SINGLA:** Yes, it may take longer than this morning.

1 **MRS JUSTICE SMITH:** Yes, I imagine that it will. Thank you very much indeed for
2 your helpful submissions.

3 **(11.04 am)**

4 **(The hearing concluded)**

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Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
...	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?