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IN THE COMPETITION

Case No: 1339/7/7/20

APPEAL
TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Thursday 23rd February 2023

Before:

The Honorable Mr Justice Smith
Bridget Lucas KC
Dr William Bishop

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Class Representative

Mark McLaren Class Representative Limited

v

Defendants

- (1) MOL (EUROPE AFRICA) LTD**
 - (2) MITSUI O.S.K. LINES LIMITED**
 - (3) NISSAN MOTOR CAR CARRIER CO. LTD**
 - (4) KAWASAKI KISEN KAISHA LTD**
 - (5) NIPPON YUSEN KABUSHIKI KAISHA**
 - (6) WALLENUS WILHELMSSEN OCEAN AS**
 - (7) EUKOR CAR CARRIERS INC**
 - (8) WALLENUS LOGISTICS AB**
 - (9) WILHELMSSEN SHIPS HOLDING MALTA LIMITED**
 - (10) WALLENUS LINES AB**
 - (11) WALLENUS WILHELMSSEN ASA**
 - (12) COMPANIA SUD AMERICANA DE VAPORES S.A.**
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APPEARANCES

Sarah Ford KC, Emma Mockford & Sarah O' Keeffe (Instructed by Scott+Scott UK LLP) on behalf of the Class Representative.

Mark Hoskins KC & David Bailey (Instructed by Arnold & Porter Kaye Scholer (UK) LLP) on behalf of the First to Third Defendants.

Tony Singla KC & Anneliese Blackwood (Instructed by Cleary Gottlieb Steen & Hamilton LLP) on behalf of the Fourth Defendant.

Daniel Piccinin (Instructed by Steptoe & Johnson UK LLP) on behalf of the Fifth Defendant.

Josh Holmes KC & Jenn Lawrence (Instructed by Baker Botts UK LLP) on behalf of Sixth to Eleventh Defendants.

Sarah Abram KC (Instructed by Wilmer Cutler Pickering Hale and Dorr LLP) on behalf of the Twelfth Defendant.

Thursday, 23 February 2023

(10.32 am)

Housekeeping

THE PRESIDENT: Ms Ford, good morning. A couple of points before you begin. First of all, the usual warning. Some of you will be joining us on livestream. An official recording is being made of these proceedings, and a transcript being produced, but that is at my direction. Any other form of recording or transmission, audio or visual or photography of the proceedings is strictly prohibited and I know it will not happen, but that is a standard warning that I give in all of these cases.

Slightly more substantially, we are very grateful to the parties for their written submissions and we have discussed this case quite extensively, particularly given that the last case management directions, made by a differently constituted tribunal, went to the Court of Appeal and an error of law was found in those.

So we have thought about this quite hard and we have reached a provisional view, I stress it is provisional, as to how we want to proceed in this matter.

What I am going to propose is that I articulate it now, we adjourn for a period of half an hour to an hour, or longer if the parties wish, to enable the parties to

1 consider matters, and then hear submissions on the
2 critical question on which our proposal turns and which
3 is, I think, the critical part of the skeletons, namely
4 case management going forwards.

5 We do apologise for the lateness of this provisional
6 indication. I wanted to get the decision in
7 *Gormsen v Meta* out before this hearing because I had
8 the, as it turned out, rather erroneous sense that it
9 might shed light on how we proceed here.

10 That decision was only handed down on Monday and
11 although we were giving serious thought to the matter
12 before the hand-down in *Gormsen* our provisional views
13 have only emerged very recently.

14 Now, the problem, we think, and as the written
15 submissions make clear, is no one really knows what the
16 Court of Appeal actually decided in *McLaren*. On the one
17 hand, it is clear that the Tribunal erred as a matter of
18 law in failing to act as gatekeeper. Now, that is
19 a pretty serious failing in what was a matter of case
20 management, and it has caused an entirely unsurprising
21 degree of concern here.

22 On the other hand, the failure and the error of law
23 was not sufficient to oblige the Court of Appeal to lift
24 the certification so as to enable matters to be
25 considered in the round. As *Gormsen* makes clear, the

1 usual course is to consider strikeout and Microsoft v
2 Pro-Sys and certification in one go, and if there are
3 serious Microsoft v Pro-Sys problems the question of
4 certification ought to be stayed until the blueprint to
5 trial is satisfactorily complete.

6 The Court of Appeal did not take that obvious course
7 and that is because, we think, this is not an ordinary
8 Microsoft v Pro-Sys case. Rather, this is a case where
9 the Class Representative on the one hand and the
10 Defendants on the other hand advance different theories
11 as to loss and damage. On the Class Representatives'
12 case they recover; on the Defendants' case the Class
13 Representative does not, but we do not understand the
14 existence of loss arising out of the infringement, as
15 opposed perhaps to its precise quantification, actually
16 to be in dispute.

17 In short, the quantum question is more a question of
18 incidence, who benefits, and this is perhaps a case
19 where a pass-on defence is driving matters more than
20 anything else.

21 We make no finding in this regard, obviously, but it
22 is something that we have in mind and to which I will be
23 returning. It is not something, by the way, we expect
24 the parties to address, because I think that would be
25 disclosing too much of the thinking that is going on

1 behind the written submissions.

2 This is not therefore a case like Gormsen where the
3 class representatives' methodology is failing to take
4 a defence of the defendants into account such that the
5 claim cannot be tried. It is rather more like two ships
6 passing in the night, two independent theories of loss
7 which do not interrelate but where only one can be
8 right.

9 We do not, therefore, speaking provisionally,
10 consider that the sort of approach laid down in Gormsen
11 is appropriate. We should not simply send the Class
12 Representative away to do the job again.

13 Nor are we persuaded that position statements from
14 all the parties, whether advised by economists or not,
15 is the way forward. That, as it seems to us, will
16 merely involve expenditure of time and money without
17 taking the case forward. To put the point another way,
18 if one were to have position statements that were worth
19 the name, they would be so extensive that they would be
20 essentially duplicative of the process that we are now
21 going to propose.

22 Long story short, it is our view, not that we have
23 any choice about it, it is our view that the Court of
24 Appeal was right. This case does require extremely
25 active case management and that is what, subject to the

1 parties' submissions, it is going to get, reflecting the
2 unusual circumstances of this case, the ships passing in
3 the night.

4 So, what we are minded to order is something along
5 the following lines, and I stress again we will want to
6 hear from the parties as to how far this is
7 an appropriate solution going forward.

8 Each party grouping, we are going to say the Class
9 Representative on the one hand and the Defendants on the
10 other, but if the Defendants want to fragment, no
11 problem at all. Each party grouping will produce their
12 entire positive case on loss and damage by no later than
13 4.00 pm on Friday 14 July 2023. By "entire positive
14 case" we mean this: we want all the factual, expert and
15 documentary evidence filed by each party grouping on
16 this date. There will be no non-responsive cases.
17 These filings will be done in parallel, and they will be
18 accompanied by a position statement that draws together
19 the threads of the primary material filed.

20 We should make clear that there is no obligation
21 under this process for the Defendants to run any kind of
22 positive case unless they wish to do so. They can, if
23 so advised, await the Class Representative's case and
24 respond -- and I will be coming to this -- entirely
25 negatively. That would be, of course, the ordinary

1 case, but this, as I have indicated, is no ordinary
2 case.

3 Equally, we appreciate that the ability to put in
4 a non-responsive positive case is giving the Defendants
5 a great deal of leverage to make the weather. That is
6 something on which no doubt the Class Representative
7 will, if so advised, push back on; but we consider,
8 provisionally, that in the context of this case, that is
9 a price worth paying. We are anticipating that the
10 data-gathering process to enable a positive case to be
11 advanced will be expert-led. For that reason, there
12 will be no formal process of disclosure by list or
13 anything like that.

14 Rather, in the period up to July 2023 when these
15 position statements and other documents will be
16 exchanged, each party grouping may seek, by way of
17 request, disclosure from anyone else, and the default
18 position at least at the beginning will be that such
19 requests will be granted. If they are unreasonable,
20 then in the first instance you can object on the papers
21 and Ms Lucas as the chair will decide them on the papers
22 unless she wants a hearing.

23 The details of this, and indeed anything else, can
24 be worked out in a formal order. We are just
25 articulating a broad-brush provisional approach.

1 So that takes us up to the end of July 2023. The
2 parties will then have the summer to take a well-earned
3 break and consider at their leisure what the other side
4 or sides have produced.

5 But in mid-September 2023, the clock starts to run
6 again and the parties will, from 15 September 2023, be
7 entitled to probe the positive case of the other parties
8 in order to understand it. For instance, it may be
9 unclear how a particular proposition is to be made good,
10 by which data or by which witness.

11 The parties will produce a negative responsive case,
12 by which I mean something attacking the positive case
13 produced by the other side or sides, by no later than
14 4.00 pm on 15 December 2023.

15 Those negative cases will comprise all material to
16 be relied on at trial, factual, expert, documentary,
17 plus again a position statement that draws the threads
18 together.

19 No positive case can be advanced at this stage. It
20 would entirely be carving chunks out of the positive
21 cases that had been advanced in July. Again, requests
22 for disclosure can be made to be adjudicated upon, as
23 I have described.

24 All parties should be under no illusions as to how
25 the trial of these matters will go. Each party will be

1 entitled to identify well in advance of trial exactly
2 who it needs to cross-examine in order to make good its
3 negative case. The party advancing a positive case is
4 going to be required to produce the relevant witnesses
5 for cross-examination, so that the attack intended by
6 the responding party can be made good. This is not
7 going to be a process where it is for the party making
8 the positive case to choose who they call and when.
9 That will be in the control of the Tribunal and the
10 process will be negative respondent-led, not the
11 advancing party-led process that is usual.

12 So, in short, this is not a case where the party
13 advancing a case can choose who to call. That ship will
14 have sailed with the adduction of a positive case. You
15 will be obliged to present those persons who the
16 opposing party thinks need to be called in order to test
17 that positive case.

18 From this it follows there will be no rabbits from
19 hats at trial. If you have not articulated your attack
20 in your negative case, then things are going to go
21 pretty badly for you at trial.

22 Pleadings may or may not be amended in the light of
23 the positive and negative cases advanced, but our
24 preference would be for the position statements and the
25 underlying evidence to do the heavy lifting.

1 The parties, when framing their positive case and
2 their attacks on those cases, will have to have close
3 regard to the question of triability. We are going to
4 allocate a generous period of time for trial. If the
5 issues cannot be unpacked and explored in that time,
6 then the party whose approach has prevented this by not
7 focusing will suffer the consequences.

8 So, there will be a trial. Time estimate,
9 a generous six weeks, which can be cut back but not
10 expanded, at the beginning of June 2024. Convenience of
11 counsel not to be an issue. We hope obviously you could
12 all make it, but there will be plenty of time to change
13 representation if necessary.

14 Now, if we follow this route, and again I stress we
15 are inviting pushback, we will know by the beginning of
16 the summer of this year whether this case is triable or
17 not. We would certainly be prepared to hear
18 an application that there is no sufficient blueprint at
19 about the time negative cases are submitted. But
20 frankly the parties, including the Class Representative,
21 are all extremely well advised and we suspect they will
22 know whether such an application is or is not necessary
23 without troubling the Tribunal.

24 I said I would come back to the question of pass-on
25 and I will now. We understand that there may be other

1 claimants, higher or lower in the chain, interested in
2 the same loss. That is something that we cannot deal
3 with today but all parties should be aware of the
4 following.

5 First, the law regarding the so-called defence of
6 pass-on is in a state of flux. Trucks 1 may well go on
7 to appeal on exactly this point; and the MIF Umbrella
8 Proceedings litigation is fundamentally concerned with
9 this. The extent to which this is really a defence, and
10 not rather a question of who is the proper claimant, is
11 very much up for grabs. To that end it obviously makes
12 sense for all interested persons to be in one set of
13 proceedings, or else in proceedings that are managed
14 closely together. We are not in a position today to
15 make any kind of umbrella proceedings order and we are
16 not going to invite submissions on that point unless it
17 strictly arises out of the case management questions
18 that are for decision today.

19 But, the parties should know that the making of
20 an umbrella proceedings order and the bringing in of
21 other claims is something that we are not excluding and
22 it is one of the reasons we have selected a trial date
23 as late as the summer of 2024, to provide a degree of
24 wiggle room in case it is needed.

25 So, that is an articulation of where we think these

1 proceedings should go. We are more than willing to hear
2 initial responses of horror, outrage or agreement,
3 whatever, but absent such responses, we would be minded
4 to rise for as long as the parties wish to enable them
5 to consider their responses.

6 I do not know if anyone wants to try
7 a quick-and-dirty response? Ms Ford, I see you are
8 shaking your head. How long would you like to consider,
9 recognising we have thrown rather a lot at the parties,
10 to consider your responses? (Pause)

11 An hour?

12 MS FORD: Sir, we would be content with an hour.

13 THE PRESIDENT: If you need more, let us know, because
14 I think you all have a good deal to think about.

15 So we will resume, then, at ten to midday. See you
16 then. Thank you very much.

17 (10.48 am)

18 (A short break)

19 (11.53 am)

20 THE PRESIDENT: Ms Ford.

21 Submissions by MS FORD

22 MS FORD: Sir, we are grateful to the Tribunal for the
23 provisional indications. For our part, we very much
24 agree with the Tribunal's characterisation of the issue
25 which arises on the remittal. The difficulty is the

1 parties' starkly opposing pricing theories and the fact
2 that they are ships in the night and so in that respect
3 we agree that this situation is not on all fours with
4 the Meta situation.

5 We welcome the Tribunal's proposals to put down
6 a structure by which we get this matter to trial and we
7 broadly agree with the approach that the Tribunal has
8 outlined.

9 Moving on to some of the details, there is from our
10 perspective a distinction between the situation in
11 relation to the overcharge methodology and the situation
12 in relation to the pass-on methodology. The reason we
13 say that is that the pass-on methodology, as the
14 Tribunal is aware, has been the subject of great debate
15 and scrutiny and our thinking on that is relatively
16 advanced.

17 In relation to overcharge we have set out our
18 methodology and no one has taken objection to it, but it
19 remains dependent on the provision of disclosure of data
20 which is in the possession of the Defendants, and it is
21 the classic information asymmetry situation between
22 claimants and defendants, and that has therefore limited
23 our ability to progress the work on the overcharge side
24 until we get the relevant disclosure.

25 The Tribunal will be aware that we have not even

1 seen the confidential version of the decision on which
2 this claim is based. We sent a letter on 8 June 2022
3 asking for disclosure of the documents that had been
4 provided by the Defendants to the Commission and we
5 understand that in principle no objection is taken to
6 disclosure of those categories of documents.

7 We also sent a letter more recently, which is at
8 {CMC-D/14/5} in which we set out a provisional
9 indication of the categories of documents that our
10 expert considers will be necessary for progressing their
11 methodology, and the Tribunal will be aware that in the
12 skeletons the parties have engaged to a certain extent
13 on whether or not those categories of documents are
14 properly formulated or not.

15 We have heard what the Tribunal says about the way
16 in which disclosure might be pursued, but we are very
17 conscious that we cannot make any progress on overcharge
18 in particular until we get the material that will
19 underpin that exercise.

20 So what we would suggest in terms of the progress of
21 disclosure is that the Defendants now provide the
22 decision and the Commission documents that they have
23 agreed to provide. We would respectfully invite the
24 Tribunal also to adjudicate today the contested
25 application for the regulatory documents that we have

1 sought, the documents provided to other regulators by
2 the Defendants, and we would suggest that our request
3 that is at paragraph 6.3 of the letter be treated as the
4 first step in the process that the Tribunal indicated
5 would be the position for the other categories of
6 disclosure, such that the Defendants respond to these
7 requests in short order and that can be adjudicated upon
8 and progressed to enable us to deal with the overcharge
9 methodology.

10 That brings us to the timing of the steps that the
11 Tribunal has suggested. Given in particular the
12 information asymmetry that I have identified and given
13 the volume of information that we anticipate receiving
14 and having to review and having to process, we do not
15 think, with the best will in the world, that we will be
16 in a position to finalise our positive case by the July
17 date that the Tribunal has indicated.

18 THE PRESIDENT: Right.

19 MS FORD: The Tribunal will also be aware that there are
20 other strands of work which are potentially going on.
21 The Defendants have sought permission to judicially
22 review the Tribunal's communications judgment and if
23 permission is granted in that respect then that is
24 another strand of work that will need to be pursued by
25 the same team. Equally, the Defendants have sought

1 permission to appeal the Court of Appeal's judgment to
2 the Supreme Court. Again, if permission is granted for
3 that, then that is another strand of work that will need
4 to be managed. So we are very conscious that we also
5 need to accommodate those potential strands.

6 We have also taken the opportunity to enquire with
7 our experts as to their availability and they have
8 indicated that they are particularly
9 capacity-constrained over the next three months or so.
10 So, for those reasons, with the best will in the world,
11 from our perspective, we do not think the July date will
12 be doable.

13 What we would suggest is that the first stage for
14 the provision of positive cases be pushed back to the
15 second date that the Tribunal indicated, which was the
16 end of the year, and then the dates then be pushed back
17 accordingly, and what we envisage is that that would
18 then lead to a trial in the first quarter of 2025.

19 THE PRESIDENT: Well, Ms Ford, we do not have a problem in
20 dealing with disclosure questions today.

21 MS FORD: I am grateful.

22 THE PRESIDENT: Nor do we have a problem in talking about
23 dates and a timetable, but I think it is probably more
24 important that we work out where the tectonic plates lie
25 before we go into that, and certainly we are not --

1 MR PICCININ: Sir, I am very sorry to interrupt, I cannot
2 hear you.

3 THE PRESIDENT: I am so sorry. I will direct the
4 microphone.

5 So we are more than happy to debate dates, but
6 I think within the framework of a way forward that we
7 have either agreed between the parties or determined,
8 depending on whether there is agreement. So
9 I am assuming that there is nothing, as it were,
10 fundamentally wrong with the approach that we have
11 taken. The only thing that I would ask you is, given
12 the *Volkswagen* proceedings which are waiting in the
13 wings, where I think there is an attempt to seize the
14 same part of the cake, or rather the cake that you are
15 looking for, to what extent is there going to be
16 a problem from your client's perspective if we try to
17 bring together two sets of proceedings where there are
18 rival claimants, not, as it were, rival Defendants?

19 MS FORD: Well, Sir, we have indicated in correspondence
20 that we are not opposed in principle to the possibility
21 of an umbrella proceedings order. We have raised two
22 caveats to that, the first being that when the matter
23 was originally canvassed in correspondence with us, it
24 was not done, copied to *VW*, and so we were very
25 conscious that limited progress could be made until *VW*

1 was brought into the discussion.

2 The second point is that we are concerned to ensure
3 that the scope of the ubiquitous issues is properly
4 designed and we say that both because in some respects
5 the *VW* proceedings are broader than these proceedings,
6 but in other respects these proceedings are very much
7 broader than the *VW* proceedings.

8 So, on the one hand, we do not wish to have to incur
9 the costs and time of participating in hearings in the
10 *VW* proceedings which relate to matters that are not
11 relevant to these proceedings. Equally, we would not
12 wish the vast bulk of these proceedings, which does not
13 overlap with the *VW* proceedings, to be in any way held
14 back by what is going on in relation to the umbrella
15 proceedings.

16 THE PRESIDENT: Yes.

17 MS FORD: Those are matters that obviously need to be
18 considered in some detail and that needs to be done with
19 *VW*'s position in mind as well.

20 THE PRESIDENT: Yes, so there is no question of us making
21 any dispositions about that. There is going to be a *VW*
22 CMC on, I think, 15 or 16 March.

23 MS FORD: Yes.

24 THE PRESIDENT: That is likely to become an umbrella
25 proceedings matter and I think most of the parties

1 involved here are likely to have an interest in that.
2 So we will ensure that the opportunity to participate is
3 extended more broadly, and you can expect to have
4 a panel that is not necessarily the trial panel but, as
5 it were, an umbrella panel to work out how these things
6 mesh, because that is the problem with umbrella
7 proceedings.

8 The problem they are trying to solve is very easy to
9 state, but the minutiae of how one solves it are
10 incredibly difficult, and we quite understand the
11 concerns that you have articulated, that you do not want
12 either the trial date to be pushed out or the issues
13 which have nothing to do with your clients requiring
14 their attendance because they have not been properly
15 severed. Those points we understand, but that is
16 something which -- really, all I am asking at the moment
17 is, is there some fundamental problem, and I am not
18 hearing there is one, to dealing with it, but --

19 MS FORD: No, no, we have not identified a fundamental
20 problem.

21 THE PRESIDENT: Thank you, Ms Ford. I am very grateful to
22 you.

23 So, Mr Hoskins.

24 Submissions by MR HOSKINS

25 MR HOSKINS: Thank you.

1 There is a large degree of agreement on the tectonic
2 plates, you will be glad to hear. We are happy to work
3 with the Tribunal's proposal. We do have one main
4 concern and it is exactly the same one that I think
5 Ms Ford has expressed, which is the July date for
6 positive cases, and that ties in with what happens with
7 the VW claim.

8 I know you do not want to go into the detail, but
9 can I just set out our position on those big issues?

10 THE PRESIDENT: No, please do.

11 MR HOSKINS: I think that is fairly tectonic.

12 As you are fully aware, in this claim we have
13 a supply chain which is long and starts with us
14 contracting for shipping services with the OEMs, and
15 then in relation to the vehicles that are transported,
16 the supply chain goes OEMs, their NSCs, their national
17 sales companies, then dealers, then purchasers, and it
18 is the purchasers who are the class members, but there
19 is that relatively long supply chain. The difficulty
20 for, I think probably both, to be fair, the Class
21 Representative and for us, is we do not have any sight
22 of most of that supply chain in the middle, in terms of
23 OEMs, NSCs and dealers.

24 Now, one of the possibilities that we have been
25 considering -- I do not want to give away our whole

1 litigation strategy dealing with tectonic plates, but it
2 is obvious -- is we might need to seek some third-party
3 disclosure orders to try and fill in some of those gaps,
4 so that will require some time. It is not simply
5 probably a paper exercise, because the people who are
6 being addressed with these requests will almost
7 certainly want to be heard. It is a bit more
8 complicated when one is dealing with that. But that is
9 one element that will have to be dealt with before
10 positive cases, because we will need that to know what
11 sort of positive case we want to put.

12 We then have the *VW* issue. I do not want to go into
13 the detail but I think it is just worth us -- there is
14 a very easy way of seeing where the potential overlap
15 is.

16 If we could please go to {CMC-E/2/1}. So this is
17 *Volkswagen's* reply and obviously the *Volkswagen* claim.
18 If we can go to page 8, please {CMC-E/2/8}, 10.3,
19 *Volkswagen*, surprise, surprise, denies that it passed on
20 the overcharge at all down the chain.

21 THE PRESIDENT: Yes.

22 MR HOSKINS: The importance is of course *Volkswagen*, unlike
23 either of the parties in the McLaren claim, will
24 actually be able to give evidence on whether it did or
25 did not pass on any of the overcharge. So that is

1 a really important piece of evidence.

2 In addition, of course, there is the risk of
3 inconsistency if we do not tie the two together, but
4 there is that added element in this case that *Volkswagen*
5 has evidence that neither of -- or none of the parties
6 have in this case.

7 In terms of the ships that pass in the night, in
8 terms of the approach to loss, if we can look at 10.3.1,
9 *Volkswagen* are putting forward a total price approach,
10 which is of course what we are advocating for in this
11 case.

12 So you have these sort of differences. *Volkswagen*
13 has an overlap. In some instances they will have common
14 cause with McLaren, no doubt on overcharge; they will
15 both want the overcharge to be as high as possible. But
16 then, when it comes to issues of pass-on, *Volkswagen* are
17 in our camp in that sense, as against McLaren. You will
18 see that the tectonic plate is somewhat fragmented, but
19 clearly, clearly, *Volkswagen* is absolutely fundamental
20 in terms of the issue it raises in our case, both in
21 terms of the evidence that could be brought into our
22 case by bringing *Volkswagen* into this, but also in terms
23 of avoiding inconsistency so that nobody is paying twice
24 or nobody is receiving more than they should at the end
25 of the day.

1 But, that is for another day. Obviously, no UPO can
2 be made without *Volkswagen* being present, but the need
3 to consider whether there should be a UPO is screamingly
4 obvious.

5 In terms of the regression, again, I mean, we have
6 data. The CR needs to see data on regression but we are
7 all aware, some more than others in the room, that
8 putting together a regression model is time-consuming.
9 I think it is going to be hard enough for us to say we
10 could do a regression model by July and I certainly have
11 full sympathy with the Class Representative in saying
12 that they will need more time to put together
13 a regression, having not even had the relevant data yet.

14 There is another point, which is either a delay
15 point or one which might be able to be dealt with today,
16 or at least you could give us an indication of how you
17 might deal with it today because, as it stands, we need
18 permission to speak to class members.

19 THE PRESIDENT: Yes.

20 MR HOSKINS: Of course, that would include speaking to class
21 members for the purposes of, for example, finding out
22 whether we wish to call them as witnesses, factual
23 witnesses. It would also cover us contacting class
24 members who might be able to provide us with documents,
25 just because it is very likely that you will approach

1 someone and they will have bought a car at some stage.

2 So either it has to be borne in mind that that
3 itself would be a source of delay because we will need
4 to come to the Tribunal for permission, or -- and I have
5 not thought about what the detail of this would be, but
6 I think we should probably all start thinking that this
7 is a possibility -- that general permission is given to
8 the Defendants to contact class members, for example,
9 for the purposes of preparing these proceedings, no
10 doubt put more elegantly and more tightly drawn, but
11 that sort of general permission would seem to be
12 sensible because you probably do not want to be burdened
13 either by letters all the time from us saying can we do
14 this, can we do that.

15 So someone can think about the detail, but it is
16 something we would urge upon you because it will speed
17 matters up and it will just reduce the admin on both
18 sides.

19 Just to make it clear, this is not a sort of
20 Defendant's grab for the never-never. I have raised
21 issues about the July date for the positive cases. We
22 were actually going to unilaterally suggest a January or
23 a first quarter of 2025 trial date as well, so happily
24 we end up in the same place. The ships that pass in the
25 night meet in the court finally.

1 So we are not talking about, you know, this all goes
2 off, or we take it -- we are happy to have our feet held
3 to the fire, but the July date we do think needs to be
4 reconsidered.

5 Again, unilaterally, just sort of flying kites, we
6 had come up with a December 2023 date as a possibility
7 for the first stage. I think the only caveat is
8 *Volkswagen*, because clearly if -- if -- they are going
9 to be brought into these proceedings or, rather, there
10 is going to be a UPO where the two are brought together,
11 we need to know what *Volkswagen's* view is on what they
12 can do and by when. It just would not be fair on them
13 for that die to be cast. But, Sir, as you pointed out,
14 there is the *Volkswagen* CMC on 15 and 16 March and
15 clearly it is everyone's interests, in our submission,
16 for us to consider whether there should be a UPO, what
17 it should be, and if there is to be a UPO, to consider
18 the directions, whether those are UPO directions,
19 because it all comes together for that purpose, or
20 whether there are still two ships in terms of McLaren
21 and *VW* sailing, and what the direction should be. But
22 that obviously seems the fortuitous and apposite time
23 for considering those matters.

24 So in terms of the tectonic plates, I think, unless
25 someone after I have sat down disagrees violently, that

1 is my understanding of pretty much a common position,
2 subject to some extra points that I know people would
3 like to make.

4 Sir, I would suggest that you invite each of them to
5 comment on the tectonic plates.

6 THE PRESIDENT: No, that is absolutely going to happen.

7 MR HOSKINS: I am not the overall spokesman.

8 Then in terms of the disclosure, that is going to be
9 addressed by different people.

10 Just for your note, just so we can deal with it
11 efficiently, in terms of the Commission decision, the
12 Commission documents, we have agreed that Mr Singla will
13 lead on that on our side; foreign regulatory documents
14 is Ms Abram, and for the other categories of disclosure
15 it is Mr Holmes who is going to be dealing with those
16 aspects, but hopefully as an introduction to the
17 tectonic plates, I think that is all I have to say.

18 THE PRESIDENT: Mr Hoskins, I am very grateful to you for so
19 helpfully setting out the problems and the areas where
20 our proposal works.

21 Before I invite the other parties to address us on
22 this, let me float a few thoughts of my own in response.

23 It does seem to me that it would be a mistake today
24 to set out concrete dates for any of the tectonic
25 plates. When parties say something cannot be done by

1 a certain date, as both you and Ms Ford have said, then
2 this Tribunal is going to listen very hard, push back as
3 appropriate, but we are not going to, when we know the
4 parties are responsibly represented, going to ask for
5 the impossible.

6 But, given that we have the *Volkswagen* elephant not
7 in the room, we think that what ought to occur between
8 now and the *VW* CMC, which is effectively going to become
9 an umbrella CMC -- I am not saying we are going to order
10 an umbrella proceeding, but that is going to be on the
11 agenda first -- we set out the broad direction of travel
12 in which we want this case to go; give a very firm steer
13 that, again, subject to what the other parties have to
14 say, that it will be first quarter of 2025 for, let us
15 say, ten weeks, on the basis that you want more rather
16 than less so that you can cut back; indicate in the form
17 of a draft order what it is we are minded to deal with,
18 so we set out in some granularity the way in which the
19 tectonic plates would work in an order, sweep into that
20 things like the McLaren speaking to class members point,
21 on which I think we would want the parties' assistance
22 as to how that would be framed so that the spirit of
23 McLaren is abided by, but so that the parties are not
24 thwarted in their efforts legitimately to craft their
25 cases; deal with disclosure as we can, because I think

1 the one thing that is clear is that we want
2 appropriately to put the foot on the accelerator on
3 disclosure, get that done, but without producing more
4 noise. We want light to be produced. So if there is
5 going to be regression analyses, then the experts really
6 need to get together to work out what exactly it is they
7 want, and leave over the question of third-party
8 disclosure to be articulated in considerable detail
9 between now and middle of March, because, of course, the
10 great advantage of bringing *Volkswagen* in is that you
11 have a real interest in obtaining data from them, and
12 I anticipate that goes for everyone in this room. You
13 can think about what other targets you would want to
14 approach and maybe put them on notice that this is
15 something we will be considering, not so that they
16 attend in the middle of March, but so that the path is
17 being cleared to an articulation of what it is you need
18 from persons who are not going to be parties, so that
19 come the middle of March, we can actually move to the
20 next stage of making concrete orders. I am not saying
21 what they are going to be, but concrete orders which
22 will either deal with *Volkswagen* coming in or this case
23 coming into the *Volkswagen* proceedings -- it does not
24 matter which way round it is -- or them being managed in
25 parallel, but for there to be a very clear indication

1 today to VW that they know what to expect, come the
2 middle of March. In other words, they do not get any
3 unpleasant surprises about the tectonic plates, the way
4 we are minded to achieve this, because we clearly have
5 to have one way of doing all of the issues, rather than
6 two, if we are going to deal with these cases in any way
7 linked, but not to make any further precise orders on
8 exactly when things are done, save to indicate a degree
9 of sympathy with the dates that you and Ms Ford have
10 articulated, subject of course to what the other parties
11 have to say.

12 Now, before I turn to the other parties, is there
13 anything you want to push back on in that, or does that
14 fit with the way you are seeing the matter progressing?

15 MR HOSKINS: That seems very sensible. Just two details

16 I wanted to clarify. Would it assist for us to provide
17 the Tribunal with the proposed wording for permission
18 for us to contact class members to prepare our case?

19 THE PRESIDENT: It would. What I think we will do is we
20 will send, in provisional draft, the order that we had
21 in mind identifying this ships passing in the night
22 process, for the parties to add in or subtract or amend
23 whatever it is they think ought to be added in,
24 subtracted or amended, and then you could include things
25 like the approach to class members and whatever

1 disclosure orders we make today, with a view to that
2 order perhaps being set in moderately firm terms, though
3 not actually made until after the VW orders. Everyone
4 knows what they are supposed to do, but we do not
5 actually lock it down until VW comes in. So that would
6 be very helpful, yes.

7 MR HOSKINS: The second point was on third-party disclosure,
8 I think you are asking for a shopping list from us of
9 applications we might make?

10 THE PRESIDENT: That is exactly it. That is something where
11 I think we would welcome a co-operative approach from
12 the parties. I do not know, Ms Ford, whether there is
13 any third-party disclosure that you would be wanting but
14 it would obviously be making sense that we hit the third
15 parties once, rather than several times.

16 MR HOSKINS: The only issue with that is whether -- you
17 suggest we notify them but they do not have to attend.
18 I am just slightly worried we might scare the horses if
19 we notify people before we have got a nap on, those
20 being the applications we want to make; but I raise that
21 as an issue, because immediately they will start
22 generating legal costs on their side and then if we do
23 not end up making a particular application -- it is
24 a small point of detail but that is -- you know how
25 lawyers work.

1 THE PRESIDENT: I am afraid that is a problem. I think
2 perhaps the first step is for the parties without
3 scaring the horses to work out what it is as a group, as
4 a collective, you would want, leaving VW, as it were,
5 out of account, because they are coming in in some way
6 whatever, but to work out what other targets you would
7 have, including what it is you would want them to
8 provide and get that as far as possible agreed between
9 the parties here. We engage with VW to see what they
10 have got in terms of their shopping list, so perhaps
11 disclose it to VW if appropriate, and then we can
12 receive that before the middle of March to consider
13 ourselves --

14 MR HOSKINS: Yes.

15 THE PRESIDENT: -- and take it forward from there.

16 MR HOSKINS: That was all I had, just those two points.

17 THE PRESIDENT: I am very grateful, Mr Hoskins. That is
18 very helpful.

19 Ms Abram.

20 Submissions by MS ABRAM

21 MS ABRAM: Thank you, Sir. I would make two points if I may
22 on the tectonic plates issues. I do not propose to
23 address the foreign regulatory documents for now,
24 because I anticipate that Ms Ford will want to make her
25 application before --

1 THE PRESIDENT: We will come to that, yes.

2 MS ABRAM: -- I respond to it.

3 So first on disclosure, insofar as it goes to the
4 tectonic plates. We have got two concerns and again, as
5 Mr Hoskins says, this is not a matter of the Defendants
6 trying to press things off into the never-never. It is
7 a question of trying to help to identify the process
8 that is going to be useful for everyone.

9 The first is that any disclosure request between the
10 parties should follow a structured timetable, so that
11 they happen in clear phases, rather than being a sort of
12 free-for-all; I know that is not at all what the
13 Tribunal has in mind.

14 Second, that disclosure requests that are made are
15 clear and specific and detailed and reasoned, so that we
16 can respond helpfully to them.

17 I wanted to make a negative and a positive point in
18 that connection. The negative point is that certainly
19 for my part I was somewhat alarmed by the suggestion
20 that the letter that Ms Ford pointed you to on causation
21 and quantum disclosure might form the basis for the
22 Defendants to respond as to all the quantum and
23 causation disclosure that might be sought in this case,
24 certainly at this stage. We do not regard that as
25 a sufficiently reasoned or clear basis for us to respond

1 to and I anticipate, I think, in fact, that what the
2 Tribunal may have in mind is a process more in line with
3 what has been done in other cases before this Tribunal,
4 for example in Trucks, where I think what you may have
5 in mind is that the experts should set out first what
6 they think they will need, perhaps there should be
7 something along the lines of a Redfern schedule process,
8 where each party sets out the categories of the
9 disclosure they say they want and why, and then there is
10 an opportunity to respond to that.

11 We would suggest that because there probably will
12 not be agreement on all of the disclosure in this case,
13 I may be being pessimistic, but it might be sensible --
14 THE PRESIDENT: No, I think you are being very realistic in
15 that regard.

16 MS ABRAM: It might be sensible just in case that happens to
17 get a date in the diary for a hearing before the
18 Tribunal. I might float a possible timetable for that
19 process for the Tribunal and for the other parties to
20 consider. It strikes me that it is likely to be
21 sensible for the Redfern schedule process to follow
22 after the UPO hearing, because that is when the scope of
23 the trial is going to become clear.

24 So if the UPO hearing happens in the middle of the
25 March, 15 or 16 March, we are very much in the Class

1 Representative's hands as to how much time they would
2 need then to put forward their detailed disclosure
3 requests. They might suggest a date, for instance, in
4 April. We might ask for four weeks to respond and then
5 perhaps another four weeks after that there could be
6 a two-day hearing put in the diary in case there is not
7 complete harmony on what disclosure should be and should
8 be provided.

9 It is one proposal, but what I am certainly seeking
10 to forestall is the idea that either there should be
11 a rolling set of open-ended disclosure requests or very
12 vague disclosure requests.

13 THE PRESIDENT: I think the difficulty that one has with
14 disclosure in this Tribunal is that we are often not
15 really talking about documents in the traditional sense,
16 often we are talking about data, and what I would be
17 unkeen to occur would be to shoehorn the parties'
18 thinking into the typical disclosure process. Sometimes
19 the Redfern schedule -- issue by issue, we want this, we
20 are going to search for it in this way, here is the
21 order -- works very well, but if one is talking about
22 the data necessary to drive, say, a regression analysis,
23 then it does seem to us that getting the experts to
24 articulate what it is they want -- and also to have
25 explained in that forum what it is that can be provided,

1 because what one wants is very often not what actually
2 exists.

3 So rather than have that intermediated between the
4 lawyers and the Tribunal, to have that operating at the
5 expert level is something that we would be quite keen to
6 encourage in the appropriate case.

7 The trouble is, formalising the process is something
8 which has its own dangers, in that it puts parties in
9 opposition to one another and creates rather more costs
10 than otherwise.

11 What I think would be helpful -- and I take your
12 point that orders for disclosure probably should not be
13 made until after the *VW* hearing -- the Class
14 Representative should be encouraged, I think, to say,
15 "Here is our shopping list, this is what we are
16 interested in", and for there to be a constructive
17 response with a provision of the easy wins as soon as it
18 possibly can be done, without any order from the
19 Tribunal, so that one can move to the areas where there
20 is a proper dispute about, well, the utility of
21 disclosure, how it is to be provided, so that the battle
22 lines are drawn. I think we can use the next fortnight,
23 three weeks, to enable battle lines to be drawn
24 post-March.

25 So I think I am agreeing with you, provided one

1 makes use of the time before the *VW* hearing to pick the
2 low-hanging fruit and work out which bits of fruit are
3 so high-hanging you are going to have to have a hearing
4 about them and which bits you need to think about a bit
5 more, because you are not going to be able to answer
6 Ms Ford's requests or all of them very quickly. You are
7 going to need to speak to your own experts, work out
8 what you have got in your files that will be responsive
9 to them, and these are all hard questions. My point is
10 we want them to start in terms of the thinking about the
11 answers to these questions now, rather than post-*VW*.

12 MS ABRAM: I absolutely hear what you say, Sir, and that is
13 a really helpful indication and I am sure that the Class
14 Representative similarly hears it.

15 May I just make two observations. The first is that
16 when I talk about what disclosure should be and should
17 not be given and what process should be followed, we are
18 not at all seeking to close out the Class Representative
19 from pursuing those applications which have sufficiently
20 crystallised today in relation to --

21 THE PRESIDENT: No, no, I was not reading you as saying
22 that.

23 MS ABRAM: We are moving beyond that.

24 The second is that it may be that if one follows
25 this very useful process of engagement that the Tribunal

1 has indicated, that we come back in the middle of March
2 and say: look, this is what we propose the process
3 should be going forward to determine those categories
4 that we can see will be tricky. It may be one senses
5 from the correspondence that the Tribunal may in March
6 need to consider what the process should be, exactly how
7 a Redfern process or an expert-led process should be
8 determined.

9 That is what I wanted to say on disclosure.

10 May I make one other CSAV-specific point, please,
11 Sir. You will have seen, Sir, that I act for the
12 Chilean Defendant to the proceedings.

13 THE PRESIDENT: Yes.

14 MS ABRAM: In the Commission decision we were not found
15 liable for the whole infringement. You will have seen
16 also that there was an application before the Tribunal,
17 which has now been compromised, in which we asked the
18 Class Representative to set out details of their case
19 against my client. The Class Representative did provide
20 those details in their skeleton argument. We are super
21 grateful for that and we have agreed an order for costs
22 in the case.

23 So there is nothing for the Tribunal to decide
24 today, but I would like to float one point which has
25 occurred to us as a result of the Tribunal's indications

1 on the tectonic plates and on which I will need to take
2 instructions, but I want to make the Tribunal aware of
3 it now.

4 There is a very clearly defined legal issue, which
5 is effectively an issue of construction of the
6 Commission decision as to scope of my client's
7 liability, as to whether it is liable for the whole
8 infringement found against the other addressees of the
9 decision, or whether we are only jointly and severally
10 liable for the things that we did, to put it
11 colloquially. It may be, and I want to flag that now,
12 that we come back to the Tribunal with an application
13 for that issue to be heard as a preliminary issue in
14 relatively short order.

15 I am not seeking to make that application now or
16 argue it now, but just to set out the scope of what it
17 would be, it would be a very self-confined legal issue.
18 I think it would probably take a day and a half of
19 Tribunal time.

20 The reason that we raise it in response to the
21 Tribunal's case management approach is that it is
22 potentially, given the Class Representative's case,
23 wholly dispositive of the claim against CSAV because
24 what the Class Representative says is that CSAV is
25 liable for the whole of the infringement, including the

1 bits we were found not to have done. We say that is not
2 right and the Class Representative has made clear that
3 they will not be proposing a separate methodology to
4 establish the loss caused by our bit of the
5 infringement.

6 So, if there is going to be no inner case nestled
7 within the greater case, if we won on the preliminary
8 issue based on the Class Representative's approach, that
9 would deal with the the Claimant's --

10 THE PRESIDENT: So what you are saying is, although
11 theoretically speaking you are in whatever, as a matter
12 of practical politics, this is dispositive, you are
13 either in or out, depending on how this is decided.

14 MS ABRAM: I say, Sir, even theoretically we are not in
15 whatever, because the Commission's decision says we are
16 not in whatever and this is a follow-on claim.

17 THE PRESIDENT: Yes, I see.

18 MS ABRAM: So, in that sense, it is a really simple legal
19 point, we say.

20 I am not making the application today --

21 THE PRESIDENT: No, no, you are not.

22 MS ABRAM: -- but I wanted to flag it because I could see
23 how it might be relevant.

24 THE PRESIDENT: How difficult would it be for you to put in
25 place the materials to enable you to make the

1 application? It does not sound like a great deal of
2 work to get the material for the Tribunal to deal with
3 it.

4 MS ABRAM: It would be a purely legal application. It would
5 not require evidence in support. The relevant materials
6 which you would need to decide it would be the
7 Commission decision and the relevant authorities, legal
8 argument. So it is an application that could be made
9 relatively rapidly if we were to get instructions to
10 make it and, as I say, I have not spoken to my client
11 about this, this subject.

12 THE PRESIDENT: Yes.

13 MS ABRAM: I wanted to raise it as a possibility so that we
14 do not pursue a case management path that excludes this
15 as an idea, for example.

16 THE PRESIDENT: No. I am very grateful to you for raising
17 it.

18 Ms Ford, my thinking is that we put ourselves in
19 a position to decide this quickly. What do you say to
20 that?

21 Submissions by MS FORD

22 MS FORD: Sir, we will obviously respond to the application
23 when we receive it, but I should flag up now that,
24 speaking provisionally, we do not necessarily agree that
25 this is a severable legal issue which is capable of

1 being dealt with as a preliminary issue in the way that
2 CSAV appear to contemplate, for many of the reasons that
3 are set out in our skeleton argument.

4 THE PRESIDENT: Yes.

5 MS FORD: We have also flagged up that there is a potential
6 abuse of process issue, which I would wish to develop
7 further as and when we see any such application, given
8 that this is not a point that was taken previously and
9 we have very much in mind what you, Sir, said in the
10 Meta judgment about the defendants putting their cards
11 on the table at the appropriate time.

12 Obviously we will develop those points in response
13 to any detailed application.

14 THE PRESIDENT: No, no, I am not asking for the arguments
15 today.

16 MS FORD: I should put down a marker, we do not necessarily
17 agree that that is the correct characterisation of the
18 situation.

19 THE PRESIDENT: Well, Ms Abram, you should be careful what
20 you wish for. I think you should make the application
21 soonest and I think, Ms Ford, you can expect your
22 client's feet to be held to the fire in terms of
23 responding to it quickly because whoever is right or
24 whoever is wrong, I think Ms Abram is right in saying it
25 needs to be dealt with sooner rather than later.

1 So what I have in mind is, if diaries allow,
2 including the Tribunal's diary, this is something
3 I would look to have nailed in the latter half of March
4 so that everyone knows where they stand, because it is
5 going to affect the shape of things going forward and of
6 course if it is a get-out-of-jail-free card for you,
7 then you will want to play it sooner rather than later,
8 and if it is not, then Ms Ford will want to know that
9 you are in, rather than out, sooner rather than later.
10 So I think there, there is an identity of interest
11 anyway.

12 So, subject of course to getting instructions,
13 I think we will expect an application from you as soon
14 as you can put it together, so that we can schedule it
15 for rapid resolution as part of the general shaping of
16 these somewhat complex proceedings.

17 MS ABRAM: Sir, just to be sure that I completely understand
18 you, I think you -- when talking about getting it nailed
19 in the second half of March, one means the application
20 for a preliminary issue, rather than the hearing of any
21 preliminary issue?

22 THE PRESIDENT: No, I was thinking the hearing of the
23 preliminary issue.

24 MS ABRAM: I am grateful. I am grateful for that
25 indication, Sir.

1 THE PRESIDENT: No, I think this is something that is, as it
2 were, the foundational stage of how we see the
3 proceedings and if there is a delta where you are either
4 in or out, then I do not really think it is particularly
5 fair to you to have that delta persist longer than is
6 absolutely necessary.

7 MS ABRAM: I am grateful.

8 THE PRESIDENT: The same goes for Ms Ford. She needs to
9 know how far you are in or out.

10 So I am not putting dates down, but that is an
11 indication of the sort of speed with which we want to
12 proceed. Now, of course, if you say it is going to take
13 you weeks to put the application together and Ms Ford
14 needs weeks to respond, then March is not going to work,
15 but that is the sort of time frame I am thinking of.

16 MS ABRAM: I am extremely grateful, Sir.

17 MR SINGLA: Sir, could I just jump in at this point on that
18 particular issue.

19 THE PRESIDENT: Yes.

20 Submissions by MR SINGLA

21 MR SINGLA: I represent "K" Line, the Fourth Defendant, and
22 my clients are not neutral on that particular issue
23 because obviously, Sir, you will appreciate, the
24 consequences insofar as contribution claims are
25 concerned.

1 THE PRESIDENT: Yes.

2 MR SINGLA: So I would not want -- or I am being asked to
3 make clear that we would want to participate or at least
4 have the right to participate in any such hearing.

5 I again just want to make that clear now so that the
6 directions are not agreed or argued about only between
7 the Class Representative and CSAV.

8 THE PRESIDENT: Ms Ford, anything to add before I give
9 a further direction as to where we go on this?

10 MS FORD: Sir, only to reiterate that, as far as we are
11 concerned, it is not obvious that this is an appropriate
12 point for a preliminary issue, but we can deal with that
13 as and when it arises.

14 THE PRESIDENT: No. Well, the fact is, one only really
15 knows that when one hears the preliminary issue. So
16 I think we will have to see the colour of Ms Abram's
17 money first and then we will decide how to deal with it,
18 but my initial take, and it may be wrong, is that we
19 want to get this done fast rather than slow, but we will
20 consider it in the round.

21 So, Ms Abram, over to you: get the application out.
22 Obviously all parties will be served with it. I would,
23 just to ensure that they are in the loop, include VW.
24 I have no idea whether they care or not, but I think
25 make sure that they are in as a matter of courtesy, if

1 nothing else, and then we will consider how Ms Ford or
2 anyone else should response to that, but the parties
3 should have in their minds that this is something we
4 want to get done fast. I am not saying we will get it
5 done fast, but that is my present sense of where we want
6 to go on that point.

7 MS ABRAM: I am very grateful, Sir.

8 THE PRESIDENT: Mr Holmes?

9 Submissions by MR HOLMES

10 MR HOLMES: Sir, I can be very brief. We do not oppose the
11 Tribunal's approach in terms of the broad tectonic
12 plates. I can make four short points. The first is,
13 Sir, that we need a durable timetable and with that in
14 mind a trial in the first quarter of 2025, as you
15 suggested after the adjournment, is more realistic than
16 any earlier date. So we would endorse that suggestion.

17 Secondly, ten weeks is more likely to be workable
18 than six weeks.

19 Thirdly, intermediate dates are better addressed at
20 the March CMC, as you have suggested. We are not
21 ourselves a party now to the VW proceedings but we would
22 seek leave to attend that CMC as it directly impinges on
23 the management of these proceedings.

24 Fourthly, we would endorse Ms Abram's suggestions
25 for an orderly framework for dealing with matters of

1 disclosure consistent with the requirement of active
2 case management, which will be particularly important
3 given the compressed time frames.

4 THE PRESIDENT: Mr Holmes, thank you very much. Presumably
5 you are interested in VW's documents?

6 MR HOLMES: Absolutely, Sir.

7 THE PRESIDENT: Yes.

8 MR HOLMES: Yes.

9 THE PRESIDENT: That is helpful.

10 Yes.

11 Submissions by MR PICCININ

12 MR PICCININ: Sir, I can be even more brief, I think. I do
13 not want to duplicate anything that my learned friends
14 for the other Defendants have said. I agree with all of
15 it. Just two very short points.

16 One is just to note really that in the *Volkswagen*
17 claim there has already been a helpful process of the
18 experts engaging to produce a joint statement on
19 methodologies, in particular as to the data that they
20 are going to require in order to carry out the various
21 analyses that they propose to carry out. So if the two
22 cases come together, then that may be something we need
23 to look at in March or later, about this claim catching
24 up.

25 The second point is you will have seen that my

1 clients, NYKK, have an RFI that we have issued and I can
2 understand that, Sir, the Tribunal has decided to take
3 a different approach to getting clarity as to what
4 everyone's case is and, as I say, I have got no
5 objection to that, but just to say it would obviously be
6 very disappointing if we got to December and the
7 material that we received was still pleaded by way of
8 metaphor rather than by way of concrete facts that can
9 be established with evidence at a trial.

10 So we do just put down a marker that we do want
11 answers to all of those points at some point.

12 THE PRESIDENT: Well, that is a very fair point,
13 Mr Piccinin, because one of the points I made when
14 articulating the proposal was that we would have
15 certainty before the summer --

16 MR PICCININ: Yes.

17 THE PRESIDENT: -- about methodology and of course pushing
18 matters off to December means that certainty is achieved
19 later.

20 My hope and I think expectation is that if, as one
21 would have to have, there is expert engagement
22 significantly before December, because you have got to
23 have something to say --

24 MR PICCININ: Yes.

25 THE PRESIDENT: -- that there will be an indirect response

1 to your RFI --

2 MR PICCININ: Yes.

3 THE PRESIDENT: -- because the experts will or should be
4 seeking to articulate, not a common methodology, that
5 will be to hope for too much, but to the extent that
6 there are various methodologies, that there is agreement
7 about how they work and how the data that is fed into
8 them is or is not agreed. The one thing that we cannot
9 have, whenever the trial takes place, but let us assume
10 it is Q1 2025, the one thing we cannot have is
11 a situation where there is an argument about which
12 methodology works, which is fine, and then a subsidiary
13 argument about the data going into that methodology --

14 MR PICCININ: Yes.

15 THE PRESIDENT: -- where the Tribunal has a million and one
16 questions about the data that is going in, which cannot
17 possibly be resolved at trial. These things have to be
18 resolved well in advance and I anticipate that in that
19 process your client's questions will have to be
20 answered, because it is intrinsic to the process of
21 extracting the data, working out whether the experts are
22 happy with the data, even if they are not happy with the
23 way it is being used, and that way certainty can be
24 achieved.

25 MR PICCININ: Sir, I very much agree with that and certainly

1 if the parties participated in the kind of process that
2 was undertaken in the VW claim, with experts talking
3 about methodologies and data sets, I agree that probably
4 would answer a lot of our questions.

5 There is just one, I think, though it might not, it
6 might just be helpful if I just show you very briefly --

7 THE PRESIDENT: No, of course.

8 MR PICCININ: -- what the point is. It is in the Class
9 Representative's reply which is in the CMC bundle at
10 {CMC-C/7/5} and it is paragraph 11 that I am focused on.
11 The reason I want to show you this is because it is
12 actually on a prior question, it comes before you get to
13 methodology, and it is about what is the measure of loss
14 as a matter of law.

15 Now, obviously we know what their answer to that
16 question is, which is the impact of the cartel on the
17 delivery charges, rather than what people paid for their
18 vehicles; but my question is, well, what are the facts
19 about the case that they say render that the correct
20 measure of loss as a matter of law? What facts do they
21 rely on?

22 When we look at 11(b), for example, the answer we
23 are told is that the delivery charges are "separately
24 considered and accounted for throughout the OEM, NSC and
25 retailer supply chain and/or by the end consumer".

1 That gives rise to quite a few questions about,
2 well, what primary facts do they actually hope to
3 establish at trial, and that they say give rise to this
4 outcome, that the measure of loss is what they say it
5 is? Is it alleged that class members separately
6 consider and account for in some way delivery charges or
7 not?

8 Then, likewise, when they say that they are
9 separately considered and accounted for throughout the
10 supply chain, it is actually common ground that there
11 are a number of brands that do not separately itemise
12 the delivery charge at various stages in the process.
13 So what is meant by that? What facts do they hope to
14 prove at trial? Because that operates at a prior stage,
15 it is not a question of expert methodology, it is
16 a prior question as to what the legal measure of loss
17 is, it would be quite useful to know what they say, in
18 crisp form, which could really be even on one side of
19 A4, what facts do they propose to prove?

20 There is a similar point over the page in
21 paragraph 12 {CMC-C/7/6} when they deal with that
22 category that I was talking about of brands for which
23 there are no separately itemised delivery charges.

24 Again, if one just looks at 12(a), just for example,
25 they say that:

1 "The delivery charge will still have been accounted
2 for and calculated internally by the NSC ..."

3 That is the national sales company, not the dealer:

4 "... as a separate cost."

5 So they say in such a situation where an NSC has
6 accounted for it separately, then the delivery charge
7 will still have been paid by the class member, as it is
8 a cost that the NSC tracks and passes on to the end
9 customer; but again, that seems to us to be
10 a metaphorical answer, because it is not alleged that
11 the class member deals with the NSC in any way in the
12 majority of cases, the vast majority of cases. So what
13 do they mean by saying that the NSC passes on the
14 delivery charge to the end consumer in a way that
15 renders the appropriate measure of loss to be the impact
16 of the cartel on the delivery charge?

17 So that is really just a little bit of a flavour of
18 the types of questions that we asked. I mean, if the
19 Class Representative were able to answer those questions
20 sooner than December, that would certainly be helpful.

21 I did float in my skeleton, Sir, as well, the
22 possibility that if we knew those answers, then if you
23 had on a sheet of A4 the precise facts that they say
24 give rise to this outcome, what the measure of loss is,
25 it might even be possible to knock this case on the head

1 with a short preliminary issue on that point if they
2 turned out to be discrete facts; but at the moment it is
3 quite difficult to think about that because we do not
4 know the answers to these questions.

5 So I do not know, Sir, whether you would find it
6 helpful to have answers to these questions as well?

7 THE PRESIDENT: The difficulty, I mean, you have put your
8 finger on the chasm that exists between pleadings and
9 evidence.

10 MR PICCININ: Yes.

11 THE PRESIDENT: The problem is that what you are
12 articulating could, depending on exactly what it is that
13 is in issue, be characterised as evidence rather than
14 fact. What I am going to say is that in the spirit of
15 cards on the table that characterise these proceedings,
16 if Ms Ford can provide further detail so that you know
17 what is coming down the track, then that would be
18 helpful, but I am certainly not going to make an order
19 to that effect because it is precisely this sort of
20 dispute that the approach articulated this morning was
21 framed to avoid.

22 MR PICCININ: Yes.

23 THE PRESIDENT: The problem I think that Ms Ford will have
24 in answering these questions is that her team will
25 ineluctably be drawn into giving evidence, which is, of

1 course, not in place now, rather than pleading facts.
2 The problem is that the distinction between pleading
3 facts, not evidence, not law, is something which is
4 a much harder distinction in this sort of case than it
5 is in a conventional breach of contract case or
6 reinsurance case, where you can nail the facts and then
7 you come to the evidence.

8 MR PICCININ: Yes.

9 THE PRESIDENT: Here I think it is harder.

10 So your points are well made and I am quite sure
11 that Ms Ford has been listening very carefully, but
12 beyond that I do not think we would be minded to go.

13 MR PICCININ: I am grateful, Sir. That is fine. As I said,
14 my real concern is that we do not get to December and
15 find out that this case is untriable or that we do not
16 know what it is about.

17 THE PRESIDENT: Well, that is certainly the concern that we
18 all share and we will certainly, I think, be keeping
19 a close eye on the question of triability going forward,
20 but I think that is somewhat ineluctably linked with the
21 disclosure process --

22 MR PICCININ: Yes.

23 THE PRESIDENT: -- that we are not discussing in any
24 granularity today, but which I would hope is much more
25 cast into clear light come the middle of March when we

1 would be expecting to make orders on exactly that fact,
2 whether we are doing disclosure on an issues-based
3 approach or an expert-led approach or both.

4 MR PICCININ: Yes. I am very grateful, Sir. Those are my
5 submissions.

6 THE PRESIDENT: Likewise, I am very grateful, Mr Piccinin.
7 Mr Singla.

8 Submissions by MR SINGLA

9 MR SINGLA: Sir, we are content with the overall direction
10 of travel, in relation to the trial shape and structure
11 and so on, but I actually just wanted to raise one
12 point, which is connected and similar to the points
13 raised by Mr Piccinin.

14 Could I just ask you, members of the Tribunal, to
15 look at the reply, paragraph 14, so that is {CMC-C/7/7},
16 because this is, with respect, another aspect of the
17 Class Representative's case which is unclear and is
18 fairly fundamental, and waiting until December, in my
19 submission, would be unsatisfactory, to know the answer.

20 So at paragraph 14 what the Class Representative has
21 done, this is since the Court of Appeal's judgment, they
22 have now pleaded a case in the reply that if the
23 Defendants are correct that the correct measure of loss
24 is the difference in the overall price of a vehicle,
25 they say that that nonetheless ought to be treated as --

1 the difference in the delivery charge ought to be
2 treated as the best available proxy. Then you will see
3 more particularly their proposed approach to quantifying
4 the difference.

5 So, as we understand it, they are now seeking to run
6 an alternative case based on overall pricing, but they
7 are saying that they will use the same methodology to
8 support that case.

9 It is not clear to us whether that would fall into
10 the positive or the negative side of things, and it
11 would be useful to understand from the Class
12 Representative sooner than December whether in fact this
13 is being run as an alternative positive case, because we
14 do not see in the claim form a claim for aggregate
15 damages being brought on the basis of overall pricing.
16 It is all put in terms of silo pricing. Now we see
17 paragraph 14, which is rather curious, buried in the
18 reply.

19 So, like the points which Mr Piccinin has raised,
20 that is something, with respect, we ought to know the
21 answer to before December.

22 THE PRESIDENT: Well, two points in relation to that. First
23 of all, is the answer not going to become clear when we
24 start sorting out the issues on disclosure, because
25 presumably there is going to be a data set in relation

1 to paragraph 14 that the Class Representative is going
2 to require to put together. When Ms Ford says, "well,
3 we would like information on this", you will say,
4 "why?", and that will have to be justified by reference
5 to the pleadings, at which point we will get clarity.

6 Now, is that sufficient for your purposes?

7 MR SINGLA: We had the same thought, but, with respect, it
8 should be straightforward for them just to answer the
9 question or to explain the position without it coming
10 out indirectly or obliquely. We can obviously wait for
11 the disclosure process to happen and that will run its
12 course --

13 THE PRESIDENT: Yes.

14 MR SINGLA: -- but I think the question of principle is
15 whether they need to provide clarity. Whether it comes
16 out in a straightforward answer or whether it comes out
17 through the disclosure process, we obviously do not mind
18 as to when or how it comes out, but it does need to come
19 out sooner rather than later.

20 THE PRESIDENT: Well, that was my second question. I mean,
21 assuming Ms Ford by some miracle actually does not need
22 disclosure to make this point good, what is the harm in
23 waiting until December?

24 MR SINGLA: I think the difficulty is that at the moment
25 they are saying they are going to run the same

1 methodology. So just to come back on the disclosure
2 question, because they are saying the same methodology
3 will be run --

4 THE PRESIDENT: Yes.

5 MR SINGLA: -- whether it is silo pricing or overall
6 pricing, the answer may in fact not become clear in the
7 course of the disclosure discussions, and so it would be
8 helpful to have --

9 THE PRESIDENT: But, why would it be helpful?

10 MR SINGLA: It would be helpful to understand because, Sir,
11 as I say, because the claim -- because the claim has
12 historically been put purely in terms of silo pricing,
13 this is all part of our entitlement to understand the
14 case which we --

15 THE PRESIDENT: Of course, and that --

16 MR SINGLA: So, Sir, when we come to put in our positive
17 case, which we are now going to be doing simultaneously,
18 as it were --

19 THE PRESIDENT: Yes.

20 MR SINGLA: -- we will not have had the benefit -- we are
21 not doing it sequentially, so we will be making our
22 election and our decisions as to our positive case at
23 the same time as it were as they are putting forward
24 their positive case.

25 THE PRESIDENT: Yes.

1 MR SINGLA: Now, the simple point I am making is in
2 paragraph 14, that is a slightly curious plea, because
3 it is different, very different, with respect, to the
4 claim as advanced in the claim form. So when the
5 Defendants or my clients are faced with the decision in
6 December whether to run a positive case or not, it would
7 be helpful to know in advance of that what the Class
8 Representative's claim was, because this was not the
9 claim that we were facing when the certification hearing
10 happened and we responded to the application and the
11 claim form on the basis of silo pricing.

12 So, Sir, in a sense, obviously normally one would
13 have a claim form and defence and the traditional
14 sequencing. I think what the Tribunal is now envisaging
15 is that we will be putting in our positive cases at the
16 same time.

17 THE PRESIDENT: Yes.

18 MR SINGLA: I think all we are really saying is, well, it
19 would be nice in that context and important, before we
20 go nap on our positive case, actually to understand the
21 case that we are having to meet, given that these
22 proceedings were not certified on the basis of this
23 overall pricing case.

24 So they advanced a particular methodology to support
25 the silo pricing. They are now saying, well, if you are

1 right about overall pricing, we will use the same
2 methodology. Now, with respect, that does raise a real
3 triability question in our view, but we would like to
4 know the answer to that before we choose whether or not
5 to advance a positive case or what that positive case
6 would look like.

7 It should not be difficult, with respect, it is a
8 simple point; they have obviously thought about this for
9 a long time and they seem to be changing tack in
10 paragraph 14. We say we would like to know the answer
11 in advance of December.

12 THE PRESIDENT: Yes, I understand. You do not, of course,
13 have to put in a positive case.

14 MR SINGLA: No, we completely understand that, Sir, but that
15 is the point I am making: we have a decision to make
16 come December.

17 THE PRESIDENT: Yes.

18 MR SINGLA: In my submission, the Defendants should be in
19 a position where they understand what -- ultimately this
20 is their claim, Sir. So in the normal course of things,
21 we would know what claim we are trying to meet. We
22 would be able to probe it through RFIs and so on, and
23 then you plead your defensive case and you lead your
24 evidence and so on in response to the claim.

25 THE PRESIDENT: Yes.

1 MR SINGLA: But what has happened here is obviously in
2 December the Tribunal is now envisaging the parties will
3 be exchanging positive cases.

4 THE PRESIDENT: Mr Singla, I think that is the point. If
5 you want to carve chunks out of Ms Ford's case, then you
6 will do that after December. If you want to put in
7 a positive case, then that is for December. I mean,
8 assuming those are the dates we stick to.

9 Unless there is a need for information that actually
10 precludes you putting a positive case, then it seems to
11 me this is in the class of "would be nice to have",
12 rather than something that is in any way essential to
13 the proper management of the case going forward.

14 MR SINGLA: But -- may I just --

15 MS FORD: Sir, it may be I can put Mr Singla out of his
16 misery because we have answered this question in our
17 skeleton. It is paragraph 23, sub-paragraph 3 and it
18 was in response to the suggestion in Mr Singla's
19 skeleton that we should be amending our claim form to
20 plead this case and we said {CMC-A/1/12}:

21 "The CR does not agree that it needs to amend its
22 Re-amended Claim Form (RACF). Its case on the use of
23 the delivery charge as a proxy is advanced in the
24 alternative and is purely responsive to the Defendants'
25 'overall pricing' cases."

1 It is a responsive case.

2 MR SINGLA: Right. So I will take it from that, they will
3 not be advancing this in December.

4 THE PRESIDENT: Well, I think this is a little microcosmic
5 example of what we are trying to avoid by the general
6 proposal. This is not straightforward litigation.
7 There is a very dangerous elision between a pleaded case
8 which is a pleading actually not of fact but of
9 methodology. What we are talking about here is: how am
10 I going to prove it? The problem is, how you are going
11 to prove it is intrinsically tied to how you are going
12 to prove it, which we are not going to know until
13 December. So we are quite deliberately
14 reverse-engineering this so that the cards come on the
15 table in a manner that is entirely fair to the
16 Defendants. We have got that very well in mind. So
17 Ms Ford will be saying, "Look, here is our case, read it
18 and weep", and you will then push back and carve chunks
19 out of it and we will decide the dispute.

20 The positive case side should not deflect you from
21 the fact that the chances are that the Defendants' big
22 moment in this process is going to occur post-December.
23 It may very well be that none of the Defendant classes
24 think it is worth their while putting in a positive case
25 at all and that is a matter which, as I indicated in my

1 note, is something of a luxury that is being afforded to
2 you to which Ms Ford has not objected. You can take it
3 or not. But if you are in the position of simply
4 saying, "Ms Ford has got it wrong", well, your time will
5 come. All we are doing is stretching the time frame
6 away from the normal pleadings because the pleadings, in
7 this type of case, because they are not really focusing
8 on facts that are being averred but discussing
9 methodologies, which cannot be assessed except in the
10 broad brush without the experts doing the hard yards,
11 well, that is why we have got a December date. I mean,
12 I would like it to be sooner, but we do understand why
13 Ms Ford and Mr Hoskins have said that it cannot be done
14 sooner and I suspect --

15 MR SINGLA: No, we agree with that.

16 THE PRESIDENT: -- if I put anyone else's feet to the
17 fire --

18 MR SINGLA: No, we agree with that. I think you have my
19 point.

20 THE PRESIDENT: I have your point. No, I am very grateful,
21 Mr Singla.

22 Well, it does seem that a delightful and, would I be
23 cynical to say, a surprising amount of harmony has
24 broken out. We are very grateful.

25 MR HOSKINS: For the moment.

1 THE PRESIDENT: For the moment! I was only speaking about
2 today.

3 So, what we will do is we will rise now. What we
4 will do this afternoon is seek to sort out the immediate
5 disclosure questions, but what I would like the parties
6 to think about over the short adjournment in addition to
7 that is if we get out a form of order that deals with
8 the tectonic plates, we leave to the parties the careful
9 consideration of things like engagement with class
10 members and anterior permission to make that work and
11 how disclosure is going to work, apart from the stuff we
12 are going to deal with this afternoon, that those
13 debates be incorporated in a further iteration of the
14 order with a view to having a much more crystallised
15 position for argument in March, where I fear you are all
16 going to be required again, to the extent that you are
17 not willing, and you will not be, to abdicate an ability
18 to have your say in the light of whatever *Volkswagen* say
19 about the overall shape of the action.

20 But that, I think, is where I am proposing to leave
21 it for the moment. But, Ms Ford, if you have anything
22 to say in addition to that, obviously I would be
23 delighted to hear you.

24 Submissions in reply by MS FORD

25 MS FORD: I am grateful. Very brief observations arising

1 out of what you have just said and also essentially some
2 of the comments down the line.

3 There has been obviously an exchange of
4 correspondence in relation to the umbrella order and
5 I do not know if the Tribunal is aware that there has
6 been a response now from *Volkswagen* in relation to that,
7 which is now in the bundle at {CMC-E/11}.

8 One of the points which arises out of that is that
9 we suggested it would be helpful if the Defendants who
10 had raised this proposal could put in a detailed
11 proposal for consideration and that is one of the points
12 that has been endorsed for *Volkswagen*, if we could go
13 over to the second page, I think it is {CMC-E/11/2}. It
14 may be in fact the third page {CMC-E/11/3}.

15 Yes, paragraph 13:

16 "In light of the above, our clients agree with the
17 [Class Representative] that the Writing Defendants
18 should make a properly reasoned proposal ..."

19 Including the various matters that have been
20 discussed in correspondence.

21 Our suggestion was going to be that it would make
22 sense if that could be done imminently and in good time
23 for the forthcoming CMC so that the parties can engage
24 with it appropriately.

25 There are other short observations we have, but

1 Mr Hoskins has an answer.

2 MR HOSKINS: We did not put this forward as some sort of
3 great adversarial application. It was just screamingly
4 obvious it had to be considered. If it helps, it almost
5 certainly will, we will have a first bash at what the
6 UPO might look like and people can comment on it. It
7 seems to me eminently sensible -- someone has to go
8 first.

9 THE PRESIDENT: Someone has to go first. Mr Hoskins --

10 MR HOSKINS: We are quite happy for it to be us.

11 THE PRESIDENT: Well, since you have put your head in the
12 noose, it would be churlish to refuse it.

13 MR HOSKINS: Absolutely.

14 THE PRESIDENT: So, no, that would be very helpful. To be
15 clear, we anticipate that the Tribunal will be engaging
16 with all sets of parties themselves, with a view to
17 ensuring that everyone is at least on the same page.

18 Mr Hoskins, you are absolutely right, this is
19 an absolutely blindingly obvious thing that needs to be
20 covered. We are very grateful to you for taking the
21 first draft on your hands.

22 Ms Ford?

23 MS FORD: I am grateful. In relation to the timing of
24 disclosure, there has obviously been some discussion of
25 the way in which it has been approached in other cases

1 which are not connected proceedings cases. We remain
2 very conscious that the nature of the collective
3 proceedings regime is that we have been obliged to
4 front-load our work on our methodology in a way which is
5 not really conducive to then having a further round of
6 discussions with experts about what the methodology
7 should be, because we have been obliged to do that
8 exercise already.

9 So we were not particularly attracted to the
10 suggestion that one has to wait until after April for
11 this entire process to start. We would certainly
12 propose to start engaging immediately on the question of
13 disclosure that supports our methodology and we would
14 hope that the Defendants will also engage with that
15 reciprocally.

16 THE PRESIDENT: Well, Ms Ford, I think I have made clear
17 that whilst I am not proposing to make any orders as to
18 anything other than the immediate disclosure questions
19 which are for this afternoon, we would want you to begin
20 engaging with the Defendants as to what material you
21 need, in the expectation that if that is capable of
22 being provided, in other words, if it can be produced,
23 because it is uncontroversially necessary and relatively
24 easily produced, then it should be.

25 If it is controversial and expensive, then of course

1 you are likely to need the Tribunal's assistance to
2 resolve matters. If it is easy to produce,
3 uncontroversial, why, then, I think it should be
4 produced.

5 MS FORD: I am grateful, Sir. In that spirit there has been
6 a mention of an experts' joint statement on data in the
7 VW proceedings. We obviously have not seen that because
8 we are not party to those proceedings but it would be of
9 assistance to us to see it and that could then enable us
10 to progress matters.

11 THE PRESIDENT: Well, that is a matter which will involve
12 VW. I am certainly happy for you to approach VW to say
13 we think it will be helpful for you to be provided with
14 that. I do not think we can go as far as to make
15 an order in that regard, but certainly the strong
16 suggestion, given the interconnectedness that we have
17 been discussing throughout this morning, given that
18 interconnectedness, it would be a little annoying if
19 delays were introduced when something that is likely to
20 be produced in due course is not produced soonest.

21 So you are more than welcome to quote that to VW and
22 we will see what they say, but you cannot get an order
23 and I know you are not asking for one.

24 MS FORD: I am grateful.

25 Sir, you have mentioned the possible trial date.

1 Our suggestion was going to be that it might make sense
2 to put the first quarter 2025 date into the diary,
3 rather than have the Tribunal's availability potentially
4 lost in the meantime.

5 THE PRESIDENT: Well, you can take it that we will put in
6 the diary, in pencil, a ten-week trial in the first
7 quarter of 2025, and we will find a Tribunal to deal
8 with it. I am saying that without looking at the other
9 matters that are in the diary already for 2025 but we
10 will make that work. The only reason I say "in pencil"
11 is because, for reasons that I have already given, we
12 are not in the business of making final orders today,
13 but the parties should work with a high degree of
14 confidence that that is a date that we will make work.
15 It may be that it has to be shifted around because of
16 other arguments regarding feasibility, but I think the
17 parties should leave this courtroom today with
18 a ten-week trial in that time frame well in mind.

19 MS FORD: Sir, I am grateful for that.

20 The final point is simply that it will not surprise
21 the Tribunal at all to hear that we do not agree with
22 the characterisation of our pleading as being pleading
23 by metaphor. We do not agree that there is any material
24 lack of clarity in relation to our pleaded case. We do
25 endorse the distinction that you, Sir, have drawn

1 between what is said on the pleading and what can be
2 covered in evidence. Of course we have provided
3 a significant volume of evidence in support of our case.
4 That evidence has been combed over in some detail, both
5 by the Competition Appeal Tribunal and by the Court of
6 Appeal, and if the Tribunal were to look at
7 paragraphs 81 to 83 of the CAT's judgment and
8 paragraph 125 of the CAT's judgment, the Tribunal will
9 see set out there a fairly comprehensive explanation of
10 the facts on which our pleading rests. So we do not
11 agree that there is any lack of clarity whatsoever.

12 THE PRESIDENT: Well, Ms Ford, I do not see what is wrong
13 with pleading by metaphor, speaking for myself, but that
14 is no doubt a difference of approach in terms of
15 linguistic style. But I think we have put sufficiently
16 on the record our sense that this is not a matter for
17 today. The reason I say that is because this is quite
18 clearly not a Gormsen case. There, the need for
19 articulation as set out in the judgment of earlier this
20 week was clear. It was very easy to say: look, you have
21 got to provide the following materials in order for the
22 case to be triable. The fact is we are not there
23 because neither this Tribunal nor the Court of Appeal
24 said there is a Microsoft v Pro-Sys problem, still less
25 a certification problem, in that sense, so we are

1 significantly more advanced than Gormsen. That is
2 really what has informed the orders that we have floated
3 this morning.

4 So, clearly, in the spirit of co-operation, if there
5 is material that you can easily provide to the
6 Defendants so that they can understand where you are
7 coming from, before December, then if the cost is
8 negligible, it ought to be provided. But we are not in
9 the business of RFIs or a crisply articulated pleaded
10 case. We are way beyond that. We are now working
11 towards 2025 and a trial then, and that is what we are
12 focusing on, not whether the case is or is not
13 understood at the pleadings stage.

14 MS FORD: I am grateful, Sir. I think I can leave it at
15 that, in that case.

16 THE PRESIDENT: I am grateful.

17 We will rise then until 2 o'clock and we will deal
18 with, as it were, immediate disclosure questions.

19 I do not know, Ms Ford, will you have to make
20 an application, or is it actually clear what you want
21 and we can move straight over to the responses?

22 MS FORD: We have produced a draft order and I can talk the
23 Tribunal very briefly through it. We anticipate that
24 the Commission documents point is relatively
25 uncontroversial, subject, I understand, to a potential

1 point about redacting for relevance.

2 The regulatory documents application is opposed by
3 the Defendants, and then there was an additional limb
4 which related to other documents, but I suspect that
5 that has been now superseded by the discussions as to
6 the progress that is going to be made in relation to
7 those, so it ought to be capable of being dealt with
8 I would hope relatively briefly.

9 THE PRESIDENT: I am very grateful. Well, I am sure the
10 Defendants have heard what you say. We look forward to
11 hearing from you at 2 o'clock. We will resume then.
12 Thank you very much.

13 (1.13 pm)

14 (The luncheon adjournment)

15 (2.00 pm)

16 (Proceedings delayed)

17 (2.06 pm)

18 THE PRESIDENT: Ms Ford.

19 MS FORD: Sir, our draft order with the provisions about
20 disclosure is at {CMC-A/1.1/3}, please.

21 Starting with paragraph 5, this is the paragraph
22 that is concerned with the Commission documents. What
23 we are asking for is disclosure by 3 March 2023 of
24 confidential versions of all categories of documents,
25 and we have made the usual provision that they can be

1 redacted on the basis of leniency statements, settlement
2 submissions, legal professional privilege or Pergan.

3 The categories that we have defined are the
4 confidential version of the decision itself:

5 "Documents provided by the Decision addressees' to
6 the Commission, and to which the Defendants were
7 subsequently granted access by the Commission (the
8 'Access to File Documents').

9 "Any other document within the Commission's file
10 which is within the Defendants' possession or control.

11 "Documents provided by the Defendants to the
12 Commission, but which are not on the Commission's file."

13 We understand this to be broadly agreed subject to
14 a couple of wrinkles. The first wrinkle is what seems
15 to be something of a confusion about what is the
16 relationship between categories (b) and (c), (b) being
17 documents provided by the decision addressees, the
18 Access to File and any other documents on the
19 Commission's file. The Tribunal will have seen from our
20 skeleton that there appears to be a potential lack of
21 agreement as between the various Defendants about what
22 the relationship is between those two categories.

23 For our part, we have no objection to the Defendants
24 providing disclosure of those documents that they
25 themselves provided to the Commission, rather than

1 having to go through the exercise of redacting other
2 people's documents and providing them. We do not need
3 to receive the same document from each Defendant. We
4 have no objection from that.

5 Our concern is that insofar as that sort of
6 arrangement is operated as between the Defendants, we
7 should be provided with a complete set of whatever is
8 available. We are concerned that nothing falls through
9 the cracks and that the confusion arises insofar as --
10 there seems to be a lack of clarity as to who holds what
11 and in what circumstances. So we say we do not require
12 the Defendants to duplicate, but we do say we would like
13 to receive a complete copy of that which is available.

14 THE PRESIDENT: Yes, I see. I mean, that can be dealt with
15 as a drafting point or is it more fundamental than that?
16 Who is the --

17 MR SINGLA: Sir, I have been volunteered to address you on
18 this glamorous topic.

19 THE PRESIDENT: Lucky you, Mr Singla.

20 MR SINGLA: To explain the position factually, as
21 I understand it, the decision is obviously the decision,
22 but then there are three further categories of
23 documents. So there is the Access to File, which
24 contains all the documents that were sent by the
25 Commission to the addressees, and then there is the

1 Commission file, which is broader than that, because it
2 is all of the documents on the file used by the
3 Commission, and there is a file index, as I understand
4 it. But some of those documents may have been provided
5 by third parties, so not the Defendants.

6 Then there is a final category, which is documents
7 provided by us to the Commission which did not even make
8 their way on to the file. So what we can do is
9 obviously provide everything to the Class Representative
10 that we provided to the Commission, and if every
11 Defendant does that, that will lead to
12 a reconstitution of the Access to File, but what they
13 will not ever get from these parties is a reconstituted
14 version of the wider Commission file insofar as there
15 may have been documents that were provided to the
16 Commission by non-addressees, or by parties other than
17 these Defendants.

18 THE PRESIDENT: Unless the Commission provided them.

19 MR SINGLA: Exactly.

20 THE PRESIDENT: To the Defendants under (c).

21 MR SINGLA: Exactly.

22 THE PRESIDENT: Well, look, if we take the approach that
23 these documents, i.e., documents produced by the
24 Defendants, and documents going to the Defendants from
25 the Commission, are in principle disclosable and should

1 be disclosed, subject to any specific concerns on
2 specific documents, one would not expect that to arise,
3 because, say it is a third-party document, well, if the
4 Commission has provided it to the Defendants then
5 sensitivities are unlikely to arise.

6 So would it be easier to have a broader collapsing
7 of (b) through (d), just to make it clear that you are
8 to provide collectively all of the documents within
9 these classes, it being made clear, however, that if and
10 to the extent there are issues of -- well, there will
11 not be privilege, but confidentiality, within the
12 meaning articulated by this Tribunal in BGL, rather than
13 any wider sense of confidentiality, that that can be
14 provided by the Defendants acting in co-operation with
15 each other so that there is not duplication and you are
16 actually all providing the documents that you yourselves
17 have sent or received, does that work?

18 MR SINGLA: Sir, if we were starting from scratch that may
19 well be a sensible way forward, but we do in fact have
20 two orders, both in the Jaguar proceedings and the
21 *Volkswagen* proceedings, which cover the same ground.

22 THE PRESIDENT: Right.

23 MR SINGLA: So, in my respectful submission -- I mean, there
24 are copies of those orders in the bundles, but
25 essentially what we are seeking to do is just provide

1 that which we have offered to provide to Jaguar and
2 *Volkswagen* historically, and so the order, in my
3 respectful submission, should simply follow what has
4 already been the subject of two orders in this Tribunal.

5 THE PRESIDENT: Were they actually provided to Jaguar?

6 MR SINGLA: Yes.

7 THE PRESIDENT: Okay.

8 MR SINGLA: A point I am going to come on to is a relevance
9 filter which also exists in those other orders, but just
10 before we get there, all of -- there really should not
11 be anything controversial. We are going to provide
12 everything that we have concerning the Commission
13 investigation, subject to the redactions and so on and
14 the withholding for various categories. But in terms of
15 whether the Class Representative will get from us
16 everything that the Commission ever had, that obviously
17 is not something that we can help them to achieve. We
18 can just only give --

19 THE PRESIDENT: Well, no, but I do not think that is what
20 Ms Ford is asking for in paragraph 5.

21 MR SINGLA: Well, she is asking for clarity as to whether
22 that will be the outcome if the Defendants provide all
23 of the documents. I think what she is saying is
24 ambiguous.

25 MS FORD: Sir, I can confirm that our paragraph (c) does

1 contain the clarification that it is those documents
2 within the Defendants' possession and control.

3 THE PRESIDENT: Yes.

4 MS FORD: So we are not seeking anything they do not have to
5 give. What we seek to ensure is that we do not fall
6 between the cracks in the sense that the Defendants say:
7 well, we will give you everything that we gave to the
8 Commission, but nobody is going to hand over things that
9 are in their possession and control that did not come
10 from them. But certainly these categories have been
11 based on the categories that were directed in the other
12 proceedings, and so it is not --

13 MR SINGLA: With respect we are not saying that. We are
14 going to give everything that is within our possession
15 or control -- so if we go through the categories, there
16 is the Access to File. They are going to get all of
17 that --

18 THE PRESIDENT: Yes.

19 MR SINGLA: -- because all the Defendants had the files. So
20 that will be fully reconstituted.

21 So far as the Commission file went wider than the
22 Access to File, we are going to give any other document
23 within our possession or control. There is nothing more
24 we can do in that respect.

25 THE PRESIDENT: No; this is why I am wondering why we are --

1 MR SINGLA: I am not sure, Sir. There should be nothing
2 controversial about this. This is exactly what has
3 happened in other proceedings.

4 THE PRESIDENT: Right. So can I make an order like this?

5 MR SINGLA: Yes, subject to the relevance point, which I
6 would like to address you on.

7 THE PRESIDENT: Okay.

8 MR SINGLA: If Ms Ford is content thus far --

9 THE PRESIDENT: All right, so, so far, so good.

10 MR SINGLA: I hope so.

11 THE PRESIDENT: I will make an order in paragraph 5, subject
12 to your relevance point.

13 MR SINGLA: Yes. So the relevance point is simply that
14 obviously you will see the (1), (2), (3) and (4) in
15 paragraph 5. Those are the redactions that the Class
16 Representative accepts that we can make, either
17 withholding documents or making redactions, I think it
18 says redactions.

19 THE PRESIDENT: Yes.

20 MR SINGLA: Now, we submit that we should also have a right
21 to redact or withhold irrelevant material, applying the
22 usual test for relevance under CPR 31.6 and essentially,
23 the basic point is, first of all, they have no
24 entitlement to irrelevant material and we have no
25 obligation to disclose irrelevant material. That is

1 just taking the matter from first principles.

2 Secondly, the orders in the other cases which I have
3 mentioned did have the relevance filter in them, and
4 I can show you those in a moment.

5 THE PRESIDENT: No, no, I do not need to see them.

6 I am sure they are there.

7 MR SINGLA: Thirdly, that is consistent with a wider
8 practice in other cases. Of course, you will be aware,
9 we have brought along copies, but this happens in many
10 other cases, for example, a Trucks judgment of
11 Mr Justice Roth in 2018, and he in that judgment refers
12 to a decision of Mr Justice Green, as he then was,
13 sitting in this Tribunal.

14 So this is a long-established practice whereby one
15 of the additional exceptions is irrelevance.

16 THE PRESIDENT: So what are you going to do? Are you going
17 to review -- what is the volume of documents we are
18 talking about here?

19 MR SINGLA: I do not know the answer to that question but we
20 have obviously done this disclosure exercise in these
21 other proceedings. So we are not looking to push back
22 the date. We have agreed 3 March. So in my respectful
23 submission, there is no prejudice to the Class
24 Representative if we have a right to redact irrelevant
25 material. It is not quite clear to us why this is

1 contentious either.

2 THE PRESIDENT: Well, I am just troubled by the arguments
3 that almost always arise when you put black coverings
4 over words, that they immediately seem vastly more
5 significant, and significantly inhibit the easy reading
6 of documents if you do it, over and above which you have
7 the cost of doing it.

8 Now, this redaction I am not sure is a thing that
9 can properly be described as "we have always done it
10 this way". The redaction of words from documents is
11 a relatively recent phenomenon, by which I mean it has
12 cropped up in the last sort of 15 or 20 years. Before
13 that, well, you provided the document and if the
14 document was relevant, you did not go through excising
15 a name here and a word there.

16 So I am interested in how much this is going to
17 cost.

18 MR SINGLA: Well, Sir --

19 THE PRESIDENT: I hear what you say about delay, but --

20 MR SINGLA: Well, first of all, can I just take this in
21 stages.

22 THE PRESIDENT: Of course.

23 MR SINGLA: First of all, it is not merely redactions. It
24 should actually be withholding wholly irrelevant
25 documents.

1 THE PRESIDENT: Right.

2 MR SINGLA: So there is that point.

3 THE PRESIDENT: Okay.

4 MR SINGLA: The second point is, as I say, certainly for our
5 part, we have done this exercise in other cases. So it
6 is not something that we would be looking at completely
7 afresh. Obviously relevance one needs to look at in the
8 context of a particular case --

9 THE PRESIDENT: Yes.

10 MR SINGLA: -- but it is not something we would be starting
11 from scratch.

12 Thirdly, of course, it is a matter for each
13 Defendant whether they do this or not. All we are
14 seeking is a right to withhold and redact.

15 Sir, just to give you an example, the decision --
16 this is a follow-on claim, only a follow-on claim. The
17 decision concerns deep sea shipping. So just to give
18 you a sort of simple example, if there are documents
19 concerning short sea shipping, then those would be
20 entirely irrelevant to this case. It is just not clear
21 to us -- as I say, if one looks at this from first
22 principles, the obligation to disclose is obviously in
23 relation to relevant material, and in circumstances
24 where that is the order that has been made in two sets
25 of proceedings concerning this very same decision, and

1 we are not looking to ask for more time, we are doing it
2 within the time frame that you will see in the draft
3 order, we really, with respect, cannot see the
4 difficulty.

5 THE PRESIDENT: Well, take your point about short sea
6 shipping. I do not know, because I have not looked at
7 it in any great detail, the sort of contrasts or points
8 that are made in the Commission decision that might make
9 a contrast between shipping types relevant in order to
10 understand what the Commission is getting at. So there
11 is an argument to be said that if this is material that
12 was considered by the Commission and used in order to
13 reach its decision, it is ipso facto relevant for that
14 reason.

15 MR SINGLA: Sir, again, one needs to take this in stages --

16 THE PRESIDENT: Okay.

17 MR SINGLA: -- because insofar as we are looking at the
18 Commission file that goes wider than the Access to File,
19 those are documents which were not relied upon by the
20 Commission in its decision. So actually if one takes
21 a document that did not even make its way onto -- well,
22 if we look at (d), there are documents provided by the
23 Defendants to the Commission which are not on the
24 Commission's file. They did not even make it on to the
25 Commission file. (c) -- sorry, which are not on the

1 Commission's file. But then you have documents which
2 were on the Commission's file but not on the Access to
3 File.

4 So, Sir, where we are talking about a universe of
5 documents that contains everything that went to the
6 Commission but by definition some of those documents
7 were not ultimately relied upon by the Commission in the
8 decision, there is a prima facie case that there are
9 going to be some wholly irrelevant materials, given that
10 this is a follow-on claim.

11 If they want to challenge any particular redactions
12 in due course, then that can happen in the usual way.
13 But in my respectful submission, it is not right simply
14 to make an order that requires us to disclose irrelevant
15 material. There is a wasted cost in them reviewing such
16 material. It is very difficult to see how it can be
17 justified that if there are documents wholly irrelevant
18 to the Commission's decision --

19 THE PRESIDENT: Yes, I see.

20 MR SINGLA: -- why we should be disclosing them.

21 THE PRESIDENT: Ms Ford?

22 MS FORD: Sir, you asked a question about how many documents
23 might be in issue. There was an exchange of
24 correspondence about this. It is at {CMC-D/4/1},
25 please.

1 This is a letter of 22 July 2022 which is sent, you
2 can see from the first paragraph, on behalf of all the
3 Defendants.

4 If we then go over the page, please {CMC-D/4/2},
5 there is a figure in sub-paragraph (a):

6 "we estimate that the Disclosure will comprise of
7 around 550-600 MB of data, and around 1,500
8 documents ..."

9 So that is what we have been told in terms of the
10 scale of the exercise.

11 On the question of redacting for relevance, given
12 that these are documents which have been provided to the
13 Commission, either by the Defendants themselves or by
14 other parties, for the purposes of investigating the
15 conduct on which the decision is based and on which this
16 claim is based, we really struggle to see that there is
17 any scope for filtering that universe of documents on
18 the basis of relevance and we are concerned that
19 an overly narrow approach to relevance might undermine
20 the utility of the exercise and that might take place in
21 a way which it is very difficult for us to scrutinise
22 because if those redactions are redactions which amount
23 to withholding entire documents, rather than simply
24 taking out a paragraph, it is very difficult to
25 interrogate that and to see what has been done.

1 THE PRESIDENT: Yes. Well, thank you very much, Ms Ford.

2 (Pause).

3 We will rise for five minutes to discuss this.

4 (2.22 pm)

5 (A short break)

6 (2.25 pm)

7 RULING

8 I wonder if you could bring up the order that Ms Ford was
9 speaking to, paragraph 5, and put that on our screens

10 .

11 Thank you very much. We have before us an
12 application that the Defendants provide to the Class
13 Representative confidential versions of various
14 documents concerning the decision of the European
15 Commission and the documents provided to the Commission
16 and from the Commission, pursuant to the decision-making
17 process.

18 The draft order that has been produced by Ms Ford's
19 clients in paragraph 5 is substantially agreed. The
20 area of disagreement constitutes an argument about the
21 carve-out as to what can be redacted or removed from the
22 production that is otherwise ordered in paragraph 5.

23 There are certain redactions that are permitted on
24 the agreed version of the order. These relate to
25 leniency statements, settlement submissions, legal

1 professional privilege and material protected from
2 disclosure under Article 48 of the Charter of
3 Fundamental Rights. Those carve-outs are well
4 understood and, as I say, not controversial.

5 There is a further carve-out that is sought, a
6 fifth, which relates to relevance. We are, I must say,
7 quite hostile to this carve-out. Of course it is right
8 that disclosure is to do with providing relevant and not
9 irrelevant documents, but at first blush it does seem to
10 us that material that has been provided in the course of
11 an investigation, even if it has not been used by the
12 Commission, is liable to be relevant rather than
13 irrelevant and it seems to us that the debate as to what
14 is and is not relevant is liable to be productive of
15 costs, rather than genuine insight in terms of
16 protecting the producing party from inadvertently
17 disclosing sensitive material that is already covered in
18 heads (1) through (4).

19 Accordingly, mindful that it has been argued with
20 force and care by Mr Singla that the relevant carve-out
21 needs to be preserved, we are prepared to create a fifth
22 carve-out, but on the following terms.

23 First of all, the costs of doing this exercise are
24 to be for the Defendants' account and are not to be
25 claimed, whatever the outcome of these proceedings, from

1 the Claimants.

2 Secondly, there is to be no redaction of documents
3 on the grounds of relevance. There is to be exclusion
4 of wholly irrelevant documents and that is all that may
5 be done. I am not going to have blacking out of
6 specific documents that are otherwise relevant and
7 disclosable.

8 Thirdly, to the extent that there are in the 1500
9 documents to be disclosed documents that are withheld on
10 the grounds that they are entirely and complete
11 irrelevant, then a schedule will have to be compiled by
12 a partner in the relevant Defendant-instructed firm,
13 setting out the documents by date and description and
14 stating, very briefly, the reason for withholding them
15 on grounds of relevance and that will be a statement
16 that will have to be signed by the partner in the
17 relevant firm.

18 On that basis, we are prepared to create a fifth
19 carve-out in paragraph 5.

20 THE PRESIDENT: Ms Ford.

21 Submissions by MS FORD

22 MS FORD: Sir, moving on to paragraph 6, this is (inaudible)
23 documents provided to ...

24 I am sorry, Ms Abram reminds me of a point that she
25 has raised with me which concerns CSAV's deadline. They

1 ask for 8 March, rather than 3 March, to which we have
2 no objection on the basis that we will be receiving
3 everything from everybody else on the 3rd.

4 THE PRESIDENT: We are grateful in that case, very grateful.

5 Thank you, Ms Ford.

6 MS FORD: Paragraph 6 is seeking disclosure of documents
7 provided by the Defendants to any other regulator or
8 authority in connection with the investigation of
9 anti-competitive practices in relation to roll on roll
10 off maritime transport, so essentially seeking to obtain
11 documents which fall within the subject matter of the
12 infringement findings in the Commission decision but
13 which were provided to other regulators.

14 Certain of the Defendants have already been directed
15 to disclose these documents in other proceedings. So if
16 we look, for example, at {CMC-E/5/1}, please, this is
17 the order of Mr Justice Picken dated 14 July 2022 in the
18 *Volkswagen* claim, and if we go on, please, to page 7
19 {CMC-E/5/7}, paragraph 13.1 is directing:

20 "the Seventh to Ninth Defendants [that is KK] shall
21 give disclosure and inspection of all documents which
22 (i) are or have been in their control; and (ii) have
23 been provided either by the Ninth Defendant or by any of
24 its current or former subsidiaries to regulators and/or
25 authorities in Japan, Australia, South Africa, Brazil,

1 Peru, Chile, Mexico, the USA, India, South Korea, and
2 China in connection with the investigation of
3 anti-competitive practices in relation to Roll On Roll
4 Off maritime transport."

5 Then paragraph 14, if we can go on to the next page,
6 please {CMC-E/5/8}. Paragraph 14 is directing the first
7 Defendant, that is MOL, to give standard disclosure in
8 those proceedings, and that would presumably encompass
9 documents which have already been provided to other
10 regulators insofar as it falls within the scope of
11 standard disclosure.

12 MR HOSKINS: That is not right.

13 MS FORD: Is that not ...?

14 MR HOSKINS: It is not right, but it does not matter. The
15 point was that was the MOL UK company which did not have
16 any foreign regulator documents. It was the parent
17 company, but subsequently the parent company was sued,
18 they were consolidated, then the parent company was
19 ordered to give foreign regulatory disclosure.

20 MS FORD: I see. I am grateful to Mr Hoskins for that
21 clarification.

22 There is a second order in the bundle, CMC-E --

23 THE PRESIDENT: Just to interrupt there, to what extent has
24 disclosure of this material already been provided in
25 other contexts by the Defendants? You may not know the

1 answer to that.

2 MS FORD: The Defendants may be in a better position to
3 assist with that question. I am afraid we are not
4 necessarily clear.

5 THE PRESIDENT: No.

6 MR HOSKINS: As I just described by the MOL parent it is
7 ongoing and it is due by 31 May 2023.

8 THE PRESIDENT: I see.

9 MR HOSKINS: In the *Volkswagen* proceedings.

10 THE PRESIDENT: In the *Volkswagen* -- and is that true of how
11 many other Defendants?

12 MR HOSKINS: I am not sure.

13 MR SINGLA: Also my clients, because, importantly, there is
14 a pleaded issue in *Volkswagen* which gave rise to this
15 disclosure.

16 THE PRESIDENT: Yes, I see.

17 MR PICCININ: My clients are in the *Volkswagen* claim; they
18 have not been ordered to produce this material and have
19 not produced it.

20 THE PRESIDENT: All right.

21 MR HOLMES: Sir, in the case of my client, we are not in the
22 *Volkswagen* proceedings but we did give disclosure of
23 some foreign regulatory materials in the context of the
24 Daimler proceedings, which I can describe in more detail
25 subsequently.

1 THE PRESIDENT: I am grateful.

2 MS ABRAM: Similarly, we gave the disclosure in the Daimler
3 proceedings which, unlike these proceedings, were
4 a hybrid claim, so not merely a follow-on claim. That
5 was the critical difference.

6 MS FORD: Sir, that is actually the order I was going to
7 show the Tribunal now in the Daimler proceedings. It is
8 {CMC-E/7/1}, please. That is the order of His Honour
9 Judge Pelling of 22 April 2020 and paragraph 3 provides
10 for the third to seventh Defendants in that case, that
11 is WWL, to give disclosure of documents provided to
12 regulators that had not previously been disclosed.

13 Perhaps we can just go over the page to show the
14 rest of that {CMC-E/7/2}.

15 THE PRESIDENT: Yes.

16 MS FORD: So what we say essentially is that insofar as any
17 of the Defendants have previously compiled and provided
18 documents to foreign regulators, it should be relatively
19 straightforward for them to provide that same set of
20 documents to the Class Representative.

21 We say that must particularly be the case insofar as
22 the Defendants have already been directed to disclose
23 those documents again in proceedings within this
24 jurisdiction.

25 So we do not see that there can be any challenge to

1 the proportionality of the exercise of handing over
2 those documents, and none of the Defendants have
3 actually put in any evidence suggesting that there is
4 a genuine proportionality type objection to handing
5 these documents over.

6 THE PRESIDENT: You are looking for contemporaneous
7 documents, not, as it were, the to and fro between
8 regulator and person being investigated, even if there
9 is in that correspondence a discussion of issues that
10 might be said to be relevant here.

11 MS FORD: Sir, I do not think the order that we have drafted
12 makes that distinction.

13 THE PRESIDENT: No.

14 MS FORD: What we are looking for is documents that enable
15 us to understand the way in which the cartel operated
16 and its likely effect.

17 THE PRESIDENT: That is what I mean, because for my part,
18 and I am speaking just for myself here, anything that
19 gives you an ability to understand what is going on, and
20 I appreciate, of course, this is a follow-on action, but
21 we all know that there is an enormous nexus between how
22 anti-competitive conduct operates and the quantification
23 of that conduct.

24 So I am not particularly impressed by the suggestion
25 that disclosure should be narrowed by virtue of the fact

1 this is a follow-on action.

2 I do think that you should not be seeing the toing
3 and froing between a regulator and a person the subject
4 of investigation by the regulator, even if it is
5 precisely parallel to what the Commission was looking at
6 and deciding, because what is said there is of no
7 probative value to what one has to decide in this
8 matter.

9 On the other hand, contemporary material does seem
10 to me to be prima facie relevant and if one has got
11 a collection of documents that are not provided to the
12 Commission, i.e., are not captured by the order I have
13 just made, but are contemporary and supplementary to the
14 Commission documents, well, then, subject to a per
15 document relevance approach, my provisional thinking is
16 you ought to have those.

17 Now, is that something that you would be happy to
18 have as a clarification of the order that you seek?

19 MS FORD: Sir, the only caveat I would suggest to that is if
20 the toing and froing were to cast light on the content
21 of the contemporaneous documents, then that would be of
22 relevance in seeking to understand them.

23 THE PRESIDENT: Well, that is, I think, where I have some
24 difficulty. I mean, let us suppose there is
25 a characterisation of the document, the contemporary

1 document in some way in the correspondence. It may be
2 helpful to you, it may be helpful to the Defendants, but
3 let us suppose there is some sort of characterisation.
4 How is it going to help us adjudicate? Because at the
5 end of the day, what the documents mean is going to be
6 a matter for the Tribunal and with the best will in the
7 world, we are not going to really want to adjudicate
8 upon what other people have said about contemporary
9 documents. We want to cut to the chase and look at the
10 contemporary documents.

11 MS FORD: Sir, what I had in mind more was for example
12 a question which says, well, who is this person who is
13 sending this document? What role do they have? Those
14 sorts of questions that enable one to understand
15 a document, that might well be relevant.

16 But, of course, seeking to filter out the toing and
17 froing from the contemporaneous documents might also
18 take time and costs. So it really, again, is a question
19 of whether it is proportionate to engage in that
20 exercise or whether -- the basis on which we have made
21 this application is that there can really be no
22 proportionality objection to it, because this package of
23 documents has already been selected and provided to the
24 regulator. So that is really the basis on which we
25 envisage that it should not involve a lot of work on the

1 part of the Defendants.

2 Just to anticipate the point, and it may be that
3 I am pushing on an open door in the sense of what you,
4 Sir, have just said, but the point that is taken against
5 us, is: well, you have not pleaded reliance on decisions
6 of other regulators, yours is a follow-on claim, it is
7 not concerned with the effect of the cartel in other
8 jurisdictions.

9 Of course, both of those things are true, but the
10 Tribunal will appreciate that we are trying to get to
11 the effect of the cartel in respect of our claim, and in
12 a cartel which is international in nature, we are
13 talking about international conduct, it is based on deep
14 sea shipping routes into the EEA, our particular claim,
15 one cannot presume that simply because a document was
16 provided to a foreign regulator that it is necessarily
17 irrelevant to the effect of the cartel in the context of
18 this claim.

19 So we do say that that sort of objection on the
20 basis that this is a follow-on claim, or we have not
21 pleaded foreign regulation, does not go anywhere.

22 The suggestion has also been made: ah, well, one can
23 assume that if there were relevant documents, then those
24 documents would appear on the Commission file and there
25 is no basis to go any further.

1 We have not been provided with any evidence
2 explaining the basis on which the documents were
3 provided to the Commission, and the respective bases on
4 which the documents were provided to foreign regulators.
5 So, in my submission there can be no assumption that
6 anything that was provided to foreign regulators will
7 equally appear on the Commission's file. So we say that
8 is not a legitimate objection.

9 THE PRESIDENT: Yes. Thank you, Ms Ford.

10 Who is the lucky person who is responding to this?

11 Ms Abram.

12 Submissions by MS ABRAM

13 MS ABRAM: That is me, Sir.

14 Sir, the starting point is that the most relevant
15 documents relating to the facts, operation, nature and
16 effect of this cartel is going to be the set of
17 documents held by the Commission relevant to the
18 Commission file, and those will be provided.

19 Ms Ford's submission on relevance I think was that
20 one cannot necessarily presume that documents sent to
21 other foreign regulators will be irrelevant. That is
22 not the test for relevance on disclosure. The burden is
23 on the Class Representative to explain why the documents
24 are relevant. Of course, in this case, to the extent
25 that documents were relevant, bearing in mind that this

1 was a settlement decision, we will have provided those
2 documents to the Commission and so it is difficult to
3 see why the relevant documents relating to this
4 infringement should not already be in the Commission
5 file.

6 But, that is what I say about relevance. I want to
7 say something about proportionality and then I want to
8 make a suggestion as to how we might take this forward.

9 On proportionality, there is not necessarily
10 a pre-existing set of documents including documents
11 showing all the toing and froing from the regulator. So
12 we had not understood that there was any suggestion that
13 there might be disclosure of documents toing and froing
14 between addressees and the regulator.

15 I can tell the Tribunal, Sir, that in the DOJ, CSAV,
16 so just one of five Defendant groups, produced 200,000
17 documents to the DOJ based on their very wide search
18 terms. They are not quite all but almost all of the
19 documents, contemporaneous documents we produced
20 globally to any regulator, and we produced 100,000 of
21 those documents in the Daimler proceedings following
22 a relevance review. So this is a really, really
23 substantial cache of documents, and if one looks at
24 timesing that by five, potentially, one is looking at a
25 set of documents in the hundreds of thousands.

1 order that was made in the *Volkswagen* proceedings --

2 THE PRESIDENT: Yes, of course.

3 MR SINGLA: -- because there are just two points to draw
4 your attention. It is at {CMC-E/5/7}.

5 So paragraph 13 is the foreign regulator documents
6 provision or order made against my clients and at 13.2
7 you will see:

8 "the obligation to give disclosure ... shall be
9 subject only to a right to redact or withhold material
10 on one of the grounds set out at ... 9.1.3 and 9.1.4
11 above, or otherwise as required by applicable local
12 laws."

13 So there are just two points to draw to your
14 attention. One is 9.1.4 is again the relevance filter.
15 So that is the first point. If they are going to get
16 disclosure of the foreign regulator or these materials
17 that really should be again subject to relevance filter.

18 Secondly, the "or otherwise as required by
19 applicable local laws", this is something that is, as
20 I understand it, going to be argued about or may be
21 argued about in the *VW CMC*, which is in March.

22 Essentially, there are prima facie local law
23 restrictions. I understand the case law in this
24 jurisdiction about the significance or relevance of
25 those restrictions, but at the moment we have not been

1 ordered in the *Volkswagen* proceedings to disclose any
2 documents in this category where there is an issue under
3 applicable local laws.

4 THE PRESIDENT: But could there be such an issue in relation
5 to contemporary documents?

6 MR SINGLA: Yes. As I understand it, yes. There may be
7 a question as to what weight the English court attaches
8 to those local law restrictions. That is yet to be
9 argued about it. But as I understand it, yes, the
10 answer is there may be contemporaneous documents
11 containing, for example, personal information. That is
12 just one example that has been given to me.

13 So I just wanted to draw your attention to the fact
14 that the order, on any view, we would respectfully
15 submit, should not go further -- our primary position
16 is, as Ms Abram says, this a follow-on claim. They
17 should not get any of it. But if you are minded to make
18 the order, we would respectfully suggest it should not
19 go further than the order that has already been made
20 against us in the *Volkswagen* proceedings, at least
21 pending that argument.

22 THE PRESIDENT: Well, why whenever there is a party
23 domiciled abroad does one not have this argument in
24 every disclosure dispute?

25 MR SINGLA: I think I am just not in a position to answer

1 that sort of question in the abstract. There is --
2 there is -- all I can say is there is an issue in this
3 case. I do not know whether it is to do with the nature
4 of the documents or the particular jurisdictions with
5 which we are concerned, but at the moment all I can say
6 is there is an issue that has been raised in the
7 *Volkswagen* proceedings. At the first CMC, this was the
8 way it was dealt with, i.e., we were entitled to
9 withhold or redact to this extent pending further
10 argument --

11 THE PRESIDENT: You see --

12 MR SINGLA: -- which we are not, obviously, ready to have
13 today. That is --

14 THE PRESIDENT: No, I understand.

15 You see, this is one of the reasons why we have the
16 costs levels we have on disclosure. Why is sensitive
17 material not appropriately protected in these
18 proceedings by Rule 102 of the Tribunal Rules, the
19 undertaking not to use for collateral purposes?

20 I mean --

21 MR SINGLA: No, I completely understand, Sir, but obviously
22 I would need to make -- if we were having this argument
23 on the substance, we would need to put in evidence and
24 I would need to make detailed submissions. But at the
25 moment I am not in a position to do that.

1 THE PRESIDENT: Okay.

2 MR SINGLA: I would just -- I would urge the Tribunal to be
3 cautious about going beyond -- I think even Ms Ford is
4 asking for what has been provided in other proceedings.
5 I do not think she is suggesting, although the form of
6 order does seem to go wider, with respect, there is no
7 basis at this stage, on the material you have before
8 you, to make an order which goes wider than what we have
9 been ordered to do in other proceedings. That is all
10 I am in a position to say now.

11 THE PRESIDENT: Is that right, Ms Ford? I thought your
12 order was rather wider than that.

13 MR SINGLA: Well, it is as drafted --

14 THE PRESIDENT: Right.

15 MR SINGLA: -- but I think in substance what she is seeking
16 is what we have already done.

17 MS FORD: Sir, we are happy to be pragmatic and at least
18 start with that which has been provided in other
19 proceedings. We do have some concerns about the
20 compromise proposal which was suggested because, of
21 course, the difficulty is that one does not know what
22 one has not got.

23 THE PRESIDENT: Yes.

24 MS FORD: So the notion that we can look at the Commission
25 documents and identify gaps seems somewhat unlikely in

1 circumstances where we do not know what else exists and
2 is out there.

3 MR PICCININ: Sir, I hear what Ms Ford says about seeking
4 only that which has been provided in other cases just
5 now. Just to be clear --

6 THE PRESIDENT: But some have not provided it.

7 MR PICCININ: We have not provided any. In fact, disclosure
8 was sought from my clients in the *Volkswagen* proceedings
9 and it was not ordered.

10 So we do say that it would be inappropriate for it
11 to be ordered against us.

12 THE PRESIDENT: Well, we are not going to do -- we are not
13 going to be bound in this matter by what has or has not
14 been ordered in *Volkswagen*. We will decide this de
15 novo.

16 MR PICCININ: No, of course not, Sir. The point I was
17 making was rather that one of Ms Ford's submissions is
18 that this work has been done --

19 THE PRESIDENT: Yes.

20 MR PICCININ: -- and the material has been packaged up and
21 is ready to go, and that obviously goes to
22 proportionality. That is not the case for my client.

23 I understand there are 13 jurisdictions around the
24 world, 13 different sets of local counsel that would
25 need to be contacted and engaged with in order to get

1 back that material and put it together. That is
2 an awful lot of work, and for material that is of
3 questionable relevance to the case.

4 MS FORD: Sir, I simply make the observation that it is
5 somewhat surprising that these submissions are being
6 made now without the benefit of any evidence whatsoever.
7 The Defendants have been on notice that we are seeking
8 these categories of documents. Insofar as there are
9 objections of this nature, one would normally expect
10 them to be set out in evidence; and they had not been
11 taken in that way.

12 MR PICCININ: But, I am sorry, that this is -- I can give
13 you a reference in the bundle if you like -- it is
14 {CMC-D/31/2} -- as set out in a letter from my
15 solicitors. I say I do not know if Ms Ford wanted
16 a witness statement, but ...

17 THE PRESIDENT: Well, I think she wants an outcome.

18 If we were to impose the following filters on the
19 disclosure exercise --

20 MR PICCININ: Sorry, Sir, I did not catch that.

21 THE PRESIDENT: Filters.

22 MR PICCININ: Filters?

23 THE PRESIDENT: Yes, if we were to impose the following
24 filters on the disclosure exercise, let us see how many
25 objections we retain.

1 First of all, it is not going to be documents
2 prepared for the purpose of an investigation. It will
3 be contemporaneous documents only.

4 Secondly, anything that has been provided to the
5 Commission is excluded, because it has been provided by
6 the order that I have just made.

7 Thirdly, you may filter for all of the exclusions
8 that we had in paragraph 5 of the order plus a per
9 document relevance test, which can apply. Subject to
10 those filters, you produce the material.

11 Does that absolve the concerns that you had?

12 MR PICCININ: No, Sir, it does not because that would be
13 an enormous amount of work to do to go through -- pull
14 back together all of the documents, the contemporary
15 documents, that have been provided to these other
16 regulators all over the world, concerned with
17 investigations that are different scopes, compare those
18 documents to the documents that were provided to the
19 European Commission and remove the ones that are
20 duplicates, and then review the substance of all of the
21 other, you know, thousands of pages of documents to see
22 whether they are relevant and apply the filters. That
23 is an enormous amount of work to go through in
24 circumstances where the Class Representative has not
25 yet, for obvious reasons, even done the job of looking

1 at -- at what they have got from the
2 European Commission.

3 It may well be that the documents they get from the
4 European Commission materials are more than enough to
5 understand what was going on in the cartel, insofar as
6 it is relevant to inbound shipping into the EU, which is
7 the only point that is of relevance to this claim. This
8 claim is not concerned with, for example, shipping
9 between Japan and the United States, or between Japan
10 and Australia. So going to the trouble of -- of getting
11 hold of and then reviewing thousands of documents about
12 shipping between Japan and Australia seems like
13 a disproportionate exercise, Sir.

14 MR SINGLA: Sir, I wonder if I can make a pragmatic
15 suggestion? I wonder if we could stand this debate over
16 to the CMC in March, where all parties will be
17 attending. Any issues arising in relation to this
18 category of documents in the *Volkswagen* proceedings can
19 also be debated. If we need to put in evidence, in
20 order to have a more substantive and detailed argument,
21 we can, but it is rather difficult without -- without
22 that material to explain properly what -- how much
23 material we have, etc, and --

24 THE PRESIDENT: I mean, how many regulators are you talking
25 about, or do you not even know?

1 MR SINGLA: It is a large number of regulators. If I can
2 take -- from my clients' perspective, they are all
3 listed in the -- the jurisdictions are all listed in the
4 *Volkswagen* --

5 THE PRESIDENT: The jurisdictions, is that equivalent to the
6 number of regulators or is that --

7 MR SINGLA: I think it is. I think, from memory, it is
8 close to ten -- 11, I am grateful, 11 -- and there is
9 a substantial amount of the documentation. It may be
10 that we could assist the Tribunal by setting out in
11 a bit more detail -- as you say, obviously one needs to
12 look at this de novo.

13 THE PRESIDENT: Is it ten regulators and ten different law
14 firms involved?

15 MR SINGLA: It is nine law firms, but obviously then
16 different local law issues and so on and so forth, which
17 probably we could explain in a bit more detail so we can
18 argue this out properly, rather than trying to ...

19 THE PRESIDENT: Okay.

20 Mr Holmes, you wanted to --

21 MR HOLMES: So my clients and Ms Abram's clients are in
22 a slightly different position from the other Defendants,
23 in that we have given some disclosure already. But to
24 just give you some sense of the difficulties that arise,
25 may I just endorse the point about the very large

1 volumes of documentation involved. There were, for
2 example, over 200,000 documents provided by my client to
3 the US Department of Justice, and that is a product of
4 the fact that in US proceedings very broad searches
5 are -- they are not focused requests, they are very
6 broad searches indeed by reference to very large numbers
7 of custodians, very broad search terms. So the
8 consequence of that is that any deduplication exercise
9 would be extremely burdensome, comparing one data set
10 with another. With respect, we would not favour that as
11 a proposal.

12 The second point is that in order to try to bring
13 this within manageable bounds, what was done in the
14 Daimler proceedings in the case of my client was not to
15 undertake a manual relevance review, but to apply quite
16 a broad-brush set of automated search terms using some
17 agreed terms. We, Sir, would be content to provide the
18 disclosure that was provided in the Daimler proceedings;
19 but what we would not be keen upon doing would be
20 embarking on any subsequent exercise, any fresh review,
21 any consideration for relevance or any deduplication
22 exercise as between regulators, because that would be
23 a very onerous and a significant task and it would not
24 be proportionate given the, we think, dubious relevance
25 of this material, for the reasons that Ms Abram has

1 developed.

2 THE PRESIDENT: Ms Abram.

3 MS ABRAM: Similarly, I am in exactly the same place as
4 Mr Holmes. So if there is to be any disclosure, we
5 could give the 100,000 documents we gave in the Daimler
6 proceedings on the basis of those keyword searches. We
7 are not sure how much use they are going to be because
8 there are so many documents, but what we cannot do and
9 what it would clearly be disproportionate to do would be
10 to engage in a further ab initio and de novo relevance
11 review of all those documents.

12 MR PICCININ: Sir, can I make one final practical proposal,
13 which is, in light of those offers that have been made,
14 that if that material were disclosed to the Class
15 Representative, the Class Representative could then
16 review it, see whether those repositories of documents
17 actually add anything to their understanding of the
18 cartel and are relevant; if so, see whether there are
19 any gaps in them that are missing that need to be filled
20 and then come back to us, rather than make us embark
21 upon this exercise. Of course, that is exactly what the
22 court -- the approach that the court took in the
23 *Volkswagen* case, where it ordered disclosure from some
24 and said come back to us, Guss(?), later if, having
25 reviewed it, it seems (a) useful and (b) like something

1 is missing. But otherwise we are just spending a lot of
2 money for not much point.

3 THE PRESIDENT: Yes, thank you.

4 Ms Ford.

5 MS FORD: Sir, for our part we have no objection to the
6 filters that the Tribunal has indicated. It is, of
7 course, a matter for the Defendants whether they wish to
8 avail themselves of those filters or not. So if they
9 contend that it is disproportionate to have to apply the
10 filters, then they can hand over the package of
11 documents; and if they wish to apply them, then they are
12 at liberty to do so.

13 MR HOLMES: Sir, I did not understand from Ms Ford whether
14 she was content with the cut that had already been
15 performed in the Daimler proceedings or otherwise.
16 I would be grateful if she should just confirm.

17 MS FORD: That, in my submission, will be the effect of
18 saying, "We choose not to apply the filters. We will
19 provide you with that package of documents that we
20 provided in the Daimler proceedings."

21 THE PRESIDENT: So I think that Ms Ford is saying that she
22 is happy with the scope of the disclosure provided by
23 your clients, Mr Holmes and Ms Abram, in the past. If
24 you wanted to provide or apply the filters that I have
25 articulated, you can do so and Ms Ford will not have

1 a complaint, but she is not saying you have to do so.
2 It is a matter for you. I think that is the position
3 where we are left with.

4 MR HOLMES: I am grateful, Sir. As long as it is clear
5 there will be no fresh relevance review.

6 THE PRESIDENT: No fresh -- no, that, I think, is clear.

7 Very good. We will again rise for five minutes to
8 discuss the order that we will make. Thank you very
9 much.

10 (2.59 pm)

11 (A short break)

12 (3.04 pm)

13 RULING

14 We have before us an application for disclosure over and
15 above the disclosure of Commission decision and related
16 documents, namely documents which arise out of other
17 investigations conducted by other regulators in respect of
18 matters which may or may not be related to the subject
19 matter of the decision of the European Commission.

20 We are going to park substantially large parts of
21 this application on terms that I will come on to
22 describe, but we are going to provide the Class
23 Representative with the following half loaf, which has
24 been very helpfully proffered to us by Mr Holmes and Ms
25 Abram, acting respectively for the sixth to 11th

1 Defendants and the 12th Defendant.

2 What Ms Abram and Mr Holmes have proposed is that
3 they provide what has already been provided in the
4 course of other proceedings by way of disclosure. The
5 provision is on the basis that they do not have to do
6 any further work. In other words, what has been
7 provided elsewhere is provided to the Class
8 Representative without any further effort on their part.
9 That seems to us a very sensible and pragmatic approach
10 to the issue. There is clearly a risk of some
11 over-disclosure to Ms Ford's client on that basis, but
12 since it is being offered as a pragmatic solution and
13 since Ms Ford finds that solution acceptable, we
14 consider it the appropriate way forward.

15 I add this simply by way of assistance to the sixth
16 to 11th and 12th Defendants. I articulated various
17 filters in the course of argument, one of which was
18 confining matters to contemporary documents, and there
19 are a couple of others which I am afraid I cannot now
20 remember, but will appear on the transcript.

21 I do not oblige the sixth to 12th Defendants to
22 apply these filters, but if they wish to do so, then
23 they will be at liberty to do so because they are
24 intended to cut back the scope of the disclosure, rather
25 than provide excessive disclosure. But that is on a

1 facultative, not an obligatory basis to those parties.

2 So far as the other Defendants are concerned, it
3 seems to us that at the moment no order beyond the
4 following with regard to the provision of information
5 should be made. The other Defendants should provide a
6 list of the investigations that they consider to be
7 responsive to the request for disclosure made by Ms
8 Ford's clients; that is to say, they should identify the
9 regulators involved, the relevant jurisdictions and,
10 with as much specificity as can be given, the scope of
11 the investigation under way.

12 Secondly, they should identify, in addition to the
13 jurisdictions involved, the front-line lawyers involved,
14 so that we have an understanding of the number of
15 counterparties that will have to be considered if we
16 make an order for disclosure in this regard.

17 Thirdly, we would like to understand how these
18 documents are held at the moment. In other words,
19 whether they are held on a document platform; if so,
20 whose document platform, and just how difficult or easy
21 it will be to search the various documents held by the
22 various lawyers instructed by these Defendants.

23 Then, fourthly and finally, we want to have some
24 idea of the volume of documentation that is involved.
25 We are not obliging the Defendants to produce de novo a

1 list volume, but to the extent they know the volume
2 involved, we would like to understand what is entailed
3 in a disclosure order, because we do need to have some
4 idea of the scale of the task.

5 So with that bifurcated disclosure order, we
6 determine the application pro tem made by the class
7 representative.

8 MS FORD: I am grateful. There is only one remaining
9 matter, which is that the parties have agreed the terms
10 of a confidentiality order which is at {CMC-A/8/1}. I
11 would simply invite the Tribunal to make an order in
12 those terms, provided it is content with it.

13 THE PRESIDENT: We will just refresh our memories of it.
14 I am sure it is fine.

15 Next page {CMC-A/8/2}. Yes.

16 The next page after that {CMC-A/8/3}. I have looked
17 at this, but I better refresh my memory.

18 The next page {CMC-A/8/4}.

19 Yes, and going on {CMC-A/8/5}.

20 Again {CMC-A/8/6}.

21 Next page {CMC-A/8/7}.

22 Again {CMC-A/8/8}.

23 Again {CMC-A/8/9}.

24 Again {CMC-A/8/10}.

25 Yes, next page {CMC-A/8/11}.

1 Yes, next page {CMC-A/8/12}.

2 The next page {CMC-A/8/13}.

3 Yes, next page {CMC-A/8/14}.

4 Thank you. (Pause)

5 If that is agreed, then we are happy to make
6 an order in those terms.

7 MS FORD: I am very grateful.

8 Sir, for our part, that is it.

9 THE PRESIDENT: Anyone else got any ...

10 Very good. Well, we are very grateful to all of the
11 parties for their assistance. We look forward to seeing
12 probably all of you in the middle of March when we will
13 be joined by *Volkswagen*, and who knows who else. But
14 thank you all very much. We are very much obliged.
15 Thank you.

16 (3.11 pm)

17 (The Tribunal adjourned until 10.30 am
18 on Wednesday, 15 March 2023)

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