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5 **IN THE COMPETITION**

Case No: 1440/7/7/22 & 1518/5/7/22

6 **APPEAL**

7 **TRIBUNAL**

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

12 Monday 26th June 2023

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14 Before:

15
16 The Honourable Mr Justice Smith
17 Andrew Lenon KC
18 The Honourable Mr Justice Richards
19 (Sitting as a Tribunal in England and Wales)

20
21 BETWEEN:

22
23 **Proposed Class Representative &**
24 **Claimants**

25
26 **Clare Mary Joan Spottiswoode CBE**
27 **&**
28 **London Array Limited & Others**
29 **v**

30 **Defendants**

31 **Nexans France SAS & Others**

32
33
34 **A P P E A R A N C E S**

35 Daniel Jowell KC & Gerard Rothschild (Instructed by Scott+Scott UK LLP) on behalf of
36 Clare Mary Joan Spottiswoode CBE

37 Colin West KC (Instructed by Hausfeld & Co. LLP) on behalf of London Array Limited &
38 Others

39 Tony Singla KC (Instructed by White & Case LLP) on behalf of Nexans France SAS and
40 Nexans SA

41 Helen Davies KC & Jack Williams (Instructed by Macfarlanes LLP) on behalf of Prysmian
42 Cavi e Sistemi S.r.l. and Prysmian S.p.A.

43 Daisy Mackersie (Instructed by Addleshaw Goddard LLP) on behalf of NKT A/S and NKT
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Monday, 26 June 2023

(10.00 am)

(Proceedings delayed)

(10.10 am)

Case management conference

THE PRESIDENT: Mr Jowell, good morning.

MR JOWELL: Good morning.

Mr President, members of the Tribunal, I appear for Ms Spottiswoode, the Proposed Class Representative in the collective proceedings, with Mr Rothschild.

For the Claimants in the London Array proceedings Mr West KC appears.

For the Defendants Nexans, in both sets of proceedings we have Mr Singla KC and Mr McIntyre.

For the Prysmian Defendants in the Spottiswoode proceedings we have Ms Davies KC and Mr Williams.

For the NKT Defendants in the Spottiswoode proceedings we have Ms Mackersie.

There are two sets of issues that you will have seen from the skeleton that are or were before you this morning.

The first are matters arising out of the overlapping issues or potentially overlapping issues in the two sets of proceedings.

The second are matters of disclosure unique to the London Array proceedings.

I understand, although it is not my territory, that the disclosure issues have been compromised between the parties to the London Array proceedings.

THE PRESIDENT: That is right. I will just check that there are not any dissenting voices. Good.

1 Well, that is welcome news indeed, Mr Jowell, and leaves really the broader questions
2 of case management.

3 It may assist the parties if I set out our provisional thoughts, so that the parties can
4 push back as appropriate.

5 **MR JOWELL:** Yes.

6 **THE PRESIDENT:** First of all, I should say I am not giving the usual livestream
7 warning, because we are not being livestreamed here, so that is why I haven't said
8 that.

9 Moving to the substance, we obviously appreciate that it is not at this point
10 straightforward to identify overlapping issues. That is partly because of the inherent
11 complexity of the issues themselves and partly because Spottiswoode has some
12 catching up to do and it is right to say that the issues are perhaps not as fully articulated
13 as they are in London Array.

14 What we want to achieve today, if it can be achieved, is a configuration which enables
15 common issues to be tried commonly, should they in case management terms warrant
16 that. What we don't want to do is put in place a series of directions which makes that
17 outcome impossible.

18 So we want to apply a very light touch. Unpacking that a little bit, it seems to us that
19 in the first instance we would not want to touch the timing of the London Array trial.

20 That has been set down for a four-week period at the beginning of 2025, I think that is
21 right, and we don't want to alter that. What we would like to float is the notion of
22 expanding that window, so that if there are Spottiswoode issues or, indeed, the whole
23 Spottiswoode trial that could fit into that window, it is there and available if needed.

24 That is one of the points that we would want the parties to consider. But that is
25 absolutely subject to the no prejudice to the London Array process, which we do not
26 want to derail.

1 Spottiswoode, as various parties have rightly made clear, is, through no fault of its
2 own, it's been due to service, somewhat behind the running. We are quite keen, if that
3 is achievable, to put the afterburners on Spottiswoode and achieve if we can
4 certification sooner rather than later.

5 The time frame that was being discussed was a resolution of the certification question
6 in around April of next year. For our purposes, that seems to us dangerously late. It
7 may well be that if we get a certification judgment out quickly, the expert reports can
8 follow and one can identify the common issues. But there is very little time between,
9 let us say, a certification decision in April/May and a trial of common issues early the
10 following year.

11 What we would like to see is some consideration being given to dealing with
12 certification this year, rather than next year. We had in mind a, sort of, November or
13 December sort of date, rather than an April/May sort of date.

14 That would enable a clear direction to be set, assuming certification, in what would be
15 about a year.

16 That was our thinking on the Spottiswoode case. We do recognise the concerns that
17 have been articulated regarding the potential effects of the *PACCAR* decision, where
18 judgment is awaited in the Supreme Court. We have no special information about
19 when that is likely to be handed down. It has been a number of months.

20 But we are not sure that waiting for *PACCAR* is actually that beneficial. We, of course,
21 accept that if the case goes in a certain direction, problems are occasioned for not
22 merely the funders in Spottiswoode but for funders across the board and that will
23 obviously have to be dealt with. But we can't really see why that should require
24 a slower time frame to certification. Obviously if *PACCAR* becomes a crystallised
25 problem, the Tribunal will devote what resources it can to assist in resolving the
26 problem, if it can be resolved by the Tribunal's intervention.

1 I suspect if it goes a certain way, the Tribunal's intervention will not be helpful at all.
2 But we will certainly stand willing to assist. But we can't really see why we should not
3 be making reasonably aggressive dispositions in Spottiswoode certification in the
4 meantime.

5 So that -- if I have missed anything out, my colleagues will row in -- but that was our
6 thinking on how to manage matters going forward. Mr Jowell, since you are for the
7 PCR in Spottiswoode, it may be that your reaction is called for first.

8 **MR JOWELL:** Yes.

9 **THE PRESIDENT:** If you want some time to consider, we are more than happy to rise
10 for five or ten minutes.

11 **MR JOWELL:** I think we would like some time to consider, but if I may just give two
12 immediate reactions --

13 **THE PRESIDENT:** Of course.

14 **MR JOWELL:** -- and then if I can take some time to consider.

15 The first is, as I understand it, the trial of the London Array proceedings is currently
16 scheduled to start in -- is it the middle of April? End of April 2025. So there is a little
17 bit more time perhaps than is being indicated. So there would be ...

18 Secondly, we certainly want to get on with things in Spottiswoode and indeed that is
19 why we are digging our heels in a bit in terms of having a March date rather than
20 an April date.

21 But we do have somewhat of a difficulty in seeing how one could have a final CPO
22 determination absent the *PACCAR* judgment. Because there would be a question
23 mark over whether the funding was enforceable and we don't have funding if it is
24 not -- we can't go forward if we don't have funding. In a way it is a sine qua non for
25 certification.

26 That is not to say that the *PACCAR* judgment will necessarily be determinative if it

1 goes against the Claimant in *PACCAR* because, as we have indicated, there are
2 significant differences between our funding arrangement and that in that case. But
3 there is some sense, it seems to us, in the Tribunal having that judgment in front of it
4 before it makes a determination as to whether our funding position is enforceable or
5 not.

6 So it is a bit of a bind, really, for us all. But we could certainly take instructions. The
7 risk, I suppose, of having a November hearing, of everything, is just that we won't have
8 *PACCAR* and then it can't resolve things.

9 **THE PRESIDENT:** Yes. I mean you are absolutely right, Mr Jowell, and I hear strong
10 echoes of the similar debate we had with *Merricks* when we did the FX certification,
11 where we did put something in the diary and then had to adjourn it.

12 **MR JOWELL:** Yes.

13 **THE PRESIDENT:** I suppose the difference here is that *PACCAR* is confined to
14 funding, obviously critical, but even if -- we very much hope that there would be
15 a judgment this side of the summer, so that a November hearing could be dealt with
16 the *PACCAR* decision before us -- there would be no immediate problem in actually
17 dealing with everything but funding in, say, November/December even if one did not
18 have the *PACCAR* decision or we could list it and then, as we did in, I think, at least
19 one hearing in FX, adjourn it off if it is so game changing that you need to have
20 *PACCAR*, so that is something that I think we would want to hear you further on.

21 **MR JOWELL:** Yes. Perhaps if we could all -- I am sure everybody would like the
22 opportunity to --

23 **THE PRESIDENT:** The thing is, if we are talking about doing certification, let's say
24 April 2024, 12 months between April 2024 and April 2025 is even then remarkably
25 tight.

26 **MR JOWELL:** It is tight. Although if it were just the London Array issues, they are

1 much more confined than the Spottiswoode claim. I think if one were considering the
2 Spottiswoode claim as a whole, it would be very ambitious, I think, to have
3 an April 2025 hearing that encompassed all the various issues in the Spottiswoode
4 proceedings, because those are a large number of different projects and a large
5 number of different issues, wider issues on pass on, whereas London Array is more
6 confined and if it were simply a question of us intervening, albeit as a full party, but
7 intervening in the London Array issues. Then if we did have a full year we probably
8 could just about do it.

9 I mean, there is no question you would have to put off expert reports into the autumn
10 and so on, it could not happen in June. But one could, with a bit of expedition, we
11 could probably get there, we think. But only if it was confined in those ways to the
12 London Array issues.

13 **THE PRESIDENT:** Yes. I think that is the concern. I mean, speaking entirely for
14 myself, I can see a great deal of sense in dealing with the Spottiswoode/London Array
15 overlap in, let us say, April 2025. However, given that this is certainly for the Tribunal
16 and for most of the parties relatively early days, I wouldn't want us to be committed to
17 that sort of configuration.

18 **MR JOWELL:** No.

19 **THE PRESIDENT:** In other words, we would, I think, accept it is a tall order, want to
20 have the option of actually having a Spottiswoode/London Array trial in April 2025 and
21 thereafter so that we can look that option squarely in the eye and decide we don't want
22 to exercise it, but nevertheless have the choice. That, I think, if that is something we
23 are wanting to keep available as a theoretical opportunity --

24 **MR JOWELL:** Yes.

25 **THE PRESIDENT:** -- really does mean the CPO application has to be really as early
26 as possible.

1 **MR JOWELL:** Yes, certainly. If one was thinking of having the full Spottiswoode
2 claim, then we have estimated, I think, 12 weeks, so that would be a much larger trial.
3 As I said, I think it would be ambitious to have it in 2025.

4 **THE PRESIDENT:** You don't think 2025 is doable at all?

5 **MR JOWELL:** Yes, I think that is very difficult. Because there is lot of disclosure, a lot
6 of issues, yes. It's quite tough, I think.

7 **THE PRESIDENT:** Yes. I mean, obviously, there is no question of doing that without
8 the funding being resolved, and that may answer the question.

9 **MR JOWELL:** Yes. Yes.

10 **THE PRESIDENT:** But for our part, given that it is unhelpful speculation to work out
11 when *PACCAR* will emerge, we, I think, would rather put in place a process that --

12 **MR JOWELL:** I mean, one -- yes. One possibility would be to say that one lists
13 something in November and if ... rather similar to what we suggest, but just confined
14 to funding. But that if a judgment on *PACCAR* is not handed down by, say,
15 1 September then we reconsider. That could --

16 **THE PRESIDENT:** Mr Jowell, we said we would rise. We will do that. But before we
17 do, we have had a very helpful exchange and I am very grateful. If anybody else wants
18 to chip in, we would be delighted to hear from you.

19 **MR SINGLA:** Could I also just give some immediate reactions?

20 **THE PRESIDENT:** Of course.

21 **MR SINGLA:** I will need an opportunity to take instructions. Just to put down a marker
22 in relation to both if I can call it the front end and the back end of what the Tribunal has
23 provisionally indicated.

24 In relation to the front end, the *PACCAR* judgment, I think, there is a danger of that
25 being a deceptively simple question because depending on which way it goes, if it
26 goes in one direction the funders would then have to revisit the position. They may

1 need time to think about some alternative funding arrangements. We would need time
2 to consider those arrangements and we don't, with respect, necessarily accept that
3 the DBA question is a discrete question or sufficiently discrete from the other funding
4 issues that might arise at the certification stage. For example, there may be questions
5 about cost benefit and the question of representation and so on. So we do query
6 whether it is all becoming a bit too compressed at the front end, because we don't
7 know when *PACCAR* is coming, we will need time to consider and of course we need
8 time to deal with the methodology points as well.

9 Also, as regards the back end, speaking for Nexans, who are the Defendant in London
10 Array, we would be very concerned -- if I could just put this down as a marker and
11 perhaps address you more fully later -- with the idea of all the directions today being
12 set down on the premise that there may be ... I appreciate what you have said, Sir, in
13 relation to keeping options open, but we with respect would suggest that it may be tail
14 wagging dog to leave open the idea of a joint trial of Spottiswoode and London Array.
15 We would have some quite serious concerns about whether that is feasible and,
16 indeed, fair to what is going on in the London Array proceedings.

17 I would, with respect, just put down that marker. That we do have concerns about
18 things being done today on the footing that there may be a joint trial, which I think we
19 would all say is probably not feasible, and also a hearing in November, we think, is
20 going to be unrealistic for us to be prepared for a CPO hearing in November. If I could
21 just, perhaps, respond in that way now but take instructions and address you more
22 fully later.

23 **THE PRESIDENT:** Yes. Thank you, Mr Singla.

24 Ms Davies.

25 **MS DAVIES:** Sir, if I may just echo what Mr Singla has said.

26 Prysmian and, indeed, NKT have had some experience of dealing with claims arising

1 out of this Commission decision. This is, in fact, the fifth, I think, instruction from me
2 in relation to this Commission decision.

3 We, I have to say, would 100 per cent echo Mr Jowell's position that it is not going to
4 be feasible to have a trial in 2025 of the entirety of the Spottiswoode claim. In addition
5 to the submarine element of it, there are claims in relation to underground power
6 cables, involving multiple projects. Those two are quite distinct markets and the expert
7 evidence that is going to be required for the two is going to be different.

8 We are, as we have indicated in our correspondence, intending to resist certification,
9 including on the grounds of expert methodology. In fact, the point that Mr West has
10 identified in his skeleton in relation to pass on through the ROC mechanism, and there
11 is an obvious error in Mr Druce's report in our submission in relation to that. If we are
12 right about that, then there is not going to be any overlap at all because if there is no
13 pass on to consumers in relation to wind farms, then there is no need to even look at
14 overcharge in relation to the London Array project. And that is obviously going to be
15 the big debate at certification and it is a very important debate for both parties, because
16 it affects about 60 per cent of the value of the claim.

17 We would also be concerned about the timing being too truncated to allow us, both
18 parties, to put in appropriate evidence in relation to what is going to be a significant
19 methodological challenge on our part.

20 For that reason also, we support what -- I'm sure we are going to be supporting what
21 Mr Singla has just said about the front end being too compressed. I understand
22 entirely what you have said, Sir, but it is not going to be feasible even on the
23 non-PACCAR issues for the parties to be ready for a CPO hearing in November, would
24 be our position.

25 The Claimants have never suggested that either. The debate has been March or April.
26 But both of us are acknowledging that we will need through the autumn to produce the

1 evidence that is going to be necessary for the certification hearing.

2 **THE PRESIDENT:** How far will that work shortcut what would need to occur after
3 certification, on the assumption that we grant it?

4 **MS DAVIES:** If we are right, it gets rid of 60 per cent of the claim and has a whole
5 impact on the cost benefit analysis and the funding arrangements and so on, which
6 we are also going to have to debate at the certification hearing, because the level of
7 the contribution to the funders is going to mean that there is very little left for
8 a consumer in relation to the remainder of the claim. That is something the Tribunal
9 is obviously going to have to consider on the cost benefit analysis.

10 This is not, sort of, minor issues around -- the point I'm just trying to make, these are
11 not minor issues around the edges in relation to certification. They are going to the
12 heart of the claims that are being made and that is why all, I think, parties had
13 acknowledged coming into today that actually one could not take any view about
14 overlapping issues and case management until we have had the certification hearing.
15 I completely understand, that has then led to the Tribunal's reaction: well, can we bring
16 forward the certification hearing? All I am saying is because of the nature of the issues
17 that are arising, the Tribunal has only seen a fraction of Mr Druce's report at the
18 moment. It is actually hundreds of pages long. We are working but the working ... it
19 is not going to be feasible to allow us to produce the evidence in sufficient time for the
20 PCR to consider it, respond, Mr Druce to consider whether he wants to alter his
21 methodology, come up with a different explanation and so on and so forth, for
22 a properly reasoned CPO hearing in November. It is, I am afraid, too tall an order,
23 even with the very best will in the world.

24 Of course, the Tribunal can be assured that you have the very best will in the world
25 from all parties before it. But there needs to be a realistic timetable set.

26 **THE PRESIDENT:** Oh, yes. I mean don't get me wrong, we take indications from the

1 legal teams as to feasibility, particularly when they speak with one voice, very
2 seriously. We don't have to try the case, we just have to hear other people trying it.
3 So we recognise that as a question. But I think it would be helpful if one of you could
4 be ready to articulate the most aggressive timetable consistent with a proper hearing
5 of the CPO issues and very briefly explain why that timetable is both aggressive and
6 in 2024, rather than 2023, so that we can understand the parameters.

7 Just to be clear, we are not in any way determining today what are or not common
8 issues. What we are trying to do is simply --

9 **MS DAVIES:** Understood.

10 **THE PRESIDENT:** -- achieve a theoretical possibility of such an outcome if it is
11 desirable in case management purposes. That is what we are talking about.

12 **MS DAVIES:** Understood.

13 **THE PRESIDENT:** That is why, just to be clear, we are sitting in this somewhat
14 unusual configuration.

15 **MS DAVIES:** I should also say, Mr Jowell indicated that if it is narrow overlap in
16 relation to London Array, by which I understood him to be contemplating simply that
17 overcharge on the London Array project, if there was one, and possibly the ROC pass
18 on issue, those two points I would agree with Mr Jowell, could be prepared even with
19 a CPO hearing in March/April and judgment before the summer. Because those two
20 points are relatively narrow. It is the moment you expand it into the rest of the
21 Spottiswoode claim that things become much more complex.

22 **THE PRESIDENT:** I'm grateful.

23 Mr West, Ms Mackersie, if you want to say anything we are delighted to hear from you.
24 If you don't --

25 **MR WEST:** Very briefly, we are keen, naturally, to maintain the April 2025 trial date.
26 Although, as you have heard, that may be very challenging for a joint trial of everything,

1 the real issue is to avoid inconsistent treatment of common issues and that could be
2 achieved simply by having a trial with London Array on the common issues which, as
3 I understand it, appears to be accepted as feasible. We would be keen to press on
4 with that and almost reserve the possibility of it happening.

5 In relation to timing, the expert reports according to the parties are agreed, subject to
6 the Tribunal draft order in London Array, to be exchanged next June. Given that the
7 trial is not until April 2025, there is some flexibility on that date.

8 **MS MACKERSIE:** Sir, I add my voice to the one voice. We have concerns, would
9 have concerns, about a November CPO hearing and certainly about an April 2025
10 hearing of the whole of the Spottiswoode claim. But we hear the request for
11 an indication of the most aggressive timetable and we will consider it and come back
12 to you on that.

13 **THE PRESIDENT:** Thank you very much.

14 What we will do is we will rise for 15 minutes to enable the parties to either discuss
15 their common position further or indicate in the clearest way possible why the Tribunal
16 is overreaching if it goes for certain dates that were mooted. I will leave it to you as to
17 how you use that time.

18 If you need more, do please say and we will obviously accommodate. But 15 minutes
19 may be enough. If you need more, just say.

20 Thank you very much.

21 **(10.37 am)**

22 **(A short adjournment)**

23 **(10.58 am)**

24 **MR JOWELL:** Mr President, thank you for the time. We have come up with a proposal
25 which we have shared with the other parties, I cannot say whether they agree to it or
26 not, they will tell you themselves.

1 Our proposal is that there should be a hearing of the CPO application on the first
2 available dates in February 2024 and that the dates that we proposed running up to
3 that should all be moved forward one month correspondingly, so that -- I don't know
4 whether you have a copy of the proposed order that Prysmian have very helpfully
5 compiled with the alternative proposals that we have previously put. You will see the
6 dates in red are our previous proposal.

7 **THE PRESIDENT:** Yes.

8 **MR JOWELL:** We think it would be workable -- if one starts at paragraph 9 -- instead
9 of the first available dates in March, we say first available dates in February and then
10 everything else that is in red moves correspondingly forward one month, so that
11 1 December becomes 1 November, 6 October becomes 6 September and so on.

12 We think on that basis it probably ... we would lose our proposal to have a funding
13 hearing in the interim, it probably does not make sense on that more compressed
14 timetable. But we think there probably should be a PTR in December to see where
15 we all are.

16 Then in terms of the London Array proceedings, we would suggest that that should
17 perhaps be the estimate there should be extended from four weeks to, say, six weeks
18 in order to allow us time properly to intervene.

19 One point that I should just mention is that Ms Davies mentioned the ROC pass on
20 issue. There are other pass on issues, ROC is only one part of it. It is only actually
21 a relatively small part in London Array. There is also the potential of pass on via the
22 transmission charges, which is another element. I don't propose we need to get into
23 that today, but I think assuming that we obtain certification it will then be necessary to
24 define with greater precision those precise areas of overlap and those issues of
25 overlap in relation to pass on that could be introduced and determined in the London
26 Array proceedings. But we think giving an extra two weeks should suffice for that.

1 **THE PRESIDENT:** I agree.

2 **MR JOWELL:** Obviously on a provisional basis.

3 That is our proposal.

4 **THE PRESIDENT:** Thank you very much, Mr Jowell. That is very helpful.

5 Ms Davies.

6 **MS DAVIES:** Sir, I am afraid there isn't agreement on this side of the court in relation

7 to those proposals, save for the last of adding two weeks on the London Array trial.

8 There is no objection to that from any of the Defendants. That would seem to be

9 a -- obviously it is very difficult to say at this point in time -- potential period that could

10 be sufficient to deal with any overlapping issues that remain following certification.

11 I should say in relation to the last point that Mr Jowell made, the ROC point goes to

12 the whole of the pass on issue in relation to wind farms, whether it is at the

13 transmission charge level or in relation to inter-array cables, and that is clear from

14 Mr Druce's own report --

15 **THE PRESIDENT:** That is an argument for another day, yes, indeed.

16 **MS DAVIES:** Just to put down that marker.

17 So far as getting us to the CPO hearing, we have thought very carefully in accordance

18 with the Tribunal's direction about what is the most aggressive timetable we can offer

19 to enable us to put our response in. I am afraid, Sir, it is 6 October. We would not be

20 able to meet September. There are multiple issues that arise in relation to the

21 certification, I have obviously touched on one of them, which is the methodological

22 point where we are responding to a 280-page expert report from Mr Druce and

23 a second expert report as well. The bundle only contains a fraction of it.

24 Of course, we have to liaise amongst the three Defendant groups and we are going to

25 be doing that, with a view to avoiding duplication. That adds time and obviously we

26 have July, but then August is a summer month, as I'm sure the Tribunal appreciates,

1 | where just getting that kind of deduplication cooperation is very difficult. Not only in
2 | terms of counsel availability, but actually clients as well. My clients are Italian, and
3 | August is a problem. I can say that with a degree of experience, I'm afraid.
4 | So we do say 6 October and then 8 December.
5 | Then in terms of the timing for the hearing of the CPO, I'm afraid if it is listed
6 | in February none -- I understand the Tribunal may say that this is a problem that we
7 | will just have to deal with -- of the counsel team for Prysmian are available. That would
8 | be a matter of serious concern to my client because, as I have mentioned, I have
9 | considerable experience dealing with these kinds of claims. Ms Banks, my junior, was
10 | my junior in relation to National Grid and Scottish Power, so she has a lot of experience
11 | too. And, if we are being realistic about it, there is a *Trucks* trial happening during that
12 | period, so trying to find alternative counsel with the relevant experience is not going to
13 | be straightforward.
14 | I have been asked to make those points as strongly as I can, but of course we
15 | understand the difficulties about availability of counsel, but in these circumstances
16 | listing it for a date when none of the team are available -- I believe that Mr Singla has
17 | difficulties as well, he will explain -- is problematic from our point of view.
18 | We would suggest sticking with the March date that the Claimants had originally
19 | suggested and not the February.
20 | Then the other point we need to address is what we are doing in relation to the funding
21 | arrangements. The position in relation to the Claimant's funding in this case is
22 | somewhat unusual, in that there is actually an express condition in their funding
23 | arrangements which means that the Claimants can only draw down the bulk of their
24 | funding once the Tribunal has determined that their agreement is not a DBA, so post
25 | *PACCAR*, unless that condition is waived by Burford. That does mean that it is
26 | a certification condition, because without that condition having been satisfied, they do

1 not have the funding that is necessary to fund this litigation through. So the only point
2 at which that can be decided is certification and with respect, Sir, dealing with
3 everything else and leaving that over, is not going to advance this case, the
4 Spottiswoode case, at all, because they have no money to do anything until that issue
5 is sorted out. That is clear from the terms of the funding agreement which is in the
6 bundle, we don't need to go there, but that is the condition.

7 So the other advantage of March is it gives us more chance of there being a judgment
8 from the Supreme Court and that aspect of their arrangements being considered and
9 that condition being certified and, you know, anything sooner potentially is just a false
10 hope, because it won't actually allow the Spottiswoode proceedings to go anywhere
11 because they can't progress these claims unless and until that issue has been
12 resolved.

13 In terms of what our evidence should include, we had, we thought, agreed with the
14 PCR that if the *PACCAR* judgment is available by 1 September, we would address
15 funding issues in the evidence we are due to serve but if it is not available by then, we
16 would park that and there would be a separate timetable agreed to deal with the
17 evidence in relation to the funding issues.

18 That, in our respectful submission, seems a sensible course because it is a wasted
19 exercise addressing funding issues until we know where we are in relation to the
20 *PACCAR* point.

21 **THE PRESIDENT:** Yes. I must say, that seems sensible.

22 **MR JOWELL:** We have no objections.

23 **MS DAVIES:** I should say there are other points that we also need to look at and we
24 are looking at in relation to the CPO certification stage. There are issues about some
25 foreign law issues, there are some issues to do with limitation, there are a whole host
26 of things which is why it is not just the methodology. We do respectfully say we need

1 until 6 October to put in our evidence.

2 **THE PRESIDENT:** Really your best point on timing of the CPO is that no one is saying
3 that if we were to deal with it in March, let us say – sorry, later than that. There is not
4 a problem in dealing with the common issues in the following year?

5 **MS DAVIES:** No, Sir. We would agree with Mr West, who made the point that the
6 expert evidence in relation to London Array could be moved back a little bit from June.

7 **THE PRESIDENT:** Indeed.

8 **MS DAVIES:** It is the end of April. As I said earlier, the two points that appear -- so
9 far as we can tell at the moment, subject to the outcome of the certification
10 process -- to be potentially overlapping are ones that could be dealt with, it seems to
11 us, relatively narrowly in the Spottiswoode proceedings.

12 Of course, we are going to have to keep that under review in light of the outcome of
13 the certification process and seeing how the evidence develops in London Array,
14 because no evidence has been served yet. But we do believe there would -- as I said
15 before we rose -- with the certification hearing in the spring, a judgment before the
16 summer, there would be time.

17 **THE PRESIDENT:** Yes. I am grateful. Thank you very much.

18 **MR SINGLA:** Sir, if I may just pick up that final point.

19 We respectfully agree that as things currently stand on that sort of timetable there
20 would be time for the Spottiswoode overlapping issues to be dealt with. But we would
21 like to just urge a bit of caution in that respect because, of course, there may be
22 an appeal from any certification decision and that obviously would set things off in
23 a slightly different direction. One cannot predict how these things might turn out. But
24 we are of the opinion that a joint trial of all of Spottiswoode is not going to be feasible.
25 But, subject to the appeal point, if a certification hearing were to happen in March next
26 year, there ought to be time for the two overlapping issues.

1 We would respectfully just remind the Tribunal there is a degree of overstatement in
2 relation to the overlap, at least so far as overcharge is concerned, because
3 London Array is only one of 40 offshore wind farm projects.

4 But we essentially agree with what Ms Davies has said as to the way forward. We do
5 intend to oppose the CPO. We will need time to properly consider our response and
6 we would respectfully agree with March rather than February. From my perspective,
7 the second half of March are dates that I am available and I am obviously representing
8 Nexans in London Array as well. So my clients would be keen for the Tribunal to list
9 it. Obviously availability is only one of many factors, but if we are looking at February
10 versus March we would respectfully ask for March. But we otherwise agree with what
11 Ms Davies has said about the timetable.

12 **THE PRESIDENT:** Thank you very much.

13 Ms Mackersie?

14 **MS MACKERSIE:** Sir, again, I stand up mostly to agree. In relation to the front end
15 of the timetable, we completely agree with what Ms Davies says about October. We
16 don't see responses in September being feasible from our part. We also agree with
17 her submissions on the delay that is in any event necessitated by the *PACCAR*
18 judgment because of the problem caused by the fact that the forward looking funding
19 is conditional on the outcome of *PACCAR*. At least potentially.

20 In those circumstances, it seems to us that a certification that nonetheless had to be
21 conditional on *PACCAR* would not actually help us because we would not get the
22 progress that the Tribunal is seeking.

23 On the back end, we have nothing to add. On the matter of the overlapping issues,
24 we agree in principle that is something that is likely to be feasible. We also agree with
25 Ms Davies that it would need to be kept under review because, as you said at the
26 outset, Sir, we just don't know what the overlapping issues are yet. Depending on the

1 position post certification, it may be that we have more to say on that. But as matters
2 stand, we agree that that is possible in principle.

3 **THE PRESIDENT:** Thank you very much.
4 Mr West?

5 **MR WEST:** From my client's perspective we also agree that extending the trial from
6 four to six weeks ought to enable any common issues to be determined at that trial if
7 they arise.

8 I don't really have anything to add on the timing of certification, in which my clients are
9 not involved. As to the possibility of an appeal from that decision, in my submission
10 that is a bridge we will have to cross if and when we come to it. Of course appeals
11 from this Tribunal are limited to points of law.

12 **THE PRESIDENT:** I am very grateful.
13 Mr Jowell, do you have anything to say?

14 **MR JOWELL:** Just to observe that all of this pleading that they need much more time,
15 we will just observe they have been served, in Prysmian's case, in February of this
16 year and they have had the documents actually in their possession for at least a year.
17 So they have had an awfully long time to look at them, consider them. But, I mean,
18 I have to accept our original proposal was March. We have proposed a more
19 aggressive --

20 **THE PRESIDENT:** We are very grateful to you, Mr Jowell, because we like to stress
21 test these things.

22 **MR JOWELL:** Yes.

23 **THE PRESIDENT:** But it does seem to us that the point that you are not making is
24 perhaps the most significant one, which is that the difference between February and
25 March is one that you are very helpfully articulating, because we asked you to. But
26 you are not saying in order to achieve our aspirational goal of common issues in the

1 London Array trial, it has to be February, it can't be March. You are happy that March
2 will do --

3 **MR JOWELL:** That is absolutely correct. I hate to put pressure on the Tribunal, but
4 it is contingent upon the Tribunal producing a judgment relatively promptly --

5 **THE PRESIDENT:** That is understood.

6 **MR JOWELL:** -- otherwise it could throw things ...

7 **THE PRESIDENT:** What we will do is we will rise. I don't think there will be any
8 surprise in what we are going to say, but we ought to discuss it for five minutes. We
9 will rise for five minutes and we will get back to you.

10 **(11.14 am)**

11 **(A short adjournment)**

12 **(11.18 am)**

13 **THE PRESIDENT:** Thank you very much for bearing with us.

14 We won't make a ruling, but we will direct that two weeks be added to the
15 London Array trial, that the timetable be as essentially is common ground, in other
16 words, we won't advance it in the manner that we asked the parties to think about. It
17 seems to us there are no advantages and several significant disadvantages in doing
18 so. So March it will be. We anticipate that the draft order can on that basis be agreed
19 and the multicolourings removed. We do think there is some merit in a CMC being
20 listed in the end of this year, say December, in case there are issues arising out of
21 Spottiswoode or, indeed, London Array. We don't anticipate that being necessary but
22 if parties could slot that into the directions, that would be helpful.

23 Hearing what Mr Singla says about March availability, we are not going to specify
24 dates for the CPO but we would invite the parties to liaise with the Tribunal so the
25 dates that are the most convenient for counsel are selected, we obviously want to be
26 as helpful as we can. We will get the dates most convenient to counsel slotted in there

1 and we are very grateful to the parties for the constructive approach they have taken.
2 Is there anything that we need to discuss beyond that?

3 **MR JOWELL:** Not from our part. Just to clarify though, that it will be in March, the
4 hearing, regardless of counsel's availability? So within March it will be subject to the
5 best dates?

6 **THE PRESIDENT:** We will say March. I mean, we think that going beyond March is
7 dangerous but diaries are tricky things. I mean if it was to be extremely early April,
8 I don't think we would necessarily lose sleep over that. But we would like the parties
9 to consider dates in March. Judging from what Mr Singla says, it looks like the latter
10 half of March but no promises. Diaries are difficult things generally and I'm afraid the
11 Tribunal is finding itself rather busier than it has been in the past and our diaries are
12 now in themselves a significant issue.

13 I will say this. We will identify and let the parties know as soon as possible who the
14 economist will be to sit in my place in both panels. It will be the same economist
15 across the board so that we have the ability to deal with common issues in the way
16 envisaged.

17 Subject to that, Mr West?

18 **MR WEST:** Currently as I mentioned before, the agreed date for the exchange of
19 expert reports in London Array is 28 June 2024. Either of the parties could reflect on
20 that or the Tribunal may wish to give a direction.

21 **THE PRESIDENT:** We will give a direction to this extent: that the parties should
22 reflect. We think, given the gap between that date and the April commencement date
23 of the now six-week trial, that there is enough flexibility to accommodate Spottiswoode
24 to ensure that one not only does not prejudice the trial -- Mr West, that is what you will
25 have to pay most heed to, that there is not any risk of derailment of London Array.
26 Subject to that, we think you should accommodate Mr Jowell and the Spottiswoode

1 parties in ensuring that there is the opportunity to bring the two streams together so
2 that the common issues, to the extent they arise, can be articulated.

3 **MR WEST:** I think the only other point to mention is that Mr Druce's expert report has
4 been referred to. From my client's perspective -- quite properly referred to, that means
5 we ought to be entitled to see all of it, so far, we have only seen part of it. I don't know
6 if my friend wishes to restrict the availability of that report. There was some indication
7 in his skeleton he may wish to do so.

8 **MR JOWELL:** No. If the Tribunal wishes to make an order that we should provide
9 the Druce report in full we will obviously comply with that order. We think it should be
10 ordered.

11 **THE PRESIDENT:** It seems to me it is sensible, given that we are eliding, that there
12 should be access. I am sure you can liaise about the extent to which the report is
13 protected, i.e., who has access, if that matters --

14 **MR JOWELL:** Yes.

15 **THE PRESIDENT:** -- but, Mr West, it seems to me that since you have, through no
16 fault of your own, been dragged into a combined trial, you are certainly entitled to see
17 what it is that you are being dragged into and the expert report is a rather good way of
18 showing that. Again, I will leave it to the parties to draw that up.

19 Ms Davies --

20 **MS DAVIES:** It is a similar request. There is referred to in the context of the London
21 Array proceedings a memo from Mr Bell, who is Mr West's expert, in relation to the
22 ROC pass on issue, which we have not seen because it is in bundle B, which we do
23 not have. So for the same reasons, I mean, Mr Singla has obviously seen it but it
24 would be helpful if all the Defendants could --

25 **MR JOWELL:** Indeed us too, we have not seen it either.

26 **THE PRESIDENT:** Oddly enough I had a sort of note about common disclosure and

1 common documents which I binned as a suggestion, because I did not think it was
2 needed.

3 It does seem sensible if there were to be a sharing of material given not the alignment
4 of positions, necessarily, but the alignment of the parties in terms of the outcome they
5 are achieving. So provided it is not controversial, we would be prepared to include in
6 the order a form that ensured that there was a bleed across or a read across of
7 material on both sides, but we would obviously want that, to the extent confidentiality
8 issues arise, to be protected so that all parties are happy.

9 **MS DAVIES:** That was the point I was going to raise. There are inevitably some quite
10 significant confidentiality issues that arise or could arise when we get down the road.
11 At the moment just on methodology and so on they don't arise. But certainly as
12 regards disclosure that might be necessary in the Spottiswoode proceedings, there
13 are some serious restrictions in terms of how material has come to the Defendants
14 and so on.

15 All I wanted to do was put down a marker to say that is all fine, but obviously we are
16 going to have to deal with confidentiality at some point.

17 **THE PRESIDENT:** We are grateful, Ms Davies, for you raising it. Let's deal with it
18 this way.

19 We will have a simpler form of order to deal with the problems that have immediately
20 arisen today and we have to make an order in that regard. The parties should give
21 careful consideration to the regime that they would want to have later on down the
22 line. We do know that these regimes can become peculiarly complex and at the end
23 of the day, if we need to direct, we will do so. But it is far better in these cases if the
24 parties can work out the sensitivities for themselves and ensure appropriate protection.

25 The only thing I would say is what I said in *BGL*, that we do not want confidentiality to
26 be wagging how a trial is dealt with in open proceedings. But up to public proceedings

1 of the substance, we think it is for the parties to work out what works for them and,
2 generally speaking, the Tribunal will row in behind what the parties have agreed
3 between themselves.

4 **MS DAVIES:** I am grateful.

5 Just to make clear in relation to the order that we are going to be agreeing, is, as
6 I understood it, Mr Jowell agreed that we should carve out funding issues from our
7 CPO response if the *PACCAR* judgment is not available by 1 September. That would
8 then be an issue that could be revisited, for example, at the Case Management
9 Conference in December if we have not managed to sort out a timetable for dealing
10 with that evidence.

11 **MR JOWELL:** Yes. It might be that it might need to be resolved before that
12 Case Management Conference. I mean if, say, we had a *PACCAR* judgment in mid-
13 September, then hopefully we would have exchanged by then.

14 **THE PRESIDENT:** Look, we don't want an order to unpack the number of
15 contingencies that might arise, given we actually have no idea when this judgment is
16 coming. Let me just say this. Let's carve out *PACCAR* as something which should
17 only be addressed when you actually have the material to address it.

18 **MS DAVIES:** All the funding issues, with respect.

19 **THE PRESIDENT:** Yes.

20 **MS DAVIES:** Because it is so contingent in this case.

21 We will amend the order to make sure that that is clear. I am sure, Mr Jowell and I,
22 we can sort that out.

23 **THE PRESIDENT:** I am sure you can. The only thing I would want you both to be
24 clear on is that once certainty has emerged, in the sense that you have a *PACCAR*
25 judgment, we are unsurprisingly going to expect the parties to sort out the fallout from
26 that. If it is early no problem, if it is late we will have to deal with that. We would not

1 really want it to come back to the Tribunal, but if it does then we will deal with it
2 probably on the papers. But it is idle to do crystal ball gazing because, frankly, I have
3 found my crystal ball is really rather unhelpful.

4 **MS DAVIES:** None of us know. It may even be that the Supreme Court does not
5 know.

6 **THE PRESIDENT:** I'm not even going to be speculate on that. But that is how we will
7 deal with it. We will kick that particular issue, in terms of its minutiae, into the long
8 grass. Because I know the parties will be sensible, but if we try to create a regime that
9 catered for everything, we would just be arguing about something that does not need
10 to be argued about.

11 **MS DAVIES:** Absolutely, we are grateful.

12 **THE PRESIDENT:** Thank you all very much. We are very much obliged to you for
13 your very helpful cooperation. We will rise now.
14 Thank you very much.

15 **(11.30 am)**

16 **(The hearing concluded)**

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