IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1415/5/7/21 (T)

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Friday 29th September 2023

Before:

Andrew Lenon KC

(Sitting as a Tribunal in England and Wales)

BETWEEN:

The Secretary of State for Health and Social Care & Others **Claimants**

v

Lundbeck Limited & Others **Defendants**

A P P E A R AN C E S

Duncan Sinclair, Daniel Stedman Jones & David Hopkins (On behalf of the Secretary of State for Health and Social Care & Others) (Instructed by Capsticks)

Sarah Abram KC, Paul Luckhurst and Oscar Schonfeld (On behalf of Lundbeck Limited & Others) (Instructed by Dentons and Cleary Gottlieb Steen & Hamilton)

Tim Johnston (On behalf of GUK) (Instructed by Skadden)

Robert O'Donoghue KC (on behalf of Alpharma and Xellia) (Instructed by Clifford Chance)

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Friday, 29 September 2023

(10.30 am)

Housekeeping

THE CHAIR: I start with the customary warning to those of you joining us on livestream. 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 provision is punishable as contempt of court.

Thank you.

Case Management Conference

MR SINCLAIR: Sir, I appear on behalf of the claimants, along with my learned friends, Mr Daniel Stedman and Mr David Hopkins. To my right are representatives of the various defendants, going in order from Paul Luckhurst, Sarah Abram KC, Tim Johnston, Robert O'Donoghue KC and Oscar Schonfeld. I think that's right. If I can get a nod.

THE CHAIR: What is Mr O'Donoghue doing here? I don't have his name on the list?

MR O'DONOGHUE: Forgive me for interloping, I appear on behalf of the Alpharma defendants.

THE CHAIR: Which?

MR O'DONOGHUE: Alpharma.

MR SINCLAIR: If I understand things correctly, you have a joint skeleton from the defendants -- well it says from all defendants but there is a further short skeleton from the third defendant, put in by Mr Johnston and Robert O'Donoghue KC appears for defendants eight and nine.

THE CHAIR: Yes, thank you very much. I have read the skeleton arguments.

MR SINCLAIR: In terms of housekeeping, there have been some additions to the authorities bundle, sections 2 and 32 of the Limitation Act.

THE CHAIR: Yes, I am not sure I have the authorities bundle.

MR SINCLAIR: There should be a total of three files.

THE CHAIR: Great. Yes, I have them.

MR SINCLAIR: Two being the CMC bundle and one being the authorities bundle.

THE CHAIR: Yes, thank you.

MR SINCLAIR: The authorities should run up to 11 in terms of case law and to that --

THE CHAIR: All right, yes.

NEW SPEAKER: There are two more to add. I don't know if you have those, 12 and 13?

THE CHAIR: Yes, I think I've got those.

MR SINCLAIR: Those should be the Limitation Act and the Commission decision itself. Sir, I don't know how you wish to proceed, if you would like some background to the case or specifically to the applications relevant today in this CMC or if you would like me to follow the agenda circulated by the tribunal.

THE CHAIR: Yes, I was going to go through the agreed list of issues. That seemed to be a sensible way of dealing with things. I don't think I need to know much about the background. As I say, I have read the skeleton arguments and there seems to be a high level of agreement, certainly as far as the preliminary issue is concerned.

MR SINCLAIR: There is.

THE CHAIR: If you have anything to add, feel free but otherwise, I was just going to make a ruling on that straight away. Ms Abram?

MS ABRAM: I have nothing to add.

MR SINCLAIR: We've made it clear we were not going to expand upon our written submissions.

THE CHAIR: Very good. Well I will make a ruling on that straight away.

Ruling 1

THE CHAIR: Dealing first with the application for a preliminary issue, the defendants have applied for a direction that the issue of whether the claim in these proceedings is time-barred be determined as a preliminary issue.

The defendants submit that this is an appropriate case for determination of a preliminary issue on the grounds that the issue, if determined in their favour, would bring the whole proceedings to an end and achieve major time and cost savings, both for the parties and for the tribunal.

Even if determined in the claimants' favour, the preliminary issue would not materially increase costs. They submit that the preliminary issue can be determined relatively quickly and cheaply. The claimants do not actively oppose the application. They correctly point out that ordering the determination of a preliminary issue has potential disadvantages. If the defendants are not wholly successful in establishing that the claim is time-barred, then absent settlement, the case would have to proceed to a full trial, with the consequence that the overall costs would be increased and the final outcome of the case would be delayed.

At the same time the claimants recognise that limitation is a classic issue for preliminary determination, bearing in mind the relatively low costs, time and effort involved, compared to a full hearing.

I am satisfied that this is an appropriate case for the trial of a preliminary issue of whether the claim in the proceedings is time-barred, for the reasons put forward by the defendants and I so direct.

MR SINCLAIR: I am grateful, sir, and a corollary of that is, if you like, our application to amend our reply, so as to plead section 32 under the Limitation Act, in addition to our primary argument that the Limitation Act does not apply.

THE CHAIR: Yes. Well again, I understand that's not opposed by the defendants.

MS ABRAM: It's not opposed, sir. I would make two points on it if I may. Unless Mr Sinclair wants to say anything else by way of opening that application first?

MR SINCLAIR: Well it would be rather odd to have a hearing on a preliminary issue of determination if we were not permitted to advance our case, plead our case and then advance it.

THE CHAIR: I don't think it's going to be suggested you are not to have permission, I suspect what's going to be said is one or two criticisms are going to be made of the way the case has been conducted in relation to limitation, if Ms Abram wants to make those points.

MR SINCLAIR: Sir, we could equally make criticisms of the way in which it's been raised. It was raised, for instance, only about a month before the defences were due, at the end of July of this year, us having extended, by consent, the period for serving of defences to four months rather than one. They sought, initially, an application that they only served defences in relation to limitation. The CAT decided not to agree and hence there were full defences. The CAT also envisaged, and this was our understanding of how things would take place, that we were to serve a reply if so advised, it wasn't necessary, they would then make an application. We would then have the opportunity to make submissions on that.

Until the application was made, it was not certain. Although the parties had alluded to it in June, they had not made an application.

THE CHAIR: I think the criticisms that could be made are, first, that the section 32 defence wasn't included in the reply and, secondly, that there is no draft amendment before the tribunal today. As I say, I don't want to waste too much time debating those points because the application is not opposed. But I think those are the points that Ms Abram was probably going to make.

MR SINCLAIR: Yes. Sir, as to the draft of what could be in section 32, I appreciate we've had a short period of time since the application and our submissions to draw up such a draft, but it really has only been since the application itself that their joint case,

i.e. between the seven separately represented, if you will, defendants became narrowed. But, sir, I take that point on the chin.

THE CHAIR: Okay.

MS ABRAM: Sir, I am not going to stand up and have a whinge, I promise. I am going to say three things if I may, with an eye to working out the next practical steps on the application. The first thing, just to clear away a point that you will have seen in the skeletons. In skeleton arguments the claimants were seeking four weeks to produce their draft amended reply. Mr Sinclair has kindly informed me this morning they are now happy with three weeks.

THE CHAIR: Good.

MS ABRAM: That means no need for consequential amendments to the rest of the timetable in the draft order.

The second point is just on process for the draft amendments. Sir, you will be aware that there is Court of Appeal authority that permission to amend shouldn't usually be granted in the abstract without sight of amendments and so what we've provided for at paragraph 3 of our draft order, you'll see, sir, is for the claimants to provide a draft amended reply to us for our consent not to be unreasonably withheld. It's not that we expect to create difficulties around this, it's just that we are conscious of what the Court of Appeal has said by way of guidance on this.

Now a point that --

THE CHAIR: My draft order doesn't include those additional words. Is there an updated draft of that in fact?

MS ABRAM: Yes, it went in with our skeleton argument.

THE CHAIR: Sorry.

MS ABRAM: No, not at all, it's in the supplemental bundle --

THE CHAIR: Okay.

MS ABRAM: -- which may be behind you, sir, at tab 5. The amendments are not terribly consequential. In fact, I think this was the main point.

THE CHAIR: Yes.

MS ABRAM: So we make provision for us not to unreasonably withhold our consent. There's a wrinkle there I should just call to the tribunal's attention which is that, sir, you are probably aware there's this odd lacuna in the tribunal's rules about amending replies and, indeed, defences, where there's no express provision for defences and replies to be amended on the consent of the parties. Which is why, as you know, for example, from Trucks, our usual practice is that when amendments are consented, we send a consent order to the tribunal to approve and that's what we envisage doing in this case once the draft amendments are circulated and assuming they are agreed.

THE CHAIR: Very good. Well that seems sensible. Mr Sinclair?

MR SINCLAIR: Sir, strictly of course, the authority cited doesn't apply to the CAT which has different rules on pleadings. The CAT guide does have the wrinkle that for anything other than statements of claim it's not for the parties to agree but it's only by order of the CAT, of the tribunal.

So we would suggest that paragraph 3 of the order need not provide for the defendants to consent, but merely for the tribunal to so order that we amend our reply in the terms as regards section 32 and there can be leave to apply, of course, if we overstep the boundaries.

THE CHAIR: No, I am satisfied that the draft order prepared by the defendants is satisfactory on that point.

MS ABRAM: I am very grateful, sir.

The third point to address is the costs of the application to amend. Is now a sensible time to do that or should we wait until the end?

THE CHAIR: Well let's wait until the end. It didn't strike me, when I read what was in your skeleton, that there would be, actually, any significant additional costs. You know, the CMC had to take place. If you can persuade me there are significant additional costs, I will hear what you have to say but at the moment I remain to be persuaded, notwithstanding the criticisms you've made.

MS ABRAM: I hear what you say, sir. I am sure everyone hears that. We'll come back to that if we need to. I am grateful.

MR SINCLAIR: Sir, if I may then return to the agenda --

THE CHAIR: Yes.

MR SINCLAIR: -- and go through the points as set out.

The first issue is forum. I think both parties or all parties are agreed that these should be treated as proceedings in England and Wales --

THE CHAIR: Yes.

MR SINCLAIR: -- for the reasons set out in our claim form and agreed with in the defences.

As regards limitation, this is obviously an issue we've been dealing with just now and so unless, sir, you require any further assistance, I think that is dealt with.

Likewise pleadings. I think that has been dealt with, including that, as my learned friend says, whilst we asked for four weeks in our skeleton in paragraph 13, three weeks will suffice.

As regards disclosure, it may be helpful to turn to the draft order, specifically paragraph 8 of the draft order. But our suggestion is that, having made an application for a determination of a preliminary issue, accompanied with a witness statement which sets out in some detail the relevant publicly available documents, that the defendants should be restricted to relying on those identified documents rather than letting the ever expanding issue of publicly available documents cause further costs unnecessarily.

So that would be under the order dealt with at paragraph 8(a) and our suggestion is that this be amended so as to reflect the documents already relied on in the application or such further documents as are agreed, with the ability to apply to the tribunal if agreement isn't reached.

THE CHAIR: Shall I hear Ms Abram on that point?

MR SINCLAIR: Shall we take it point by point.

MS ABRAM: I am very grateful. That proposal is resisted by the defendants. The purpose of the reference to a couple of documents in Ms Munro's witness statement, in order

to identify the nature of the section 32 argument, was to make it clear to the tribunal, in the absence of a pleading from the claimants, what the sort of questions were that the tribunal would need to determine, in order to decide on when the claimants had sufficient knowledge, in order for time to start running. Ms Munro actually made it express in her witness statement that she obviously wasn't seeking to set out an exhaustive list of the documents that we say are relevant to when the claimants had sufficient knowledge for time to start running and I am sure the tribunal wouldn't have thanked us if we had set out an exhaustive list of all such documents on that occasion.

It is quite topsy-turvy to be suggesting that the defendants should be restricted, at this stage, to relying on a couple of documents that we referred to in a witness statement in order to assist the tribunal, before the claimants have even pleaded their case on section 32. Of course, section 32 is an exception from the usual limitation regime, so it's for the claimants to allege that it applies and explain why it applies and then the ordinary course would be for us to address the claimants' case.

Now things have happened in a slightly different order in this case and as I say, I am not going to have a whinge about that, but there certainly shouldn't be any suggestion we should be guillotined from referring to any additional documents from those we've mentioned just by way of examples, there's no proper basis for that. Now I think a point that we are alive to and this is the genesis of paragraph 8(a) of our draft order, is that the claimants might reasonably say: look, we need to know what documents you, defendants, are going to be cross-examining our witnesses on, for example, when we say the claimants could, with reasonable diligence, have been expected to know enough to set time running on date X.

So what we suggested in paragraph 8(a) was that in order to be fair, as fair as possible to the claimants, we should set out a list and provide inspection of all such documents, at the same time as the claimants give disclosure, just to make sure that there was no inequality of arms between the parties.

So we absolutely remain content to do that. There will be many additional documents beyond those referred to in Ms Munro's witness statement. But that's a function of the fact that there was so much information in the public domain about these agreements long before the decision was adopted and in my submission, it's transparently and unacceptably self-serving for the claimants to say: look, you can't refer to all of this information that was in the public domain regarding the matters that are now the subject of this claim. Instead, you have to be cut off and restricted to some documents you happen to mention in a witness statement in a preliminary issue application. That just wouldn't be fair.

MR SINCLAIR: My Lord, if I may just respond to that by making clear that the application was viewed by us as, for the first time, a distillation from seven very different defences which named, without any limitation, publicly available documents and the application refers to three documents. Perhaps, sir, it may be more attractive if I advance the proposition that the defendants be required to disclose such documents as they have already pleaded in their defences, excluding the categories where they say "and any other public document." That will still give some, at a guess, 20 or 30 public documents between the seven defences. Simply in the interests of efficiency. Again, if the defendants seek to adduce further evidence, then we can either agree or an application be made to the tribunal.

MS ABRAM: May I make a suggestion I hope will help, sir. Two points. Something we will agree to and something that we resist.

So we don't really understand why the claimants need our help in identifying public documents relating to the subject matter of these proceedings. They can be found by the claimants using Google, in the same way as they can be found by the defendants using Google. So it shouldn't be necessary. But we want to be as helpful as possible and so what we would be prepared to do, if it would be of assistance to the claimants, is to provide a set of documents on which we currently intend to rely, as matters stand, before the claimants have even pleaded their case, as to the state of their knowledge

before the decision was adopted by the Commission. That would be a really good faith offer.

But the second point is what it wouldn't be, and we wouldn't accept, is that that should be the whole set of documents on which we would ever be intended to rely -- ever be entitled to rely in connection with this limitation point. Because if you imagine, sir, the claimants haven't even set out what they say the state of their actual or constructive knowledge was at the time when the decision was adopted. It might be, for example, that when the claimants give disclosure in four months' time, there is an internal email passing around an article from a newspaper within the NHS bodies, that now shows the claimants, saying: look at this, perhaps we have a valuable claim.

Now if that wasn't one of the documents we intend to rely on at the minute, we ought to be entitled to say: actually, the claimants were aware of that and we do now intend to rely on it. So, happy to produce the documents of which we are currently aware in the public domain and on which we intend to rely but with no suggestion that that should be a guillotine in any way.

THE CHAIR: Yes. I mean, obviously, my concern is that this shouldn't be an open ended, very expensive, very far-reaching direction in terms of disclosure. That's not going to be efficient and it's going to be contrary to the overriding objective. On the other hand, I can well see it would be wrong to restrict the defendants simply to the documents that happen to have been referred to in a witness statement or even in the defences.

So it's a question of trying to find a middle way here.

MS ABRAM: Perhaps the way of squaring the circle is to retain paragraph 8(a) in the draft directions so that there is a date by which the materials are collected but for us -- as I say, a gesture of good will and good faith at this stage, in two weeks -- the assembled mass, two weeks? Two weeks from today, to produce copies of the documents on which we currently intend to rely, taken from the public domain.

THE CHAIR: Yes.

MR SINCLAIR: Sir, I am grateful to my learned friend for that constructive suggestion. I think that would help greatly. It may mean that we ask for four weeks for the reply, just in case these documents are more -- well they will be numerous and to digest them and reply to them within one week may be difficult.

MS ABRAM: So I understand that Mr Sinclair needs two weeks from receiving the documents to producing his reply, so in order to be as helpful as possible, we will produce our documents within one week.

MR SINCLAIR: I am grateful. Then we would be most content with that and 8(a) can stand from our position, sir.

Sir, I will move on --

THE CHAIR: So I am going to direct that the defendants produce a list of the publicly available documents on which they currently intend to rely within a week, without limiting the defendants to those documents.

MS ABRAM: I am very grateful, sir.

THE CHAIR: At the trial of the preliminary issue. Otherwise paragraph 8 is agreed, is it?

FIRST SPEAKER: Yes, sir.

As to 8(b).

THE CHAIR: It rather skips over four, five and -- four to seven. Are they agreed? That's the Redfern Schedule.

MR SINCLAIR: Sir, I have addressed four and you've reached a conclusion on that. Five is agreed. Six is agreed. And seven, yes.

THE CHAIR: Very good.

MR SINCLAIR: As regards 8(b) and still on disclosure, we submit that this is still too broad. Without wishing to hamstring the defendants in any way, we would suggest that the disclosure be limited to the relevant time period, namely the date at which the Commission started investigating and the date at which the Commission reached a final decision.

So that is the scope and that's the temporal scope. As regards which parties should be concerned or must be required to disclose documents, we would suggest that this be such names as provided by the defendants, because at this time, they actually have far greater detail as to who received the requests for information from the Commission than we do. That's a feature of the Department of Health not keeping records that far back and the defendants having had access to the Commission's files.

So one category would be any adverse documents within the meaning of paragraph 2(a), et cetera, as set out at (b), to which parties specified by the defendants are party, and any other parties within the claimants who have liaised about Lundbeck or who have liaised about citalopram, as investigated by the Commission. So the Commission's investigation into citalopram over the relevant period. So as I say, sir, the relevant period will be from the start of the Commission's investigation to the end.

THE CHAIR: What period is that in fact?

MR SINCLAIR: That's from 7 January2010 until 19 June 2013.

And that the parties are required to carry out the disclosure exercise in those named by the defendants or which are otherwise found to have, on a search of emails, et cetera, to have liaised at all about the Commission's investigation or decision.

THE CHAIR: Okay.

MS ABRAM: Three points on that, sir. The first is to say that paragraph 8(b) of the draft order makes provision for known adverse documents. Whatever the position might be in respect of documentary searches, there's absolutely no basis to suggest that known adverse documents should be restricted by reference to time period or, indeed, custodians, if these are documents that the claimants know they have, without doing any further searches. Which is, of course, the touchstone which bears on their actual knowledge or their reasonable diligence knowledge. I think Mr Sinclair may be conceding that point, so perhaps I don't need to press it. No. Okay, so I think 8(b), on that basis, is agreed.

Then (c), the suggestion is there should be a limit on temporal period and (inaudible due to audio distortion) on custodians. So, to start with the temporal period, the proposal that the temporal scope of the searches should be limited to the period from 2010 until 2013. Two points about that. The first is really this is a question for Redfern schedules and there's a question to be resolved in that context because the reasonableness and proportionality of the potential scope of the disclosure request is really something that the tribunal will only be able to evaluate in case of dispute, once the parties have set out what those disclosure requests are and their responses to them are.

But second, just to be clear so I don't suggest to the claimants inadvertently that we might accept this, it is already plain that the period of the Commission's investigation, the formal investigation, would be too narrow because we know there were indicia of actual knowledge before that. So I won't take you to the reference but my learned friend Mr Luckhurst's defence refers to a request for information sent by the Commission to the Department of Health in 2006.

THE CHAIR: Right.

MS ABRAM: So, sir, we would resist the idea the time period should start in 2010. As I say, it's a question for another day but we will be resisting it then.

Then as to custodians, so again, it's a question for the Redfern Schedule stage of the process rather than for now. But, again, I would make two observations, resisting the idea that custodians should be limited to either a list that the defendants identify now or to a list of anyone who liaised with the Commission.

As to the idea the defendants should identify the claimants' custodians, the defendants have very limited insight into the claimants' actual or constructive knowledge. What we have, because we obtained some access to files in the context of the Commission investigation, we obviously are not the people best placed to identify who the claimants' custodians should be. That's the claimants and any responsible litigant will take that task seriously.

So it shouldn't be the defendants' job. Then as to the idea that it might be defined by reference to people that liaised with the Commission relating to citalopram, there are two issues with that as well. The first is it's kind of circular, so circular in a self-serving sense, I suppose, because the idea is that disclosure in relation to actual knowledge should only come from the people who the claimants accept might have actual knowledge because they liaised with the Commission. That's not how disclosure works. The process of disclosure is about finding out more than we already know. So, sir, we don't accept that's right.

Second, as a matter of principle, we are very unlikely to accept that disclosure should be confined by reference to custodians because the question is who in the organisation had the knowledge, not: did this individual in the organisation have the requisite knowledge?

So if, for example, person A was communicating with the Commission but person B read an article in The Times and said: look, there is this potential claim that we, the NHS, might be able to bring, and sent that to person C, then it absolutely should not be the case disclosure should be cut off at person A and not include persons B and C. So a question for another day but, again, we are not going to agree to that proposal, sir.

MR SINCLAIR: Sir, just to be clear, we accept that 8(b) stands and that deals with, I would suggest, a lot of my learned friend's concerns as regards, for instance, communications within the Department of Health which relate to the same issue.

As regards the time frame, although Lundbeck referred to requests for information dating back to 2006, I think the reference was, well that was undoubtedly before this investigation and it was during the Commission's sector enquiry into pharmaceuticals which took place over two to three years leading to a report in 2009, so well before this investigation and, really, it does lead to a very open ended disclosure criteria over far too long a period, most of which will not be relevant. If it is relevant under (b), then we have to disclose it.

As to (c), the aim in asking, if you like, that the defendants first of all name parties and that forms the starting point, it's because they do have greater information than us at the moment because they've had access to the case file and we have not kept the documents and we have asked within the Department of Health if they have copies of those and they don't.

But, secondly, we are not limiting it to that. We are saying: and anyone else we find who talks internally or with the Commission, I am happy to accept internally, as well as with the Commission, about the case, over the duration of the Commission's investigation.

So those, sir, are my submissions.

MS ABRAM: Sorry, sir, may I make two very brief points just in response to that. The first is as to the idea of custodians being confined to anyone who has relevant documents which is, I think, where Mr Sinclair now is, that is completely circular because Mr Sinclair is saying that disclosure should only be given from those people who have knowledge of the investigation. Of course, the only way one finds that out is by doing a search to see who has those documents, so that's not a workable limitation for the parameters of disclosure.

The second thing that I do need to pick up on behalf of the defendants is the suggestion that the claimants may not have kept the documents relevant to these proceedings. Now that isn't relied on in resistance to the idea of seeking to find any relevant documents that have been preserved. Of course, if documents haven't been preserved, that's a matter on which we would expect to see evidence. It would be a matter of the most serious concern to the defendants and the greatest potential relevance to this preliminary issue and the circumstances and date of any document preservation failure will be something that will need to be investigated with great care.

Ruling 2

THE CHAIR: So the next issue is whether or not the directions for disclosure should be limited temporally or should be limited to documents held by identified custodians. It does not

seem to me that it would be right to make any direction of that kind at this stage, essentially for the reasons given by Ms Abram. There is provision in the directions for a Redfern Schedule to be completed and if there is a dispute as to the scope of the documentary requests for the matter to be referred back to the tribunal, it seems to me that it would be more appropriate to deal with issues as to the scope of disclosure at that stage rather than now.

I also accept the point put by Ms Abram that it is not really for the defendants to identify who the relevant custodians are.

THE CHAIR: Yes, thank you.

MR SINCLAIR: I am grateful. Sir, as to -- well, perhaps we return to the agenda and knock out any points there. We've just dealt with disclosure. The next point is confidentiality. We don't see any need for a confidentiality ring at this stage of the proceedings and I see my learned friend is in agreement.

There was a heading "Future conduct of the proceedings." Sir, we submit that the only sensible course would be to proceed first with this preliminary issue, reach a result and then have a second case management conference at which, as we note in the skeleton, we'll raise the issue of binding issues of fact before this tribunal --

THE CHAIR: Yes.

MR SINCLAIR: -- as perhaps the second preliminary issue. But that's for another day.

Any other matters. Here we return, I think, to the order and any costs. Costs are at 13 and 14 of the draft order.

THE CHAIR: Yes, I think perhaps before we get to that, we should just look at paragraph 2 of the draft order, the provision for the trial date to be listed. I am sorry, I am looking at the wrong -- that's the wrong one.

MR SINCLAIR: Yes, sir. In terms of duration, I think the parties are agreed that a three day hearing will be appropriate and necessary. Certainly from our side, we envisage at

least two witnesses of fact and the other side has made representations. As to date, we are in your hands.

THE CHAIR: Yes. As to the date, I don't have an objection, in principle, to the date of 15 April 2024 but I should point out I am currently due to sit in Trucks 3, as it is known, but it looks as if that may settle. So I would be prepared to list the trial of the preliminary issue in the hope, in the expectation, that the trial will, if it doesn't go away entirely, will be shorter than currently planned, so I should be able to fit it in.

MR SINCLAIR: I am grateful. Returning then to costs and it's useful to refer to the draft order again. Our submission is that the claimants should bear -- well as regards the PI application, the costs should be in the case. As regards paragraph 14, the claimants should bear their own costs of the amendment application and the amendments to the reply but the defendants' costs occasioned by an amendment application, should not be granted, for the reason that if we had pleaded this earlier, they would have to address it in any event and, secondly, this application really has not incurred very great costs and the CMC would have had to proceed at any event.

THE CHAIR: Okay.

MS ABRAM: Sir, I have heard what you indicated earlier and those behind me have heard it as well. I am not pressing the application for the costs of and occasioned by the amendment application. Just in terms of what that means for the drafting of the order, I think paragraph 14 should say "The claimants to bear their own costs of the amendment application and the amendments to the reply", full stop, and then there will be another provision saying:

"The defendants' costs of and occasioned by the amendment application shall be costs in the case."

MR SINCLAIR: I am grateful.

THE CHAIR: Very good. Anything else?

FIRST SPEAKER: Not from our side, sir.

MS ABRAM: Nothing from me, sir, thank you.

THE CHAIR: Thank you.

(11.19 am)

(The hearing adjourned)