IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1435/5/7/22 (T)

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 28th March 2023

Before:

Justin Turner KC
(Chair)
Sir Iain McMillan CBE FRSE DL
Professor Anthony Neuberger

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Claimants

PSA Automobiles SA & Others

v

Defendants

Autoliv AB & Others

A P P E A R AN C E S

Collin West KC & Sean Butler (Instructed by Hausfeld & Co. LLP) on behalf of the Claimants.
Robert O'Donoghue KC & Hugo Leith (Instructed by White & Case LLP) on behalf of the First to Fifth Defendants (Autoliv).
Sarah Ford KC & David Bailey (Instructed by Macfarlanes LLP) on behalf of the Sixth to Tenth Defendants (ZF).
Daniel Piccinin KC (Instructed by Steptoe & Johnson UK LLP) on behalf of the Eleventh Defendant (Tokai Rika).

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Tuesday, 28 March 2023

(10.30 am)

(Proceedings delayed)

(10.33 am)

Housekeeping

MR WEST: May it please the Tribunal. My name is Colin West KC and I appear --

THE CHAIR: Can you give me a moment? I have to read the announcement. Some of you are joining us via the live stream on our website. I'll start, therefore, with the customary warning: an official recording is being made and an authorised transcript will be produced, but it's strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that is contempt of court.

Can you give me just one moment, sorry, just to plug my computer in.

MR WEST: May it please the Tribunal. My name is Colin West KC. I appear for the Claimants today, with Mr Sean Butler. Mr O'Donoghue KC and Mr Leith appear for the Autoliv Defendants. Ms Ford KC and Mr Bailey for the ZF/TRW Defendants, and Mr Piccinin KC for Tokai Rika, and I believe this is Mr Piccinin's first outing in silk.

THE CHAIR: Congratulations.

MR PICCININ: I'm very grateful.

MR WEST: The Tribunal should have received skeletons from all parties. I hope you've had the opportunity to consider the skeletons and the evidence.

I apologise for the length of the pre-reading list. There was something of a proliferation of issues. Although happily there has been some narrowing of the issues in the last few days, in particular there should be an updated composite directions order in the core bundle, at tab 2.

THE CHAIR: Yes.

MR WEST: The Tribunal will see that rather more of this is marked black, indicating that it is now agreed -- than was the case with the version attached to my skeleton argument.

There are some updates to this composite directions order, which I can, perhaps, just run briefly through, because they indicate some further narrowing of the issues.

At paragraph 11B --

THE CHAIR: Yes.

MR WEST: ZF has pointed out overnight that it doesn't apply to them, which we accept. Although I should say that disclosure in relation to this particular RFQ is currently part of the sample disclosure, so they may have to give disclosure in relation to that in any event.

In the annex, annex 1, page 12, there's currently some wording in green referring to the EEA, and that is now agreed.

THE CHAIR: On which page?

MR WEST: That is 12 of the bundle. This EEA wording in green appears in a number of these paragraphs. The question is whether the Defendant's disclosure should be limited to EEA sales; that is agreed.

THE CHAIR: That's agreed now?

MR WEST: That's agreed.

THE CHAIR: What about the 2007 --

MR WEST: That is not agreed.

THE CHAIR: Okay.

MR WEST: ZF raised the question overnight whether their disclosure of quantum material can be limited to material found in databases, which, as the Tribunal knows, is the proposal the Claimants make for their own disclosure and that is also agreed.

THE CHAIR: So where is that?

MR WEST: That is going to record some additional wording specifying, in annex 1, that it's limited to disclosure of material from databases. But, on that basis, hopefully it can now be agreed that the equivalent wording, in annex 2, limiting the Claimants' disclosure to database documents can also be agreed.

I should clarify, that doesn't apply to disclosure of communications in relation to RFQs. I think that's also common ground.

THE CHAIR: Okay.

MR WEST: It's also agreed that in relation to communications disclosure -- that's communications in relation to RFQs, which are invitations to tender -- there should be a cut-off date. So it should end in 2011, because that coincides with the end of the cartel; that's also now agreed.

It would make sense for the sample RFQ disclosure also to cut off at that point, since that is also directed to the question of the operation of the cartel and of the tender process.

In relation to the sample RFQs, ie which ones are in the sample, those currently appear in the schedule to annex 1. They are all in red. So this is the Claimants' proposal. We haven't yet had the counter-proposal from the Defendants. I suspect, where we are, we're not going to be in a position to resolve this issue at this hearing, so it may be necessary for there to be a provision in the order for the parties to seek to agree it within a specified time; if they cannot agree it, to make brief written submissions or something along those lines.

I would hope it can be agreed, but we don't want it simply to drift after the hearing, because until we know which the sample are of RFQs, the disclosure process cannot really get going.

Hopefully it's simply a question of identifying a sample which is a manageable quantity of documentation.

THE CHAIR: But your submission is we're going to have to hear arguments on the sampling?

MR WEST: My submission is we're not going to be able to resolve this at this hearing, which RFQs are in the sample.

THE CHAIR: I think we would like to know more about it at some point anyway, so perhaps we can get to that in due course.

MR WEST: We can produce an updated version of the CDO, if that would assist, overnight.

THE CHAIR: Yes, thank you.

MR WEST: Those instructing me have compiled a list of issues based on the CDO, and that is found, I believe, in the supplemental bundle, in the letter from Hausfeld of yesterday.

THE CHAIR: It's the letter of 27th. I have it.

MR WEST: In tab 2 of the supplemental bundle.

Subject to the minor points I just went through, I believe this remains accurate as an agenda. I suggest this can be usefully used as the agenda for this hearing.

The Tribunal will see that it falls, in effect, into two halves. We have Tokai Rika's strike out application, and then everything else is really to do with the disclosure.

THE CHAIR: So where are we on timings for today and tomorrow? There was some concern about --

MR WEST: Well, we haven't agreed that. We have agreed that, subject to the Tribunal, the strike out should go first.

THE CHAIR: Yes. How long is the strike out going to take?

MR WEST: Well, I don't know if the Autoliv and ZF Defendants wish to remain here for the strike out. I was going to suggest, if they don't, they be released until after the short adjournment. My friend may have a different view.

MR PICCININ: I'm likely to take most of the morning for my submissions, which is why we said there ought to be a day allowed for it.

It may be Mr West doesn't need that long because I need to go through the authorities and show you the pleadings and the materials relied upon, which is why it will take me some time.

THE CHAIR: Yes. Okay, we'll see how we go. That does seem a generous estimate given the scope of the dispute from the skeletons. But, obviously, you must take your course.

MR PICCININ: Yes. It depends, as well, on questions from you.

THE CHAIR: Yes. So should we start there?

MR WEST: That's all I had by way of housekeeping.

THE CHAIR: Are people staying? It's entirely up to you whether you wish to stay or not, other parties.

MS FORD: Sir, we would be grateful to be released.

THE CHAIR: Of course, yes. So we have, presumably, numbers for you and things. We can keep you informed as to where we get to, when we're getting near the end.

MS FORD: I'm grateful.

MR O'DONOGHUE: We will stay out of morbid curiosity.

THE CHAIR: Right. Jolly good.

(Pause).

Just give me a second.

Application by MR PICCININ

MR PICCININ: I'm grateful. So I would like to start, if I may, with an outline of my application and what it consists of.

You'll have seen, I hope, from my skeleton argument that there are really two

components to it. There is the first component, which is a strike out of the allegations of infringement against my client, so infringement that goes beyond those found in the decision. In particular, I'm focused on the allegations that my client colluded on supplies that formed part of this case, so supplies to the Claimants that formed part of the commerce in this case.

On that, my submission is that there is nothing in any of the regulatory decisions in this case to suggest that my client colluded on any of those supplies.

The Claimants now have all the contemporaneous documents that were produced during two European Commission investigations that lasted for six and eight years respectively. Those investigations were conducted with the benefit of leniency applications from a number of the cartelists including all the Defendants to these proceedings. Yet, with the benefit of that material, the Claimants have not found any documentary evidence to suggest that there was any collusion involving my client in respect of supplies that formed part of this case.

So that's the first component to my strike out application, which will occupy the bulk of my submissions.

The second component is a strike out of an allegation which is really a causation allegation. So this is a strike out of what I say is an amorphous claim, the collusion on supplies of one OSS product, by which I mean a seatbelt or airbag, or steering wheel, so one OEM, say Toyota or Suzuki, caused an increase of prices of other OSS products purchased by other OEMs, in particular, the Claimants.

So just to give an example of that, my client was involved in collusion on the supplies of seatbelts to Suzuki. So the argument would be, that the Claimants are making, is that our collusion on seatbelts for Suzuki caused an increase of prices that the Claimants paid on airbags for the Peugeot 308, for example. Or an airbag in a Maserati, or a seatbelt in one of those two vehicles. So I'm applying to strike that claim

out as well.

This application, by which I mean all of it -- so you may remember, the Chair, that was very heavily trailed at the last CMC by me, probably trying your patience to some extent, and not just the fact of this application, but the content of it, too, those two bases for it. I even took you to the FOREX judgment of that Tribunal, to make clear why I was going to say that we had an application to strike out.

The reason I say that, and the reason I did that at the time, was to ensure that the Claimants were on notice of this. So that when they had the benefit of the months that followed that CMC to produce their amended particulars of claim, they would address the criticisms that I made of it at the last CMC. What I'm saying, today, is that what they've done in that respect is just inadequate.

So, in terms of a road map for that application, I'm going to start by showing you some authorities just on the approach to strike out in this context. Then I'll show you the Commission decision that concerns my client, just briefly. Then the meat of my application will consist -- first, in showing you the pleadings against my client on infringement and the evidence referred. Then, finally, the pleading and the evidence relied on in support of the causation argument.

So if I may turn to the authorities, the general principles concerning the applications for strike out and summary judgment, I'm sure are well-known to all of you. The summary judgment, the principles are those stated by Mr Justice Lewison, as he then was, in EasyAir. We have that in the bundles, but I would just like to take it from this Tribunal's judgment in FOREX instead, because I need to go there. That's authorities bundle, so tab 32, page 1111.

Do you have that?

THE CHAIR: Sorry, give me a second. I just have a few minor issues.

Sorry, which page again?

MR PICCININ: Page 1111.

THE CHAIR: It's not scrolling for some reason.

MR PICCININ: You're looking electronically as well?

THE CHAIR: Yes. We have hard copies.

MR PICCININ: I'm working electronically, so I'm afraid I couldn't tell you which volume it was, but it must be at the back end, given it's tab 32.

THE CHAIR: Sorry about that.

MR PICCININ: Yes. So, since it's familiar, I'll just run through it briefly. But you can see, at paragraph 208, the Tribunal sets out the quotation from EasyAir and I just wanted to draw attention to a couple of points.

The first one, which is at (i), is that the question on a summary judgment application is whether the claimants have a realistic rather than fanciful prospect at trial.

Then, at (ii), we can see that "realistic" carries some degree of conviction. It means something more than merely arguable.

At (iii), you can see that the Tribunal is not to conduct a mini-trial, and I won't be inviting this Tribunal to conduct anything that is remotely like a mini-trial.

At (iv), that doesn't mean that you just take the allegations made by claimants at face value, because some assertions that a claimant may make may have no real substance. That's particularly so if they're contradicted by the contemporaneous documents. Here we have contemporaneous documents, because disclosure of the Commission files has already taken place.

(v), a point against me. We need to take into account not just the evidence that the claimants already have, but also any evidence -- this is important -- that can reasonably be expected to be available at trial. So there needs to be some basis for that expectation which is reasonable.

Then (vi), you should hesitate to strike out if there are some reasonable grounds that

exist to believing that the fuller investigation at the trial can affect the outcome.

(vii) we don't need to worry about because that's about points of law and this isn't one of those summary judgment applications.

I want to show you as well what this Tribunal said in FOREX about the strike out jurisdiction, and that's just over the page.

Just picking it up from paragraph 209, you can see the Tribunal said that there's no hesitation in saying:

"In causes of action where actionable damage is a necessary element, a failure properly [and I emphasise the word properly] to assert a causal link between breach and damage will result in a claim being defective and, if that defect is not cured, liable to be struck out."

This was in the context of the collective proceedings, but the same is true for other cases, as the Tribunal said.

Paragraph 210:

"It's not enough for a claimant to commence proceedings unable properly to make the necessary factual averments."

Again, "properly", and sufficient to constitute a cause of action. And:

"In particular you can't commence proceedings in the hope that material will turn up later that will enable you to make those averments."

211, that's why in that case the Tribunal sent a letter to the parties about the Nomura case, which holds that it is an abuse of process to advance a claim where it is not possible at the time the claim is made to plead out all the necessary elements of the cause of action.

212, the Tribunal explains that the basis on which claims can be struck out has expanded with the advent of the CPR, which the Tribunal rules emulate. Under those rules a claim may be struck out when a statement of case discloses no reasonable

grounds for bringing or defending the claim. That's different from the old formulation. The current formulation is doubtless wider. But what is clear under both dispensations is that a statement of case may be struck out where a necessary element of a cause of action has not been pleaded with proper particularity. It is this element of the strike out jurisdiction that the Tribunal was concerned with in that case, and Nomura dealt with a special situation where a pleading is defective in that way, but the argument is made that if only disclosure was given, and here if only more disclosure was given, the deficiency can be made good and the pleading corrected.

The Tribunal says:

"Although a party will generally be given an opportunity to amend to make good a deficiency of that kind, Nomura makes clear that that opportunity must be taken before and not after disclosure."

So, in other words, a claimant needs to have a reasonable basis for bringing the claim. It's not good enough to plead an assertion and hope that material to support it will come up later.

Now, there have been lots of applications to strike out or for summary judgment in competition claims over the years, but almost all of those are made by defendants in the context of a jurisdiction challenge. Almost all of them concern applications by what's called anchor defendants, which are subsidiaries of parties -- subsidiaries in the jurisdiction of parties that have been found to have participated in the cartel. They say, "Well, it's not arguable" or "nothing has been pleaded to explain why this subsidiary would also have been involved in the cartel". So there's a lot of case law around what's required in those circumstances, which is not much at the jurisdiction stage before any disclosure has been given.

But I want to look at one case which is not about anchor defendants. It's similar to our case because the claim concerns supplies that were outside the scope of the

Commission decision. So they had a pleaded allegation that the cartel in that case extended beyond what the Commission had found to the supplies that did form part of the claim. So that's like what we have here; that's my infringement strike out.

Also an allegation that the cartel on other supplies, so the cartel that had been found by the Commission, had what I'm calling "spill over effects" and my learned friend, I say wrongly, calls "umbrella effects", on the supplies that were actually at issue in the case.

So this is the Bord na Mona case, and it's about supplies of the plastic industrial bags. That's in the authorities bundle, at tab 16. So somewhere halfway through if you're using hard copies, I imagine, and it's page 308.

THE CHAIR: Sorry, which page?

MR PICCININ: 308. I'm going to begin on the next page, 309.

So, just picking up from paragraph 5, you can see what the Commission found in that case was a cartel in the French, German and Benelux markets.

Scanning up to the page to the top paragraph, 2, you can see that the claimants did have some purchases in Germany and the Netherlands, and there was a proper follow-on damages claim based on their own supplies, based on what the Commission had found. But the question was whether they could also sue for purchases in the UK and Ireland, where the Commission decision had not found that there was a cartel.

At the time that this application was made, there was no disclosure at all, not even the confidential version of the Commission decision, so it's just the public version that everyone was working from.

If we can go on to page 311, so just a couple of pages on -- I should say that the reason I'm taking this to you is: although every case is obviously different, this case, I say, is illustrative of the kind of thing the claimants in these stand-alone or causation arguments need to do to resist a summary judgment or strike out application; that's

why I'm showing it to you.

If we just see paragraph 12, you can see that this is the key recital from the Commission decision in that case on the geographic scope of that cartel. It identifies the relevant markets.

Then you can see, in the middle the paragraph, the Commission added that there was some evidence that appears to show that the arrangements occasionally concerned other countries as well.

So you can see that the decision itself in that case showed that there might be something more, it offered some promise of more.

In paragraph 13, you can see right at the very end that Mr Justice Flaux, as he was, was saying that he took from this that the Commission had not conducted an exhaustive investigation regarding the other countries.

Then over the page, at paragraph 14, you can see that there was reference to another recital in the Commission decision that described the document that appeared to set quotas and prices for Western Europe, which again might be thought to provide some support for the cartel in relation to the UK and Ireland.

That was about all they could take from the Commission decision because, as I say, at that stage they didn't have the file. But they did have these hints they could point to, that there might be something more.

If we could go on to page 317, I just want to pick up slightly more by way of legal principles, because you can see at the bottom of the page, in paragraph 28, there's reference to a decision of the then Chancellor, Sir Andrew Morritt in the Humber Oil case. You can see in the second paragraph of that quote from Humber Oil, Sir Andrew Morritt actually quotes from Mr Justice Roth in the Sel-Imperial case, so that's paragraph 17.

You can see that he said:

"It's important that competition claims are pleaded properly. To contend that a party has infringed competition law involves the serious allegation of a breach of a quasi public law which can indeed lead to the imposition of financial penalties, as well as civil liability. A defendant faced with such a claim is entitled to know what specific conduct or agreement is complained of and how that is alleged to violate the law."

Then Mr Justice Roth -- this is a bit like the Inception film, we get layer upon layer of quotation -- Mr Justice Roth then quotes Mr Justice Laddie in the Victor Chandler case, where Mr Justice Laddie said:

"These are notoriously burdensome allegations, frequently leading to extensive evidence, including expert reports from the economists and accountants, the recent history, back in 2005, of cases in which such allegations have been raised illustrate that they can lead to the lengthy and expensive trials."

Then Mr Justice Roth, speaking in 2010, said:

"Subsequent experience only reinforces the accuracy of that observation."

He then explains:

"This is not to adopt an overly technical approach to pleadings, but is consistent with the overriding objective [and I submit the analogue of rule 4 in this Tribunal] to enable the case to be dealt with expeditiously and fairly. It's only through the clear articulation of each party's position and statement of case with appropriate factual detail that the other side can know what case it has to meet and what issues any experts have to address, and so that the court can effectively exercise its case management powers."

We'll see that theme is picked up again later in the Tribunal's very recent case law.

So that is three judges with very great experience in competition law stressing the importance of holding claimants in these cases to the proper standard of pleadings. So that this Tribunal, in FOREX, was not going off on a frolic in applying Nomura to a competition case, but those concerns that we saw earlier are longstanding and familiar

in competition claims.

But I need to show you what Mr Justice Flaux went on to say by way of qualification of those observations, in paragraph 29 and 30.

At 29, he says:

"You don't strike out a claim unless it's bound to fail."

That's a reference to applications to strike out on the basis that the claim is bad in law. So I say that sits alongside the Nomura-type abuse of process strike out that the Tribunal discussed in FOREX. But I accept what he said in the rest of this paragraph, namely:

"Where any defect is capable of being cured by amendment, the court should refrain from striking out unless it has afforded an opportunity to the party to amend."

But, again, you have my submission on that. The claimants have already had that opportunity, and they have not turned up today with an application to amend in any further way.

The second qualification is also important, paragraph 30. It says:

"Where the claim involves damages arising from infringements of competition law by cartels which are secret, the court is considering an application by alleged participant to strike out prior to disclosure and evidence. The court will tend to allow a more generous ambit for pleadings where what is being alleged is necessarily a matter which is largely within the exclusive knowledge of the defendants."

So that's more latitude that you would get in other cases.

Again, I absolutely accept that. But that qualification, I say, is itself subject to three further qualifications.

The first, which is obvious, is that the degree of latitude depends on the circumstances. So Mr Justice Flaux was talking about a situation prior to disclosure in evidence, and the same is true of the excerpt that then follows from the Nokia case. Whereas, in this

case, we've had full disclosure of the documents that were gathered in two European Commission investigations, so that means a different degree of latitude is appropriate. Second, even pre-disclosure, we are only talking about a more generous ambit than in other cases. It's not carte blanche. There still needs to be some specificity and some basis for making allegations of this kind, and that's why I'm going to show you what the basis was in this case.

The third is that the reason, the rationale for this latitude, is that the allegation concerns matters that are largely within the knowledge of the defendants. But, as we will see, one thing that can often be done in these cases is plead from what's within the knowledge of the claimants, because the claimants usually have something to say, or at least can have something to say from their own experience of competition in the market as well, so we'll see that.

If we can just go on to page 324, you can see, right at the bottom of the page, there's a heading:

"The hybrid and stand-alone claims."

What Mr Justice Flaux and the parties referred to as a "hybrid claim" in that case was the allegation that the infringement found by the Commission on the continent also had an effect in the UK and Ireland.

The difficulty with that type of claim was primarily one of causation. So Mr Justice Flaux starts with that so I will look at that. It's paragraph 53. It's really the second half of it that I want to look at.

So what you can see there is the claimants relied on a proposition of fact from within their own knowledge to support that claim of causation. What they said is that the prices they paid in the UK and Ireland were not discernibly different from the prices that they paid to members of the cartel on the continent.

You can see how that provides a basis for pleading the kind of spill over effects in the

causation that were at issue in the hybrid claim in that case and, similarly, could provide some sort of basis in this case, if such an allegation had been made.

Paragraph 55, they go on and they make a case that's based on a specific tender they conducted in 1999. They say that prices at the end of that tender, which was a competitive tender, were substantially lower than previously. They put forward expert evidence, at this stage in defending this application, to suggest that this implied there had been an effect of the continental cartel previously.

So, in my submission, that shows how an allegation of causation outside the scope of the cartel, "market wide harm" is the terminology that we now use, should be made. Some basis for it needs to be put forward.

The claimant might say that the commerce in the claim all concerns a highly homogeneous product, the prices for which are the same wherever you buy it, or that some particular experience they had qua claimant supports the inference of an effect. So that's something you can do that gives you a reasonable basis to then go out and get extensive disclosure and have a long trial. So we'll come back to that later.

Moving onto the stand-alone claim, it's at page 328, paragraph 63. You can see, again, on the stand-alone case the claimants also placed reliance on what could be inferred from their tender process in 1999.

Just over the page, if you go to paragraph 68, just to cut this short, you can look at a little summary that the court produced of what the claimants contended, again supported by their expert economist. It said that various features of the bidding process won the remarkable proximity of Stanford's offer to BPI's current prices; (2) the low number of bids submitted; (3) the apparent submission of a sham bid, all of these things supported the reasonable inference that the cartel extended to or affected the markets in the UK and Ireland. There was no evidence any of this had ever been brought to the Commission's attention.

So, again, you can see from this that the claimants had grappled with the issue that they're trying to establish a cartel that had not been found by the Commission. They've put forward reasons grounded in facts that were within their knowledge and supported by an expert opinion of an economist to provide a basis for that allegation, so that the Tribunal, the court there, could be confident that this was the type of case that should go forward to disclosure.

Now, that's just one case. Mr West is right that there are other cases out there where people have pleaded stand-alone cartel infringements, and nobody applies to strike them out or they do and it fails. He gives the example of his client's stand-alone, hybrid, individual claims in the FOREX case and in the Allianz proceedings.

I'll just give you some references to that and, just to save time, tell you what the upshot was. That's in authorities bundle, page 35, beginning at page 1285. In that case, there was actually, in paragraph 8, a class action litigation in the US about global FOREX manipulation, going back all the way to 2013. That followed publication of an article, in Bloomberg, that contained allegations of that sort.

So the original proceedings -- so, originally, Mr West's clients in that case issued proceedings only against the banks that actually had been found by the European Commission to have been involved in that cartel. They then had disclosure -- and this is in paragraph 14 of judgment -- on the back of that claim of all the material on the Commission file, as well as disclosure from -- that had already been given previously to other US and UK regulators who had been investigating the same conduct.

Because, of course, the thing about FOREX is conduct that happens in London, say, relating to the US dollar-GDP exchange rate affects trades taking place in both New York and the UK. So the same conduct was in interest to regulators in both jurisdictions.

Then what the claimants did was, they reviewed that evidence and then they pleaded

the stand-alone case by reference to that material that they had been given. So, again, we see that is orthodox, and it's something that you see happen in other cases as well. There's something in the public domain that suggests there's a wider cartel which you plead, you then get the Commission file and you see, lo and behold, there's more evidence with which, rightly or wrongly, you can plead a case.

So that's actually what happened here. I turned up at the last CMC and said: really worried about this pleading. It's so inadequate it deserves to be struck out. But can I see that Mr West's clients will want to see what the Commission found in its investigation and come back and do your best. Give us your best shot, and then I'll take my best shot, and that's what we're doing today.

So those are the authorities I wanted to show you.

If we just move on to look at the decision in the OSS1 case. That's also in the authorities bundle. It should be the first one. It's tab 5, and it's page 70 that I want to pick it up at.

There are a few pages of contents.

So you can see who the parties were, the three Defendants who are and were in front of you today, plus Takata, who has settled with the Claimants, plus Toyoda Gosei, who was the 12th Defendant, who has also settled with the Claimants and provided disclosure to the Claimants. Plus Marutaka, who is missing from these proceedings.

Recital 1 says that the cartel concerned price coordination and market sharing in respect of the supply of OSS products for passenger cars to a number of Japanese car manufacturers active in the EEA.

Page 72, we have a recitation of the procedure that the Commission adopted in this case, how we arrived there.

Recital 19. February 2011, my clients applied for immunity in relation to collusion on supplies of seatbelts to Toyota.

Recital 20. Six weeks later, Takata applied for immunity on supplies of airbags to Toyota, seatbelts to Suzuki and seatbelts, airbags and steering wheels to Honda.

So what happened there was an investigation -- that had begun as an investigation about seatbelts to Toyota -- expanded because Takata put forward evidence of infringing conduct that went beyond what the Commission had then been looking at.

Just pausing there, we also know from the other decision about the OSS products, OSS2, that at the same time Takata also provided evidence of conclusion on supplies of two European manufacturers, Volkswagen and BMW. Unsurprisingly, given that the European Commission is rather concerned with supplies and distortions of competition in Europe, the Commission didn't put those in the bin and say, "I'm focused on Japanese manufacturers, go away, not interesting", what it did was it opened a whole new investigation and investigated those as well. So it structured the investigations as one for the Japanese OEMs and another for those two European OEMs.

It didn't stop there. Over the page, recital 21, you can see that a couple months later the Commission actually conducted a dawn raid at Autoliv. It didn't just rest the materials it was given, it went out and conducted a dawn raid at Autoliv.

Then it applied for the leniency. Then two and a half years later, recital 23, Toyoda Gosei applied for leniency.

Then recital 24 explained that the investigation continued for another two and a half years. Then the Commission initiated proceedings with a view to the settlement negotiations. That was April 2016, more than five years after the investigation began.

Then I want to show you what the Commission said about these cartels, recital 34, on page 75:

"The essence of each of the four cartels concerned the maintenance of each competitor's incumbent commercial rights to supply a specific type of OSS [so that's

seatbelts or airbags, or whatever] for a particular passenger car model."

Then they go on to explain what was meant by that.

The gist of that was that it had coordination of new tenders for a particular model, the object of which was to ensure that whoever won the right to supply that OSS product, for that model, for that OEM would win at the second time as well.

THE CHAIR: Do we know: why are these four separate cartels? I understand why the steering wheel is different to seatbelts, but seatbelts as against what -- one manufacturer to another; why would they be different cartels?

MR PICCININ: So it is unusual. In most Commission decisions, what the Commission finds is a single market-wide cartel. It can only be that the Commission thought that was the right legal analysis of the facts that were presented to it.

THE CHAIR: So we don't know the reason? There's nothing in here that explains why that --

MR PICCININ: No, I think they're the only recitals to the decision that explain why that -- this case.

But there are recitals of decisions which explain why each of those cartels constituted a single and continuous infringement, each of those four separate cartels on their own, constituted that. That's the conclusion that the Commission reached on the evidence before it.

It may be, just looking at it, that there are different parties involved in different ones. So, just looking at seatbelts for example, you can see that there's Tokai Rika, there's Takata, there's Autoliv, there's Marutaka for Toyota, but there's only Takata and Tokai Rika for Suzuki.

You can see similar differences across all four of these and plus the others in the OSS2 decision. Different time periods as well.

So thinking about the criteria that applied to the question of whether there is a single,

overall cartel, which is a factual analysis of the extent of similarity and overlapping conduct and overall plan that motivates all of them, it's not difficult to see why, observing these differences and dealing with products that are bespoke -- which is common ground between the parties -- the Commission might have alighted on that analysis. But that's the analysis that it alighted on and those are the findings that we're stuck with.

Of course, the Claimants now have all the material that the Commission had. If the Claimants wanted to say, "When you look at that material, actually there are more overlaps than the Commission perceived and there was a single overall plan, you can see it from these documents", that's something the Claimants could have pleaded and haven't. So that's really why we're here.

So I'm not suggesting that recital 34, which is about the incumbency, is the limit of the cartel that the Commission found. Not at all. But it is important, I say, that the Commission says that was the essence of the cartel.

The Commission went on, in recital 35, to say that sometimes, when there was a wholly new model, that the parties would meet to find common understanding as to who had supplied the relevant OSS equipment for that model.

Recital 37 makes clear that didn't happen all the time. Sorry, that didn't happen all the time, even for these OEMs in these time periods, it didn't happen all the time. It's only in most cases that there was even a discussion.

I also just want, before we leave this decision, to show you a little bit more about how the leniency applications worked in practice. Because the Claimants faintly suggest that what might happen in these investigations is you just focus on what the Commission is looking at, like the date range the Commission is looking at, and you don't try to extend it with anything going beyond that.

We've already seen, from the procedural summary, that is not right. That Takata's

leniency application massively expanded the scope of this investigation, in terms of products and customers, products and OEMs.

But we can also see, from the penalties part of this decision, that the leniency applications extended the duration as well.

So we can see on page 96, recital 133, that Autoliv actually had partial immunity in relation to one bit of the Toyoda's seatbelts cartel because it provided evidence that enabled the Commission to expand the duration of that cartel. That meant that Autoliv didn't get penalised for that bit of it.

Then, at recitals 137 to 138, you can see that both Autoliv and Toyoda Gosei received partial immunity for the third airbags cartel for the same reason; they allowed the Commission to extend the duration of that cartel by providing more evidence that it hadn't seen before.

So even those later leniency applications by Autoliv and Toyoda Gosei were providing evidence of infringements outside the scope of what the Commission had already found.

Of course, you have every incentive to do that as a leniency applicant, because if someone else gets there first, then you may have to pay a fine for the additional period that the other people disclosed to the Commission.

Finally, I just want you to show you the operative part of the decision, which is on page 100.

Again, you can see that there are four separate findings of infringement with different participants and with different dates. Again, the dates part might also be a reason why you don't find that it's all part of a single and continuous infringement. Suzuki, for example, is only from 2008 to 2010. Even within Toyota the periods are not the same for each of the cartelists.

It's important for my case on causation that Tokai Rika was not found to be involved

in collusion in supply of seatbelts to Honda, and not found to have been involved in the collusion of the supply of seat belts or anything else to VW or BMW. Indeed, not found to have participated in collusion on anything other than seatbelts to anyone. That's actually going to be important, I should say, to both parts of my application, infringement and causation.

So now I need to show you the pleadings. When I do that I'm going to dip into the evidence at the same time. There's actually only one bit of evidence I need to show you, so we can cover everything off as efficiently as possible.

So if we can go to the core bundle, please, tab 11. Page 12 is where it starts, but I'm going to pick it up from page 26.

THE CHAIR: Sorry, give me a second.

Yes, I'm sorry. You're going to pick it up where?

MR PICCININ: Page 26, with the promising sounding heading:

"Facts giving rise to the claim."

Are you there?

THE CHAIR: Hm-mm.

MR PICCININ: Good. Paragraph 39. There's an awful lot in paragraph 39. It's really the core allegation of infringement:

"Over a period which extended from at least as early as 6 July 2004 ..."

I just need to pause there because there is slightly weasel wording, "at least this early". I understand the words "at least as early" to mean they are alleging a cartel from 6 July 2004; they're not alleging that there was a cartel on 5 July 2004 or any earlier date. But nor are they positively alleging that there was no cartel on those earlier dates. That's my construction of the words that appear there.

THE CHAIR: Well, you'll explain to me why that matters in a moment no doubt.

MR PICCININ: When we get to -- yes, when we get to the B0, we will see why it

matters.

So, in those dates, the undertakings to which the addressees of the decisions belonged, so that's all of us. There is an allegation that what follows applies to all of us.

They then go on to say:

"... or any two of them in combination."

Sorry:

"Any two or any more than two of them in combination."

So:

"All those different groupings entered into and implemented one or more agreements or concerted practices to prevent, restrict or distort competition in the supply of OSS products [that's all of them] to automotive OEMs, including [so including, but seemingly not limited to] PSA, FCA and Vauxhall Opel [those are the Claimants] (or any of them) as well as Toyota, Honda, Suzuki, Subaru, BMW and ..."

VW Porsche. So there is an awful lot there, as I said.

They seem to say that all of us, or maybe some of us, colluded on supplies for airbags, steering wheels and seatbelts to OEMs including the Claimants, as well as that last six.

Of course, the Commission has thoroughly investigated collusion on supplies to those last six, except Subaru. I think Subaru is there because there's a DoJ finding in relation to Takata without Subaru.

But what is the basis for the allegation, I ask, that Tokai Rika colluded on the supplies of airbags to Toyota? What is the basis, I ask again, for the allegation that my clients colluded on supplies of anything at all to Honda, anything at all to BMW, anything at all to VW, Subaru, the rest of them? There's nothing anywhere in the pleadings to justify those allegations.

The same for the Claimants. Just running through them, I think it's common ground that there is nothing that is pleaded anywhere in this document about my clients -- no specific basis given for any allegation that my clients colluded on supplies for any of the FCA brands, none of them; any of the Vauxhall Opel brands, none of them, and indeed any of the PSA brands other than the B0 project, which we're going to come to, which is actually a joint venture with Toyota.

So all those allegations are made with absolutely zero basis. I don't say no reasonable basis; I say no basis, nothing. So they should all be struck out.

Now, in the green text that follows over the page, what we have is the best that the Claimants have been able to do with the material that they've been given, which is all the material that the European Commission gathered. These plead specifically collusion relating to the Claimants; that is the focus of it. They don't go off and deal with Honda and everything again.

But, just flicking over it -- I don't want to waste too much time, but if you just flick through those green pages, none of that relates to Tokai Rika.

So if we go on --

THE CHAIR: You place reliance on what the Commission did and didn't do; what's your position on why the Commission didn't investigate the Claimants generally, supplies to the Claimants generally?

MR PICCININ: Yes, so we've seen what the Commission did. It was given leniency applications by all the parties except for Marutaka, I think. It also conducted a dawn raid at Autoliv.

My submission is that the only appropriate inference is that the Commission didn't find any material that it thought justified a finding of infringement relating to the Claimants; that's what I say.

THE CHAIR: Right. But you don't know, and we don't know, whether the Commission

addressed its mind to supplies to the Claimants?

MR PICCININ: I think we can take it that the Commission did its job properly, and so the Commission looked at all the material it was given. It would be quite wrong for the Tribunal to proceed on the basis of the Commission didn't look at the material over -- a six or eight-year investigation didn't look at the material it was given. But, obviously, the Commission didn't have any material other than the materials that the Claimants had.

So what that means is that all these parties, when they were doing their leniency applications, and you've seen the way they made applications that expanded the scope in terms of OEMs, no one came forward and said, "Yes, there was collusion in relation to Citroen, there was collusion in relation to Fiat".

I'm not asking you to find that it's a theoretical impossibility that there was any collusion involving the Claimants. I can't say that. But what I do say is: if you're going to make an allegation, there needs to be a positive basis for it, not just that I can't rule it out --

THE CHAIR: But, in your skeleton, you rely on the absence of findings from the Commission. That's part of your positive case, as I understand it.

MR PICCININ: That's right.

THE CHAIR: And I struggle with that a little bit.

MR PICCININ: That may be, Sir, because you take me to say more than I am about it.

What I'm saying about it is: that doesn't provide any support for the Claimants' case. Specifically when get to the B0, where you'll see that material was produced for the Commission in relation to B0, it does seem pretty unlikely that where the parties were looking at the B0 they somehow didn't think to look for B0 phase 1.

But I'm going come on to B0. That's a specific one.

But the Claimants generally, I don't say much about the Commission decisions

because all they say, really, is they didn't contain anything that concerns the Claimants. It's not case that the Commission saw it and then missed it, because the Claimants had the material.

So if the Commission had discarded material that was relevant, and the Claimants have had a go at that. Those are the green bits I just pointed to you. They have had a go at saying there was collusion involving Vauxhall Opel, but not involving my clients. I don't know if that's why my learned friends aren't here making a strike out application as well. Maybe they think those arguments are bad, but ones for trial. I don't know. But they're not ones that concern my clients.

So that's important. All these couple of pages of green material are all about Takata and --

THE CHAIR: Yes, I understand. We have read them. Yes.

MR PICCININ: Good.

So turning to page 29, what I say is that there is no basis for any of the allegations in paragraphs 41, 42 or 43 concerning my client colluding on supplies to the Claimants. I just note in particular that paragraph 41 now has the green word "accordingly", and that seems to be a reference back to the green text we've just looked at, which didn't concern my clients. So I just say there's no proper basis for those allegations.

The Claimants need something positive. That's really the nub of my application. I'm not asking you to find that it's impossible, or it follows from the Commission decisions that it's impossible there was any collusion --

THE CHAIR: You've made that submission, I think.

MR PICCININ: I don't make that submission.

THE CHAIR: You have made that submission already, yes.

MR PICCININ: I'm sorry.

So then there's paragraph 44, which I want to park for now, because that is the

causation argument that I'm going to come back to.

THE CHAIR: Right.

MR PICCININ: But before we do that we need to deal with over the page, section F, which concerns TPCA. That's really the focus.

My learned friend sometimes seems critical of me for focusing on this section. He seems to think that I focus on it because it's the only instance they've identified of my clients making supplies to the Claimants or to someone who's connected with the Claimants. His point -- he makes it in his skeleton -- is that we can also be jointly and severally liable for collusion on products that we agreed not to supply to the Claimants, and that's obviously correct. If we were party to a cartel where we agreed not to compete to supply Citroen, then they could sue us as part of that cartel.

So that's not why I focus on the TPCA. The reason I focused on this one is because it's the only example of the Claimants even alleging that we colluded on supplies to anyone even connected with them on the basis of any specific evidence.

There are no examples anywhere where it is said that we colluded to avoid winning a contract to supply any of the Claimants.

As you will have picked up, I'm sure, at paragraph 47, it's common ground that the TPCA was a joint venture between PSA and Toyota. It had a project, a vehicle project effectively, called B0 which came in two phases. The first contract was awarded in 2005, but the tender began in 2002.

The second project launched in 2014, which is well after the cartel ended.

But I should say there was some -- the tender initially began before that, during the cartel period. We're going to come on to look at some documents relating to it. But it then ceased its common ground because of the financial crisis and began again some time in 2010. We don't know exactly when.

But the key point about phase 2, which is what all the documents relate to, is it's

outside the scope of this claim. Because the seatbelts were supplied by Takata and, actually, the airbags are supplied by Toyoda Gosei. All that commerce has been removed from the claim by my learned friends.

The basic problem with my learned friend's case in this stage of the pleading is all the alleged examples of collusion they plead here relate to phase 2.

Pausing there, there are a couple of interesting things about these phase 2 examples of collusion that I just want to draw attention to.

One is: the reason the Claimants have them is of course, as I said before, that these documents were given to the Commission during the OSS1 investigation. So it's obvious that collusion, or potential collusion, relating to B0 was something that the parties considered was relevant or at least provided to the Commission.

Another interesting thing is that for B0, phase 2, Tokai Rika was actually the incumbent supplier, because it's common ground Tokai Rika had won the contract to supply seatbelts for phase 1.

You can actually see, if you go down to paragraph 49E(ii), on page 32, you can see what was said in that email:

"That the supply of seatbelts for phase 2 was a commercial right that we can never give away."

But, as I've just said, Tokai Rika did not win the contract for phase 2, despite that. So obviously something went wrong on Tokai Rika's perspective. We know what happened. As I said, these emails are all from 2008/2009, but the project was pulled and only restarted after the dawn raids of the DoJ at least. It seems only concluded or launched in 2014, which is well and truly in the Commission investigation.

So it's not surprising that although these materials were provided to the Commission, it's common ground that these materials don't form part of the Commission's finding of infringement.

I say that's not surprising. It actually doesn't matter. All that is an aside. The important point is: whether these commissions are infringing or not, so whether you could in principle have found a cartel for supplies to B0, phase 2, they don't relate to any commerce in the claim.

So the only reason they seem to be here at all is to support the submission that somehow these documents showing collusion in relation to phase 2 supports an inference that there was also collusion in relation to phase 1.

THE CHAIR: And what's wrong with that as an inference? Assuming that's what it shows, and I appreciate you don't accept that. But assuming that's what it shows; why is that not a reasonable inference to draw at this stage of proceedings?

MR PICCININ: I say because phase 2 and phase 1 are in critically different positions. In phase 2, there was an incumbent, which was Tokai Rika, the seatbelts. Whereas, in phase 1, there was no incumbent, so there could only have been collusion if the parties had come together to agree from scratch that the Tokai Rika should be the winner, which of course is something that might have happened. But the documents you see, relating to phase 2 -- which I'm going to come to; we're going to look at the underlying material -- don't provide any support for the contention that ever happened, that there was any meeting to get together in 2002 to agree who should --

THE CHAIR: You've said quite a lot. Can you just go through that more slowly?

Why is that not a reasonable inference? If this does an arguable case of collusion with regards to phase 2 --

MR PICCININ: It's because of the nature of that case. The case is that Tokai Rika was the incumbent. That's what the documents show, at 49E, and consistent with what the Commission said was the essence of these cartels. There was collusion -- or it's alleged that there was collusion between the parties to preserve that incumbency. Whereas, for phase 1, there was no incumbency, because for phase 1 it was

an entirely new model. So there's nothing in the documents, I say -- and we'll look at one of them -- to say that there was this different form of collusion in phase 1, where the parties had received an invitation to tender for an entirely new vehicle and they came together to agree who should become the incumbent in circumstances where there wasn't one. But, more than that, that request for the quotation for phase 1 came in 2002. There's not even an allegation that is pleaded, that's why I showed you 2004.

THE CHAIR: I see.

MR PICCININ: Now, the model was award in 2005, so I have to accept that and that's during the alleged cartel period. But, again, if we're looking at the forms of collusion that the Commission identified, they are talking about the parties getting together for entirely new models at the beginning to decide who ought to be the winner, 2004 seems a bit late for that, really, for a tender that began in 2002.

THE CHAIR: So that 2002 date; where do I find that in the --

MR PICCININ: I'm sorry, I'll need to get a reference for that. It's in Mr Bolster's witness statement, I think Bolster 5.

THE CHAIR: Okay. In due course, when someone can dig it out.

MR PICCININ: So that's what I say. I don't say it's impossible that there was an earlier cartel that somehow all these leniency applicants doing their best to expand the Commission's findings of infringement missed, but there is no particular reason to believe that it did happen.

THE CHAIR: So you're saying it's possible your clients were part of a cartel?

MR PICCININ: It's possible that anyone was part of a cartel. Everything is possible. But there's nothing in the materials to suggest that was the case, that could provide a reasonable basis for making that allegation. So that's what I'm submitting to you.

So I'd like to look, though, at what I think is the high point of their case, which is the email from Tokai Rika, 27 November 2008, which I hope will allow me both to rebut

the argument that my learned friends make, but also to show you this point about incumbency and the significance of it.

So that's in the exhibits-bundle. I'm thinking it's actually a few different places in the exhibits-bundle. But I was going to go to tab 11 and page 2231.

So this is the convenient translation of the original Japanese --

THE CHAIR: Is this a convenient moment to have a five minute break for the shorthand writer?

MR PICCININ: Of course. Yes.

THE CHAIR: So we'll be back at 14 minutes to.

MR PICCININ: Sorry?

THE CHAIR: We'll have five minutes.

(11.41 am)

(A short break)

(11.49 am)

THE CHAIR: Right. We're going to the email, I think; is that right?

MR PICCININ: Just before we do. I'll give you the reference. It's the point about 2002. It's in Bolster 5, paragraph 7A, which is in the application's bundle, tab 14. If you'd like to look at it, it's in tab 14, page 164.

THE CHAIR: Tab 14 ...?

MR PICCININ: Page 164.

THE CHAIR: Yes.

MR PICCININ: Of course, I say as well about this, just like in Bord na Mona, the Claimants through TPCA were also involved in that tender and, unlike the claimants in Bord na Mona, they've not come forward to say: well, it's interesting, because we invited X, Y and Z to participate, but --

THE CHAIR: I mean, I don't find attempting to draw analogous facts across cases

particularly helpful. I mean, we --

MR PICCININ: That's fine, Sir. I'm just trying to say that there are things that a claimant could do to investigate an allegation like this.

THE CHAIR: Right.

MR PICCININ: Then provide a factual basis for it, a reasonable basis for the allegation that is made, by investigating their own materials. They've not pleaded anything specific about the B0 tender, any of the things they might be able to observe in it that were unusual. Whether it's close together, where someone refused to participate in the tender. Did the tender develop in a particular way over the course of years that was surprising? There's nothing like that.

So I'm not saying Bord na Mona says everyone needs to do that in every case; I'm just trying to illustrate the kind of things that you could find in a pleading. I'm not saying a stand-alone allegation should be impossible at all, quite the contrary. There are lots of things you can do and they haven't done them.

THE CHAIR: Sorry, just go through that list again of things they could do. Just --

MR PICCININ: Yes. So they haven't done anything; right? They haven't pleaded anything about it.

THE CHAIR: I appreciate that. You just gave some examples.

MR PICCININ: There are things they could do. They could say they issued the invitation to tender to a particular set of tenderees, and that surprisingly somebody didn't participate. That would be one example.

Another would be that the bids came in and they were surprisingly similar at one level, and the others were all at a higher level. They could tell us who were the tenderees.

THE CHAIR: That's what I was searching for. So we don't know who tendered?

MR PICCININ: They've not said anything about it at all, despite these being matters that must be within their knowledge. It may be said the only people we've asked, as it

happens, are people who were party to the Toyota seatbelts cartel. Then they behaved in ways that were suspicious for these reasons. The partner bids.

That was the only reason for going to Bord na Mona, just to illustrate --

THE CHAIR: I understand.

MR PICCININ: But the particular document I wanted to look at is at exhibits bundle, tab 11, page 3221.

What this is, is an internal email from a Mr Ken Obara, and he is someone who was interviewed by my solicitors as part of the leniency process. That's in Mr Whiddington's second witness statement, at paragraph 19, just for your note.

Obviously, we don't waive the protection that applies to those materials. But just in case it is said that we might have completely missed someone important who knew about B0, or this email is particularly important --

THE CHAIR: I understand.

MR PICCININ: It's within scope.

The key bit for this email, towards the bottom of the page -- can you see, six or so lines up, there is the text:

"Next B0 for all seats will be the commercial right we can never give away."

So that's saying that the next B0, as in phase 2, so 2008, was their commercial right. That's because they were the incumbent suppliers for phase 1.

Then it says:

"Regarding B0, we have been discussing with competitors since the time of the Yaris competition."

Of course, the Yaris is a Toyota vehicle. It goes on to say that they are tentatively --

THE CHAIR: So who are the competitors that they're discussing?

MR PICCININ: I'm about to get to that.

THE CHAIR: Okay.

MR PICCININ: So it goes on to say that they, we, being Tokai Rika and those competitors, are intending to move forward with the following allegations.

I understand AL is Autoliv; TR is Tokai Rika; and TKA is Takata. You can see that particular allegations are mentioned. In particular, next term, B0, so that the phase 2 B0, all seats Tokai Rika. There are also references to the Yaris.

Then, over the page --

THE CHAIR: So, sorry, just -- you say -- obviously, we can't form a determinative view of what this means necessarily. But what do you say -- so next term Yaris. So Yaris, in this particular second phase of B0, is concerning the Yaris; no? So Yaris would have been going back to --

MS FORD: Yaris is a separate -- not a B0 at all.

THE CHAIR: It's not a B0 car?

MR PICCININ: No, it's a Toyota vehicle. It's not a joint venture car.

THE CHAIR: So the joint venture cars are what?

MR PICCININ: It's the B0. There may have been others, but no others that are here.

THE CHAIR: Oh, B0 is a type of car, is it?

MR PICCININ: It's a project name for a type of car. The particular car is a Peugeot. There's a Toyota Aygo and there's a particular Peugeot and Citroen car. I can't remember which ones.

THE CHAIR: There's evidence to say that B0 doesn't cover the Yaris?

MR PICCININ: I think that's common ground, yes.

THE CHAIR: Okay. So ...

Right. So next term "Yaris"; what does that mean?

MR PICCININ: Autoliv seems to get none.

THE CHAIR: Okay.

MR PICCININ: CDV, I can't help you with. But I understand it's a type of vehicle.

THE CHAIR: What does "avoid price battle" mean, do you say?

MR PICCININ: I don't have any submissions as to what that does mean, but that seems to relate to the CDV.

THE CHAIR: But it's consistent with cartel activity.

MR PICCININ: I can see why you might say that. I'm not inviting to you find that. That's not the case at all.

THE CHAIR: It's not a question of just what's not; it's also what is arguable.

MR PICCININ: Sure. But I say it's just not relevant to the B0, because that's referring to CDV, which is something else.

Then we get to the relevant bit that my learned friend relies on.

THE CHAIR: So -- okay. Why is it -- you say it's relating to CDV, I see.

MR PICCININ: Because you can see that the text "CDV" column, and then it says: "Autoliv odds on favourite. Avoid price battle."

I can see what you might think that means.

THE CHAIR: Okay.

MR PICCININ: But next term:

"B0, all seats Tokai Rika."

So that is suggesting it's consistent with the text that appears above, which is our position. What had been discussed seems to be -- with the other parties -- was that the proposal was that all the seats in phase 2 would go to Tokai Rika. That's not what happened. That does not matter, that's by the by. But that does seem to be what was proposed.

THE CHAIR: So proposed to AL?

MR PICCININ: Sorry, to AL?

THE CHAIR: We have an AL. Sorry, just help me with this a bit more. I'm not quite understanding your submission at the moment. We have a reference to AL; yes?

MR PICCININ: Which I understand to be Autoliv.

THE CHAIR: Yes:

"And ..."

And then some text. So what's the relationship between AL and the last clause "all seats TR"?

MR PICCININ: Nothing. As I understand, the "all seats TR" relates to the next term, B0.

So what we have here -- what we're looking at here, it doesn't really matter what the details are, nothing turns on it, except to say you have proposed allocations that have been discussed between these competitors about who would get what for different vehicles.

THE CHAIR: Right.

MR PICCININ: There's some reference to the Yaris, which is irrelevant because that is Toyota. There's some reference to the CDV, which I don't know anything about, and there is a reference to the B0, which we all know what it is, and this is the bit my learned friend relies on. There the proposal was everything should go to my clients for the seatbelts because my clients were the incumbent. So that's what --

THE CHAIR: There was a proposal for two competitors.

MR PICCININ: That's right. That's what the document is saying.

So that he is just for context, really. The important bit is actually what follows over the page. That is what my learned friend relies on.

THE CHAIR: We'll come on to that. But you're accepting that this email is evidence of cartel activity around the time it was written, 2008?

MR PICCININ: At least for the purpose of this application, yes.

THE CHAIR: Yes.

MR PICCININ: It came to nothing, but yes.

THE CHAIR: Right. Sorry, you were going over the page.

MR PICCININ: So, over the page, immediately after setting out these proposed allegations which were being tentatively put forward by the competitors, we have the text that says:

"Nevertheless I heard something that the person in charge of PSA in Autoliv has an authority of, maybe final decision on B0, so careful discussions will be held for several times behind the scenes again."

I say that the first word of that sentence is important, the "nevertheless", because what it's doing is qualifying what's just come before. So the rest of the sentence is qualifying what's just been set out or commenting on what's just been set out as these proposed allocations.

What it says is that his he'd heard that the person in charge of PSA, which is one of the Claimant groups of brands, at Autoliv is the person who has authority for Autoliv's bid for B0. So, because of that fact, careful discussions will be held several times behind the scene again.

THE CHAIR: Hm-mm.

MR PICCININ: So I say the only sensible interpretation of that is: he's just told you, just told the internal Tokai Rika recipients of this email that he's been having discussions with his competitors, including Autoliv, resulting in the proposals that he's just set out. What he's saying is: well, unfortunately, we're going to need to do that again, we're going to need to have those discussions again, because actually the person that I needed to be talking to Autoliv is the person in charge of the PSA account, presumably rather than the Toyota account.

Now, my learned friend says: no, no, that's not right.

He says the word again at the end of this sentence must be a reference to collusion that took place years ago in relation to the B0, phase 1. But it's just impossible to

understand why that could follow, what would have to be to do with the proposals that have been set out in the previous paragraph.

THE CHAIR: But I think you accept -- and of course this is all at the level of being arguable, I appreciate that, it's the caveat.

But you accept that this indicates that the cartel activity of your client extends beyond the sale of seatbelts to Toyota as found by the Commission.

MR PICCININ: Extends to?

THE CHAIR: No, extends beyond.

MR PICCININ: I was just going to qualify what you put to me. Except it extends to an attempt to coordinate, a failed attempt to coordinate on B0, phase 2. That's the limit of what this document shows. This document doesn't show anything other than a failed attempt to coordinate on B0, phase 2.

This document went to the European Commission. It may be that the reason the Commission didn't do anything with it is because it was obviously, but self evidently, a failed attempt to coordinate.

THE CHAIR: But "odds on favourite to avoid Price battle"; you're not suggesting that's a reference to the Yaris, as I understand it?

MR PICCININ: I thought it was a reference to the CDV, but it doesn't matter.

THE CHAIR: Well, it does in answer to my question, because the finding of the Commission, sorry -- unless I'm getting this wrong -- is that there was a cartel in respect of the sale of seatbelts to Toyota, which your client was involved in, and the sale of seatbelts to Suzuki.

MR PICCININ: That's right.

THE CHAIR: And now, here, we have another possibility, which is the CDV, whatever that is.

MR PICCININ: I've no information that isn't another Toyota brand. There is no

allegation, there is no pleading about that, there is no suggestion in the evidence that is anything other than another Toyota vehicle. It's certainly not said to be one of the Claimants' vehicles.

THE CHAIR: Right. But the point I'm putting to you is: this email is consistent with the argument and is supportive for the argument that there was collusion beyond those findings made by the Commission.

MR PICCININ: Only to the extent that it relates to a failed attempt to collude on B0, phase 2.

THE CHAIR: Right.

MR PICCININ: Because there's nothing in this document and no one said anything about this document suggesting that anything in the rest of this document is anything other than Toyota seatbelts. It's Toyota seatbelts and then there's this joint venture between Toyota and PSA.

THE CHAIR: But this is your document.

MR PICCININ: That's correct.

THE CHAIR: You could have told us what CDV was.

MR PICCININ: I don't want to have a mini-trial, so I don't want to lead evidence that might be contested about what this means or that means or the other thing means. It's not alleged against me that CDV provides any evidence of that. It's not even said, I don't think, in any of Mr Bolster's six witness statements.

THE CHAIR: Yes.

PROFESSOR NEUBERGER: Can I ask one question? I didn't understand what you're asking us to read into that "nevertheless" paragraph. I didn't quite understand.

MR PICCININ: The reading that I was putting to you was saying that those discussions we've just had, with Autoliv and others, that led to those proposed allocations, we need to do that work again now because we've been talking to the wrong person at Autoliv.

The right person to talk to at Autoliv in relation to the B0 is actually the person at Autoliv who is responsible for dealing with PSA. I assume the person that they've been talking to instead is the person at Autoliv that is responsible for talking to Toyota, but it doesn't matter.

Whereas what my learned friend says is: no, he's talking about something else. He's saying that these discussions we're having on B0, we need to have them several times behind the scenes, just like we did six years ago when we were dealing with phase 1. He wants to read the word again as meaning "just like we did six years ago in relation to the phase 1", and I say that's not a sensible reading of that sentence. That's my submission about this document.

So what does that --

THE CHAIR: If this goes to trial, Mr Obara will give evidence.

MR PICCININ: That's true. I do say to read this document in 2008, that has just been talking about a particular set of discussions, expressly, and then it says: we need to have discussions again because it is so, and because the person in charge of PSA at Autoliv, who is responsible for the B0, to read that as being just some random other reference to some other collusion six years ago, isn't, even though it's a summary judgment resistible reading of that sentence.

That's my submission.

THE CHAIR: Right. Where do we go to next?

MR PICCININ: So where we go to next is just ask: where does that leave the Claimants with their pleaded allegations concerning infringement?

Well, what we've seen is there's nothing at all in relation to anything other than B0. So, at the very most, what they have is this argument based on this document --

THE CHAIR: I understand that. We'll see what they say about that.

MR PICCININ: The rest of it, we say they have nothing.

In respect of this one, I do say it's relevant. This is where I do rely on the context of the Commission investigation. As I said before, that what they're positing is that --

THE CHAIR: Sorry, who is "they"?

MR PICCININ: Sorry, the Claimants must be positing that the parties to the OSS1 Investigation did produce evidence that showed what you've just said is collusion relating to B0, phase 2, and included this word again in an email written by Mr Obara. They interviewed Mr Obara; that's what Mr Whiddington said, he did it personally. They were leniency applicants, so my clients were leniency applications to the European Commission and --

THE CHAIR: I mean, you're not even entitled to ask us to rely on the findings of the Commission, are you, and the assessment of the evidence? I mean, that has to be for this Tribunal. Surely --

MR PICCININ: Absolutely. I'm not submitting that you're bound to reach the same conclusion. Not at all.

THE CHAIR: You're trying to foist on me what might have happened in an imagined interview as to why certain steps weren't taken. Whether that's legally admissible is a serious question mark. It certainly doesn't seem to be persuasive. It doesn't seem to be your best point.

MR PICCININ: No. Okay. Well, my Lord -- Sir, sorry, I think you have what I'm saying about that, which is that it's just part of the context. That you would have thought that if there had been collusion on phase 1, given that we've seen that there were leniency applicants who came forward and expanded the scope of the Commission investigation, with material about other OEMs, other time periods, it seems likely that someone would have found that and would have put it forward. There's no reason why. There's no reason to think that people would have missed that.

It's not impossible, but it's quite hard to understand how that would happen with so

many leniency applicants doing their best.

So that's my submission about the B0, and I say the B0 is really all they have.

I say it's not enough.

So I invite you to strike out everything else in any event, then the B0 if you're with me on the argument that I've just made to you.

So those are my submissions on infringement.

Moving on to causation, I should stress that these two parts of the application work independently. So whether you're with me on infringement might make a difference to what you think about the argument on causation. But they do stand independently from each other.

So I want to go back now to the way it's pleaded. So if we can go back to the core bundle, tab 11, page 29, and it's paragraph 44.

THE CHAIR: Sorry, bundle number 29?

MR PICCININ: Paragraph 44.

THE CHAIR: Yes.

MR PICCININ: So they say:

"In the further alternative even if there were no cartel concerning supplies of OSS to the claimants, the effect of the cartels established by the Commission decision and the findings of other regulators would have been to increase the prices charged by the cartelists of supplies to OEMs other than the targets by tending to lessen the degree of competition in the market in general and thereby to increase prices in the market.

"The defendants are liable for the losses resulting to the claimants by reason of such increased prices, even the absence of any cartel concerning supplies to the claimants specifically."

So the only thing that is said about the mechanism by which that would have happened

in this case is that the collusion found by the Commission would tend to lessen the degree of competition in the market in general, and thereby to increase prices in the market. Nothing more specific than that.

There's not even a plea as to what the market is. They say that can all come later, which is having an amorphous plea that any collusion in this sector, whether it's airbags for Honda or seatbelts for Suzuki, just increases prices for all OSS products, for all OEMs, at all times during the claim period.

Now, if that will do, then the upshot would be that anyone in a broad sector in which there was cartel activity, even if not inside a market, could escape strike out and use the threat of a costly disclosure exercise and trial to extract settlement sums from defendants in cases for cartels that did not concern them. I want to compare that with what the case law of this Tribunal says about what is required for this type of pleading specifically.

So this Tribunal and the CJEU, I should say.

So, firstly, since the Claimants like to call this "umbrella damages", I want to show you what the case law actually says about umbrella damages first. That's the decision in Kone, which is tab 3 of the authorities bundle. If we can just pick it up from page 42.

This case was about the elevator's cartel, and there was a cartel damages claim in which there was a claim --

THE CHAIR: Sorry, which page again? I apologise.

MR PICCININ: Sorry, page 42.

So there was a cartel damages claim, which included a claim for umbrella damages, which we are going to look at in a moment.

There was a reference to the CJEU because Austrian law precluded umbrella damage claims altogether, so they weren't sufficiently causally linked with the cartel. The question was: is that consistent with EU law and the principle of effectiveness?

The court says that it wasn't. You have to allow that type of claim.

So, if we can just look at paragraph 27, you can see that said:

"In the main proceedings the claimant claims that part of the loss it suffered was caused by the cartel issue which made it possible to maintain a market price at such a high level that even competitors not party to the cartel were able to benefit from a market price that was higher than it would otherwise have been, but for the existence of the cartel, whether in terms of profit margin or simply of survival ..."

Et cetera.

Paragraph 28:

"It is not disputed by the interested parties that have presented observations that a phenomena such as umbrella pricing [which is what has just been described] it recognised as one of the possible consequences of a cartel in certain circumstances."

By contrast, the appellants in the main proceedings, they're essentially arguing that it would be inappropriate to interpret EU law, meaning that it would permit claims for umbrella claims.

In that regard, in paragraph 29, it should be noted that market price is one of the main factors taken into consideration. So that's a factual matter:

"The market price is one of the main factors taken into consideration by an undertaking when it determines the price at which it will offer it goods or services. When a cartel manages to maintain artificially high prices for particular goods and certain conditions are met relating in particular to the nature of the goods or the size of the market covered by the cartel, it cannot be ruled out in those circumstances that a competing undertaking outside the cartel might choose to set prices higher than they otherwise would have. In such a situation, those prices can be taken to have been affected by the cartel in short."

So you can see that's a phenomenon in which there is a market and there's market

price which is effectively set by the cartel or moved by the cartel. The consequence is that other transactions, not the cartel transactions, take place at that higher market price as well, and that is what establishes the proximate causal link that is required.

So before I get to my submissions, I just want to show you one other authority, which is go to back to FOREX, which is in tab 32, and it's page 1113.

THE CHAIR: 1113, did you say?

MR PICCININ: Sorry, I think that's the wrong reference. Paragraph 217.

THE CHAIR: Yes, 1113. Yes.

MR PICCININ: So it is. Yes.

So I need to apologise, because I need to bounce around a little bit in this one, just to pick up the definitions.

So, at paragraph 217 to 218, the Tribunal deals with the straightforward case of collusion on supplies that form part of the subject of the claim and you can see what the Tribunal says there is that in those situations, where you have collusion under commerce, if I can put it that way, causation might be said to be res ipsa loquitur, it follows from the thing itself. Because the consequence of the cartel is that those transactions do not occur in a competitive way, because they're the subject of collusion. That is then in the passages I'm going to come to, contrasted with market wide harm.

To see how that is defined, it's on page 1087. You need to go backwards. The Tribunal later actually says it's in paragraph 141, but I think that is a typo, because paragraph 139 seems to be the one to me that defines market wide damage and underlines it.

So:

"The claims in that case are not straightforward. In different ways, each applicant advances a claim for what might be called [and what we will refer to as] market wide

damage or harm resulting from the inference found by the Commission. We appreciate it's not a precise label. It seeks to encapsulate forms of loss sustained by claims, both directly and indirectly, which are diffused across a market. A textbook example of this [which is not the FOREX case] is umbrella effects. In such case a case, identifying the manner in which the loss is transmitted through the market is likely to be challenging. It's inherent in the vagueness of the label 'market wide damage' that is liable to embrace a wide number of cases."

That, I say, does cover the claim that we've just seen in paragraph 44 of the particulars.

So I now want to show you some of what was said by the Tribunal about that, and if we can pick it up from 1129. I just want to show you -- you can see the heading:

"The market wide harm."

So this is where we come to market wide harm. It's paragraph 232.

At 231, the Tribunal has just explained the economic theoretical basis for why you might think market wide harm could arise in the context of FOREX.

232 says:

"Economic theory does not in and of itself constitute an arguable legal claim. As we have put it, to the lawyer it amounts to no more than assertion bereft of the particularity that is required in order to render the claim triable. Economic theory does not automatically or easily translate into a legal claim. A civil action requires amongst other things identified or identifiable claimant, identified or identifiable defendants, and some kind of actionable and identifiable harm caused by the defendants to the claimants."

I showed you that because that comes up again, if we cross-reference to the next bit I'm going to, which is page 1131, which is paragraph 234. That's subparagraph 2, where I'm picking it up:

"We do not consider that market wide harm cases can be pleaded at a level of economic theory only. The facts of the matter, set out in paragraph 232 [which you've just seen] are unlikely to be provided with the specificity required to try a claim by theory alone, but we should stress that we are very much alive to the difficulties of pleading a market wide harm case and will be open to novel ways of doing it provided they were sufficiently specific to enable the trial processes properly to go ahead."

Then, at 3, we have a very helpful suggestion from the Tribunal as the two ways in which it might be done. The first is a statistical correlation between infringement and effect on market spreads could be averred. The essence of such a plea would be that whilst the transmission mechanism would not be set out or averred the statistical relation between infringements and the effects was such as to amount to an arguable claim. The explanation for this correlation was that the widening spreads in that case or higher prices in this case were caused by the infringement.

Look at the start and end of the causal chain, without filling in the detail, inferring those links from the data.

That's the first way.

The second way is that you could trace through the causal steps.

Then it's important that we go on to page 1136, to see what the Tribunal said. Because there was, in that case, a pleading of econometric -- a statistical link between the infringing conduct and the harm, but I need to show what was said about that.

So, in subparagraph 4, on page 1136, it says it may be what the PCR in that case was trying to do. You can see what is said there, that they intend to test the causative effect of the cartels by their effect on prices. This could be achieved by rigorous empirical testing upon regression analysis and corroborative techniques based on disclosure.

Then it goes on to provide further details of this. There are obviously expert reports

and so on as well.

But then what the Tribunal says, at subparagraph 5, is at best:

"This plea is one where there is the hope framed as an expectation that something will come out in the wash, probably in the form of the regression analysis that can be conducted, that would, if these actions were to proceed, be provided on disclosure, so as to enable a theoretical position to be fleshed out by some kind of fleshly articulated case."

THE CHAIR: Sorry to interrupt you. I'm sure you told me already: had they had disclosure in this case at this stage?

MR PICCININ: In this one?

THE CHAIR: Yes.

MR PICCININ: No.

THE CHAIR: So it's pre-disclosure?

MR PICCININ: Yes. This was a class action, a collective action, so this was at the certification stage.

THE CHAIR: I'm sorry.

MR PICCININ: There also wasn't an application to strike out. This is work the Tribunal did on their own motion in that case.

THE CHAIR: Understood.

MR PICCININ: But, subparagraph 6:

"Allowing actions to proceed on a wing and a prayer is precisely what Nomura enjoins. Defective claims cannot be allowed to proceed in the expectation, even the competent expectation that the deficiency will be made good by disclosure. The answer to this sort of problem is pre-action disclosure. No application along these lines has been made."

Then 7:

"Nor are we confident that the regression analysis would demonstrate the kind of correlation between infringements of decisions and movements in the market so as in and of itself to make the causative link between the infringement and the losses alleged."

So the Tribunal looked at what had been put forward by the class representative and said, "You know what? We're not convinced that this will be do the job".

So what have the Claimants done against that background other than the mere assertion in paragraph 44? What is there in the particulars of claim to provide any support for this?

If we go back to the particulars, we can see there is some pleading of how the markets, I would say, work. That's at page 16 in the core bundle. It's at paragraph 10(i) and --

THE CHAIR: Sorry, could you give me in a reference again?

MR PICCININ: I'm sorry, it's at page 16 in the core bundle.

THE CHAIR: Which tab?

MR PICCININ: Tab 11.

THE CHAIR: Page 16 internal?

MR PICCININ: No, page 16, as in the external numbers. Tab 11, page 16, paragraph 10.

THE CHAIR: Yes.

MR PICCININ: Are you with me, Sir?

THE CHAIR: Yes, I have it. Go on.

MR PICCININ: Oh good, excellent.

So here we have the Claimants pleading about what the CJEU called the certain circumstances in the case, let's learn about what's been done. What is the product? What's the nature of the product?

Okay, 10(i):

"OSS components are typically bespoke, customer specific products. In order to select their suppliers, the claimants would typically issue a request for quotation to potential suppliers. RFK might be issued for a new contract or in the context of an existing contract if they wanted to make a change."

Then they plead that there are lengthy tender processes for each specific product for each specific model of the vehicles. We can see that at (ii).

There needs to be a response concerning both the technical nature of the product, as these things are not off-the-shelf, and a response, like a tender response, with the economic office. This is so bespoke that it usually goes on for a year or more.

So that's positively unhelpful for their market wide harm case. It's not like FOREX, where a dollar exchanged for a pound is a dollar exchanged for a pound.

If there was no collusion on any of these tenders that form the commerce of this claim; how exactly is it that collusion on seatbelts to Suzuki -- to take the best case for the Claimants -- would affect the prices that anyone offers --

THE CHAIR: When you say the case hasn't been pleaded yet. You say the case hasn't been pleaded yet.

MR PICCININ: Yes, not to the standard that is required.

This is where it matters a bit, what you think about my strike out application on infringement, because if you're with me on the strike out application on infringement entirely, that means that all that's left is Toyota and Suzuki, and only in the particular time periods found by the European Commission. Because that's the only thing that's a reasonable basis for them to allege by way of infringement.

So, if you're with me on that, then the specific question really is: how did those particular tenders, which they can see in the Commission file materials, they can see where there was conclusion, what the Commission was referring to, they have the documents; how would those ones cause harm on whatever particular tenders it is

that the Claimants carried out during the claim period? Which ones? Why?

If you're against me on the B0 project, then we add the B0 Project to the list. So it's Toyota, Suzuki and B0. Again, we need to know why did that collusion affect prices on Fiat 500 seatbelts?

THE CHAIR: So if we're against you on that, this paragraph -- there's no application by the other Defendants to strike out this paragraph?

MR PICCININ: No, that's right, Sir.

THE CHAIR: So the investigation into identifying paragraph 44 would proceed. What's your position as to whether or not you should be a part of that in those circumstances?

MR PICCININ: Sorry, my Lord?

THE CHAIR: What is your position as to where you would stand? If we were against you on your principal case, and bearing in mind the paragraph 44 investigation is going ahead or enquiries going ahead in any event; are you saying you should nevertheless be able to extract yourself from paragraph 44?

MR PICCININ: I say two things. One is that, if you're with me on it, nothing's been pleaded here. Then, actually, have you powers of the Tribunal, just like the Tribunal did in FOREX, to do this of your own motion, strike it out altogether. That's one thing you can do.

The other thing is that you can strike it out vis-a-vis my client, so that my clients don't have to go away and do disclosure and do all that exercise to examine all these diffuse and amorphous causal links that haven't been identified. It's not my client's fault that my learned friend don't have the gumption they do, and there's no reason why we should be put to that cost just because my learned friends want to do that.

THE CHAIR: No.

MR PICCININ: So that's what I say about it.

So I do say that --

THE CHAIR: Sorry to interrupt. But just so we know where we're going, you say you shouldn't have to give that disclosure, as I understand, you've not made submissions on the scope of disclosure; is that right?

MR PICCININ: All I've said is I agree with my learned friends about that. What I'm saying is: it should be struck out against us. And once it's struck out against us --

THE CHAIR: No, I understand that. But if it were to proceed, your disclosure obligations would be the same as --

MR PICCININ: Sorry, if that allegation were to proceed?

THE CHAIR: Yes, exactly.

MR PICCININ: Absolutely. I just meant that's the reason why it should be struck out.

THE CHAIR: I understand.

MR PICCININ: I do say, Sir, it's sometimes tempting just to decide the applications before you, in fact it's very often the right course. But this is a matter, as you've seen from this Tribunal's judgment in FOREX, it's about triability. It's about the ability of this Tribunal to carry out it functions under rule 4, to try cases in a way that is expeditious and fair. Fair not just to the parties, but to other court users, and to embark on that sort of process in circumstances where there's claim that this Tribunal, that is in a form that this Tribunal has said is unacceptable I do say is inconsistent with what is required of this Tribunal.

So this isn't just a party-party thing; this is also just about your ability to do your jobs in managing this Tribunal.

THE CHAIR: Yes, all right.

MR PICCININ: Yes. So the only other thing we have in the pleading on this topic of causation is page 42, paragraph 80. I think it's somewhat generous of me to say that it's on this topic.

This is part of the causation loss and interest section. It's paragraph 80 which says: "So far as concerns the overcharge, the claimant's preliminary econometric analysis over which privilege is not waived has identified cartel overcharges as follows ..."

THE CHAIR: Yes.

MR PICCININ: All they seem to be saying is that controlling for whatever they've controlled for, which they won't tell us, their seatbelts were 10 to 16 per cent during the claim period than afterwards; that's what regression does.

But there are all sorts of reasons why it might have been the case that they paid more for seatbelts in the period 2004 to 2011 than afterwards; the financial crisis is just one. We don't know anything about their regression analysis at all because, unlike in Bord na Mona -- I know you don't like comparisons, Sir -- another thing they might have done is turn up with an expert report in support of their claim on causation and they haven't.

But what's funny is that they have turned up with -- I'll call it an expert report -- they're a bit careful about what they call it -- in relation to their disclosure application, which said something quite different from this.

THE CHAIR: It's my fault, I'm sure. I'm struggling to see the relationship between 80 and paragraph 40, whatever, on --

MR PICCININ: Yes, I think what they're saying is: paragraph 80 basically says we suffered loss, and paragraph 44 is one way in which we might have suffered loss. So I think Mr Bolster does rely on paragraph 80 in support of his causation claim, if I'm not mistaken. He said he does.

Yes, and I say it just doesn't do the job, particularly in circumstances where we haven't been told anything about it.

As you put to me, Sir, in relation to the Commission investigation, you can't assert privilege over something and positively rely on it. That doesn't allow this Tribunal to

test it in any of the ways that has been done in the other cases. Mr Justice Flaux was able to look at what the experts said in Bord na Mona. This Tribunal, in FOREX, was able to look at what the experts said in that case and assess it.

But this certainly don't show there was market wide harm at all.

As I say, the interesting thing is that the Claimants have put forward an economic report which talks about a different form of analysis, and that's in the exhibits-bundle at page 7. I'm struggling to get there myself. It's tab 2.

Have you managed to find it?

THE CHAIR: I'm getting there. Page 7, you say?

MR PICCININ: That's right. This is part of the letter from AlixPartners, explaining why they require certain documents and data.

THE CHAIR: Yes, okay.

MR PICCININ: They say:

"Consistent with its objective the cartel is likely to have caused prices to be higher than they would have been absent the collusion. I note that the decisions do not directly name Stellantis as being targeted by the cartelist, but the cartel may still have caused prices to be higher to Stellantis to the extent that the illegal conduct extended to Stellantis and/or collusion relating to some customers spilled over to affecting the prices to Stellantis."

Now, of course, that is a truism. If then, that must be right. But all they're saying about this is that's something he envisages testing in the future. He doesn't say any analysis done so far, or the analysis in paragraph 80 of the particulars of claims, supports that, just something in the future.

If we go on to page 11, you can see in the bottom, on 318, he notes, again, Stellantis is not named:

"Having defendant sales data to other OEMs, could that be established whether the

prices charged to Stellantis during the cartel period developed in a similar way to defendants' prices to those OEMs identified in the decision?"

Over the page he gives more detail:

"Once I have those data, I will be able to perform a difference and difference analysis, comparing trends in the Stellantis prices with those in the OEMs. The objective is to identify whether they had different or similar trends over time. I will be able to compare whether the prices that defendants charged to Stellantis fell differently from other OEMs, eg VW or BMW."

Of course, we weren't party to any cartel involving BMW or VW:

"By identifying its prices the defendants increased their prices towards Stellantis in a similar way to those, I can further consider the nature and extent of the cartel effects on Stellantis."

Now, there are lots of problems with that I don't want to get into with you. But again I will say this is hope not even framed as expectation. It doesn't say it expects to be able to find that. It doesn't identify any features of the market that support that as a likely outcome or even a plausible one, and I also note what's missing from all of this. Now, the Claimants themselves -- and the reason I do this, I keep doing this, Sir, is because it might be said against me, "Oh, we don't have disclosure. What's the poor Claimant to do?" I keep wanting to say, "There is work you could do. You've had years to get to this point, years. There is work you could do to provide a proper basis for a claim like this". I'm not setting a bar that is impossible for the Claimants to meet.

Here, the Claimants themselves produce lots of different models of vehicles from lots of different brands. Indeed, during the claim period, many of those were under completely separate ownership, Peugeot and Citroen were separate from Vauxhall and Opel, both of those separate again from Fiat, Alfa Romeo, Chrysler, Jeep, Maserati, and yet the Claimants have not even pleaded, let alone set out any basis for

pleading, the proposition that prices for those brands' seatbelts developed together. That's something they could have done to come here and say: well, you see, the thing about this is, although they're all bespoke products, they all tend to move together, unless there is a something separate going on.

So that might give you a starting point for what he says might be spiller effects or umbrella effects. That's entirely within their own knowledge and it is not what they have done.

So the basic problem is this: what reasonable grounds have the Claimants put forward to justify embarking on this --

THE CHAIR: Yes, I think we have that point.

MR PICCININ: -- inquiry, yes.

So those are my reasons for saying that the causation case, in paragraph 44, ought to be struck out as well.

Unless the Tribunal has any further questions, those are my submissions.

THE CHAIR: I'm grateful. Thank you. Mr West.

Submissions by MR WEST

MR WEST: Gentlemen, I do want to remind you of the starting point, but in my submission the correct starting point is the EasyAir test and in particular the requirement that the Tribunal should be satisfied on an application of this nature that there will not be further relevant evidence should the matter proceed to trial and my friend has taken you to that.

So in deciding an application of this kind, the Tribunal has engaged in a sense in an exercise of prediction, predicting how the trial would proceed and what evidence would be likely to be available if it did. That is of course why an application of this kind cause for a cautious approach and I say particularly in the circumstances of this case,

because Tokai Rika is sued as one of three Defendant groups, the others being Autoliv and TRW, and they are sued for participation in a cartel which by definition requires collusive conduct between more than one Defendant and is by definition a tort of joint and several liability.

But neither of Tokai Rika's co-Defendants is seeking to strike out the claims against them. On the contrary, as we've seen in the composite draft order this morning, both of Tokai Rika's co-Defendants have agreed to provide substantial additional disclosure. I'll get to the precise parameters of that disclosure later on but it includes substantial additional disclosure in relation to the question of liability, including the document surrounding the particular tenders which are known in this industry as RFQs, and it includes disclosure of communications with competitors, if any such documents exist.

THE CHAIR: So, I mean, Mr Piccinin's right that can't be a relevant factor. I mean, if this is strikeable today, the fact that other claims are going to go to disclosure shouldn't be a reason why he fails in itself. I would like your comment on that.

But the other thing, and maybe you're coming it to a later, and I don't want to take you out of your course, but saying more will turn up in disclosure, I'd just quite like to understand why you say -- assuming that you get the disclosure that's been ordered for present purposes, why you say that's going to assist you as against the 11th Defendant, with as much particularity as you're able to give.

MR WEST: Just to finish the point I'm on, the reason it's important to my friend's strike out application is because of the EasyAir test. The Tribunal has to ask itself what documentation might reasonably be available at the trial and in this particular case one is going to have a trial against Tokai Rika's co-Defendants and in the meantime they're going to be giving disclosure of any documents which record communications between the cartelists or between the tenderers on the tenders.

Now, in my submission there is -- and I'll come on to explain why -- a reasonable basis to believe that may include documentation implicating Tokai Rika. The reasons for that are firstly we know that Tokai Rika has been found to be involved in cartel activity. It was found by the Commission to have been involved in cartel activity against Toyota and Suzuki but the material the Tribunal has seen today demonstrates that there is also evidence that it was involved in attempts to cartelise sales to the Claimants specifically. The TPCA joint venture, in particular, or the B0, as the project was called.

THE CHAIR: You're referring to the email.

MR WEST: Yes.

THE CHAIR: Yes.

MR WEST: So in my submission, when the Tribunal comes to ask itself what material may reasonably be available at the trial, it simply cannot conclude that now that the further disclosure which the Defendants are going to give will not bring to light any further material of the same kind we already know exists, demonstrating Tokai Rika's involvement in cartel activity, including against my clients.

It's perhaps worth just looking at the relevant email at this stage, which is page 2231 of the exhibits-bundle.

This is a translation, as my friend said, from the original Japanese of an email from Mr Obara. It's an internal email, so it isn't communication between the cartelists, but it does report discussions between the cartelists.

THE CHAIR: This is not an agreed translation at this stage.

MR WEST: It's not an agreed translation. This I believe is one given to the Commission.

THE CHAIR: Yes.

MR WEST: The first point of note is just after the first hole punch. One sees Mr Obara saying "please save the attachment as necessary and delete this message after

confirming this email".

So one has there a direct evidence of the cartelists attempting to delete the evidence of their wrongdoing. In this occasion it didn't work.

But then we see a reference to the in-house kick-off meeting.

THE CHAIR: We don't know what the attachment was?

MR WEST: We don't, I believe. I don't know.

Then just after the second hole punch, next B0, so that's phase 2, B0 for all seats, that's a reference, I think it's agreed, to seatbelts, will be the commercial right that we can never give away.

That ties in with the OSS1 decision, as we see in the authorities bundle at tab 5 and in particular at recital 34, which my friend took you to.

So we have here the essence of each of the four cartels concerned the maintenance of each competitor's incumbent commercial right.

THE CHAIR: Where are you reading?

MR WEST: It's recital 34, page 75.

So one sees the words there "commercial rights", exactly the same words as appear in this translation of the email:

"... to supply a specific type of OSS for a particular passenger car model. When the OEM in question develop new model of certain existing passenger vehicles, the relevant competitors coordinated in an attempt to ensure that the supplier who had won the award for supplying the relevant OSS equipment for the previous model [that's to say the incumbent supplier] would also supply the OSS for the new model."

Now, of course those are the facts of phase 2 of B0, where Tokai Rika was the incumbent and Mr Obara says in this email we cannot give up their commercial rights.

Now, my friend also took you to paragraph 35, which is critical in my submission.

THE CHAIR: Sorry, I don't want to cut you short, but Mr Piccinin accepts this is a

prima facie or arguable evidence of collusion with respect to the second phase of B0. He'll shake his head if I've got that wrong. So you don't need to --

MR WEST: No, but I was then going to look at paragraph 35.

THE CHAIR: Of the Commission?

MR WEST: Yes.

THE CHAIR: Right.

MR WEST: So he emphasises that that's the essence of the cartel but in 35:

"The relevant parties also met and the OEM in question introduced certain completely new models. In the absence of pre-existing commercial rights, the relevant parties sought to find a common understanding as to which party would supply the relevant OSS equipment for that model."

So that's phase 1 of B0. Now, it doesn't specifically refer to that, but those are the facts. These are new models to be produced by the joint venture and here we have the Commission saying that the cartel included that as well. So in my submission --

THE CHAIR: I mean, that seems to be a bit of a jump. You're saying that paragraph 35 is a reference to the first phase of B0.

MR WEST: No, I'm saying it's the same fact pattern.

THE CHAIR: Right.

MR WEST: My friend, as I understand it, seeks to explain away in email on a strike out application by saying that it can't possibly indicate coordination in relation to phase 1 because the cartel was all about maintaining incumbency and phase 1 didn't have an incumbent. Phase 2 did have an incumbent and so that's how he says, well, this doesn't indicate any likelihood of cartelisation in relation to phase 1.

Well, the answer to that in my submission is recital 35, which says that the cartel wasn't limited to preserving incumbency where the commercial rights had already been allocated. But it included allocating OSS equipment supply contracts for new models,

unlike phase 1. It doesn't refer specifically to phase 1, but that's my point.

THE CHAIR: No, I understand what you mean. Sorry, that's understood.

MR WEST: So this evidence shows that when the seatbelt tender for phase 2 was first issued in 2008, they went straight into the cartel and the parties sought to the allocate it in accordance with the incumbency principle.

THE CHAIR: Sorry, which sentence are you reading now.

MR WEST: This is Mr Obara's reference to B0 seatbelts being a commercial right that they can never give up. Just after the second hole punch.

THE CHAIR: Yes.

MR WEST: "Next B0 for all seats will be the commercial right we can never give away" and he refers in the next line, regarding B0, "we've been discussing with competitors since at the time of Yaris competition.

So we see here the attempts to allocate 2 in accordance with the cartel and --

THE CHAIR: So -- sorry to interrupt. So I'm following. So "regarding B0 we have discussing with competitors since at the time of Yaris". Subject to the grammar being a little bit unclear, or the words being a little unclear, what was the time of the Yaris competition?

MR WEST: I'm not in a position to assist on that. The Yaris is a Toyota vehicle.

THE CHAIR: Yes. We don't know the dates.

MR WEST: We don't know.

But then we see over the page, as my friend took you to, "though I heard something that the person in charge of PSA in Autoliv has an authority of final decision on B0, so careful discussions will be held for several types behind the scene again".

So that refers to the fact that there had been discussions behind the scenes on a previous occasion and we don't know which previous occasion that was. Does this refer to the same attempt at cartelisation or does it refer to phase 1? What's quite

interesting is of course that it refers specifically by name to one of my clients, PSA, and to the person in charge of PSA at Autoliv. Now, we know who that is. That's a gentlemen called Christophe Riviere and Mr Riviere is the subject of an investigation in Brazil, as we may come on in relation to disclosure.

THE CHAIR: Mr West, there are alternative readings of this being put to us. One is that this is just saying that now we find out who the guy at PSA is -- sorry, in charge of PSA at AL, well, we need to go back and do this again. You're accepting that that's a possible interpretation of that sentence?

MR WEST: Yes. On the strike out application, I don't have to persuade the Tribunal that my interpretation is the only permissible one --

THE CHAIR: No, I understand.

MR BAILEY: -- but just that it's one reasonable one and Mr Obara, it seems, has suffered no detriment to his career as a result of writing this email. He's apparently in charge of the procurement division within Tokai Rika. So he could presumably give instructions to my friend's solicitors, as he apparently has before, about what this email says in a witness statement and I can ask him some questions about it. That's the way these sorts of factual issues are resolved.

Now, my friend said that this doesn't assist me because these are not the supplies in issue in this case. Now, the only reason they're not supplies in issue in this case is because in the event the tender was won by Takata and we have settled with Takata as a result of their insolvency in 2017. But that isn't the point in my submission. The point is this is evidence, direct evidence, that Tokai Rika was involved in attempts to cartelise OSS supplies to my clients and the question for the Tribunal is, in light of that evidence, can it be said that there is no real or realistic possibility that further evidence of the same kind will come to light as part of the disclosure and evidence gathering stages of the case.

THE CHAIR: Mr Piccinin says, leaving aside paragraph 44, which we'll come to, your case is really limited to this email. That's really all you've got to hang your hat on at the moment. Is that correct or are you relying on general inferences drawn from the activity which the Commission have identified? Or what else? Could you just summarise for me what your --

MR WEST: There is other evidence of Tokai Rika being involved in cartelising this same prize, or attempting to cartelise B0 -- this isn't the only evidence in relation to B0.

THE CHAIR: So, just so I know where we're going, what other evidence are you going to be relying on.

MR WEST: Well, it is pleaded but maybe the best place to show you it -- but, as I say, it all relates to the same tender.

THE CHAIR: Right. So the second phase, they all relate to the second phase.

MR WEST: B0 phase 2, yes, but the evidence shows that the parties before the tender took place had each other price submissions in their pockets effectively.

THE CHAIR: Well, just show me in pleading. We've got -- 49K is the pleading.

MR WEST: Yes, it carries on in 49. So 49G.

THE CHAIR: Sorry, 49 ...?

MR WEST: 49G refers to a discussion in which -- a discussion of Takata's quote for a price. In an email of the same day, Autoliv and Toyoda Gosei reported to have said that Takata quote would destroy -- actually that's something slightly different which I'm going to come back to.

THE CHAIR: Okay, but you're going to address us on 49G in due course, is that right?

MR WEST: Yes. It's L and K. So in K we have --

THE CHAIR: K is the one we've been looking at.

MR WEST: Yes, sorry, and L. So K is Toyota disclosing bid prices and L, Takata -- so

a document with Takata's minutes of a meeting with PSA which appeared to contain Tokai Rika's price submissions for the forthcoming tender.

THE CHAIR: Right, and that's again -- so the same point would be put against you. That's phase 2.

MR WEST: Yes, that's phase 2, but of course we haven't had disclosure in relation to phase 1.

THE CHAIR: No, I understand that. No.

MR WEST: And phase 2 should not be underestimated in terms of the of sheer size. Phase 1, just the phase 1 contract, was 92 million euros worth of seatbelts. Just by way of contrast, in the recent Trucks judgment of the CAT, there were two claimants, Royal Mail and British Telecom. The total of British Telecom value of commerce in that case was £44 million. So this is about twice the size of that entire case, this one tender. It's very significant indeed.

But our case is, in relation to this, that there are reasonable grounds for an inference, which we allege and plead, as I'll show you, that phase 1 is also likely to have --

THE CHAIR: The inference -- sorry, I just want to be precise, just to get it straight in my mind. You're relying on an inference of phase 1 as against phase 2 from phase 2.

MR WEST: Yes.

THE CHAIR: Are you also relying on an inference as to the findings of the Commission that feeds into the acts complained of? Do you draw that --

MR WEST: Yes.

THE CHAIR: And could you show me in the pleading where that's -- is that pleaded as an inference or -- if you'd prefer to do that after lunch, that's fine.

MR WEST: Yes, the Commission decision was obviously the basis in the way of the pleading against all the Defendants, including the fact that they were found in that case to have been involved in cartelisation. It isn't evidence of cartelisation against my

clients, I accept that, so it's in a different category. Nevertheless it does show --

THE CHAIR: Yes. If you lose on the inference of phase 1 from phase 2, if we're against you on that, then you've really got nothing else to put before the Tribunal. It's really all turning on paragraphs 49K and 49L.

MR WEST: That's the only direct evidence we have at the moment of cartelisation by Tokai Rika against my clients, I think that's fair to say. Yes.

THE CHAIR: Yes. So if you lose -- and perhaps you want to think about it over lunch. If we're against you on that, are you advancing any distinct arguments as the reasons why this claim should not be struck out today?

MR WEST: Well, we also have the argument about umbrella losses.

THE CHAIR: I understand that, yes. That will need to be dealt with separately.

MR WEST: But I think we would say that the evidence has to be taken in the round in of Tokai Rika's willingness to be involved in this sort of conduct and that the Commission decision is also relevant in that respect and that material taken together justifies this Tribunal in requiring Tokai Rika to give further disclosure in relation to the allegations in the case, which is in my submission the ordinary way of dealing with these types of proceedings, particularly where, as the authorities recognise, my clients had no involvement in this and, as we've seen from that very email, attempts were made to destroy the evidence and to conceal it from us, as always happens in cartel cases.

THE CHAIR: Is that going to be a convenient moment?

MR WEST: Yes.

(1.00 pm)

(The luncheon adjournment)

(2.00 pm)

THE CHAIR: Right. Sorry, just give us a minute. Thank you.

MR WEST: Sorry, you asked me before lunch whether we have any other pleaded inferences which I could find. We do rely on the Commission's decisions generally for the allegations of our claim. So, at paragraph 9 -- so this is tab 11, page 15 of the core bundle --

THE CHAIR: So paragraph 9, yes.

MR WEST: The allegation that the Claimants were parties to a cartel or series of cartels concerning sale of OSS products.

Then, paragraph 12, we see the European Commission has adopted two decisions holding they were parties to the cartel behaviour concerning OSS products.

THE CHAIR: Hang on.

Yes.

MR WEST: Then, at 13:

"The effect of the cartel was to increase the price of OSS products purchased by PSA and FCA and contracts that were negotiated during the cartel periods."

You'll see that we go on to explain that we put that in two different ways; one being direct cartelisation, and other being umbrella effects.

The other part of the pleadings, I'll just show you in my reply, tab 16.

THE CHAIR: Hold on. Yes, tab 16. Yes.

MR WEST: So, at paragraph 24B, which is page 163, we say the fact the Claimants are prevented from pursuing a claim in relation to the supplies of seatbelts for phase 2 -- so this is B0 again -- due to release incident with the CAT many years later, does not negate the clear evidence of attempts on Tokai Rika's part to cartelise supplies to PSA via the joint venture, in connection with this RFQ. In light of that evidence, Tokai Rika's protestations in the amended defence to the effect there was no proper basis -- those will be familiar -- for the claims against ring hollow.

Further, the evidence in relation to the phase 2 give rise to a clear inference that

supplies to phase 1 were likewise likely to be cartelised, in particular in view of the contents of the email. The cartelisation of these supplies took place within duration of the cartel period, policed by the Claimants at paragraph 39 of the particulars. Part of the phase 1 tender and the award having taken place after 6 July 2004.

In the premises, the Claimants have alleged that the start date of the cartel began at least as early as the tenders for phase 1 of the TPC's B0 project, beginning in around 2002, at least in relation to those tenders. However, the Defendants have not to date given any disclosure in relation to the tenders.

So if there's any issue about the date and whether that falls within the claim, it's clear from that pleading that we do make an allegation of cartelisation in relation to phase 1.

So can I now come to look at two particular arguments my friend makes?

Firstly, that his clients would have given all relevant material to the Commission and, secondly, the causation point.

So my friend says that his clients were subject to a sentence as a leniency applicant to provide all evidence in their possession, otherwise they would have risked their status as a leniency applicant. But, if we look at the decision itself, which is in the authorities bundle, tab 5, and my friend took you to this, to recital 19, on page 72, we see there that in February 2011 Tokai Rika applied for immunity under point 14 of the notice in relation to collusive contracts related to the supplies of seatbelts to Toyota and that as a result the Commission gave Tokai Rika conditional immunity in relation to those supplies.

Then 20, on 24 March 2011, Takata applied for an immunity or alternative for a reduction in fines under the notice that would otherwise have been imposed on it in relation to supply of airbags to Toyota, seatbelts to Suzuki, and seatbelts, airbags and steering wheels to Honda.

Now, what's important about that is that the cartel concerning seatbelts to Suzuki was a cartel to which Tokai Rika was also a member, as was found by the Commission.

So Tokai Rika's argument is: it would necessarily have given all information it had at hand to the Commission about any infringing conduct because otherwise it would risk losing its immunity. But here we see, in fact, it only gave information to the Commission about the cartel in relation to Toyota. It was Takata which subsequently revealed the cartel to which Tokai Rika was also a party concerning supplies of seatbelts to Suzuki.

That's directly contrary to what my friend says. Now, we don't know why that information wasn't supplied. One interpretation is that this was a bet by Tokai Rika that if they didn't blow the whistle on the cartel in relation to Suzuki, then it would get away with it. If that was the bet, it didn't succeed.

But Tokai Rika now asks this Tribunal to accept that it would not make any such bet as regards any supplies in particular to my clients.

THE CHAIR: So you're -- right. I mean, this is a question -- is it a jump to say that Tokai Rika said nothing about the Suzuki vehicle supplies? You're just getting that out of the two recitals?

MR WEST: Well, that's right. Tokai Rika applied for immunity in relation to the seatbelts to Toyota. The cartel in relation to the seatbelts to Suzuki came only to light after Takata subsequently applied for immunity.

If Tokai Rika had applied for immunity, first, in relation to those, it would have won the race and been granted immunity in relation to those, but it didn't. So the very thing that says it would have done, and this Tribunal can be sure it would have done, it didn't actually do in this very case.

THE CHAIR: So, sorry, I'm being very slow. We know it didn't get immunity with respect to the supplies to Suzuki; is that right?

MR WEST: Yes.

THE CHAIR: One gets that from where?

MR WEST: Because Takata was the immunity recipient.

THE CHAIR: Okay. So they can't both get immunity?

MR WEST: No.

THE CHAIR: Okay. That was the key thing I was missing.

MR WEST: Could I just briefly address the authorities?

Bord na Mona. I don't mean to take a lot of time, but can I explain what the case is actually about? So this is tab 16 of the authorities.

So, as my friend says, here the Commission found a cartel in relation to industrial bags, relating to supplies in continental Europe. The claimant then brought a case in relation to the supplies in the United Kingdom and Ireland, and an application was made to strike that out.

The basis of the application was that the proceedings were contrary to the modernisation regulation, which provides that national courts cannot take decisions which run contrary to decisions of the Commission. So the submission was: if this claim were to succeed and the national court were to find the cartel in the UK and Ireland, that would be contrary to the Commission decision. We can see that from paragraph 6 and 7 of the judgment.

At paragraph 6:

"Mr Lasok contends the decision is that the only markets in which members of the cartel adopted anti-competitive practices were France, Germany, Benelux and Spain. To the extent that the claimants seek to argue that the cartel operated in Ireland, that is the contrary to the decision of the Commission and thus in breach of Article 16 of the modernisation regulation."

Which is then set out, which says:

"National courts cannot take decisions running counter to the decision adopted by the Commission."

So for that reason, amongst others, Mr Lasok contends:

"However the claimant's claim against BPI is formulated, it's unsustainable and should be struck out. Alternatively, summary judgment should be entered for BPI."

So that was the argument. It's contrary to the decision of the Commission to allege that there was cartel which was broader than the Commission held.

Now, the short answer to that is: it isn't contrary. A finding of a cartel which is broader than the Commission fund would only be contrary to the Commission's decision if the Commission had held that there was no such wider cartel and the Commission -- I can't think of an example where it's ever done that -- but it certainly doesn't normally do that.

That's not an argument my friend is running in this case, because it's a bad argument. He doesn't rely on Article 16 and Mr Justice Flaux, as he then was, rejects the argument at paragraphs 44 to 48.

One of the matters to which reference was made is that the Commission makes its decision on the basis of the evidence in its file, which is what it refers to, rather than alleging that it's mounted a comprehensive investigation and that it's purporting to adopt comprehensive findings.

That, again, is the formulation one tends to find in Commission decisions, and one can see it in the decision in this case. Again, in the authorities bundle, tab 5, for example at recital 52:

"The legal assessment set out in this section takes into account the fact ..."

Sorry, it's page 79.

THE CHAIR: Yes.

MR WEST: Tab 5, paragraph 52. The legal assessment takes into account the facts

and the body of evidence as described in section 4. So the decision is based on the evidence in the Commission file.

Another example, back at 45, in relation to duration. The evidence demonstrates that the cartel started on such and such a date.

At 46, based on the available evidence, the cartel ended on such and such a date.

And 64, another example among other others:

"Based on the submissions of the parties, on the other evidence obtained during the course of Commission's investigation, the Commission considers that each of the four cartels was a continuous infringement."

So, again, the findings are based on the evidence the Commission had. There was no finding, positive finding, that there was no broader cartel, and that's what one would need for the sort of submission which was being pursued in the Bord na Mona case.

So I really struggle to see how my friend can get any assistance from this authority, which is a case where the defendants attempted to strike out on a completely different basis and were completely unsuccessful in that attempt.

My friend took you to it, but the authorities are set out in the Bord na Mona judgment, which emphasise that a claim in a cartel damages case has an attenuated burden of pleading, precisely because of the asymmetry of information which it faces. So it has a certain margin of appreciation as to what it can be expected to be plead, particularly before disclosure.

Then I can briefly address the FX judgment. That's a very long and complex judgment primarily about certification of a collective claim.

THE CHAIR: Just remind me, which tab?

MR WEST: It's tab 32.

Professor Neuberger was also party to this judgment. It was primarily about certification, and there was no issue of certification in case; it's not a collective claim.

I should also say it's going to the Court of Appeal. I understand it's going to be heard relatively shortly. Although one can't assume it is the final word. There's no submission that any of it is wrong. My submission is it has nothing to do with this case. Just by way of background, there are a number of different FX cases, as the Tribunal will be aware. These are two collective claims which are dealt with in this judgment. There are also two claims with named claimants, and the first claimant in both was a company called Allianz Global Investments. That separate claim is mentioned in my skeleton argument.

The first of those claims was brought against six banks, who were held by the Commission to have been involved in the FX manipulation.

The second of them was another claim by the same claimants against another eight banks, which had not been held by the Commission to have been involved in such manipulation. But who, so the claimants alleged, had been anyway.

The very existence of those proceedings is rather peculiar on my friend's view of the world because, on his view of the world, if there had been an infringement against or by those banks the Commission would have found it. But it didn't. It doesn't have to. The Commission is entitled to reserve its resources to pursuing the biggest fish as the Commission saw it, the six big players, and to leave it at that, which is what it did. If private damages claimants wish to come along and pursue the others, so be it, and that's what we did.

Now, turning to the collective action, the facts of the FX cases all pre-date 2015, and that's important because prior to 2015 this Tribunal only had a follow-on jurisdiction. So you couldn't bring a stand-alone claim in the Competition Appeal Tribunal until 1 October 2015.

Now, competition claimants could avoid that limitation on the Tribunal's jurisdiction by bringing the damages claim in the High Court, which did have jurisdiction over

follow-on claims and stand-alone claims.

The trouble for the collective claimants is that the High Court has no collective jurisdiction, so they had had to sue in the Tribunal and, therefore, they had to limit their claim to a follow-on claim because the facts arose prior to 2015.

That created a big headache for them for the reason I have just explained. The Commission's findings were limited to a handful of banks and, actually, a handful of chat rooms, which is where the infringement happened. So the claimants were based with proving as a matter of causation that the very limited findings by the Commission of infringement had nevertheless resulted in loss to the class as a whole, including where the class engaged in FX transactions with banks who had not been found to be parties to the infringement by the Commission.

Well, how did that result in loss to the claimants, given the banks which weren't involved in the manipulation? That was the big problem that they faced. They didn't manage to overcome that hurdle.

The mechanism to summarise it that they came up with was to say: in order to meet those orders by their customers, the non-participating banks had to obtain currency in the interbank market. The price -- it wasn't prices, spreads, were inflated in the interbank market because of adverse selection risk resulting from the fact that some of the banks in that market were party to the infringement; that was the theory.

The Competition Appeal Tribunal, at paragraphs 238 to 239, which is the very lengthy section of the judgment, explained that it had no sufficient basis on the facts of the case, that theory.

But, of course, in a certification application, the main hurdle for the claimant is to demonstrate that they have a proper mechanism to establish class-wide loss, hence the Tribunal held that they didn't and certification was refused.

It should also be borne in mind that FX was about financial markets, which are rather

different in a number of ways to ordinary markets. For example, because the products are essentially fungible and the markets are also extremely fast moving.

This case is not about financial markets. In this case, there was no need for my clients to show how prices were affected on purchases from non-Defendants, because all of the value of commerce in this case consists of purchases from the defendants.

So what is the mechanism that we allege by which these purchases resulted in loss? Well, there are two, as I've already mentioned. The first is that the supplies were cartelised, and the second is, even if they weren't cartelised, there were umbrella effects.

My friend took you to the passage where the Competition Appeal Tribunal said that one of the ways in which a claimant could attempt to demonstrate that there was a mechanism of loss was by a statistical analysis. In my submission, that's what we have attempted to do, and have done sufficiently for the purposes of pleading, in paragraph 80, I'm sorry, of the particulars of claim.

So the Claimants' econometric experts were instructed to do a preliminary analysis limited to a PSA only to seek to identify whether there had been an overcharge by virtue of the cartel, and these are the conclusions. Yes, there was an overcharge. This is attested by a statement of truth. If it's true, we don't produce the analysis because, in the usual way, the experts will produce their final analysis at a later stage of the proceedings. That final analysis will be based on better information, including information from the Defendants.

THE CHAIR: So does this extend to the umbrella claim or not?

MR WEST: Well, this shows that the Claimant-- the PSA's purchases of OSS, that's steering wheels, airbags and seatbelts, were subject to the cartel overcharge. Now, the explanation of that may be either umbrella effects or direct effects.

THE CHAIR: Yes.

MR WEST: But what the experts have said is: adjusting for all the changes in costs, for exchange rates, labour costs, material costs, we find an unexplained increase in costs for purchases made and which were affected by the cartel, which made it the right time, though they have been affected by the cartel.

PROFESSOR NEUBERGER: Can I understand: are you talking about from the Defendants or are you talking about other purchases from the non-Defendants on that?

MR WEST: These are all purchases from the Defendants. So all the purchases we sue upon in these proceedings are from the Defendants, using that term to mean the particular Defendant companies or other companies within those groups of companies.

PROFESSOR NEUBERGER: So when you talk about "umbrella effect", you're talking about effect of cartels on purchases from the Defendants which were not themselves cartelised?

MR WEST: Exactly.

PROFESSOR NEUBERGER: Thank you.

MR WEST: So that is our attempt to plead the statistical analysis. My friend relies on the Kone judgment to say that umbrella effects are not plausible in a case like the present. But, again, it's important to note the type of products which were at issue in the Kone judgment, which is tab 3 of the authorities bundle. One can see it just from the heading of the judgment, at page 18.

So this was a cartel about elevators and escalators, much larger pieces of kit than seatbelts, therefore much more bespoke, much more contract specific.

The mechanism is explained in this judgment. If one goes on to paragraph 29, on page 42:

"It should be noted that market price is one of the main factors taken into consideration

by undertaking one of the terms of the price at which it will offer its goods or services."

THE CHAIR: Which paragraph are you reading?

MR WEST: 29 of the judgment, so page 42.

THE CHAIR: Sorry, I'm in the headnote.

MR WEST: "Where the cartel manages to maintain artificially high prices for particular goods and certain conditions are met relating to particulars of the nature of the goods or the size of the market covered, it cannot be ruled out that a competing undertaking outside the cartel might choose to set the price of its offer at an amount higher than it would have chosen under normal conditions of competition, that is in the absence of the cartel. In such a situation, even if the determination of an offer price is regarded as a purely autonomous decision taken by the undertaking not party to a cartel, it must nevertheless be stated that such a decision has been able to be taken by reference to the market price distorted by that cartel and as a result contrary to the competition rules.

The question of the nature of the product was considered by the advocate general. So if one turns back to page 31, paragraph 48 of the advocate general, where it's stated:

"It's true that the more homogeneous and transparent the relevant product market is, the easier it is for an operator not party to the cartel to be guided by the business practices of the cartel members when determining his own prices. This does not, however, support the converse inference that a cartel is unlikely ever to give rise to umbrella pricing on markets that are not homogeneous, but exhibit little transparency, and where the products, such as some of the elevators and escalators in question here are customised. After all, even in markets such as these, operators tend to be acutely aware of the prevailing market price and how the individual suppliers on the market are behaving."

Now, that's particularly so in the facts of this case, because the supplier under the putative umbrella contract is actually one of the cartelists as well. So it knows the prices the cartelist have been charging when the cartelised supplies to other OEMs because it's a member of the cartel.

THE CHAIR: So one of the points that's made against you in both sides the case -- and focusing on the phase 1 alleged cartel to start off with -- is you haven't pleaded anything on which reliance can properly be based. I think the examples were you could have pleaded what tenders you received, what people didn't tender, and plead out the circumstances of the tender process from which it's possible to draw an inference that there was a cartel in operation. That must be information that you possess, and it should have been in the pleading, rather than just waving your hand at an email; are you able to assist us on what your response to that would be?

MR WEST: Well, the approach that we had taken is that we were seeking disclosure in relation to particular requests for quotation, including the B0, phase 1, as part of the disclosure which is before the Tribunal at this CMC. To the extent we have a further case in plead in relation to that, we will do so as a result of the disclosure which we are seeking to obtain.

THE CHAIR: But you don't need the disclosure to plead what happened during that tender process, because you are a party to it.

MR WEST: Well, we are the purchasers. There's a limited amount we would be able to plead, to ascertain or to demonstrate, that the purchase was cartelised; if it were otherwise, the purchaser would always be able to tell that it was the victim of a cartel. The whole point of a cartel is that the purchaser isn't able to tell that it's a victim of the cartel.

THE CHAIR: Well, for example, you could tell if somebody refused to tender.

MR WEST: Not necessarily, because what quite often happens in these cartels is the

bidders agree the level of their bids, and so everyone who has been invited has a bid and the purchaser can't tell whether those bids are all the result of an agreed allocation between the bidders.

I mean, maybe there was some obvious feature of it that made it obvious. But, if so, one might thing that the TCP joint venture would have realised this at the time.

THE CHAIR: I think a similar point is made on paragraph 43, isn't it, in your pleading? At the moment, this is just a hand wavy stuff, and you haven't made any effort to plead anything specific. 44, sorry, I beg your pardon.

What's your comment on that?

MR WEST: Well, we had submitted some evidence in response to the strike out application which identifies a mechanism or potential mechanism.

The general mechanism and umbrella price is the one set out in Kone and is well understood, which is simply that the market price is used as the starting point for the bid. So if the market price has been cartelised, some element of the overcharge will make its way into the bid, even in the case of a bid by a non-cartel member. That is the general mechanism of umbrella losses.

THE CHAIR: These are bespoke products and --

MR WEST: But, even in the case of bespoke products -- it may be slightly different in the case of financial markets. But even in the case of, for example, an elevator or an escalator, a company is bidding on a major project, for example at a railway station, it may well look back at what it bid the last time, or market intelligence it has as to what the last winning bid was in a similar project.

PROFESSOR NEUBERGER: I'm familiar with umbrella pricing, in the sense that if many of the suppliers in an industry are cartelised, then that raises the general prices and reduces the level of competition, so that even competitors who are not in the cartel charge prices.

But I'm less familiar with the notion of members of a cartel, who when they are not competing in cartel benefit from their own umbrellas.

MR WEST: It's a very unusual situation. As my friend says, usually when a Commission finds a cartel, it finds a cartel defined by the product. So industrial bags, for example, in continental Europe or synthetic rubber. So you're either in the cartel or you're not.

This decision is a little unusual because the Commission says: we find the cartel in relation to the occupant safety system products insofar as they were sold to the following OEMs ...

That doesn't find any wider cartel. Neither does it say that there wasn't any wider cartel; it just stops there.

So this umbrella theory starts on the assumption that in fact the Commission was right to say there was no wider cartel. So you're right Professor Neuberger to say it's an unusual situation. We say, if anything, it's an a fortiori case to the ordinary case of umbrella pricing, where one is dealing with purchases from someone who is completely outside the cartel.

Here, we have somebody who is actually in the cartel, but it's just that the cartel only applies to BMW for example or Suzuki, but not to Peugeot.

PROFESSOR NEUBERGER: Surely it's not a fortiori, because in the normal cartel case, a normal umbrella case, some of the competitors in the market are not competing effectively. You're talking about a case where actually people who normally aren't cartelised and not cartelised in this case --

MR WEST: Well, they're not --

PROFESSOR NEUBERGER: -- it seems to be --

MR WEST: They're not competing, effectively, in relation to certain supplies in the market, albeit not to my client. The question then is: is there a mechanism whereby

that affects the price of supplies to my clients?

I say it's the same mechanism by which the cartelised supplies become the market price, they're used as a benchmark for supplies by non-cartelists and there is --

SIR IAIN McMILLAN: Would that not give the non-cartelist a competitive advantage in price?

MR WEST: Well, non-cartelists often will have a competitive advantage on price if they're not charging the cartel overcharge, that's right.

SIR IAIN McMILLAN: So where does the umbrella work then?

MR WEST: The umbrella is: although they have a competitive advantage, they can still afford to charge more than they otherwise would have done and still win the tender because their competitors are all charging a cartel overcharge, which means their price is even higher.

SIR IAIN McMILLAN: Right, thank you.

MR WEST: In an ordinary umbrella case. We do have some specific evidence, one email which is referred to in the evidence, which is page 2179 of the exhibit-bundle. This is an email chain concerning, again, B0, but airbags on this occasion.

THE CHAIR: So this is dated 7 January; yes?

Are we on the right page?

MR WEST: Yes. Page 3 -- sorry, 2341.

THE CHAIR: Okay. Okay.

MR WEST: It's the second email in the chain which has been referred to. One sees the third line down there.

THE CHAIR: Sorry, the page again?

MR WEST: 2179. Sorry, 2341. It has two pages going on.

2179, I'm told.

So it starts with:

"The three companies met today ..."

THE CHAIR: Let me just make a note of the page number. This is not pleaded, this email?

MR WEST: This is pleaded.

THE CHAIR: This is pleaded. Which paragraph is it pleaded in?

So one of the subparagraphs of 40. That's 49G.

MR WEST: 49G, yes. So this concerns a meeting between Autoliv, Takata and Toyoda Gosei, three cartelists in relation to the airbags at B0. So one sees:

"The three companies met today."

So this is a cartel meeting. TKP, that's Takata-Petri, so Takata. Its price for the STW. I'm not sure what that is, but DAB I think is driver airbag:

"For the next Yaris was discussed. The other company said the price will destroy the market price and will become the standard price for the next B0 and the next Corolla."

So what one sees there is the discussion of the price quoted by one of the cartelists for a cartelised supply, in that case to Toyota, for airbags. Those are, of course, part of the cartel. Becoming the market price and becoming the standard price for the next B0.

So there is, again, a mechanism one can see. We rely on that in our evidence against this strike out application, for how the cartelised price could also then become the market price and be reflected as such in the prices of other supplies.

Now, our pleading on this is slightly limited because, as I explained earlier on, the Claimant has settled its claim in relation to B0, phase 2 airbags and seatbelts. So those claims have been settled out. So we're not in a position to pursue another claim in relation to that as a result of this email. But I do rely on it in relation to the question of a mechanism and in relation to how the cartel price could become the market price.

THE CHAIR: Yes, I mean, your pleading doesn't make clear if it's been relied on for

that purpose?

MR WEST: It doesn't. Although I would say it's relied on for that purpose in the evidence for this hearing.

THE CHAIR: Yes.

MR WEST: Of course, if the Tribunal thinks we should plead it, then it's always an answer to a strike out to amend the pleadings.

THE CHAIR: Yes.

MR WEST: Now, as I say, we're going to be supplied with extensive disclosure in relation to quantum to enable my clients to prepare a regression analysis, to seek to determine on an econometric basis whether there was a cartel overcharge in this case. We have carried out a preliminary version of that, as you have seen, but we will carry out a full version.

This being a strike out, in my submission, the Tribunal has to assume that there is at least some prospect that will show a cartel overcharge. In my submission, that will be powerful evidence either that the supplies to the Claimants were cartelised themselves or that they were umbrella effects.

In my submission, it is very difficult to understand how Tokai Rika can persuade you now that if that were to happen, somehow the other Defendants are liable for that, but Tokai Rika is not, particularly in the case of umbrella losses because, by definition, those that result from the participation of the cartelists in supplies to other buyers -- and what's known for sure is that Tokai Rika did participate in a cartel and supplies to other buyers.

THE CHAIR: Is it right that Tokai Rika is saying that other people are liable and they are not. It's just saying: well, I'm just concerned with the claim against me, I'm not relying on any inferences about who else may succeed or fail in due course.

Do I have that wrong or --

MR WEST: They haven't really explained how the Tribunal had reached that conclusion, which seems to be inherent in their strike-out application, that they have no liability for any of this in any event.

THE CHAIR: Well, the consequence of their arguments might be that nobody has any liability for it. The claim is a bad one.

MR WEST: Well, I'm not sure how the Tribunal could reach that conclusion against the other two Defendants in any event, who are not here, and in relation to the other evidence we haven't looked at.

THE CHAIR: Yes, I mean, it just seems a neutral point, that's all, unless I'm misunderstanding it.

MR WEST: Perhaps it's not my best point.

Let me just check that I've covered everything.

My friend did mention the recent AlixPartners document where they give evidence, or they explain the nature of the documents they need for regression analysis. He points out that document doesn't say they've already found a cartel overcharge. It says: this is what we need to investigate whether there was one.

Their explanation for that is, firstly, that is what the purpose of the document was, to explain the data they need to do the analysis.

Secondly, it's written on behalf of all the Claimants, the analysis which is pleaded, and which a cartel overcharge has been found on a preliminary basis, it was just in relation to the PSA.

THE CHAIR: Just help me: on the order, and, again, on the assumption that this order is made, that's the draft order you introduced me to at the beginning of the hearing, what disclosure is going to -- you may consider this as the answer is self-evident, but I just wanted to ...

What categories of disclosure are going to support your case against the 11th

Defendant? Can you just point them out?

MR WEST: Yes. If we just look at the annex, which is the first annex sets out the disclosure to be given by the Defendants.

THE CHAIR: No, the first annex.

MR WEST: This starts at page 12.

THE CHAIR: Yes.

MR WEST: A lot of this is concerned with the data needed for regression analysis, so volume of commerce, overcharge, price amendments and so on.

THE CHAIR: Yes.

MR WEST: Now, we say that will assist us in proving a case against all the Defendants, by establishing whether there was a cartel overcharge.

THE CHAIR: I understand that, yes.

MR WEST: But we are also seeking specific communications disclosure. So if one then turns to page 16, under (d), this is concerned with disclosure surroundings a sample of RFQs, so a sample of tenders. We haven't yet settled on what the sample should be.

THE CHAIR: Is it page 16?

MR WEST: Yes, it's (b), just above the first hole punch.

THE CHAIR: I don't have any hole punches in mine. So 7B? Sorry, I can't --

MR WEST: Sorry, page 16 of the core bundle.

THE CHAIR: Could you give me the reference to the order? I have the order loose.

MR WEST: I'm sorry. It's 6D of the schedule, first annex 1.

THE CHAIR: 6D, starts:

"Any communications ..."

MR WEST: Yes. So this is disclosure in relation to a sample of the tenders that happened during the cartel period. They're going to be disclosing any communication

between a Defendant and any competitor not otherwise encompassed, in other words that haven't already had, relating to price amendments or any OSS product components and then there is some debated wording.

But the point is: this is communications between competitors in relation to the sample RFQs.

THE CHAIR: Sorry, could you just explain what sample RFQs are?

MR WEST: Yes.

THE CHAIR: I haven't --

MR WEST: So the word for it in this industry and some others, instead of calling it an "invitation to tender" --

THE CHAIR: I know what an RFQ is; it's the sample.

MR WEST: Yes, so there were quite a lot of RFQs during the cartel period between the Claimants and Defendants, and disclosure of this material in relation to all of them is thought to be disproportionate. So the party suggested an approach that they take a sample of them --

THE CHAIR: I thought, at one point, that there aren't that many RFQs; am I getting muddled with something else?

MR WEST: It maybe a -- relative to what?

THE CHAIR: These are the products in issue.

MR WEST: These are the products in issue.

THE CHAIR: So the bespoke products going into the motor cars, and there are so many RFQs that you're sampling.

MR WEST: Yes. So if you look at page 18 to 19, this is the Claimants' suggested sample.

THE CHAIR: Yes.

MR WEST: Which I think is, in broad terms, about half of them.

THE CHAIR: Right. So what do these numbers represent?

MR WEST: So B0, you'll be familiar with, is one of them.

For some reason, they didn't go by the names of the cars, but they had project numbers.

THE CHAIR: Right.

MR WEST: And in relation to FCA, there's been an issue in relation to retrieving project codes, and so it's given by reference to the part numbers, and likewise for Value Added Tax value.

THE CHAIR: Are these seatbelts --

MR WEST: Seatbelts or airbags, yes.

So these are about half of the total number of tenders which were supplied by the Defendants to the Claimants. I'm not entirely sure what the period is covered by this, but --

THE CHAIR: Thank you.

MR WEST: So the idea is they would provide us with the surrounding communications, and they also want the Claimants to do that, because they want to be able to see if we could play the Defendants off against non-cartelist, so as to compete away the overcharge and so on.

That paragraph D, I think specifically relates to amendments.

But if you go further down, to paragraph 7, C6, one has:

"Any communications between the defendant and any competitor."

So that's not specific to amendments.

Then (vii), we're going to be coming back to this. That is the live debate. Should we also get internal discussions?

Mr Obara's email, for example, you will have seen, is not a compensation between cartelists, it's an internal Tokai Rika email. So we have to debate whether we get --

THE CHAIR: In terms of the documents from other jurisdictions, are they expected to involve the 11th Defendant. So I'm thinking South Africa and Brazil, and the Department of Justice.

MR WEST: The 11th Defendant is still under investigation in both South Africa and Brazil, although there is some evidence about the extent to which that investigation concerns supplies to my clients. We don't have any direct knowledge of that. But we at least say there is some possibility that further information will come to light, linking Tokai Rika to supplies to my client.

We saw, for example -- I did try to mention it briefly -- Mr Obara's email refers to the individual at Autoliv who is in charge of the PSA; they need to have new discussions because he's the right person. Well, that is Mr Christophe Riviere, he is an individual who is under investigation in Brazil.

THE CHAIR: Right. Did you have any insight into what CDV was on this?

MR WEST: We haven't been able to get to the bottom of that, I'm afraid.

THE CHAIR: Is there anything else?

MR WEST: Sorry, I'm reminded there is also the Department of Justice investigation in the US --

THE CHAIR: Yes.

MR WEST: -- where we've already been given some documents by Tokai Rika, which do refer to my clients, but in so far as we've been able to tell so far aren't duplicative of the Commission. We are going to come on to all this.

The key words which have been run to date only refer to PSA, there haven't been any FCA key words run yet on that material.

So unless I can assist further, those were my submissions.

THE CHAIR: Thank you very much. Mr Piccinin.

Submissions in reply by MR PICCININ

MR PICCININ: I'm very sorry.

Sirs, I'd like to start with two very brief points. I'll be brief overall, but two very brief points about the authorities without even turning them up. Then I want to structure my reply submissions under three headings, one is strike out of infringement other than the B0, then strike out of the B0, and then market wide effects causation.

THE CHAIR: Hm-mm.

MR PICCININ: The two short points on authorities, I'm not sure whether my learned friend really meant to say all this, but he seemed to say at some points that in Bord na Mona the only argument that was being made by the defendants seeing to strike out was the point about the court being bound by the Commission's findings, not to make any findings that went beyond what the Commission found in the decision. That is not the only argument that was being made in that case, and it's not the argument that was being made in the paragraphs that I took you to and showed you. I don't want to go back to them, but that was just one bad point in that case which I'm not taking in this case. I don't know why my learned friend went to that.

Secondly, in FOREX, in the CAT, which was the collective action case -- and I feel very silly telling Professor Neuberger about that since he was on it.

But my learned friend said: oh well, that's mostly about certification.

That might be true in a sense, I don't know, if you count the paragraphs, if that's right or not. It probably is. But, again, none of the material that I showed you is from a part of that judgment dealing with certification. The material that I showed you was from the part of the judgment applying the Nomura strike out test for abuse of process for pleading something you don't have a proper basis for pleading.

The conclusion that was reached in that section, in paragraph 240, which is on page 1139 of the bundle, just for your reference, was that those claims were strikeable,

even though no application had been made to strike them, they weren't struck out because the Tribunal went on, as Professor Neuberger will remember, to find that they couldn't be certified in the form that that certification was being sought anyway. But the finding was that those claims were strikeable at that early stage, before disclosure. That's all I wanted to say contextually, by way of those authorities. But I hope it was clear from my submissions earlier, I'm not trying to submit to you that any of the particular analysis in those cases binds you to reach a particular conclusion by analogy with this case.

My purpose in showing them to you was by looking at how the test has been applied, to learn something about what's required by the test, and what it means to have reasonable grounds to bring a claim.

So turning then to my first main heading, which is: strike out of infringement allegations other than relating to the B0.

Before lunch, my learned friend, I thought, accepted that the only basis for their case was inference from the emails -- and there is more than one of them, but emails relating to phase 2 of B0. After lunch, my learned friend seemed to think better of that and he showed you the particulars of claim, paragraphs 9 to 12. Perhaps we can just pull those up?

So it's core bundle page 15 and paragraph 9. The heading here, for this whole section, is:

"The claim in summary."

So this is just the part of the particulars where the claim is summarised.

Paragraph 9 says: well, there were cartels from 2004 to 2011.

Then paragraph 12 says: well, there were two Commission decisions that made particular findings of infringement. I don't read either of those as pleading an inference that the wider cartel can be inferred from the narrower cartels found by the

Commission. So I don't accept that's pleaded in those paragraphs.

In any event, I say that is not a proper way to plead it, even if they had pleaded that inference. That you can't say: well, the Commission has found an infringement of scope X. It is to be inferred from the Commission's finding of an infringement of scope X that there was also an infringement of wider scope Y.

I mean, if you could do that, the work of this Tribunal would just become impossible.

THE CHAIR: But, sorry, just trying to keep in my head where this is all fitting in. So you say you're dealing now with claims beyond the B0 claim?

MR PICCININ: Correct. So Citroen and Maserati.

THE CHAIR: So if we're against you on the B0 -- I'm leaving the economic arguments to one side for the moment -- why would the claim not go to trial broadly? In particular, this Tribunal isn't necessarily going to say there are different cartels and neither did the Commission. I mean, it may be one big cartel; is that possible? In which case, why would one be product plucking out one contract and disregarding another contract?

MR PICCININ: Whether that is a possible or not is a question I'm not making any submissions on today.

THE CHAIR: We're not determining it today.

MR PICCININ: I'm not inviting you to say it's impossible, although I do say it would be different and inconsistent with what the Commission did find.

THE CHAIR: Well, it might be.

MR PICCININ: So part of the answer to that question is what my learned friend showed you in relation to disclosure, where he is seeking disclosure from all of us, including from my clients, of documents relating to all sorts of projects that we had no involvement in and that are not connected to the B0 allegation. So the question is: what --

THE CHAIR: But if you're going to trial -- I understand why you want to get out of this litigation entirely. But if it's going to trial; why would we, at this stage, say, "Well, it's not appropriate to have wider disclosure to see the extent of your alleged wrongdoing", particularly given the Suzuki-Toyota point. Now we have B0; why today would we say, "Well, we think those are the limits of your wrongdoing?" These are all on the hypotheses, of course.

MR PICCININ: I understand the question, Sir. It must be right that there's more to be gained by striking the whole thing out than by striking out only some of it.

But the reason comes back to: why do we have the Nomura principle at all? Why do we have these pleading rules? Why don't we just say: as long as you have something there, some narrow thing that could stick, you could allege anything you like, and then have a wider factual investigation, wider disclosure, wide expert evidence, a wider, longer trial involving my clients, putting my clients to that expense?

The reason we don't do that is that this Tribunal's work becomes unmanageable and also it is unfair on the parties, it's unfair on my clients, and it's unfair on wider court users to have allegations of that unparticularised kind just all products, all OEMs, everything, which have no proper basis to be allowed to move forward. That's why we have those rules.

THE CHAIR: Yes. All right. I understand your submission.

MR PICCININ: So the disclosure -- you know, when we come to disclosure tomorrow -- I mean, I've said, I'm only adopting points that my learned friends have made. But, of course, if you were -- I don't know if you're going to decide the strike-out application before then, but if you did decide to strike out allegations of infringement against my client, I would say it follows that you ought not to order disclosure in relation to those from my client.

THE CHAIR: So that is the first point.

MR PICCININ: That's the first point.

THE CHAIR: And then the second one was B0?

MR PICCININ: Sorry, before we leave that --

THE CHAIR: Yes.

MR PICCININ: -- I also need to deal with a couple of other points on this, other than B0 point.

So everything else really hung on the B0 evidence. The submission was made that the B0 emails show the cartelists colluding and targeting the Claimants specifically, and they don't show that. What they show is targeting the B0, which is, of course, a Toyota brand as well. It was a joint venture with Toyota, and they were discussed in the context of the discussion that you saw relating to the Yaris. So it doesn't support the inference that there was some sort of targeting of the Claimant, of Peugeot going on at all.

Finally on this topic, you asked my learned friend whether he also relies on the foreign investigations in relation to --

THE CHAIR: Yes and --

MR PICCININ: Perhaps I should deal with that. I have two points to make against them. One is that they are foreign investigations. This is a claim that is limited to supplies to Europe, to the EA. This is not a claim about Chrysler in the US, for example, or any of these other brands, Jeep in the US.

So it would be pretty surprising to expect that you would have investigations overseas that reveal collusion on supplies to Europe, specifically, that have not been picked up by the European Commission investigations.

So that's my first point.

My second point is that Mr Whiddington, in his first witness statement, paragraphs 44 to 49, which is in the applications bundle, at page 154, says that actually in none of

these investigations is there any allegation being made against my clients that they did collude on supplies to the Claimants.

THE CHAIR: So in the DoJ, South Africa and Brazil, there are no allegations against your client; is that what you're saying?

MR PICCININ: No. There are no allegations that my clients colluded on supplies to the Claimants; that's the submission, which is the topic that we're on.

THE CHAIR: Right.

MR PICCININ: The other point I would make is that we did, actually -- I know you didn't order it, but we did actually go ahead and provide to them the documents from the DoJ.

THE CHAIR: Yes, I'm aware of that. Yes.

MR PICCININ: There seems to have been nothing in that that supported them, and that's entirely consistent with what you would expect, given what I've already said. It would be a bit funny if the US was busy investigating European suppliers.

THE CHAIR: What do you say about the point -- sorry, I just alluded to it. So in the Commission short decision, recitals 19 and 20, that you didn't inform the Commission as to your -- as to the Suzuki seatbelt.

MR PICCININ: That's right. That's why I've never been submitting -- and I hope this is clear: it has never been my submission that because we are a leniency applicant it follows that we missed nothing at all. Obviously, we will have done our best, you would expect that. But it's not impossible for a leniency applicant to miss something. It does happen. Actually, what this case shows is what happens if you do. If you miss something either because you don't have the documents or you didn't find them, I don't know which it was, what happens is the next paragraph --

THE CHAIR: I just wanted to see if there was any difference between you on that.

MR PICCININ: There isn't. So those are my submissions on the first topic.

On to the second topic, which is strike out in relation to B0 specifically, I don't want to go over the interpretation of the emails again, because I think you have my submissions on that.

THE CHAIR: Yes.

MR PICCININ: But my learned friend made the submission: ah well, when you go back to the decision of recital 35 --

THE CHAIR: I'm sorry. Can you just -- I do apologise.

MR PICCININ: That's all right.

(Pause).

THE CHAIR: I do apologise.

MR PICCININ: Not all. I should say, we did make leniency submissions in relation to Suzuki as well, which you can see recorded later in the decision, when we had leniency, but not immunity for Suzuki. So what happened is that Takata was there first. It's not that we didn't produce it. So that was the answer to the previous point.

The second point in relation to B0 -- that's right, my learned friend took you to recital 35 of the decision, which I did show you, which said that there was also -- it wasn't the essence of the cartel, but there was also collusion sometimes, when new vehicles, entirely new vehicles were started.

He said: well, if you had collusion on project 0 phase 2, which was the incumbency type, then looking at recital 35 of the Commission decision seems like pretty likely that you also had collusion of the recital 35 kind, which is the entirely new vehicle kind, back when the B0 project was commenced, at phase 1, in 2002. But, of course, one problem with that argument is that recital 35 does not relate to the year 2002.

The Commission is not saying that in relation to Toyota vehicles even, there was collusion of that kind in 2002 at all. The Commission only finds a cartel in relation to Toyota from 2004 and indeed, I mean, if Toyota were here, saying, "Ah well, there was

collusion on our products from the 2004 to the 2010 period, therefore it follows I can allege there was collusion in 1997 or 2000, or ...

You can't do that. You need something in the file to provide some basis for that submission, and there just isn't anything.

My learned friend -- this is a similar date point. My learned friend places particular reliance on his inference that in the email we looked at there was a reference to the Autoliv person who was responsible for PSA, and he says, well, that's Christophe Riviere from Autoliv. Well, maybe.

But if that's true, that makes it less likely, not more, that this was a reference to some collusion in phase 1 in 2002, or thereabouts, or phase 1 at all. Because, of course, Autoliv was only found to have participated in any of these cartels, including the Toyota one, from 2006. That's in this decision, on page 86, the table of infringements, and the OSS2 decision on page 230. So the idea there was some reference to some collusion with Mr Riviere, back in 2002, just doesn't make sense.

It's also right that Autoliv has said -- and it's at applications bundle, tab 7, page 70, paragraph 40 -- Autoliv has said that they searched his documents, that person's documents, and provided them to the Commission. Of course, therefore, the Claimants already have them. So we say there's no proper basis from there either for the allegation that there was collusion on B0 project, phase 1.

So that takes me on to causation, where I have, I think four points to make. The first of the points is the point that Professor Neuberger made, that what we're talking about here is quite different from umbrella effects, because we're operating here on the hypothesis that there was no collusion in relation to the commerce in the claim at issue.

So what we're trying to find here -- we're working on the hypothesis that the cartelists were actually competing with each other to supply these products to the Claimants and they weren't colluding on it. But, somehow, the earlier collusion that they had on

some different product for some OEM had an effect. That's different from umbrella pricing. I'm not saying it's impossible that there could be one, like, in theory. I'm just saying that you need to plead something, some sort of mechanism, some sort of basis for a completely diffuse and amorphous allegation of that kind.

So what they have pleaded, being generous, is the regression analysis. But my learned friend quite rightly pointed out -- and I'm sorry I missed it -- that regression, of course, was only for PSA and not for the rest of the Claimants. So that's not good enough for the rest of the Claimants, it gives you nothing at all.

For PSA, we say it's not good enough either because all they're saying is that the prices that PSA paid for their seatbelts overall, lumping them all in together, was higher to during the infringement period than afterwards. That doesn't tell you that's because of my client's collusion in relation to Toyota or Suzuki.

If there's no proper basis for alleging that my clients colluded on supplies to anyone else, that's not -- I mean, nothing's been said. It's not been said, unsurprisingly, that Toyota and Suzuki make up 80 per cent of the market and, therefore, low and behold, to collude on that 80 per cent of the market it must have some sort of impact. Nothing's been said about that at all, to explain why collusion to such a limited extent and such a limited duration has been found by the Commission, could have these market wide harm-type effects.

My learned friend also referred to the AlixPartners letter and said that of course what that's doing is saying: this is the information we need in order to go away and conduct an analysis.

But, actually, it wasn't that analysis. It's an entirely different analysis; the differences analysis that hasn't been pleaded at all is what that was about. But, even then, that was, as I said before, hope, not even expectation. I just don't see how that can be said to meet the standard that this Tribunal laid down in FOREX at all.

The final point on causation is the document in the exhibits-bundle, at 2179, which my learned friend took you to. I wonder if we could bring that --

THE CHAIR: We have --

MR PICCININ: You have it in front of you. That's handy.

You can see that what that's saying is, it's talking about prices for the next Yaris, and they're expressing concern -- which is a Toyota vehicle. These people -- who are not my client, I should say -- are expressing concern that might become the standard price for the next B0, which is another Toyota vehicle, joint venture, and also the next Corolla, which is another Toyota vehicle.

So they're not expressing any concern at all that a low price for the Yaris will set any kind of benchmark or have any impact at all for prices for Fiat 500s or Chryslers or Jeeps or Maseratis.

THE CHAIR: No. But I think the point's being made it goes some way to saying: look, these are all bespoke products and therefore one can have a clear line between them. That's --

MR PICCININ: For these vehicles? Yes. For one OEM. It's not a coincidence, in my submission, that they're all one OEM and talking about tenders that are likely to be proximate in time.

So it's something else altogether to say that collusion on Suzuki would have some sort of impact on Fiat. If it is limited to the same OEM, then it's very difficult to see how it can help the claim against my clients in this case because we must be talking about the collusion that my clients are involved in vis-a-vis Toyota and Suzuki, or if you want to add B0, Phase 1.

Well, what's the next Toyota joint venture with PSA that they're claiming for?

Not B0, phase 2. It's nothing. There aren't any. So there aren't any examples of Toyotas or Suzukis that are also Peugeots or Citroens that they're claiming for in this

case.

The only one they are claiming for is the B0, which is avoided in 2005 based on tender that commenced in 2002.

So what is it? Which tender is it that they say my clients are actually liable for, even arguably, that gives rise to these spill over effects for which vehicle?

This is the work that they need to do so that you have properly defined questions that we can go on and work towards a trial of. I actually can't see what the answers might be.

I'm not making dry pleading points to you, where I say: this should have been done and it hasn't been done, naughty, naughty.

It really seems to me there aren't answers to these questions, and that's why after so many years no answers have been provided.

So, looking behind me, there's nothing further to add. Those are my submissions, unless you have any further questions.

THE CHAIR: Thank you very much. Thank you.

MR PICCININ: I'm grateful.

THE CHAIR: We're going to just rise for a while. If you stay there, we'll be back.

(3.13 pm)

(A short break)

(3.09 pm)

THE CHAIR: We will consider your application overnight and let you know the decision in the morning. In the meantime, if you'd like to carry on, use the time efficiently with disclosure.

MR O'DONOGHUE: Forgive me for popping up. Might I make a practical suggestion? So based on Hausfeld's list of issues, there are certainly two or three issues we can ease through today because the battle lines are drawn.

On a number of disclosure issues, there has been correspondence from my solicitors today to the Claimants. They have been concessions by Mr West on his feet, and we've asked them for revised composite order. My suggestion is the issue of foreign regulatory disclosure --

THE CHAIR: Sorry, say that again?

MR O'DONOGHUE: The issue of foreign regulatory disclosure, limitation disclosure, and pass-on disclosure, they could be completed, certainly completed, today.

THE CHAIR: Yes, okay.

MR O'DONOGHUE: On the other disclosure points, things are somewhat in flux and it may be more efficient if we came back to those tomorrow in light of the correspondence.

THE CHAIR: We don't have that much time today, but that sounds very sensible.

MR O'DONOGHUE: It may not arise, but if there's a pecking order, in my respectful submission --

THE CHAIR: Well, I think that's approximately the pecking order in the list of issues, isn't it?

MR O'DONOGHUE: Yes, but apart from pass-on.

THE CHAIR: So where do you want to start?

MR O'DONOGHUE: Well, I think it's Mr West on regulatory disclosure.

THE CHAIR: Just give me a second. Sorry, I just lost the order. Right.

Submissions by MR WEST

MR WEST: This is the first issue in the CDO, or the second issue, beginning at paragraph 4, where my clients seek a disclosure of the other regulatory documents, that's those supplied in the investigations in the US, South Africa and Brazil, which carves out material which we've already been provided with as a result of disclosure

of the Commission file.

The starting point, I would say, in competition cases where there have been investigations by regulators, is that disclosure is frequently ordered because those files are likely to contain highly relevant documents, often the documents which have been seized or have been supplied in connection with the investigation, or provided to the parties as evidence on which the regulator proposes to rely in its decision.

Mr Bolster, at Bolster 4, paragraph 35, gives four examples of cases where foreign regulatory files have been ordered to be disclosed.

As we know, at the first CMC, the Tribunal ordered disclosure of the Commission file. In my submission, that disclosure has brought to light evidence that the cartel was in fact directed against the Claimants, some of which we've been discussing this morning in relation to Tokai Rika, and some of which we haven't, but touched upon briefly in relation to the other Defendants.

The common refrain of the other Defendants is that this material is thin, intermittent or fragmentary. But, of course, this is a cartel case in which the evidence often is fragmentary, precisely for reasons that we understand.

This was adverted to in the recent Trucks judgment, paragraph 324. No reason to turn it up. The Tribunal said it's critical to be aware that cartel infringements are commonly sketchy and incomplete --

THE CHAIR: Sorry, I don't want to cut you short, but as I understand it -- and correct me if I'm wrong -- the disputes have narrowed to some extent. So as I understand it, is this right: the Department of Justice documents, it's not a question of whether you get disclosure, it's a question of how disclosure is done; is that right?

MR WEST: No, I don't believe so.

THE CHAIR: There's -- right. I thought there was some discussion about electronic searching and things.

Can you explain to me the scope of the dispute on the DoJ documents?

MR WEST: Yes. In relation to Brazil and South Africa, the Defendants' position is we shouldn't get any of that.

THE CHAIR: Because of illegality?

MR WEST: And other reasons. They say it's not justified.

In relation to the DoJ, Tokai Rika provided us with around 700 documents from the DoJ file --

THE CHAIR: The 11th Defendant has --

MR WEST: Yes. Which have been retrieved using certain key words relating to the PSA Claimants.

THE CHAIR: Yes.

MR WEST: The PSA Claimants hadn't been joined yet, at that time. We seek disclosure of the balance of those files, insofar as relevant, but that is objected to.

THE CHAIR: Right. As against the other Defendants?

MR WEST: Likewise, it's all objected to.

THE CHAIR: Right. So shall we start there, on the DoJ, why you say you need them --

MR WEST: In relation to all three --

THE CHAIR: -- the practicalities of how you anticipate disclosure working.

MR WEST: All three investigations are concerned with essentially the same conduct. It's the same products, occupant safety system products; the same parties, broadly, including Autoliv, TRW, Tokai Rika; broadly the same time frames, in short, effectively the same underlying cartel conduct.

But the volumes of documentation appear broader, certainly in the case of the DoJ. The Commission file, the evidence is that that had about 1,100 documents in the file when we received it. We are told that the DoJ file has about 100,000 documents on it. Clearly, a much broader scope of documentation.

Now, the order we're seeking is only for documents which are relevant. So we're not seeking specific disclosure of all these documents.

THE CHAIR: So which paragraph were you on for DoJ?

MR WEST: Well, they're all addressed together, in 4A(ii).

THE CHAIR: But I understand it's the USA where proportionality is particularly being raised; is that correct? It's a very large number of documents?

MR WEST: Proportionality is raised as one amongst several objections, that's right.

THE CHAIR: Yes.

MR WEST: Our objection to the proposal which has been made for key word searching concerns whether the documents, given their age, are capable of being effectively searched. In other words, whether there is reliable optical character recognition in the documents. We're also concerned about limiting the key words to those which were agreed with the 11th Defendant prior to the first CMC.

THE CHAIR: So leaving aside what you say the search terms should be; what's the evidence on the fact that searching may not be possible?

MR WEST: I think it's primarily to do with the age of documents. We're talking about documents going back to the early 2000s.

Of course, we're not in a position to give much evidence about this because we don't have the documents --

THE CHAIR: But don't -- sorry, my experience of disclosure in the US, that's private litigation disclosure, is they all get -- they're all searchable by the time you get anywhere through an investigation; do we know that's not the case with the Department of Justice investigation?

MR WEST: I don't think we definitely know that that's not the case.

THE CHAIR: Right.

MR WEST: But, certainly, my clients are reluctant simply to leave it at what we've

been given so far, based on the limited key word searches of Tokai Rika on the fact.
THE CHAIR: I understand that. That's a separate point. But the question is: electronic searching in principle, can it take place?
You said to me you're not sure it can. I would like to see what the evidence is on that, because that seems to be a fairly important submission.
MR WEST: We don't, of course, have the documents, but perhaps my friends will be able to help you more.
THE CHAIR: Mr O'Donoghue, are you able to help whether these are electronically searchable documents?
MR O'DONOGHUE: They have been. That's how they got the 700 documents from the 11th Defendant.
THE CHAIR: But the suggestion is the older documents can't be searched because --
MR O'DONOGHUE: It's a pure assertion.
THE CHAIR: Yes, but do you know the position?
MR O'DONOGHUE: It's the 11th Defendant's documents to date. My understanding is -- Mr Piccinin will chip in -- they have been searched and there is no particular issue for any period.
MR PICCININ: I'm just taking instructions on the factual question of whether there are any documents that are not searchable. But, obviously, there were a large number of documents that were searchable.
THE CHAIR: We know some of them are searchable.
MR PICCININ: Exactly.
THE CHAIR: Do you have instructions on this?
MS FORD: Sir, yes. For our part, we are concerned with some 50,000 documents.
THE CHAIR: Yes.
MS FORD: We're told that the scope of the document requests that the DoJ made

were broad, so that is likely to include a significant number of documents which aren't actually relevant to the alleged infringement that was investigated by the DoJ, let alone the issues in these proceedings.

We have no reason to suppose that those documents are not electronically searchable, and the basis of our proportionality concern is the suggestion that if electronic searching is unacceptable, then that necessarily means we have to engage in a manual review of 50,000 potentially irrelevant documents.

THE CHAIR: We have sympathy in that point of view. But there is no evidence on how long that would take or what it would cost to manually search 50,000 documents?

MS FORD: We have not put in evidence with that level of granularity.

THE CHAIR: Not even approximately. So I don't know if we're talking about a million pounds in six months or £200,000 in four weeks. I have no feel for that.

MS FORD: We haven't sought to quantify the cost. We have identified the volume of documents and the fact that, if we're not permitted to search electronically, then that becomes a manual review, which we say is onerous --

THE CHAIR: Would you be able to take instructions overnight as to whether they are electronically searchable?

MS FORD: I have just taken instructions -- I can certainly take instructions again --

THE CHAIR: It looks like somebody might be trying to give you instructions.

(Pause).

MR O'DONOGHUE: While we're waiting, what we do know is that certain key words for PSA, Opel and Vauxhall were applied to this repository and that threw up something of the order of 700 documents, 402 of which have been disclosed.

So we do know that to a material extent, quite how material may be -- to be resolved. But we do know to a material extent, these have been searched and they are searchable, and have yielded material which is responsive.

Now, of course, what is striking about what Mr West -- really is what he doesn't say. What he doesn't say to the Tribunal is: yes, of the 402 we have received, we can identify, based on that disclosure, that there is a reasonable basis for a further inquiry. His issue is that he has drawn a blank on the 402 on the key words they have agreed to, and his answer to that fishing expedition having failed is: let's get out the super trawler, and look at all 50,000.

THE CHAIR: We'll come back to that. These are important submissions, I'm not saying we won't discuss that in due course. I'm just trying to, at the moment, discover whether the electronic searching is feasible; it may be you can't answer that today.

MS FORD: I'm told the difficulty arises because these documents have been stored. So in order to ascertain whether they are electronically searchable or not, one would need to restore them. That is something that would have to be done by a third party. It hasn't been done yet because of the costs --

THE CHAIR: Sorry, explain that to me again. They're stored, physical documents are stored?

MS FORD: No, electronic. There would be a process required in order to restore the documents. That is a process that will require third party assistance and cost, and it has not, therefore, been done yet.

THE CHAIR: I understand.

MS FORD: That would be necessary in order to ascertain definitively whether or not the body of documents is electronically searchable. Although insofar as we presently understand, we have no particular reason to think they would not be.

THE CHAIR: So assuming we order disclosure, which we are yet to hear argument on whether disclosure should be ordered at all, I appreciate that. You're requesting that should be done electronically, rather than manually, for good reason, because it would be more efficient.

So, to some extent, one could argue that if we get to that stage, the burden is on you to find out if what you're proposing is feasible, rather than proposing something that is not feasible; does that make sense?

MS FORD: I certainly see the sense of what you put to me. We are objecting on the grounds of proportionality. That objection is particularly forceful in circumstances where the Claimants take the position that manual searching would not be permissible. We concede that it would have less force, albeit not no force whatsoever, if it were possible to conduct the search electronically. I think that is the position.

THE CHAIR: Yes. All right. So shall we -- Mr West, can I hear from the Defendants, first of all, as to why there shouldn't be disclosure at all with respect to the DoJ documents. I understand the reasons why you want disclosure.

Submissions by MS FORD

MS FORD: Sir, I'm going to be addressing you essentially on a composite basis in respect of all the --

THE CHAIR: That's fine. I'm sure the arguments are in common at this level. Yes.

MS FORD: So the Tribunal will recall that the Claimants did apply for disclosure of this same body of documents at the first CMC and they were refused.

Just to remind the Tribunal very briefly where matters were left last time, it's at the core bundle at tab 27. So your ruling on this point begins at page 355.

THE CHAIR: Core bundle, tab 27?

MS FORD: Core bundle, tab 27.

THE CHAIR: Yes.

MS FORD: You gave a ruling which begins at 355. In particular, at point 6, which is over the page, at page 356, you made the observation:

"The case as currently pleaded against the defendants is not well particularised."

THE CHAIR: Hm-mm.

MS FORD: At paragraph 17 of your ruling, which is at page 360, you indicated that you'd heard argument concerning categories of documents supplied to other competition authorities, and you noted that the pleadings referred to the SACC. But there was also a request in respect of Brazilian and US competition authorities.

At 22, you commented that it was unsatisfactory that on the disputed issue of disclosure you've been provided with no evidence from which to assess the relevance of the documents sought or by which to assess proportionality.

Then, at 26, you noted that a dispute had arisen as to legality. Right at bottom of that page, you set out:

"Had I decided to order disclosure of the class of documents, I would have stayed that order pending further evidence and argument on legality, given that I'm not ordering disclosure, it doesn't matter."

So that's where matters were left, and I remind the Tribunal of those points for three reasons.

First, in our submission, the Claimants' case remains not well particularised. I anticipate that is something that has been aired very extensively over the course of the morning.

Bearing in mind that the Claimants have now received disclosure permissions access to the file, that has enabled them to plead only four more instances in which they say there has been anti-competitive conduct liable to affect them, the Claimants.

THE CHAIR: But the case is going -- you're not applying to strike out the case – the case is going to trial, and I don't see why that's -- the fact it may be fully pleaded, why that's a reason for not giving disclosure.

MS FORD: So, in my submission, the exercise of fishing around for a case that you identified last time is still going on, and that is relevant to the balancing of the discretion

that this Tribunal has to exercise in deciding whether it's proportionate to permit the Claimants to continue scratching around for a pleadable case.

That's the first point we make. It's still not well particularised.

Secondly, such amendments as have been made to the pleadings are, in our submission, transparently self-serving and made with an eye to this renewed application for regulatory documents. So, for example, there is now a section in the pleadings which purports to plead other foreign regulators in addition to the South African Competition Commission. So the Department of Justice has now been added into the pleadings, but with no particular explanation as to why documents or investigations by the US Department of Justice are of relevance to have allegations of breach of EU competition law.

There is also now a pleaded case in respect of the Brazilian Competition Authority. But, again, with no particular explanation as to why investigations by a Brazilian regulator are particularly pertinent to allegations of breach of EU competition law.

Now, we know that those were matters that the Claimants were aware of previously, because of course it was the subject of a previous disclosure application. So it's clear that what's been done is simply to try to bolster their perceived relevance to the purpose of renewed application for exactly the same documents when very little has changed.

So the third point I make relates to the admissibility of foreign law evidence, which is a point that is being taken against me by my learned friend in their skeleton.

The Tribunal gave a clear indication that if it were to order these categories of documents, it would need to hear further evidence and argument on the question of legality, and the Tribunal then proceeded to give directions to filing and serving of evidence in response to applications for the purposes of this CMC. So, in our submission, it can come as no surprise to the Claimants now that given that they

renewed their application for these documents, we've served evidence in response which raises again a question of legality.

THE CHAIR: I think we'll come back to legality in due course. But --

MS FORD: So that's the context in which we raise these particular points. There are obviously points about legality which I can deal with separately.

THE CHAIR: Yes, I think let's deal with legality separately. Because legality doesn't apply to the Department of Justice documents.

MS FORD: It doesn't. The Department of Justice application is solely on the basis of -- our resistance to the application is solely on the basis of proportionality concerns, and that's dealt with in Mr Firth's witness statement, which is in the witness statements bundle, tab 5.

THE CHAIR: Sorry, give me a second. Let me get the bundle out.

Yes.

MS FORD: So beginning in this statement at paragraph 10, there's a heading: "US Department of Justice."

Mr Firth explains that TRW Deutschland Holding, which is not a party to these proceedings, is the entity that signed a plea agreement with the DoJ. He confirms that he's been informed that the German automobile manufacturers referred to in the plea agreement are the VW Group and the BMW Group, and the plea agreement did not concern conduct in respect of supplies of OSS products made to Peugeot or Vauxhall Opel groups. This is a witness statement that actually predates the Claimants' amendment of their case to add in a further group.

But, on any view, the brands that are targeted are the VW Group and the BMW Group. So it doesn't concern the Claimants' brands.

The number of documents concerned are then set out in paragraph 11. This is where we get the 50,000 documents point, and the fact that the scope of the DoJ's document

requests are broad. The documents produced by the relevant entity likely included a significant number of documents that are not relevant to the infringement being investigated by the DoJ. That is the context in which we make the submission that particularly if any review has to be conducted manually, that is going to be a time consuming and expensive exercise, which, in our submission, is not justified in the light of extreme paucity of the case that is being pleaded.

THE CHAIR: Yes, but you include a significant number of documents that are not relevant, which I fully understand. But then you're accepting there are documents that are relevant.

MS FORD: Well, we're not in a position to make that submission either way, in the sense they've been stored and they haven't been reviewed.

The submission we make is that because of the breadth of the requests that were made, it's likely a large volume of these documents are not relevant --

THE CHAIR: You're not saying they're all not relevant?

MS FORD: I'm not in a position to make that submission.

The submission I make is that the exercise of reviewing them in order to find possible relevant documents in circumstances where the plea agreement was not even concerned with conduct relating to the Claimants is, in our submission, disproportionate.

THE CHAIR: Yes, but you just pointed to my judgment, where I said I was disappointed I didn't have any evidence on proportionality, and you've come along today saying it's disproportionate with no evidence of proportionality; have I misunderstood?

MS FORD: I rely on the figure in question. We are, as I explained, in the situation where one would have to retrieve and actually incur costs in looking at those documents in order to give any further detail as to the exercise of reviewing them.

So, Sir, that is the position as far as we're concerned in relation to the DoJ documents.

Submissions by MR O'DONOGHUE

MR O'DONOGHUE: Three short points, if I may. Ms Ford covered them well, if I may say so.

First, Mr West says the starting point is that disclosure of foreign regulatory documents is given routinely. But, in my respectful submission, that isn't correct. The starting point in the majority of cases is you get the Commission file as they've received, and that's it.

Now, there may be exceptions for a truly global cartel, where you will have some multi-jurisdictional documents of interest. But, in this case, we have the sum total of three non-EU regulators who have looked at this. This is not an international cartel, in the sense, for example, of Air Cargo.

So we do not accept the starting point that it is routine to order foreign regulatory disclosure, that the Commission file in most cases is the start point and end point.

Second, there was a revealing submission by Mr West earlier today, where he said in relation to the 402 documents they had received from DoJ, they were, and I quote, "duplicative of what was on the Commission file". When one is thinking of proportionality, the fact that of the 700 already disclosed there seemed only to have been duplication, in my submission, is a pretty damning point against the suggestion that we should manually review or electronically review up to 50,000 more.

THE CHAIR: Then, again, the same point to you: if you're saying it's disproportionate; why have you put in no evidence relating to how large the task would be?

I mean, that sort of evidence is routinely produced, disclosure applications I've seen in the past.

MR O'DONOGHUE: Sir, a couple of points, if I may?

First of all, when one is looking at a sampling exercise which is taking place, the way this stage of disclosure should work, if it's to be effective, is you get the sample, and if having interrogated the sample you can come to court as claimant or advocate and say, "Well, look, I have found the following and that entitles me to interrogate this further".

THE CHAIR: Interrogation. If you just give me a little bit more background as to the interrogation that has already taken place.

MR O'DONOGHUE: Yes, so what they received from the 11th Defendant, they have plugged in key words, as I understand it, that relate to PSA, Opel and Vauxhall, and that has led to a hit --

THE CHAIR: I thought the 11th Defendant only had a small number of documents in the first place; do I have that wrong?

They didn't have 45,000 or 50,000 documents. They had, like, 1,100 or something.

MR PICCININ: Sir, I don't have the total number in front of me, but I certainly have no basis to say it was 50,000. But what I can say -- perhaps if we just turn up the witness statement of Mr Whiddington at this point.

THE CHAIR: I think I had seen it written down somewhere. But, yes, which witness statement to you want me to turn up?

MR PICCININ: The second one in the application bundle, at page 195, and it's tab 15.

THE CHAIR: Yes.

MR PICCININ: So when we conducted the searches that Mr O'Donoghue has just referred to -- it's paragraph 22 -- when we conducted the searches which were agreed with the Claimants for the brands before the addition of FCA, that produced 662 document hits in total. Of those, 260 didn't actually relate to the Claimants at all. So although the search terms were things like GM and Peugeot and Citroen and all that, a bunch of them didn't refer --

THE CHAIR: That's not really the point I was on. I was just asking Mr O'Donoghue: how many did you search?

MR PICCININ: How many in total.

THE CHAIR: You went off on something else. Are you able to take to instructions on that?

MR PICCININ: I am taking instructions on it.

THE CHAIR: Sorry, Mr O'Donoghue.

MR O'DONOGHUE: So we say that some sampling has taken place. I accept there is, perhaps, some further jiggling to be done on the contours of that. But you would have thought ordinarily that if a sample of whatever the denominator is has resulted in between 407 and 700 returns, and of those not a single document is put forward at this stage and saying, "Look, we're on to something". So thinking of this as a staged disclosure issue, that doesn't amount to a hill of beans. They have nothing.

THE CHAIR: Yes.

MR O'DONOGHUE: They have had months to look at this.

THE CHAIR: I'm not sure it was done as -- it wasn't done as a sampling exercise. It wasn't -- let's test how effective sampling is, so we can draw conclusions from it. It's against a different Defendant.

MR O'DONOGHUE: In effect, we say yes, because the key words were agreed. They were PSA or from Vauxhall and have resulted in some returns.

THE CHAIR: It's a different Defendant. I have no knowledge why you've provided 45,000 documents, I may have that wrong. Ms Ford's clients provided 50,000. As I understand, the 11th Defendant provided a fraction of that. So that suggests they're not representative of each other. These sets are not representative of each other in the first place.

MR O'DONOGHUE: Sir, nonetheless, the fact that not a single document has been

shown to the Tribunal, having had these for month, is a striking and unpromising fact as a starting point.

THE CHAIR: But that's just because they appear from an another source, not because there weren't any relevant documents.

MR O'DONOGHUE: They have certainly looked at hundreds of documents and drawn a blank, that is manifest. We say that is significant.

Now, Sir, on the global figure, whether it's 40,000 or 50,000, in my submission it is trite that reviewing 50,000 documents manually is an enormous undertaking.

Now, whether that's weeks or months, or a six or seven figure sum, one can debate, but it is manifestly an enormous exercise. It is not something in my submission to be undertaken essentially on a wing and a prayer. There would need to be a concrete and, we say, robust basis to expect that if one did that, one would expect to find something of relevance.

In a sense, we go back to where Mr Ford started. We are dealing with a violation of European competition law in relation to supplies in Europe. The suggestion that the Brazilians, the South Africans or the United States were looking at their markets and their competition laws and found a smoking gun in the European Commission case file we say is remarkably unlikely as a starting point.

THE CHAIR: But you're not saying, as I understand it, that there will be no relevant documents in the -- prima facie no relevant documents in the DoJ file.

MR O'DONOGHUE: Sir, we're saying a series of things. We're saying, as a starting point on an inherent likelihood, remarkably unlikely, because they're looking at their competition law in their market, they're not looking in Europe.

THE CHAIR: Sorry to keep interrupting you, I'm trying to understand where we're going.

I thought when the DoJ documents were searched, as against the 11th Defendant, a

lot of relevant documents appeared, but they were documents that had already been disclosed.

MR O'DONOGHUE: Yes. As Mr West said, that is Mr West's point, that it's all duplicative.

THE CHAIR: Yes. So I understand one can say, "Well, it's not proportionate to produce duplicative documents", that I understand. But the submission you just made to me was quite different and opposite to that. It was that in a US regulator you're not going to get documents that are relevant to Europe. That seems to have been -- insofar as one has done sampling, that seems to have been proved wrong on the sampling, because of the Commission documents; do I have that wrong?

MR O'DONOGHUE: Well, Sir, there is a duplication, but on a pointless level. Because what Mr West hasn't done is: well, there is a wonderful document we found in the Commission's case file, which we plead in our amended particulars, it turns out the DoJ had exactly the same material.

He hasn't done that.

As we've seen from Mr Piccinin's solicitors' evidence, what they've found seems to be duplicative material that is utterly irrelevant and that kind of duplication, in my submission, has nothing to do with it.

THE CHAIR: Right.

MR O'DONOGHUE: So, in my submission, there has to be some tangible basis to expect that this enormous exercise -- and whether it's done electronically or manually, it's still an enormous exercise -- is likely to be worth the candy.

In my submission, on the evidence before the Tribunal today, not only is there nothing to support that in the sampling which has been done; it gives the Tribunal a good basis for suggesting it would be a complete and utter waste of time.

THE CHAIR: Leaving aside the sampling; what evidence do I have that the

documents, the DoJ documents, are not relevant?

MR O'DONOGHUE: Well, Sir, as a starting point, inherently unlikely. Their investigation is concerning two Japanese OEMs. They are looking at their markets. There are brands like Vauxhall and Opel that are simply not supplied at all in the United States. So, as a starting point, this is inherently unlikely. We have the duplication point, we have the sampling, for what it's worth.

Of course, I can't tell you: yes, I have looked at the other 44,300 and I've personally verified it.

No one can say that, until we have done the exercise. But one has to look at what are the inherent probabilities, what is the evidence before you, and form a view in the round.

In my submission, as a starting point, it is distinctly unpromising, to say the least.

THE CHAIR: Right. Mr West --

Submissions by MR PICCININ

MR PICCININ: Yes, so my clients are in a different position to my learned friends, and I don't mean a better position, I just mean different, because --

THE CHAIR: Have you put in a skeleton argument on this?

MR PICCININ: I'm just trying to help you with the facts, and what I said in my skeleton argument is: I don't have different points to those my learned friends have made about this document. I hope you'll see what I mean in a moment.

So the facts are: you're right, there weren't that many documents that we provided to the US.

THE CHAIR: Do you have a number?

MR PICCININ: It's about 4,700.

THE CHAIR: 4,700, right.

MR PICCININ: So what we did, we did searches on those, with search terms that were agreed at the last CMC, with the Claimants, which led to the initial set of brands. That produced 662 hits. A substantial number of those didn't relate to the Claimants at all, because it was like GM. But GM for general manager, not GM for General Motors, for example.

So there were approximately 402 that actually contained a reference to the Claimants. Of those 402, a total of zero have been identified as having any relevance at all to this case beyond what's already on the European Commission file.

THE CHAIR: But that's -- but how many -- you say they disclosed 402?

MR PICCININ: That's right. So zero --

THE CHAIR: You didn't screen them for relevance, just disclosed them?

MR PICCININ: The only screening we did was first conducting the search terms and then removing the ones where you could see it didn't refer to the Claimants at all.

THE CHAIR: It was the wrong search term, effectively.

MR PICCININ: So of those, 0 of 400 were seen to have been of assistance to the case.

So my submission is, at least as far as my client's universe of documents is concerned, that's not a very promising start for a submission: we better go out and do more searches on them, or review them.

Finally Sir, there is one other point. So my learned friends have both made the point: of course, this is the US investigation, so it would be a bit odd if you found something uniquely European that was not provided to the European Commission. But we do also have a number of concluded investigations in the US that were concluded with plea agreements. This is addressed in, again, the same witness statement, second witness statement of Mr Whiddington, in paragraph 21, where none of them concerned supplies to the Claimants. So what the Claimants seem to be positing here -- all this

happened a very long time ago. These investigations are way back in 2011, 2012, with plea agreements rolling out over the next few years.

So what has to be supposed is that there was some document relating specifically to supplies to Europe which was supplied to the US, wasn't supplied to the European Commission, so even though we, one of us, found this document and gave it to the US DoJ, when we were making leniency submissions to the European Commission, we didn't provide it to the European Commission.

THE CHAIR: Yes, I understand.

MR PICCININ: Then the US DoJ looked at that document and put it in the bin, despite the fact that it showed some collusion that no one else in the rest of world had yet found.

That is a pretty extraordinary submission to make as something that seems like worth going out and doing any work at all. So I don't put my proportionality case on the basis: gosh, there's whole lot of work --

THE CHAIR: I don't want to cut you off, but I didn't think you had a case on this. You've not addressed it in your skeleton argument, but you're making submissions. I just put a warning shot across your bow, that if you choose not to put a skeleton argument on it, you don't get free rein to raise points as you see fit. There are other people here to make these submissions, and you said you're going to follow.

I'm very grateful for the assistance on the scope of the documents you have received. Mr West. So the challenge is, as I see it, that there are prima facie unlikely to be relevant documents in the Department of Justice files. You've had disclosure from the 11th Defendant, insofar as you think that's helpful, and you have received 400-odd documents, and I am told they weren't relevant to your case in Europe.

So could you just assist me on what evidence you have to show that the DoJ documents will be of assistance to you?

Submissions by MR WEST

MR WEST: Yes, we received, that's right, about 400 documents from TR, but it's not the case that they weren't relevant. My point is that they were duplicative. So they were relevant, but we already had them from the Commission file.

The way this happened is that we were given the documents on the eve of the deadline for making our application. This is addressed in Mr Bolster's fourth witness statement.

THE CHAIR: Can you just remind me which tab Mr Bolster's fourth is?

MR WEST: Tab 2 and paragraph 27, DoJ.

THE CHAIR: Yes.

MR WEST: So, at the top of the next page:

"There have been developments concerning the documents submitted by Tokai Rika to the DoJ which occurred very shortly for the deadline for filing this witness statement."

What happened was that we were provided with the responsive documents. As a result, it was too late to address them in here. But the position, as I have explained it, is that there were a number of relevant documents, but think were duplicative of the documents we have from the Commission file.

THE CHAIR: Where is the evidence that they were duplicative?

MR WEST: This doesn't address it because Mr Bolster hadn't yet had the opportunity to look at it. But we can, if necessary, address this.

THE CHAIR: So you're just telling me that on instructions?

MR WEST: Yes. I can say on instructions, for example, that the Obara email we looked at this morning was in there, and my friend's clients will know that because they know what is in the documents.

THE CHAIR: That email was --

MR WEST: I'm told on instructions that email was in there.

Of course, the whole point to this is it's the same underlying conduct which is being investigated. My friends try to suggest it's some different cartel in America and a different cartel in Europe.

When we looked, of course, at Mr Cameron Firth's statement, he refers to the DoJ as having found anti-competitive conduct towards two German automobile manufacturers. It's paragraph 10, which my friend Ms Ford read out.

THE CHAIR: Paragraph 10 of --

MR WEST: Mr Firth's statement. But it's the same. I made the point earlier, it's the same Defendants. It's the same products. It's the same time period. This is essentially the same conduct.

THE CHAIR: Sorry, this is a very basic question. So the contracts in issue in these proceedings; are they all cars that are manufactured in Europe?

MR WEST: Yes. I believe they are.

THE CHAIR: Right. The Department of Justice case; was that cars that were manufactured only in America?

MR WEST: I don't know the answer to that.

THE CHAIR: Right.

MR WEST: But we do know, for example, a lot of the cartel conduct on the part of Tokai Rika took place in Japan. Mr Obara's email is in Japanese.

THE CHAIR: It doesn't mean -- yes.

MR WEST: So although the subject of the Commission's investigation was to suppliers of cars to Japanese manufacturers in Europe, that doesn't mean the cartel conduct took place in Europe.

THE CHAIR: No, I understand that.

MR WEST: And so --

THE CHAIR: So your submission would be that documents filed with the Department of Justice may relate to activities relating to cars to be manufactured in Europe?

MR WEST: Yes.

THE CHAIR: Do I have any evidence of that in the witness statements? Do I have any evidence to the contrary?

MR WEST: I don't believe we have any evidence. Although, as I say, the position in relation to the Tokai Rika documents can be put in evidence, if that's useful to do that. But, as we say, these arrangements don't necessarily relate to particular supplies, as opposed to relating to the cartel arrangements more generally.

THE CHAIR: Yes. So you're not saying the Department of Justice documents will relate only to car manufacturing taking place in the US?

MR WEST: Not necessarily.

What there is evidence of, for example, obviously we have the fact that a substantial number, 400-odd documents, were responsive to the search terms concerning my clients from DoJ file. My clients, as my friend said, don't actually sell vehicles in America. So you can't buy a Peugeot car in America, as I understand it. There is that evidence. In relation to the Brazil --

THE CHAIR: Just remind me where that evidence is?

MR WEST: Well, my friend just said it.

THE CHAIR: Right.

MR WEST: But it's correct.

THE CHAIR: But it's common ground, you think, that you don't sell cars in -- at least Peugeot don't sell cars.

MR WEST: I believe that's right.

In relation to the other regulators, obviously they'll address them separately. But there are specific matters we rely on there, such as the fact that the supplies to the PSA

were mentioned in the South Africa Competition Commission's initiation statement has been part of the complaint.

As I mentioned before, in the case of Brazil, one the parties under investigation is the aforementioned Mr Riviere.

THE CHAIR: In South Africa, you said, it was a reference to PSA.

MR WEST: In South Africa and Brazil.

THE CHAIR: And do you refer -- you don't manufacture cars in Brazil?

MR WEST: No, but we sell them there.

THE CHAIR: You sell them there. Right.

So, Mr West, was anything you wanted to add on relevance?

MR WEST: Not on relevance, but in relation to searches – Mr Bolster – I should refer to them. He put it in quite a lot of evidence, for example his fourth statement, at paragraph 28, explaining why there might be problems with optical search recognition.

THE CHAIR: Sorry, where --

MR WEST: So paragraph 28 of tab 2, page 21.

THE CHAIR: Well, that's just speculative, isn't it?

MR WEST: He says this is the case with respect to the Commission file disclosure received from the Claimants. So it appears that there is some evidence that the Commission file documents we received were not searched in that way.

He also does address proportionality, briefly, at paragraph 33, where he says:

"The Autoliv defendants are the only ones who have so far provided any estimate of the likely costs of giving disclosure more generally, and according to their disclosure report they've given a total cost for disclosure of between £150,000 and £300,000."

But that's for the whole action. That's just the figure in their disclosure report.

MR O'DONOGHUE: Sorry, that doesn't include the --

MR WEST: None of this is -- I'll be corrected, but I don't think there's any specific

evidence that's been addressed answering this.

THE CHAIR: All right.

Ms Ford and Mr O'Donoghue, anything else you want to say on relevance?

Shall we move on to legality?

MS FORD: Sir, I'm happy to set out our concerns on legality, albeit that it is Mr West --

THE CHAIR: It might make sense to have Ms Ford to make her other points, so to speak.

Submissions by MS FORD on legality

MS FORD: Just by way of an initial observation about the form of the evidence that we rely on in respect of this objection, because a point has been taken against us that it's not in the form of expert reports. We rely on two witness statements --

THE CHAIR: I don't think you need to -- subject to anything Mr West said, you don't need to address me on that. I take all the evidence as --

MS FORD: So the applicable principles, I think it's common ground, they are those set out in the Bank Mellat case, at authorities bundle 2, tab 22, beginning at 609.

THE CHAIR: Sorry, which tabs?

MS FORD: Tab 22 in the authorities bundle.

THE CHAIR: I think it might be bundle 1.

MS FORD: I apologise. It's bundle 2 in mine. It may be they're distributed differently.

THE CHAIR: It's tab 22.

MS FORD: 22. We start the judgment of Lord Justice Gross, paragraphs 2 and 3, where he recognises at the end of paragraph 2:

"On occasions a tension can arise between the English law requirement for the inspection of documents and the provisions of foreign law in the home country of the litigant."

He says:

"Where such a tension arises it's for the court to balance the conflicting considerations: the constraints of foreign law on the one hand, and the need for the documents in question to ensure a fair disposal of the action, on the other. That balance is struck by a judge sitting at first instance, making discretionary case management decisions."

Turning on to paragraph 55, on page 623, the report recalls that in general terms the right to inspect documents, in that case under a CPR rule, is not unqualified.

It is here addressing in particular the question of confidentiality. So, in some respects, falling short of objections of legality. But even in the context of confidentiality, the court is saying the court's task -- this is in the quoted passage --is to strike a just balance between a competing interest involved, those of the party asserting an entitlement to inspect the documents and those of the party claiming confidentiality in the documents.

There is a fairly extensive treatment of the case law, but the applicable principles are then summarised in paragraph 63, which is on page 626. We see, in (iii), a reflection of the principles I've already shown you:

"Whether or not to make an order of the production and inspection is a matter for the discretion of this court. An order will not be lightly made where compliance would entail a party to English litigation breaching its own criminal law, not least with considerations of comity in mind."

It goes on to say the court is not in any sense precluded from doing so.

(iv):

"When exercising its discretion, this court will take account of the real, in the sense of the actual, risk of prosecution in a foreign state. A balancing exercise must be conducted, on the one hand weighing the risk of prosecution in a foreign state and, on other hand, the importance of the documents of which inspection is ordered to the fair disposal of the English proceedings."

There is also (v):

"Should inspection be ordered the court can fashion an order to reduce or minimise the concerns under the foreign law, for example, by imposing confidentiality restrictions."

I take the Tribunal through that to make the point that we don't agree with the way in which it's put in the Claimants' skeleton, that it all comes down to the question of the expense, of which there is an actual risk of exposure to prosecution.

In our submission, this is a familiar exercise of discretion that the Tribunal takes into account balancing relevant factors.

Starting with the position here in Brazil, we resist the stated documents either provided to or received from the Brazilian regulator because we say it will breach Brazilian competition law regulations and it will give rise to civil, administrative and/or criminal penalties.

THE CHAIR: So I have enormous difficulty with the "provided to". So if you have to apply -- so if you have to provide your accounts to the Brazilian Competition Authority, you then can't publish those accounts.

MS FORD: Well, I can show you the relevant provisions on which we rely. Inculpatory documents are covered by the rules. Ms Fraga addresses it expressly.

THE CHAIR: And your business would -- if you put in 50,000 documents or 10,000 documents to the Brazilian Competition Authority that are yours, and are integral to running your business, and you then can't use them, I mean, your business would grind to a halt. It just seems a staggering submission.

MS FORD: Well, Sir, that does actually go to the heart of one of the points that is in issue between the parties' respective witnesses commenting on foreign law, because certainly there are provisions -- and I'll show the Tribunal the provisions -- which govern the circumstances in which a party can seek confidential treatment of its

documents and the Brazilian regulator will refuse to grant confidential treatment in certain circumstances, including essentially where they're already -- the sort of matter that would not otherwise justify confidential treatment. But Ms Fraga is very clear that, when one provides inculpatory documents in the context of a leniency process, those documents are entitled to be treated as confidential and fall within the relevant provisions. Perhaps I can just take the Tribunal through the provisions.

THE CHAIR: Yes. I'm going to take some persuading on this point that your own documents are -- you're now -- you can't ever use them, because you happened to submit them to -- I mean, it seems an extraordinary submission.

MS FORD: Well, I will seek to show the Tribunal where that comes up and there are certainly gateways by which they might otherwise be used. But when one sees in the provisions in our submission, it becomes clear.

What I propose to do is to show the Tribunal what Mr Fraga says and at the same time show you in the exhibit the actual relevant provisions that she's commenting on. So if we can hold them both open. Ms Fraga's statement is --

THE CHAIR: That would be very helpful, thank you.

SIR IAIN McMILLAN: Can I ask a question here, just to be clear.

Does that mean that, if a company provides the Brazilian Competition Authority with their audited annual accounts, they can't file them with Companies House in England as they are required to do?

MS FORD: No, Sir, this doesn't mean that, because that happens to fall within the one of gateways and I can show you that, because that is actually, as it happens, one of the gateways on which there is a disagreement between the parties as to how it operates. But that possibility is provided for.

SIR IAIN McMILLAN: Thank you.

MS FORD: So Ms Fraga's statement is in the witness statement bundle behind tab 3

and she explains, paragraph 1, that she is a lawyer and partner in the firm of Tozzini Advocates and, paragraph 9, she explains the Brazilian Competition Authority investigations that are relevant. There are two of them. There was a first investigation in 2015 which concerned an alleged infringement of Brazilian competition law which was national in scope and that one didn't include my clients, ZF. The second investigation is in 9.2 and that was initiated in 2017, when they opened an investigation concerning alleged infringement of Brazilian competition law in relation to the OSS France which was international in scope.

The parties to that included the entity ZF TRW Active and Passive Safety and Technology Division. That is not a party to these proceedings and Tozzini is the firm that has conduct of the investigation on behalf of that entity, so that's the capacity in which this evidence is being provided.

Ms Fraga explains that ZF reached a settlement with the Brazilian Competition Authority in 2019 but the 2017 investigation remains ongoing in respect of other parties and she says the conduct covered by the ZF settlement did not relate to any of the Claimants' brands. That in our submission is an important factor which needs to be factored into the balancing exercise that the Tribunal needs to carry out.

Paragraph 10, she identifies the categories of documents which had held by Tozzini on behalf of ZF and the Tribunal will see they include both those provided by ZF to the Competition Authority pursuant to the settlement procedures, so settlement submissions, contemporaneous documents and the terms of the settlement that was reached, and then documents provided by the authority to ZF and that includes documents submitted to the authority by Autoliv and Takata pursuant to leniency and settlement submissions and then overviews prepared by the Authority setting out conduct which is the subject of their investigation which includes references from the parties' leniency and settlement submissions and the terms on which CADE informally

launched its investigation.

These are the relevant categories of documents and then 10.4, she says:

"The documents in paragraphs 10.1 and 10.2 relate to CADE 2017 investigation ... are deemed classified by CADE and disclosure of these documents is prohibited as a matter of Brazilian law and its regulations. No distinctions be drawn by virtue of the nature of documents as all the documents mentioned, including contemporaneous documents created prior to the commencement of CADE's investigation, are required to be kept confidential, with access given only to the party submitting the documents, other parties to investigation and other persons authorised by CADE, see article 429.

So just as a starting point, her clear evidence is that this is a restriction which applies equally to contemporaneous documents --

THE CHAIR: I mean, there's a dispute between the experts, isn't there, which I can't resolve --

MS FORD: There is a dispute and I will address --

THE CHAIR: -- so I'm more interested in what the provisions and the case laws shows.

MS FORD: So Mr Fraga identifies three provisions. The first is article 49 of the Brazilian Competition Law and that, if we open the exhibits bundle, is behind exhibit-tab 3, page 560.

THE CHAIR: It's taking a while to get this going.

MS FORD: Article 49 --

THE CHAIR: Hold on. Yes. Thank you.

MS FORD: Just by way of general explanation, the provisions that she relies on go rather to the general, the high level to the specific, and so this is the high level Brazilian Competition Act. Article 49 says:

"The Tribunal and the general superintendents shall ensure in regard to the procedures provided in items above..."

Which include 2 and 3, non-merger administrative proceedings:

"... should ensure the confidential treatment of documents, information and procedural acts necessary for the elucidation of the facts or required in the interests of society."

So that's the very high level provision.

We then have the Competition Authority's internal rules, also article 49 of the internal rules. So that's behind this tab at 599.

Article 49 starts by saying --

THE CHAIR: So we're on the internal -- it's just coincidence it's article 49.

MS FORD: It is coincidence, yes:

"CADE gives the following treatment to records, information data, communications, objects and documents related to all sorts of administrative proceedings."

And then subparagraph (2):

"... restricted access when access is only granted to the party that has entered it, the principals according to the case and other persons authorised by CADE."

That is the position on the rules. If we then turn over the page to article 51, there's subsection (2), "confidentiality". Article 51 says:

"As far as investigations and discoveries are concerned, CADE ensures confidential treatment to records, documents, objects and procedures to the extent needed to clarify the facts and protect the public interest in the following cases..."

And then the relevant provision is subparagraph 3, administrative proceedings to impose sanctions for anti-trust violations.

THE CHAIR: Right. So this is all, as one might expect, Competition Authority keeping documents confidential.

MS FORD: Sir, yes it is and then, moving down to the very specific, there is then a resolution which is behind same tab, page 645, designation number 21 of September 11, 2018, and this is the specific provision.

If the Tribunal looks at the text in the middle of the page, it sets out what this regulates and it says "it regulates, amongst other things, the procedures for access to documents and information..."

THE CHAIR: Sorry, I've just -- as it's middle of the page, I just can't really tell where the middle of the page is.

MS FORD: I'm sorry. It's --

THE CHAIR: The plenary of the administrative council, that seems to be the middle. Just beyond that.

MS FORD: Beyond that there's heading resolution of 21 September 2017 a text which begins "regulates".

THE CHAIR: Yes. Sorry, I'm with you. Right.

MS FORD: And this is setting out what specifically this resolution is concerned with and it includes the procedures for access to documents and information contained in the administrative proceedings should be in position of administrative sanctions for violation of the economic order, including those arising from the leniency agreement, cease and desist commitment and search and seize in legal actions in relation to private and civil actions for operation of damages.

So this is particularly concerned with access to documents in those circumstances and article 1 on the same page says:

"Documents and information contained in the administrative proceedings for the imposition of administrative sanctions for violation of the economic order, including those arising in cease and desist commitments and search and seizure legal actions are public and their disclosure should occur in the adequate procedural stage according to the articles 8 to 11 of this resolution."

So the starting position is it's all public, but one then has article 2:

"The following are exceptions to the provisions of article 1 and shall be kept as

restricted access even after the final decision of the plenary of CADE's court and may not be made available to third parties."

And then item 1:

"The history of conduct and its amendments prepared by CADE's general superintendents based on self-accusatory documents and information voluntarily submitted within the scope of the negotiation of a leniency agreement and TCC due to [amongst other things] the effectiveness of CADE's leniency and TCC programmes."

And then:

"... and/or documents and information that fall under the restrictions provided for..."

And there's whole list of articles included in article 49, which is the article that I've already shown the Tribunal.

There is article 3, which then contains a series of exceptions to that and two of them are particularly in issue as between the experts and I show the Tribunal those now. The first is the reference to specific judicial decision. Ms Fraga has addressed that in footnote 2 to her statement. So this is back in --

THE CHAIR: But, I mean, she doesn't give any authority, does she? She says it.

MS FORD: She says:

"I understand the reference to judicial decision to refer to a judgment of the domestic Brazilian court rather than a judgment of the foreign judicial body."

It's correct on that particular point she doesn't cite authority, although she does then go on to cite the practice and the extent of the practice of permitting an access to these documents --

THE CHAIR: So there's no legal authority on whether specific judicial decision is to be interpreted as in a Brazilian court or in another court.

MS FORD: Certainly she hasn't identified any, but the basis on which the Claimants'

expert disagrees with that is because he considers that there is an exception under CADE's internal rules, which I'm going to come back to.

THE CHAIR: Yes, we'll come to that.

MS FORD: And he gives reasons by reference to that and he says, well, if there's this exception, why would you understand this paragraph to be narrow and --

THE CHAIR: Yes.

MS FORD: In our submission there isn't such an exception and therefore there is no reason to doubt the evidence that's being given. But I will come back to that particular point.

That's the first point that's in issue. There's second point which is in issue which is under article 3(iv) there's a reference to international legal co-operation with the authorisation of CADE and authorisation of the signatory of the leniency agreement or the committee of the TCC provided there's no detriment to the investigation.

Now, this is another paragraph that the Claimants' expert refers to and he suggests, well, ZF could simply seek permission from CADE to disclose the documents itself and in that context it's relevant to note what then follows, which is the factors that the Tribunal -- sorry, that CADE will take into account in determining any such application. It says:

"The analysis of the request for exceptional granting of access referred to the introductory part shall observe..."

THE CHAIR: Sorry, where are reading?

MS FORD: I'm sorry. I'm in article 3.

THE CHAIR: Yes.

MS FORD: Towards the bottom of page 104, there's a paragraph that begins "sole paragraph, the analysis of the request for exceptional granting of access".

THE CHAIR: Yes.

MS FORD: And it sets out a series of factors that shall be taken into account, of which factor six on the following page, page 105, is the need to preserve the national policy to combat violations against the economic order, notably CADE's leniency and TCC programme.

THE CHAIR: So, sorry, international legal co-operation under 26 and 27, we haven't been shown those.

MS FORD: No. **(overspeaking)**. I'm sorry?

THE CHAIR: Just explain what this provision is about.

MS FORD: Well, this is a provision that Mr Künzli, the Claimants' expert refers to, and suggests that this could be the basis for an application to the authority to be permitted to disclose the documents. The point that I make in response to that is that the paragraph which follows sets out that, in the analysis of any such request, a request for exceptional granting of access, the authority will take into account the series of factors which includes the need to preserve the national policy to combat violations against the economic order, notably CADE's leniency and TCC programme.

What we will see when we go back to Ms Fraga's evidence is that, whenever it has been asked for access to documents, it says no, precisely because it is concerned to preserve its leniency programme and so that very much in my submission informs this suggestion that one can simply ask for permission and be granted permission to rely or to disclose these documents.

So if we go back to Ms Fraga's statement, those are the three provisions which contain the confidentiality obligations and she then goes on to deal with --

THE CHAIR: Sorry, Mr Ford. I'm just being very slow. So the sole paragraph, it says the analysis of the request for exceptional granting of access, but I don't see a reference to a request for exceptional granting of access.

MS FORD: Sir, it's referring to the beginning of article 3, which is just above that. So

article 3.

THE CHAIR: Oh, I'm sorry. I beg your pardon. Right. Yes.

MS FORD: And these are the series of bases on which such a request could be made. One is specific judicial decision, which Ms Fraga's addressed in her evidence and her evidence is that doesn't include a foreign court.

THE CHAIR: So in all those cases you'd have to ask for -- I see. So if you've got a case, let's assume it's another Brazilian court, and you want to use a document in that Brazilian court, you still have to go through a request of permission -- you have to get permission from the Competition Authority in order to use that document in another court. You have to go through a process.

MS FORD: Sir, my understanding in that situation is that one would rely on the potential for exceptional granting under subparagraph (2), specific judicial decision, but, yes, one would nevertheless have to say, in the light of this specific judicial decision of a domestic court, please would the authority permit me to use these documents.

THE CHAIR: Right. Okay. Understood.

MS FORD: Those are the three provisions that contain the confidentiality obligations. Ms Fraga then goes on to deal with the --

THE CHAIR: So none of this assists us today in throwing any light on what happens if the UK court wishes to order disclosure of documents. It doesn't touch on that.

MS FORD: Well, Ms Fraga's clear evidence is that that is would constitute a breach of Brazilian competition law and would have consequences which I was about to take the Tribunal to. That is obviously --

THE CHAIR: Yes, we'll get to the consequences. I mean, I appreciate that's her opinion and there's an opinion and opposition. But I'm just trying to find the words that would support that position that a UK court cannot order disclosure of documents just

because they've been sent to the Brazilian Competition Authority. Because I understand your submission, you're saying this applies to all documents, irrespective of their provenance. You're not saying documents coming from the Competition Authority, you're not staying documents penned by the Competition Authority. You're saying even your own documents.

MS FORD: Documents that according to these provisions have been accorded confidential status. So the words --

THE CHAIR: Right. So if I asked you to identify a list of the documents that you filed with the Competition Authority, I still couldn't order disclosure and, if you said to me now -- not you, but if Mr Piccinin had said that email that we've all been pouring over, by the way, I've submitted that to the Brazilian Commission Authority, we'd have to say, well, sorry, you can't refer to it in court, because someone may go to prison. That's your submission.

MS FORD: I'm not really in a position to deal with that particular email. I --

THE CHAIR: Another email then. One of the emails pleaded against you. If you happen to have sent it to the Brazilian Competition Authority, it can no longer be used in these proceedings without some agreement --

MS FORD: The documents that have been provided to the Competition Authority or received from them, provided they fall within the provisions that I've shown the Tribunal, those are subject to confidentiality.

THE CHAIR: So it's almost like, you know, if the Brazilian authority becomes seized of a competition issue which turns on crucial documents first, then around the rest of the world parallel proceedings cannot take place because you can't use the documents anywhere else, even if they're your documents.

MS FORD: We're going to come on to Ms Fraga's evidence about why that might be, but it relates to the integrity of the leniency process and one can understand as

a matter of --

THE CHAIR: But I think you're agreeing with me that would be the consequence. So if documents are filed in Brazil, even if there's -- they couldn't be used in the Department of Justice, they couldn't be used in the Commission, just because they've already gone to the Brazil Competition Authority. That's the breadth of your submission.

MS FORD: That is -- insofar as they've been provided to the Brazilian Competition Authority, that document that has been provided to them has the status of confidential by virtue of these rules.

THE CHAIR: Right, and I'm just trying to find where you get that out of these words, because I don't see it there.

MS FORD: Well -- yes, it starts with paragraph 49 of the internal rules --

THE CHAIR: Yes. Which we've looked at. Yes.

MS FORD: -- which is that CADE gives particular treatment, and these are broad, to records, information, data, communication, objects and documents relating to all sorts of administrative proceedings restricted access.

THE CHAIR: But this is just about confidentiality, just being keeping it confidential.

MS FORD: Well, it's --

THE CHAIR: And there's no case -- you're not able to point to any case, any examples under Brazilian law where this has impacted or somebody has been sent to prison or somebody has been subject to a fine because they've complied with an order for disclosure of an overseas court. You're aware of nothing and your expert is aware and not given any evidence that this has ever happened before.

MS FORD: So she was expressly addressed that. She says at 19:

"I'm not aware of any precedence of parties document in breach of CADE regulations and/or where a leniency of settlement signatory has breached the confidential

provisions of a leniency or settlement agreement."

So she has been asked whether she's aware of such an example and her evidence is no, she's not.

THE CHAIR: Okay. Understood. Thank you.

MS FORD: She's actually then gone to address situations where third parties have asked for access. So 20, she makes the point that the First Claimant, PSA Automobiles SA, has already made two unsuccessful attempts to access documents relating to the 2015 investigations and she explains that:

"I'm aware from public records and reports that the first claimant tried to obtain leniency and settlement related submissions and documents provided by Takata and Autoliv. CADE denied the request for access to confidential files and PSA has applied to overturn CADE's decision before a Brazilian court."

And she says there have no been no further substantive developments in those proceedings to date.

THE CHAIR: But that's not uncommon. You ask a UK court if you can deploy disclosure documents in another jurisdiction and the court may say no, and you've got a -- and you go off to the other jurisdiction and say can you order disclosure for these documents and then it happens.

MS FORD: Sir, two points on that. First it is quite right that there are other examples in this jurisdiction of foreign regulatory documents being directed to be disclosed but in my submission, certainly so far as we're aware, there weren't submissions of this nature that the party in question considered that disclosure of these documents would expose them potentially to consequences as a matter of breach of the relevant local laws. That's the first point.

The second point is that, insofar as the claimant has approached the relevant authority and said "please can I have access to documents that relate to these investigations"

and authority has seen fit to say no, it is in my submission an important point for this Tribunal to weigh up in conducting the balancing exercise --

THE CHAIR: That's the point I was putting to you. So there are cases where you can go to the UK -- put a litigation in the UK, you are given disclosure of documents and you'd say I'd like to use those documents in France, in my parallel litigation in France. You go to the UK court and say can I have permission because it's subject to the undertaking to the court and the court says no. It doesn't mean, when you go to France and say can I use those documents -- and France may be a really terrible example but anyway. If I go to France and say can I use those documents, the French court will say, no, because the British court has said no. That's not within my experience. I just would be interested if you have any comment on that.

The fact that the South African Competition Authority hasn't provided them doesn't mean that you can't from that infer that the UK court shouldn't provide them. That seems to be a huge jump.

MS FORD: Sir, I certainly don't go so far as to say shouldn't. But I have shown the test that the Tribunal applies, a balancing exercise, and in my submission it is a weight factor in that balancing exercise that the regulator in question considered that the documents should not be provided to the parties in these proceedings. That is a factor in my submission.

THE CHAIR: But that's -- did it say that they shouldn't be provided in these proceedings or does it say that we are not going to do the work for you. You can go off to the UK court and ask them.

MS FORD: Well, the evidence we have is what Mr Fraga has put in her statement about the fact that a request was made and they were told no. I'm not a position to comment as to whether they were told no but, don't worry, go and try and get it from the UK court and in my submission it is a factor that should influence the UK court not

to permit disclosure in the proceedings to circumvent the expressed will of the regulator that their documents should not be made available.

THE CHAIR: Right. Anyway, I understand your submissions.

MS FORD: Sir, I was going to show you the relevant paragraphs which give rise to the consequences that are of concern and then I was going to come on to address the particular dispute as between us.

THE CHAIR: Sorry, the paragraphs of the consequences. Oh the criminal -- yes. All right. We better have a look at those. Yes.

MS FORD: So we are starting with --

THE CHAIR: Paragraph 16, yes.

MS FORD: Paragraph 14 is where Ms Fraga starts to set out the consequences and I've already showed you article 1 to 3 of the resolution. The consequences are then article 4. So it's exhibit 3, page 647 .

Article 4 of the same resolution that we've been looking at says:

"The person who discloses, shares with third parties or uses documents and information of restricted access referred to in articles 2 and 3 of this resolution is subject to administrative civil and criminal penalty."

So when you put to me, Sir, about where the words are, the words are designating a broad category of documents as being restricted access, coupled with the consequences if those are not complied with.

There's then -- if we go to page 659 in this exhibit --

THE CHAIR: Yes.

MS FORD: -- this is the Brazilian law on access to information.

THE CHAIR: Yes.

MS FORD: Article 25(2) on this page, so under the heading section 3, "Protection and control of confidential information" --

THE CHAIR: Yes.

MS FORD: -- article 25(2) says:

"The access to information classified as confidential creates the obligation for those who obtained it to safeguard the confidentiality."

And then, if we go over to article 33 in this same law, which is page 663. Article 33 then says:

"The individual or private entity that holds information due to a link of any nature with the public authority and fails to observe the provisions of this law shall be subject to the following sanctions..."

And then it includes a fine and suspension of participation in bidding and impediment to contract with the public administration.

There is then the Brazilian criminal law.

THE CHAIR: Yes. I mean, this is set out in her witness statement. Is there anything you want to add --

MS FORD: It is, and I don't understand these particular points to be in issue.

THE CHAIR: No, I don't understand there to be an issue. No.

MS FORD: Well, in that case I can move on from those. But on any view the consequences are civil, administrative and criminal if one is found to have violated the confidential treatment.

THE CHAIR: Yes.

MS FORD: The particular point that is being made taken against us -- sorry, before I move on to that, I should show you also the settlement agreement, which has its own confidentiality obligations. It's been exhibited to Ms Fraga's second statement, so it's in the exhibits-bundle 5C.

THE CHAIR: Page number...?

MS FORD: Page number 1,122.149.

THE CHAIR: Sorry, say that again?

MS FORD: It's tab 5C.

THE CHAIR: I'm not sure if that works -- oh, you've got tabs. Tab 5C. Yes.

MS FORD: So it's 1122.149.

THE CHAIR: Yes. Okay. I've got something in Portuguese, presumably.

MS FORD: So within -- there's then a translation of that document. That is the settlement agreement that's been reached and within that document, if one then goes to point 149, there is an English translation and the relevant paragraph is paragraph 2.2.

THE CHAIR: So just remind me, this is a settlement agreement --

MS FORD: As between the ZF entity and --

THE CHAIR: And the Brazilian Competition Authority.

MS FORD: And the Brazilian Competition Authority and it's 2.2:

"The history of conduct herein presented is exhibit 1 should be treated as a document with restricted access by all the bodies of CADE."

And then one sees towards the bottom:

"Said document shall be available made available to the other defendants solely for the purpose of the due process of law in said administrative proceedings and may not be disclosed or shared wholly or in part with other individuals or entities in Brazil or in other jurisdictions..."

THE CHAIR: Sorry, I do apologise. Just orientate me. So what is this requiring to be kept conversational?

MS FORD: This is the history of conduct, which is a document that we saw referred to in the resolution.

THE CHAIR: Yes, I remember that. So the confidentiality agreement on that. Sorry, that's the terms of the settlement. That's 10.1.3, yes.

MS FORD: I'm sorry, Sir, I didn't catch that?

THE CHAIR: It's 10.1.3 in Ms Fraga's statement.

MS FORD: Yes, I'm told that that's right. Yes.

THE CHAIR: And so there's agreement to keep that confidential between the -- and that's page -- I see. Right. I've got that point. That only applies to that document.

MS FORD: Yes. Yes, so if one goes back to article 2 of the resolution, so the most specific provision that I showed you from which the confidentiality obligations derive, that includes the history of conduct of its amendments based on self-accusatory documents and information voluntarily submitted.

THE CHAIR: Sorry, you lost me. So what am I meant to be looking at -- just show me in the witness statement.

MS FORD: Her first witness statement, paragraph 13, is setting out the resolution and the resolution includes obviously -- I've shown the Tribunal the first paragraph, which --

THE CHAIR: Right. Yes, this is the stuff you've shown me already.

MS FORD: Yes.

THE CHAIR: So, sorry, I was trying --

MS FORD: So it makes specific reference to the history of conduct and its amendments prepared by case general superintendents based on self-accusatory documents and information voluntarily submitted within the scope of the negotiation of a leniency agreement due to the risk and/or effectiveness of CADE's leniency and TCC programme.

THE CHAIR: Yes. Right. But you're talking about -- sorry, you're jumping around now. This document, specifically this undertaking, applies to 10.1.3.

MS FORD: This contractual undertaking is referring to the document that is called the history of conduct and that is then addressed in resolution 21 and 28 --

THE CHAIR: So when you set out the documents at paragraph 10, which document

is it?

MS FORD: So it's 10.1 -- well, we've been looking at the terms of the settlement but it's referring to the contemporaneous documents which themselves then informed 10.2.2, overview prepared by CADE setting out the conduct which is the subject of their investigation which includes reference from the parties --

THE CHAIR: Sorry, I don't know where you're reading.

MS FORD: I'm sorry. I'm looking at paragraph 10 of her witness statement.

THE CHAIR: Yes.

MS FORD: Paragraph 10.2, identifies documents provided by CADE to ZF, of which 10.2.2 is an overview prepared by CADE.

THE CHAIR: But 10 point -- right, overview -- so 10.2.2, overviews provided by CADE setting out the conduct which is the subject of their investigation. Those overviews are produced early in the procedure.

MS FORD: I'm afraid I don't have any evidence as to at what point they're produced. But they draw on -- as one can see from resolution number 21, they draw on -- they are based on self-accusatory documents and information voluntarily submitted within the scope of a leniency agreement.

So the point that Ms Fraga makes is this is an additional contractual obligation to keep confidential, which derives from the settlement agreement.

THE CHAIR: Yes. Ms Fraga, also her footnote on contemporaneous documents, she says the contemporaneous documents provided to CADE -- contemporaneous with what?

MS FORD: She's referring to contemporaneous documents in the sense of 10.1.2. So documents submitted by ZF to CADE. I anticipate she's saying contemporaneous documents as distinct from settlement submissions or the actual settlement itself. So it's essentially the --

THE CHAIR: Contemporaneous to the events under investigation, yes. I understand.

MS FORD: Indeed, yes.

THE CHAIR: She said the same as the -- in the footnote, the same of those provided to the European Commission.

MS FORD: She does, yes, which obviously-

THE CHAIR: Which -- right. That's quite an important point for a footnote.

MS FORD: Sir, yes. It's certainly a point that we say is an important one to weighed up when one considers the utility of going through this exercise with all its potential consequences.

THE CHAIR: Right. So she's been through all the -- it seems unlikely she's been through all the European documents in order to carry out that exercise only to note it in a footnote. It seems to me quite a bit of work.

MS FORD: Well, I don't understand her to be saying that this is on the basis of a review. I think it's that there is a body of documents which were provided to CADE and to the European Commission.

THE CHAIR: Right. Okay.

MS FORD: Yes, and the Tribunal has the point that of course the Claimants already have those documents and so that really does call into the question the utility of this exercise.

THE CHAIR: Yes, potentially, but I'm just not overly impressed by just a footnote to that effect. That's all.

Right. Excuse me. (Pause).

MS FORD: Just for the Tribunal's reference, in the light of the point that it was made in a footnote, she has reiterated the point in the body of her second statement, paragraph 15. So it's behind tab 6C in the --

THE CHAIR: 6C.

MS FORD: 78.22.

THE CHAIR: What paragraph number again?

MS FORD: Paragraph 15. She said:

"I also would draw to the Tribunal's attention the point made at footnote 1 of Fraga 1, which described the fact that the contemporaneous documents provided to CADE by ZF are the same as those provided by ZF to the European Commission in connection with its investigation."

THE CHAIR: It doesn't explain how she shows that.

MS FORD: No, although she is the person with conduct of this -- on behalf of ZF of the proceedings in Brazil, so in that --

THE CHAIR: I'm confident she knows what's been disclosed in Brazil. The bit I'm unclear about is how she knows what's been disclosed to the Commission and how she's done the comparison.

MS FORD: I don't understand her to be suggesting she has done a comparison.

THE CHAIR: Right.

MS FORD: My understanding of the evidence she's given you is that there is a body of documents and that body of documents was provided to both --

THE CHAIR: It's a little bit unclear.

Thank you.

Is there anything else you want to say on -- you were going to deal with the point that is against you.

MS FORD: Sir, I was going to come onto the point and, although it's put in some length, in our submission it comes down to a really quite short point. If we look at Mr Künzli's evidence. It's 6B.

THE CHAIR: Yes.

MS FORD: Behind -- so starting at 78.10.

The Tribunal will see that in paragraph 7 he said:

"It's correct that the non-disclosure duty flows from those provisions."

And by those provisions he means the three that he's identified in paragraph 6 that I've shown the Tribunal, so the two 49s and article 2 of the resolution. So he agrees that there is no non-disclosure duty and he makes certain clarifications in A and B below that. He agrees that there is such a duty. But what he says at 8 is:

"The correct position is as follows. Article 53 of CADE's internal rules provides..."

And he sets out the relevant provisions which I'll take the Tribunal to in the exhibit, and he goes on in paragraph 9, right at the end, to say:

"Article 53 is therefore a complete answer to the FZTR's objection."

So article 53 is behind exhibit-tab 3, page 601. Tab 3 in the exhibits bundle, page 601.

THE CHAIR: Sorry, tab 3. I've got -- okay, yes.

601.

MS FORD: 601. So I've already shown the Tribunal -- this is the CADE internal rules. So this was the second document I've shown you and I've shown you in here article 49, article 51 and we then get to subsection (3) on page 600, which is headed requests of restricted access and this is a section concerned with requests by parties to the proceedings to accord their documents restricted access. So they're saying these are my documents. I would like the Competition Authority to record restricted access to my documents.

Article 52 says:

"On a case by case basis, as far as investigation and inquiries are concerned, to comply with measures to ensure with rights to confidentiality granted by law or protect information on business activities, individuals and legal persons [et cetera, et cetera] CADE may on its own or upon application by an interested party restrict access to records, documents, objects, data and information pertaining to..."

And it gives a list of the matters to which, at the request of the party, CADE can grant restricted access. But we then come to 53, which is the article that the Claimants refer to and article 53 says "CADE does not restrict access to information and documents when..."

And then, under subparagraph (3), when they pertain to the following categories amongst others, and then under that subparagraph (g):

"Information companies either publish or disclose due to legal or regulatory requirements to which they are subject in Brazil or in another jurisdiction."

So this, Sir, is the answer to the question that was put to me about whether or not a company could say, well, I've given you my accounts that I've got to file in the UK and so I can't be required to hand them over. These are the circumstances in which CADE is saying, if you ask us to grant restrictive access to that category of documents, we will say no, because they pertain to the following categories: information companies are to publish or disclose due to legal or regulatory requirements to which they are subject in Brazil or another jurisdiction.

So what this paragraph is doing is setting out the situations where CADE will say to a company, no, we are not prepared to grant restrictive access to that category of documents.

So in my submission it's not concerned with a situation we are concerned with, where --

THE CHAIR: Sorry, just say that -- sorry, I've lost concentration. Just say that again. I do apologise.

MS FORD: I'm sorry, Sir. It's probably a function of a time --

THE CHAIR: We'll stop in a minute. Just start that again. Just tell me what this is doing?

MS FORD: This entire section is the dealing with the circumstances in which the

authority will accede to a request by a company to grant restricted access to their documents.

THE CHAIR: Yes.

MS FORD: And this particular paragraph is setting out the circumstances where the authority will say no, we are not prepared to accede to your request for restricted access and this particular subparagraph (g), which is, according to the Claimants, the answer to the point --

THE CHAIR: And how do I know it's about dealing with a request? Sorry, going back to -- it says requests of restricted access on a case by case --

MS FORD: Ms Fraga has explained it in her statement. I can come back to what she said. But one can see it from the context, because what this is about is a request of restricted access and one sees what's meant by that under article 52 and it's a request -- well, either on its own motion, the authority may on its open motion or upon application by an interested party restrict access to records, documents, objects, data and information pertaining to the matter set out below.

So it's setting out the possibility that either of its own motion or on request a category of documents could be designated as restricted access.

THE CHAIR: I see the point, yes.

MS FORD: The relevant provision that much reliance is placed on is a situation where the authority is saying we will not accede to a request for restricted access in these circumstances.

THE CHAIR: I understand.

MS FORD: It is not concerned in our submission with a situation where documents have already been accorded restricted access for the reasons that we have shown you in the rules.

THE CHAIR: No, I understand the point, although there is a dispute between the

experts.

MS FORD: There is a dispute between the parties.

THE CHAIR: So am I meant to rule on this point of Brazilian law between two eminent Brazilian lawyers.

MS FORD: Well, in my submission, the first thing that would striking is that Mr Künzli's two statements where he's addressed this, he has pointed to this provision as being the answer but he has not grappled with Ms Fraga's explanation that this paragraph is to do with requests for restricted treatment by companies. Although he has served a reply statement to her second statement very recently, he hasn't properly grappled with that particular point that that's what's going on here.

But even in my submission the position is that there is an extant dispute about the status to be accorded to these documents. In my submission that in itself is a heavy factor which ought to weigh against disclosure in the weighing exercise that the Tribunal carries out, taking into account all the other circumstances including the fact that these are documents which have already been provided to the European Commission, the sparsity of the bigger case and all the other factors that draw on to say really we shouldn't be engaging in this exercise at all.

THE CHAIR: Understood. I think we better draw stumps there. You've finished on this point, I think, on Brazil.

MS FORD: Sir, I think that is essentially --

THE CHAIR: You still have to do South Africa and --

MS FORD: We do, which is a very different point.

THE CHAIR: Yes.

MS FORD: In order just to completely finish the position on Brazil, we've made the points in our skeleton that if, notwithstanding the submissions, the Tribunal were minded to order disclosure and inspection of these documents, we have some

observations on the timing and the redactions that will be necessary in those circumstances.

THE CHAIR: Right. Well, we can deal with that as a distinct thing in due course if we get that far.

MS FORD: I'm grateful.

THE CHAIR: I think we better rise. How are we doing on timing generally, because Mr O'Donoghue's optimistic we will --

MR O'DONOGHUE: Sir, today was misplaced. I'm still optimistic. We will finish in good time tomorrow.

THE CHAIR: Is everyone agreed? Do we need to start early or --

MS FORD: Sir, I anticipate that the South African situation should be capable of being treated quicker than the --

THE CHAIR: I mean, this point has taken -- how long has this point taken? It's taken a couple of hours, hasn't it?

MS FORD: No, I think we came back into the Tribunal round about 3 o'clock.

THE CHAIR: Okay. So it's just that time has been dragging that's all.

MS FORD: Indeed.

THE CHAIR: All right. But we've got quite a lot to get through tomorrow still. Those categories that are being talked about are likely to be short, are they in terms of --

MR O'DONOGHUE: Yes, on what I would call the pure disclosure points, there's been a significant amount of movement.

THE CHAIR: Right.

MR O'DONOGHUE: I think there's movement as we speak today. So the list actually looks more forbidding than it is. Even on things like pass-on, it's actually quite a short series of points.

THE CHAIR: Right. All right.

MR O'DONOGHUE: But, Sir --

THE CHAIR: You're all agreed, so there we are.

MR O'DONOGHUE: People obviously need to cut their cloth to measure. We can all go on for many hours within things, but we do need to finish tomorrow.

THE CHAIR: Yes, I'm grateful. So half past ten tomorrow.

(5.01 pm)

(The Tribunal adjourned until 10.30 am on Wednesday, 29 March 2023)