IN THE COMPETITION APPEAL TRIBUNAL

Case No:1537/5/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 28th November 2023

Before:
Andrew Lenon KC
(Sitting as a Tribunal in England and Wales)

BETWEEN:

OT COMPUTERS LIMITED (IN LIQUIDATION)

Claimant

and

(2) MICRON EUROPE LIMITED

Defendant / Part 20 Claimant

and

SAMSUNG SEMICONDUCTOR EUROPE LIMITED

Part 20 Defendant

A P P E A R AN C E S

Andrew Bartlett (On behalf of OT Computers Limited (in liquidation))

Daniel Jowell KC and Joshua Pemberton (On behalf of Micron Europe Limited)

Kristina Lukacova (On behalf of Samsung Semiconductor Europe Limited)

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Tuesday, 28 November 2023

(10.36 am)

THE CHAIR: Good morning. I'm going to give the customary warning. Some of you are joining us live stream on our website, so I must start by reminding you that an official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as contempt of court.

Yes, thank you.

Housekeeping

MR BARTLETT: Morning. My name is Andrew Bartlett, I'm the solicitor advocate for the Claimant in this matter, OTC; and my learned friends Mr Jowell and Ms Lukacova represent the Defendant Micron and the Part 20 Defendant, Samsung.

May I check you've received the bundles, I assume, and I apologise for the length of the bundles -- I can make a brief comment on that -- and I trust you've received the skeleton arguments.

THE CHAIR: Yes, thank you very much. It was pointed out to me that I think your skeleton argument was a little bit too long, two pages over the maximum. I'm not going to make a point about that, but it was noted.

MR BARTLETT: I apologise for that, yes. Had there been a little more time, I'm sure we would have managed to condense it to the 20 pages. And yes, as to the length of the bundle, I do apologise, for a CMC. I know they do seem a little excessive. Unfortunately, without wishing to spend time allocating blame, we did find a lot of documents which were unnecessary to be exhibited and hence resulted in the duplication -- ended up being in the bundle at the Defendant's insistence, and that

made the witness statements particularly long and I appreciate that's not ideal.

As to the agenda today, we have a number of issues. There is one slight issue regarding the precise order in which we should address these issues. But if I just run through, the basic issues we need to consider are the directions regarding the Part 20 contribution claim by Micron against Samsung. We then have OTC, the Claimant's, applications for disclosure against Micron and Samsung.

We then have Micron's applications for disclosure against OTC and Samsung; Micron's application for security for costs; OTC's application for directions regarding costs management; OTC's application regarding the confidentiality ring; we have Micron's application for a stay and mediation; and then the final issue regarding directions to trial.

THE CHAIR: Yes.

MR BARTLETT: The only slight issue, as to disagreeing just to the order, is as to whether the Part 20 directions should be considered separately from the applications against Samsung for disclosure.

The position of Micron and the Claimant is that logically we should consider separately the question of how are we managing the claim against -- the contribution claim against the Part 20 Defendant, and then we can deal with disclosure issues separately. But I believe that Samsung wish to consider both the issue of disclosure and directions in respect of Samsung together, which from our perspective would not be ideal. But unless you wish to hear Samsung on that point, I propose to start with the issue of the Part 20 directions.

THE CHAIR: Can I just give an indication of how I saw this hearing developing. Most of the issues are self-contained in the sense they don't have any knock-on effect on other issues and I was therefore proposing to reserve judgment in relation to the self-contained issues because particularly as far as disclosure is concerned,

it's quite complicated, it's quite detailed, and I don't trust myself to do an ex tempore judgment that would do justice to all the matters that have been canvassed in correspondence.

Actually the one issue that struck me which I did need to deal with straight away was this question of the case management of the Part 20 claim because potentially I can see that does have a knock-on effect on other matters and therefore, subject to anything Ms Lukacova wants to say, it does seem to me that it would be sensible to deal with that issue first.

MS LUKACOVA: Thank you for that indication, sir. I would submit, unfortunately, that is the one issue that can't be determined before anything else is determined and that is because it can't be determined in isolation. We can see from OTC's application for directions what happens when the two issues are considered separately and in a vacuum. What OTC is proposing is that SSEL, my client, run further extensive searches for disclosure and then provide further extensive disclosure. There's also an overlap with what Micron is requesting from us as the claimant in our Part 20 claim. But then OTC is also proposing that we have no opportunity to participate in the trial involving that additional disclosure. That can't be right, in my submission, and also Micron agrees that that can't be right. Micron also takes the position that it is uncontroversial that if we were to provide further disclosure, we need to attend trial and participate as necessary.

So the outcome of all of that is that if OTC's application for directions is heard first, then I'm going to have to stand up and say assuming that my client isn't ordered to provide any further disclosure, in that case I'm supporting the stay. On the other hand, if my client were to be unsuccessful in resisting the applications for further disclosure, then my position might depend on the precise outcome. I wouldn't be able to be more specific on that, unfortunately, because it does depend on the scope

of what is ordered.

By way of exaggeration, if we had to disclose a couple of additional documents, that may not have an impact on our position on the stay and we may still want a stay, or rather separate hearings. But I can certainly confirm that if it were the case that we had to provide all of the disclosure by way of further additional disclosure being sought by Micron and OTC, then in those circumstances we would be opposing the stay on the basis that we need to attend, we need to be commenting on these documents at trial 1.

So on that basis I would submit that while I would be happy to make submissions on the stay first, that application can't be determined until the applications as regards disclosure are determined because I am going to need, I respectfully submit, an opportunity to come back and clarify SSEL's position based on the outcome of those applications.

THE CHAIR: I don't for the moment see why you shouldn't make whatever submissions you want to make on disclosure, irrespective of the order I make in terms of case management of the Part 20 claim. It's not precluding you from making whatever submissions you want to make at that stage.

MS LUKACOVA: Certainly, sir, but the problem is that the outcome of those applications has a knock-on impact on our position in respect of the stay, so I can't conclusively give a breakdown of the different permutations of our position on the stay without knowing whether we're going to have to provide further disclosure and, if so, what further disclosure we're going to have to provide. That is difficult to do because the requests are extensive and there's a range of different outcomes here and our position might depend on the precise -- if there were to be an order for further disclosure, our position on the stay might depend on the precise order for further disclosure.

THE CHAIR: I see that, but I think it cuts both ways, frankly. I think there is no perfect way of dealing with this and I'm going to deal with the case management issue first.

MS LUKACOVA: Yes, sir.

THE CHAIR: Yes.

Submissions by MR BARTLETT

MR BARTLETT: Thank you, sir. Turning to the application for directions regarding the Part 20 claim: from the Claimant's perspective, this should be fairly straightforward. This is set out in section F of my skeleton, paragraph 63 and onwards, OTC's application is at tab 73 of the first bundle, page 639.

This is obviously a matter of case management. It's not a matter of prior authorities, it's simply a matter of the practicalities of this case. The first point we would wish to make is that it's abundantly clear that there aren't any common issues between the Part 20 claim and the main claim. And this is clear, I think, from the updated issues list at tab 16, page 139 of bundle 1, at page 143. Perhaps I can just take you to that, page 143 -- page 143 is into the issues list, but you see there the issues relating to the additional claim and as this is a contribution claim, you will appreciate that the principal issue really is around whether there is -- what the just and equitable share is for Samsung, but the issues are articulated in slightly more detail here. You can see they are quite separate from the remaining issues in the claim.

So the first issue is: is the Defendant entitled to indemnity or contribution, and the second issue: what is the amount of that, number 8, which obviously relates to the just and equitable share. Then there is a point around interest, which is at point 9.

But those are all quite different issues from the issues in the main claim, which are set out above in the issues list, which really relate to the questions of liability -- well,

of causation and loss following on from the cartel.

THE CHAIR: But is that right? I mean, would it not be open to the Part 20 Defendant to reopen issues that are dealt with in the main trial?

MR BARTLETT: Well, sir, I don't think that is the case. From OTC's understanding -- obviously it's not OTC's dispute here in the contribution claim -- but the basic position under the Contribution Act is that if -- well, it's first the Defendant here must be found liable. So either there is a judgment against the Defendant or a settlement involving the Defendant. On that basis, as long as that is a bona fide settlement or judgment, then the liability as against the Defendant cannot be reopened in the contribution claim.

Then as regards the Part 20 Defendant in the contribution claim, it has to be found to be jointly liable for the same loss as at the original date rather than now. But that is a matter that's been determined by the Commission, by the decision. So there is no question of the Part 20 Claimant's underlying liability and the Part 20 Defendant --

THE CHAIR: But again, is that right, vis-a-vis someone who is not a major OEM? I mean, that hasn't been dealt with by the Commission decision, has it?

MR BARTLETT: So the question as to whether it's responsible for the cartel has been determined.

THE CHAIR: Yes.

MR BARTLETT: The question as to what loss was caused by that infringement has not been determined, and that is a matter that will be determined in the main claim. But that is simply a matter of causation and loss, as in any other follow-on claim, and if it is determined against the Defendant or the Defendant enters into a bona fide settlement with the Claimant, then that issue cannot be reopened, we would say, by the Part 20 Defendant. Now, obviously we are not the Part 20 Defendant, but as far as we understand from its submissions, that is the position it also adopts.

That is why a contribution claim need not be brought and commonly would only be brought after judgment. There is then a judgment and then the contribution claim really focuses on the just and equitable share point. And that's reflected in the issues list here, I think, here, really, where that is the issue in the contribution. They are ultimately stuck with whatever is found in this matter. They can't reopen all the questions of findings -- or the findings of causation and loss against the Defendant.

We say those are the key issues under the contribution claim and those are quite separate from the main claim. That's one practical point. The second point: obviously the contribution claim would fall away in its entirety if the main claim were to fail, so it is completely unnecessary to have the contribution Defendant party to the claim in those circumstances.

The third practical point is that Samsung's estimated costs of simply attending the trial are very high, just showing the large amount of wasted costs. Their precedent H costs budget suggested costs of circa $2 million just for the preparation and attendance at trial, and that's a trial in which there is no question of whether they are liable or not. That is not an issue between the Claimant -- there is no claim from the Claimant against the contribution Defendant.

THE CHAIR: That's a cost they say will be incurred even if there's a split trial.

MR BARTLETT: Well, I'm not sure that is the case, sir. That was an estimate on the basis of attending a four-week trial in the main claim, so dealing with a whole load of issues which are not relevant to them and they have no role in. But of course attending trial results in a lot of costs just being there, even if one wasn't arguing a lot of the points.

We would submit if they had a separate trial, there are a number of points to consider. One, if this went to trial, it would be a much shorter hearing to determine really the question of the just and equitable share, and there are a number of ways

you might argue about that. But in principle, market share is probably a pretty good proxy for that. So it's a much narrower issue on the contribution claim, so it will be a much shorter trial with much lower costs.

And of course there is a far greater prospect of the parties -- the Defendant and the contribution Defendant -- actually agreeing and resolving the matter and not going to trial once they know the primary liability, the amount of the primary liability. It seems very unlikely that they would argue the whole way to trial about whether or not it should be divided between them 40 per cent, 50 per cent, you know, when we know what their market shares are.

So there is no reason to believe that there would be a trial whereas the prospects of settlement would be much higher once they know the outcome of this claim. So there is no reason to believe there would be a trial. It would be a far more confined trial and there is no costs budget at present for that alone, for that sort of trial alone. We would submit, and would be very surprised, if that was more than a week. So far lower costs as compared with attending this trial, which could -- I mean, obviously from the Claimant's perspective it's not their hoped outcome, but of course it could result in a loss, so no loss being found, so no need for any claim against the contribution Defendant. That is why the Contribution Act allows these sorts of claim to be brought within two years of any judgment.

So from the Claimant's perspective, there simply is no good reason for involving Samsung to such an extent that it is required to attend trial. Unfortunately the Claimant's concern is that it's part of a wider strategy of inflating costs to cause difficulty for the Claimant so as to force an early settlement, and that unfortunately can be seen across a range of tactics which have come out of this CMC, including the security for costs application, the resistance to costs management, Micron's plan of bringing Samsung in really for the sake of having it in, and then making -- initially

starting off with detailed applications for disclosure against OTC when it's already provided full standard disclosure. Those are the sort of separate points regarding strategy.

Micron raises various points about needing to prove Samsung's liability, mentions that in the skeleton at 4A. We just don't accept that is right on any basis. In this trial, there is no -- the Claimant is not going to get any judgment which says Samsung is jointly and severally liable to pay the Claimant anything. It would be timed barred - the Claimant is now barred now from bringing any claim against Samsung.

So that simply is not an issue. The only issue in dispute in the main claim is what was the result and what were the effects of the cartel. We submit that Micron's reading of the Contribution Act is simply not the correct reading and it's been very strained, really, to suggest that this sense of joint and several liability is a common issue between the proceedings. But that isn't right, we would say. The underlying liability for the infringement has been determined by the cartel, by the decision, and we're dealing with separate issues in this claim now.

I've said I think from the practical perspective, there is a real likelihood, we would say, that the contribution claim would be settled once the main claim has been determined, because it won't be vast amounts of money and one will have the uncertainty about the main part of the claim resolved and simply it will be a matter of just and equitable share.

THE CHAIR: So you say that if Samsung doesn't turn up to the main trial, that it goes ahead without Samsung, Samsung will be stuck with whatever findings the court makes in the main trial as to the effects of the cartel on the Claimant?

MR BARTLETT: Well, we say two parts, yes. One, they will be stuck, and separately -- I mean, in the main claim, there is no claim brought against them and as far as I read their submissions, they are not suggesting there is a claim which

they need to defend at the moment. So yes, that is the nature of the regime.

Micron has therefore suggested, in an attempt to try and find this overlap between the proceedings, they've referred to one sort of factual issue as to the quantity of DRAMs that the Claimant bought from different manufacturers in the relevant period, that's at 4B of their skeleton. They suggest this is somehow a common issue between the two because they say that issue will need to be determined in the main claim and that might go to, I suppose, just and equitable share in the contribution claim.

But that is really straining the point. There is obviously a question as to just and equitable share, but the determination of quite who the Claimant bought from in these proceedings is not necessarily going to be determinative of that just and equitable share point. It is one point which may be considered relevant but it's by no means the be all and end all. And ultimately, all this is a matter of the Claimant giving disclosure as to who its suppliers were.

In fact, it will be impossible, probably, to work out where those DRAM units that it bought actually came from in the beginning. Whether they were manufactured by Samsung or Micron or a non-cartelist, it won't be possible to determine with certainty because one doesn't have all the information, and one doesn't have invoices for several hundred pieces of DRAM that were purchased. It is also an artificial exercise to suggest that in the main claim, there will be a determination which shows 60 per cent of the purchases came from this manufacturer and X came from that. In all likelihood, it is far more likely that the way any issues relating to that will be determined is by looking at the market as a whole and assuming that if Samsung were 50 per cent of the market, then of the 100,000 DRAM items purchased, 50,000 ultimately were manufactured by them.

So it's a very small point. It's impossible, actually, to determine that point in the main

proceedings and they are straining this to try and show that there is some degree of overlap between the proceedings which should therefore justify this very extravagant approach of having Samsung therefore involved in the whole proceedings, which Samsung objects to.

In summary, the Claimant's position really is that this is a tactical game unfortunately by Micron to try and inflate the overall costs. This feeds into their security for costs application, it justifies them putting even higher figures in that application, and it's intended just to add complexity to put off the Claimant and to force its hand in any settlement. My submission is that when one looks at the actual substance of this, there is no good case management reason for hearing the two claims together. It would be much better separated, and indeed the regime operates in such a way as that would probably normally be the case.

So this is very different from the sort of contribution claim where one is determining who was responsible for some wrongdoing, and obviously one needs to determine everything together to avoid having two intensive factual investigations determined separately. This just isn't one of those sorts of claims.

So those are my submissions, sir, unless you have any questions.

THE CHAIR: No, thank you.

MR BARTLETT: Thank you.

MS LUKACOVA: I'm in your hands, sir, but based on that, I think it might be helpful if I clarify my client's position first, as I think Mr Jowell might find it helpful to understand what SSEL is saying. I won't go through the same ground, I'll simply supplement and/or flag certain points of disagreement where there are some.

Firstly in terms of the overlap, my learned friend has taken the Tribunal through the issues, and as we've seen in the list of issues, there's a straight division between the issues in the main claim and the issues in the Part 20 claim. There are in principle

three key issues in the Part 20 claim. There's the question of Micron's liability to OTC, firstly; then secondly the question of SSEL's liability to Micron; and then thirdly there's the question of apportionment if the first two questions are answered in the affirmative.

As to the first question as regards Micron's liability to OTC, we don't accept that we would necessarily be stuck with the findings in the main claim. However, I would say this: if OTC's claim succeeds, there is going to be an order saying that Micron is liable to OTC in sum X and it isn't clear, certainly at this stage, on what basis SSEL could dispute the fact that there is a liability to OTC in that amount. We haven't been asked to give an undertaking that we are prepared to be bound, but if that is something that would be helpful to explore, we can certainly discuss that.

But for now, I simply note that it isn't clear on what basis we would be challenging the fact that there is a liability in a particular sum, there being a decision to that effect and an order to that effect.

Secondly, the question of SSEL's liability for the same damage. That certainly doesn't need to be relitigated. We don't accept, as set out in our pleadings, that there is a joint and several liability because we say the basis for that has not been particularised to date. So that isn't currently common ground, but it also isn't an issue which would need to be relitigated between the main claim, at a separate trial, and then subsequently a trial of the Part 20 claim. Also Micron makes it very clear in their skeleton that this is simply a matter of law as far as they're concerned. So we're not talking about the situation where Micron would have to re-establish on the facts that we are liable for the same damage as one might, for example, have to do in a car crash type claim.

Then as to the third issue, which is in the event that the first two questions are answered in the affirmative, that goes to the extent of the contribution, so the

apportionment essentially. The first point is that these are not issues in the main claim as we've heard.

As to Micron's suggestion that there is some evidential overlap – in their skeleton – when it comes to the extent of the contribution, the critical point here is that Micron in fact has yet to plead the criteria on which it relies for the purposes of the Part 20 claim. It may be helpful if we turn briefly to the amended Part 20 claim, volume 1, tab 7, page 81.

We can see that this is a very minimalist pleading as it is, it spans a total of approximately one page. We have an introductory sentence with no substantive pleading on page 81 in paragraph 1, and then paragraph 2 refers to the main claim, essentially.

Paragraphs 3, 4 and 5 assert joint and several liability and then from paragraph 6 onwards, these are simply assertions that Micron is seeking a contribution. What is missing entirely are any particulars of the criteria on which they rely when it comes to the extent of that contribution. So at this point, any suggestion that there is going to be a factual overlap is wholly untested. We just don't know. There could in principle be some minimal overlap, but there's no suggestion of it. And also it is just too early to tell because that is the state of the Part 20 claim at the moment. On the basis of the pleadings, and that is where we have to look because that's where the issues need to have crystallised, currently there is no overlap.

THE CHAIR: Presumably they're going to say that Samsung's inflated prices had an effect on OT Computers' prices?

MS LUKACOVA: Well, sir, we just don't know at the moment. We've also had slightly inconsistent indications from Micron as to, for example, the volume of commerce question. So in their skeleton argument, they're citing market shares as against us, but at the same time as against OTC in correspondence, they're saying

actually it is a matter for expert evidence to consider what the appropriate approach is.

So what I would submit is that unless and until we have a proper pleading with fully particularised particulars of claim, we have to proceed on the assumption that the issues are as they are in the pleading, and currently there is no overlap.

It brings me to my second point -- so moving away from the issues and the overlap questions -- which is that as we can see from the attempt for everyone to file and serve costs budgets, these proceedings are generally in a state of flux. But that in many ways is even more the case for the Part 20 claim than it is for the main claim. So in particular, as we've just seen, there will need to be a point where Micron provides proper particulars.

What we're looking at now is a time frame where that is starting to look unrealistic in circumstances where OTC is proposing that witness evidence be exchanged in April 2024. At the same time, Micron is proposing that the proceedings be stayed up until the beginning of March 2024. It is meant to -- well, the main claim is meant to be headed for trial in the beginning of 2025. Now, of course, if Micron were to amend its Part 20 claim, there might be additional disclosure requests and it is really hard to see how this is all going to fit within the current time frame.

There's also the additional point in relation to flux, which is that very recently we've started getting assertions from Micron that they're reserving their rights to bring additional parties into the Part 20 claim. So for example, in their skeleton, that's what they say in paragraph 20(a). Again, that does not seem consistent with an early 2025 trial at all.

In addition to there being no discernible overlap between the two claims on the pleadings as they are pleaded now, there would appear to be a real risk that attempting to progress the Part 20 claim alongside the main claim could derail the

progress of the main claim.

Now, further in terms of cost implications of the two alternative courses of action, I endorse my learned friend's submissions. I won't go through that, save to correct one point, which is that our costs budget was prepared on the assumption of a single trial. I say no more than that, obviously the point still stands in terms of the costs being very high on all sides. But yes, that was the assumption on which this particular costs budget was prepared. We are ultimately looking at a claim which, on OTC's own account, pre-interest is worth less than £7 million. They say that if they were to drop their claim for 8 per cent interest post-insolvency, which they might do, they say, in the New Year following a judgment in the LCD proceedings -- again it's all a bit uncertain. But if they were to drop that element of the claim, on their own calculations, the total value of the claim, including interest, post-settlement deductions would be about £16 million. And this is in circumstances where the combined grand total of estimated costs on all three sides is about £12.5 million.

I won't take you through the detailed costs schedules, we have the general picture. The value of the claim as pleaded is low, the estimated values of costs are very, very high. And in my submission, that's another reason to take a cautious approach and to see if there are any routes to see if there are costs savings to be made.

As submitted by my learned friend, if the main claim were to fail, then there is no need for a Part 20 claim trial at all. Of course, if that claim were to be stayed in the meantime, there wouldn't be any need for witness evidence or expert evidence or preparations for trial in the meantime. That is subject to a slight caveat in that SSEL would still need to keep an eye on the proceedings, but we certainly wouldn't be expecting to file evidence or participate actively.

But we also -- well, we certainly wouldn't confirm now that we shouldn't be entitled to any costs. We may need to take reasonable steps in terms of keeping an eye on the

claims in the meantime.

There is a decision that I wanted to --

THE CHAIR: It's that part of your case that causes me a little anxiety. If in reality you're going to go there anyway and you want to adduce expert evidence, that really does undercut the suggestion that there can be a clean distinction between the main claim and the Part 20 claim.

MS LUKACOVA: No, sir, I should clarify perhaps. It is not our intention to attend or to adduce any evidence at all. Certainly if the claim were to be stayed, then I would say we wouldn't need any additional directions. But it is implicit in that that we wouldn't be taking any active steps --

THE CHAIR: But you haven't so far agreed to be bound by all findings in the main trial. If you were, then I could see that that could considerably strengthen your position.

MS LUKACOVA: We would be prepared to agree to be bound by a finding of liability in a particular sum, so the sort of finding that is recorded in the judgment and then appears in the order. No one has asked us to provide any further reassurance -- if there were other confirmations that would be helpful, then we can seek instructions, absolutely.

THE CHAIR: It's a bit late to go into that now, but that may be something that needs to be explored after today's hearing, if I decide it's not going to be a split trial.

MS LUKACOVA: There is a judgment. Well, there is a ruling from a case management conference in the Chancery Division that I was going to have a look at because it arose in very similar circumstances. That is the ruling from the Power Cables decision, it's at tab 13 of the authorities bundle. There was no judgment but we have the transcript.

By way of background, we are also looking at cartel damages proceedings. There is

a main claim against Prysmian, and that was said to be a blended follow-on claim against the Italian entity and a stand-alone claim against the subsidiaries. Then Prysmian brought third party claims. We can go to page 214 just to flag by way of background some similarities.

At page 214, four lines from the bottom of the very large paragraph, this relates to the pleadings in the Part 20 claim and the submission made is that there is no indication as to how the case goes beyond the allegation of joint and several liability to explain how it is that any sums are to be apportioned between the various third parties, and then that short form claim has produced short form defences.

If we look two lines below that, Mrs Justice Rose says, "Where is all that – you were talking about, that they talk about the blameworthiness?", and Mr de la Mare says, "That is in the replies, my Lady". So there were at least replies in this case where there are some particulars of blameworthiness. We wouldn't accept that that's the appropriate place for the particulars, but there was at least some additional information, some additional pleading in this case.

Then further -- actually, if we go back by two pages, page 212, fourth paragraph from the top, Mrs Justice Rose says, "Just remind me, the third parties are not people who have supplied cable to National Grid or Scottish Power?", and Mr de la Mare says:

"No, exactly so. Yes, the third parties are all in the position of having made no supplies, although there is the remaining question that we will be asked, I think, by my learned friend's clients, to confirm that they are not behind any of the unallocated indirect sales to Scottish Power, and I will come back to that."

So again, this is a situation where, as you will hear further and as set out in my skeleton, there were no direct supplies. And here, as in our case, the third party -- well, the Part 20 Defendant -- didn't believe there had been any indirect sales but it remained a live question here as well.

Then if we turn to the ruling, which starts on page 223, and it's only about a page long, so it may make sense if I let you read that, if you like, and then draw out a number of points.

What I draw out of that, a number of key points. There's a finding that there was some overlap but the main issues were very different; the main proceedings were complicated enough without adding the additional layer of expense and time that will inevitably be involved by having to deal with the third party proceedings; it's appropriate to stay the third party proceedings.

Mrs Justice Rose, as she then was, was not promising the third parties they could go on holiday until six years later -- so there the estimates by counsel were that the trial in the main claim might not take place until six years later -- and she was sure that the Part 20 defendants will be keeping an eye. That goes back to the point I've made that minimal involvement as necessary in terms of keeping an eye on the proceedings was accepted, indeed encouraged, as the right approach -- of course that doesn't mean actively participating, especially if there's a stay.

Then the other observations were: bearing in mind that the sums of money involved are not hundreds of millions of pounds as is often the case, in these proceedings -- where in this case we have a particularly low value claim in the usual context. Then in terms of the actual decision, the Part 20 claims were stayed and also the Part 20 claimants were ordered to file and serve amended particulars of claim in the Part 20 claim, identifying the criteria upon which they rely to determine the quantum of any contribution from the third parties.

So it is essentially for these reasons that I would invite you to stay the Part 20 claim in these proceedings. I'm conscious that OTC sought a number of other detailed directions -- I can deal with those very briefly if that's convenient.

In terms of -- well, I should say if you were to order a stay, then I would suggest that

that is the only order that needs to be made because the proceedings, having been stayed, of course we're not going to start filing evidence or apply to put in any expert evidence. We would have to seek an order that the stay be lifted so that, we would say, is all that is needed.

If the Tribunal were to simply order sequential hearings, we would submit that the appropriate order would be for us to not file witness evidence now but rather file it after determination of the trial of the main claim, that being part of the point of splitting them up, of course. We wouldn't have an issue with a direction saying we're only filing evidence as regards issues arising out of the Part 20 claim, we don't claim to be involved in the main claim. We haven't applied for permission for expert evidence, so we would submit that there shouldn't be a direction saying that we don't get permission because there isn't an application, quite simply. Then as regards costs, we would say the order ought to be silent on the basis that of course we might need to keep an eye on the case, as I've said, and of course any costs that would be incurred would ultimately be assessed in the usual way.

So if the court were to take the view that we'd overdone it, then of course no one has to pay them. In any event, I should say we are looking to recover our costs from Micron, principally.

Unless I can assist further, that concludes my submissions.

THE CHAIR: Thank you.

Submissions by MR JOWELL

MR JOWELL: Mr Chairman, there are really two issues here. The first issue is that one needs to ensure that the Part 20 Defendant is bound by any finding in the main action both as to whether the Claimant has suffered loss, and also importantly as to the quantum of the Claimant's loss. The second issue is then the extent of just and

equitable contribution by the Part 20 Defendant. Or put another way: how that established loss, if it is established, on the part of the Claimant is to be shared as between the Defendant and the Part 20 Defendant.

Mr Bartlett's submissions proceed, I'm afraid, on the basis of a false premise. That false premise is that if absent any Part 20 claim, my client, Micron, is found liable to his client for a particular loss, that by virtue of the Contribution Act, that means then the contribution Defendant in due course, Samsung, would become jointly and severally liable for that same loss without more. That is not correct. It's a misreading of section 1(1) of the Contribution Act 1978.

What the Contribution Act says is that the contribution Defendant will be bound by the finding of liability as against the main Defendant. It does not state that it will itself be bound, that it is liable in respect of the same damage to the Claimant. So in theory at least, it is able, if it is not joined to the main action, to reopen the question in the present case both the question of whether the Claimant has suffered any loss, and certainly the extent of that loss in subsequent proceedings brought for contribution against it.

Indeed, even if we were to settle the claim, they would not be bound in subsequent proceedings by the quantum of the settlement. They would be entitled to reopen the question of whether the settlement corresponds to the true value of the claim. For your note, that is the case of Sainsbury's v Broadway Malyan, we have copies of it here. It's [1999] PNLR 286.

That is why in all of these cases where you have a cartel like this, where you have multiple addressees, why when one addressee is sued, it is absolutely routine to bring in straight away the other contribution defendants: to ensure that they are bound not just in respect of the finding of liability, but also by any subsequent findings in relation to causation and normally -- and also the finding of quantum in

the main claim.

That approach also corresponds to one's basic instincts of natural justice because it would obviously be wrong in a sense -- if you take the current proceedings, suppose we'd never have brought in Samsung, the Claimant brings a claim against Micron, we dispute it based on the evidence that we disclose; and then subsequently if we were found liable, we would subsequently bring a claim against Samsung, and Samsung might well say, "Well, wait a second, we've got all this additional evidence that we would have liked to adduce in order to rebut the finding of the Claimant's loss, and we would have liked to have made different representations. We can't possibly be bound that we are liable to a counterclaim, even if you are liable". So of course they have a right in those circumstances to reopen things. So that is the first issue.

That can be potentially disposed of if the contribution Defendant is prepared to give a very clear and comprehensive undertaking that they will be bound in all respects by the finding of both causation and quantum in the main claim and they will accept they are jointly and severally liable for the same loss as is found against Micron.

Ms Lukacova, at first she was ambiguous as to her position, I think she subsequently indicated in general terms that she might be prepared to offer an undertaking in some form. But as you rightly observed, there's nothing that's been proffered in clear and comprehensive terms at the present stage. So as things stand, for that very basic reason, it's essential that the contribution defendant is kept in so that it remains bound by any finding of quantum.

The second issue is the question then of apportionment. Supposing if one could deal with the question of liability for the same amount, joint and several liability for that amount, the question then becomes: well, would it be convenient to pursue that aspect of matters, that issue, in the single trial?

We say in the present case, it is, and really this comes down to a question of two matters. First of all, whilst there is a distinct issue, it is also inevitably interlinked evidentially to the matters that will be determined in the main trial.

One thing that is clear in this case is that the Claimant is alleging damages not just for DRAM that it purchased from Micron, but from all DRAM it purchased, and it also brings a claim for umbrella damages in respect of DRAM it purchased also from persons that were not participants in the cartel.

So inevitably one is going to be looking to the best of one's ability with the evidence we still have at who, it appears likely, that the Claimant purchased DRAM from, if only to sort out the cartelist DRAM from the umbrella DRAM. That is closely related to the question clearly of the extent to which DRAM was purchased from the Claimant by Samsung and DRAM was purchased from Micron. That issue is one which is going to be clearly important, not necessarily decisive or the only factor, but clearly an important factor in determining the extent of contribution as between Micron and Samsung.

So there is an interrelation there of, if you like, the factual evidence that will be necessary to go into in order to determine both the liability and quantum in the main claim, and also the extent of apportionment in relation to the Part 20 claim.

Now both my learned friends put emphasis on the fact that the amounts involved in these proceedings are relatively low, and they both said it's important that we proceed in a way that is proportionate. We entirely agree but we are now down to a situation where there are only two parties, or two undertakings, remaining with potential liability, Micron and Samsung. The evidence that is going to be necessary to resolve that issue will essentially be evidence of their relative market shares and the evidence of their relative sales to the extent that it can be determined to this particular Claimant.

We say that that is an issue which can be easily disposed of in the main action. As I've said, it is an issue that overlaps with the type of evidence that will be necessary to consider in relation to the main action in any event.

But importantly, there is another further consideration, which is that if you were to stay the contribution claim, it's going to make any settlement of these proceedings far more difficult. That is because it will encourage Samsung to simply sit back and wait for the main proceedings to resolve without contributing to any settlement. Because if it sees there's going to be a trial in May 2025, then it may resolve the matter entirely in Micron's favour, why should they be involved in any settlement at this stage when they're not having to do anything, effectively?

Conversely, there's little prospect that Micron is going to agree to a settlement that involves it paying for Samsung's share of liability. So we say there are good tactical reasons in order to encourage settlement to keep the proceedings together, to keep them as one. That is the most proportionate outcome one can have to a case of this nature.

Ms Lukacova took you to the pleadings and says we wish for further particulars. But it's difficult to give particulars until there's been some disclosure in relation to the volume of commerce. But in any event, there's been no request for particulars, there's been no request for further information of the contribution claim. We'd be happy to provide it in due course if it is asked for, of course.

THE CHAIR: Yes. I mean, that's obviously essential, isn't it?

MR JOWELL: Well, it will be, but as I've indicated, it's going to be based upon the market shares, respective market shares and shares of the volume of commerce.

THE CHAIR: What do you say about the possibility of Micron bringing in yet other parties?

MR JOWELL: Well, the other parties are simply other Samsung entities.

THE CHAIR: I see.

MR JOWELL: We're not proposing to bring in entire third parties. The reason for that is because the Claimant has effectively settled all of the other issues, so it -- forgive me, for all the other major issues, major suppliers.

So Samsung is the only one that remains and what we have intimated is we can't get information out of this particular Samsung subsidiary because they're unwilling to ask their parent to provide the information, and we may have no option other than to bring in the parent, Samsung. We have not intimated that we are intending to bring in anyone else and that is not our intention.

THE CHAIR: Thank you.

MR JOWELL: Those are my submissions, unless I can assist further.

THE CHAIR: Thank you.

Did you want to come back on anything, Mr Bartlett?

Submissions in reply by MR BARTLETT

MR BARTLETT: Very shortly just to say I think Mr Jowell suggested our position is that we say that Samsung is jointly and severally liable. That isn't our position. Our position is only that it would have been jointly and severally liable for the effect of the cartel, as a result of the Decision, rather than in this case. We do not say in the main claim there was any claim for joint and several liability against Samsung.

As to the legal position, the Claimant's position in terms of the main -- the entitlement to challenge would only be if the settlement and the effects of the cartel -- the settlement on the effect of the cartel was not bona fide or reasonable and the extent of challenge wouldn't go further than that in circumstances where the liability for the infringement has been determined by the decision.

And finally, just as to the sort of practical overlap point, I think it's important to keep

in mind that in the main claim, the essence of the wrongdoing here when one's considering the loss, the essence of the wrongdoing is the inference with competition in the market as a whole and all cartelists are jointly and severally liable for all of that loss, irrespective of whether they were the ones who supplied the specific cartelised product or not. That obviously is the case, otherwise one would have no claim for umbrella damages, for example.

The suggestion that our claim in the main claim will rather focus on where exactly this DRAM came from is really not right. Our claim is for the loss caused by the cartel for which everyone is jointly and severally liable, although only Micron is a defendant. That loss is a single loss, so it is wrong to suggest that we will be focusing on, or trying to prove exactly where that DRAM came from to say that, for example, Micron is liable for that DRAM. That of course isn't the case, they're liable for all the losses resulting from that interference with the market, and I think that goes to the point as to this degree of overlap.

So I think unless can I assist further, those are my only additional points.

THE CHAIR: Thank you.

Submissions in reply by MS LUKACOVA

MS LUKACOVA: Sir, three points on volume of commerce, the question where particular DRAMs have come from, which specific entity, firstly you have my points that the approach hasn't been pleaded. You have secondly my learned friend's point that that is not something the Claimant will be looking at in the main claim, and at that point that starts to sound like a suitable question for a separate trial of the Part 20 claim following determination of the main claim.

The third point is that my client has already carried out searches in relation to sales in accordance with the directions order that you made in June. Under paragraph 4.4

of the directions order, my client was ordered to search for any sales to (1) the Claimant itself and then (2) pleaded intermediaries. All of those searches have come back with nil returns, so as it is, we say there have been no sales.

I appreciate Micron will be making submissions in that regard in relation to what we say are line of inquiry requests based on their review of the Claimant's disclosure, but the Claimant themselves are saying it is not going to be possible, it is not likely to be possible to determine where the products have come from. As it is, we have provided the disclosure ordered and it has come back with nil returns.

Then a further separate point in terms of a potential undertaking. Now I have instructions that we would be able -- I apologise ... yes, I now have instructions as to a specific wording. It may actually be simplest -- so this is a copy of the order from the Power Cables claim that we've been looking at and the wording of the undertaking is in there. So it may be simplest if we distribute copies to everyone and everyone can consider the wording --

THE CHAIR: What's the gist of it?

MS LUKACOVA: -- perhaps over the short adjournment.

THE CHAIR: What is the gist of the undertaking?

MS LUKACOVA: Perhaps I'll just read it out:

"... and upon the third parties undertaking to be bound by (a) the judgment sums recoverable by the claimants in claim number ... upon which the Part 20 claimants' claims to contribution are based [so judgment sums recoverable]; and (b) any numerical findings as to the individual or aggregate levels of overcharge, pass-on, net loss and interest in respect of the contracts upon which claimants [in that claim] base their claims and upon which the Part 20 claimants' claims to contributions are based."

So I would think these are the sorts of findings my learned friend Mr Jowell was

thinking about. Obviously it may be that it needs to be tweaked slightly where it refers to "contracts on which the claimants are relying". But that is the gist of it and we do have instructions to provide that undertaking if necessary, which I would submit deals with the question of Micron having to reprove elements of the main claim in the Part 20 claim in the light of an undertaking of this sort. That just wouldn't happen.

As to the other question regards joint and several liability, that is expressly said to be a matter of law in the skeleton. There is no question there of any wide-ranging factual inquiries, therefore I would submit these are additional reasons to stay the Part 20 claim.

THE CHAIR: Thank you.

MS LUKACOVA: Thank you. Mr Jowell, this has obviously only just been produced.

MR JOWELL: Yes. I have to say, if this were to be proffered, it would have to say not just to be bound by it but to be "jointly and severally liable for and bound by" at the very least, otherwise it's unclear who's bound effectively and to what extent. They need to accept that they are jointly bound by it and then it's simply the question of apportionment.

THE CHAIR: So jointly bound by subject to apportionment, is that the point?

MR JOWELL: Yes, "jointly and severally liable for and bound by", subject only to apportionment. (Pause). Yes.

MS LUKACOVA: Sir, I was --

MR JOWELL: There also then remains -- forgive me. I'm reminded that there also remains the issue of settlement, as to whether they would be bound by any settlement, because under the current law they're not bound by the quantum of any -- so they'd also have to undertake to be similarly bound for any reasonable bona fide settlement.

MS LUKACOVA: So those two points are not being offered. So, in relation to joint and several liability, as between Micron and SSEL, that is not an issue in the main claim, first of all, and secondly nor is it an issue that would require any extensive factual enquiries. We're not looking at the situation where one would have to recall witnesses as regards that. On Micron's own account in their skeleton argument, this is a matter of law. If it were said to be anything else other than a matter of law, it ought to have been pleaded in the Part 20 claim and it isn't.

In relation to settlement, we can't offer to be bound by any settlement sum as between OTC and Micron without being able to challenge quantum. That would open us up to potentially having to argue about the extent of contributions to what we might regard as a wholly unreasonable figure in circumstances where we haven't been involved. Nor is this a unique issue to a stay, because that could arise in any circumstances, even if the two claims were to be progressed alongside each other. So that I say isn't unique to the way forward that we are proposing.

If I could also add, if we look at paragraph 1 of the same order, we can see that this is where the Part 20 claimants were ordered to file and serve amended particulars of claim identifying the criteria upon which the Part 20 claimants rely to determine the quantum.

So that would be the other points that I made as to what is required going forward.

THE CHAIR: Yes. Okay.

I'm told that the live stream has gone down, so that we need a 20-minute break, which will give me time to consider my decision on this and it would also give a chance to Mr Jowell to make quite sure that he's happy with the terms of the undertaking. Undertakings given on the hoof often lead to difficulties, so if you can be quite sure on the terms of the undertaking that you're agreed that would be useful.

Right. So we'll rise for 20 minutes then.

(11.49 am)

(A short break)

(12.23 pm)

MR JOWELL: Can I assist you. We have an update on the terms of the undertaking.

THE CHAIR: Yes.

MR JOWELL: The sticking point remains the inclusion of the words "jointly and severally liable for", which the Part 20 Defendant is not prepared to agree, which of course is an issue for us because if they are intending to maintain that, notwithstanding the language here, they're not jointly and severally liable for, subject to apportionment, then one is concerned that of course that they may be planning to dispute the matters in due course.

THE CHAIR: Well, I mean, what couldn't be disputed is the amount recoverable from the Defendant and the basis on which the amount recoverable was calculated according to this undertaking, even taking out the words "jointly and several".

MR JOWELL: It does appear so, but then one has to query why they are disputing the inclusion of those words, and one is concerned there will be some additional debate about it in due course in which they will seek to say that although somehow these are binding, they are not jointly and severally liable in respect of them.

But really it seems to us it's for them to explain why -- I think one is meant to have a situation where people are candid these days about what positions they are intending to take; and if they are intending to take a position in which they dispute they are jointly and severally liable, we should understand the basis of that --

THE CHAIR: I'll wait to hear from Ms Lukacova, but I suppose I can see at least there is a possibility that if Samsung had nothing to do with any of the DRAMs that

were purchased by the Claimant, then in that situation I suppose there would be no reason to concede they were jointly and severally liable for the sums found against the Defendant. But that's only -- I'm just speculating.

MR JOWELL: Then perhaps that can be spelt out, in which case it saves subject to the possibility that --

THE CHAIR: Okay. What do you say, Ms Lukacova?

MS LUKACOVA: The position, sir, is as set out in the pleadings. So what we have pleaded in our defence to the Part 20 claim -- well, perhaps it might be helpful if I take you to it.

It starts on page 85 of the CMC bundle.

THE CHAIR: Yes.

MS LUKACOVA: If we look at paragraph 5 -- actually, it may be helpful if we go back to what we're pleading back to. That will be the particulars of the Part 20 claim starting at page 82.

THE CHAIR: Yes.

MS LUKACOVA: We have paragraph 3 which refers to the Commission decision and says the addressees were held jointly and severally liable for all or part of an infringement of article 1(1). Then in paragraph 4, Micron alleges that Samsung was at all material times involved in the business of the supply of DRAM within the EEA. Together with Micron and others, Samsung is an addressee of the Commission decision -- so it is based on the decision. It was found to have participated in the cartel for the same period of time as Micron, thus it is jointly and severally liable for the same infringement.

So if we then go back to page 86, which is where our response to paragraph 4 is, if we just go through these allegations, we see there's no dispute of fact here as it stands. So (a) we admit that SSEL was involved in the supply of DRAM within the

EEA, so the first sentence in paragraph 4, Part 20 claim is admitted.

Second sentence, so that would say it is admitted that SSEL is an addressee of the Commission decision only on the terms set out in the operative part of the decision. So that is admitted insofar as the operative part the decision is concerned.

Then (c), we admit that the infringement recorded in article 1 of the operative part of the Commission decision comprised of the same period as that recorded for Micron, save for line 4 onwards, as regards the so-called Rambus DRAMs, which I understand are not the subject of this claim.

Then (d) is where we don't admit joint and several liability and we explain why. We say:

"In the absence of any particularised basis for why SSEL is said to be jointly and severally liable for the same infringement, SSEL cannot plead to the last sentence of paragraph 4 of the amended additional claim. As noted in paragraph 4 above, the finding of joint and several liability set out in the operative part of the Commission decision does not concern joint and several liability inter se different undertakings. Rather, it concerns joint and several liability within the same undertaking as respect the payment of the penalties imposed by the Commission."

And that is the basis on which we have pleaded it. It's a non-admission. We would like some further particulars, but that is the extent of it: that there isn't going to be any wide-ranging dispute of fact here and it is expressly stated in my learned friend's skeleton argument that this is a matter of law.

THE CHAIR: Yes, okay. All right.

RULING

THE CHAIR: The first matter I have to rule on is whether to order that the Part 20 claim brought by Micron against Samsung be tried separately from the main claim

brought by OT Computers against Micron.

OT Computers alleges in the main claim that it has suffered loss and damage as a result of a cartel concerning the market for direct random access memory used in the manufacture of computers. The DRAM cartel is the subject of findings by the European Commission in its decision COMP-38511.

Micron is seeking a contribution or indemnity from Samsung on the basis that Samsung was at all material times involved in the business of the supply of DRAM and, together with Micron and others, is an addressee of the Commission decision. It is alleged by Micron, though denied by Samsung, that Samsung was or is jointly and severally liable for the same infringements as Micron.

Whether or not to order a split trial is a discretionary matter to be considered in light of the overriding objective of dealing with cases justly and at proportionate cost. For Micron, it was submitted by Mr Jowell that a split trial would be inefficient for three main reasons. The first was that if there were separate trials, it might be necessary to reprove in the Part 20 proceedings matters that were already the subject of the decision in the main claim. That judgment was effectively addressed by the undertaking given by Ms Lukacova on behalf of Samsung to be bound by the judgment sum recoverable by OT Computers in the main claim upon which Micron's claim to contribution would be based, and also by any numerical findings as to the individual or aggregate levels of overcharge, pass-on, net loss and interest upon which the claim to contribution might be based.

Mr Jowell submitted secondly that a split trial would be inefficient because certain issues in evidence which would have been canvassed in the main trial, such as the quantities of DRAM acquired from particular suppliers, might need to be revisited in the context of apportionment in the Part 20 claim. He also pointed to the fact that Samsung wished to be represented at the main trial, even if not as an active

participant, suggesting that the single trial might be the most efficient way forward. Thirdly, he submitted that it would be conducive to settlement if Samsung was faced with the prospect of a single trial rather than being in the position of being able to wait and see what the outcome of the main trial was before coming to the negotiating table.

Mr Bartlett, for OT Computers, and Ms Lukacova contended that it would be appropriate to order a separate trial in circumstances where the issues in the contribution proceedings are distinct from those in the main claim and where the Claimant has no claim against Samsung. Furthermore, if the main claim were to fail, there would be no need for any contribution claim by Micron against Samsung so that an order for a split trial might well save substantial costs.

I was referred to a ruling by Mrs Justice Rose, as she then was, in National Grid Electricity and another v ABB and another in which she faced a not dissimilar issue as to whether to order a split trial in a follow-on damages claim where one cartelist was seeking contribution from various third parties. She stayed the third party proceedings on the basis that they raised different issues from the main claim and that dealing with all the claims in a single trial would lead to delay.

I consider that the arguments in this case are finely balanced, but taking into account the undertaking that has been given by Samsung, the relatively undeveloped state of the Part 20 claim, and the potential for delay and increased costs if there is a single trial, it seems to me that the preferable course is to order that there be a split trial with the Part 20 claim stayed pending the outcome the main claim.

So on that basis, perhaps we can move forward to the next item on the agenda.

MR JOWELL: Before we do, may I just, Mr chairman, just clarify one point, which is that I said we had agreed on the terms of the undertaking. There were some additional tweaks to the precise wording that we had agreed in advance.

THE CHAIR: Well, those can be --

MR JOWELL: One of them related to the volume of commerce, the aggregate also being agreed. But we can sort that out in the order.

THE CHAIR: Very good. Yes, thank you.

Submissions by MR BARTLETT

MR BARTLETT: So if we move on, then, to OTC's application for disclosure from Micron, the Defendant. This is addressed in part 2 of my skeleton, paragraph 9, and OTC's application letter is in bundle 1 at page 643.

Now, the real dispute here -- I'll just let you turn that up --

THE CHAIR: Yes.

MR BARTLETT: The real dispute here with Micron is as to the sources of documents that Micron should search. In fact, there is little dispute really as to the relevance of the documents that we seek disclosure of. However, having said that, the disputes as to relevance have increased slightly unfortunately since my skeleton and that relates to the issue of the territorial scope of the data which you may have picked up on.

In my skeleton, I stated I understood on the basis of Mr Hitchin's witness statement for Micron that there was no dispute as it's stated that Micron agreed to disclose the worldwide sales data. However, there was a letter on Friday night explaining that in fact this was a mistake in Mr Hitchin's witness statement and he didn't mean to say that Micron would provide worldwide sales data. So it seems that that is an open issue.

So first, as to the principles, I don't think there's any real dispute between the parties as to the law and the Tribunal will be very familiar with the principles.

However, there is one point of emphasis I think I should mention, and this goes to

the difference between on the one hand document disclosure relating to contested issues of fact, and then on the other hand disclosure of data that's really necessary for experts to create their economic models. In follow-on claims, the CAT is often dealing with the latter category where the question really is: what is sufficient data for the experts to create their models? In that situation of course, there is no need that all relevant data is disclosed, what's really needed is the best available data that's sufficient to do the job, taking into account issues of proportionality.

I would submit that's a different sort of balancing exercise from the situation where one's considering just plain old traditional disputes of fact. There one is really back into the territory of typical High Court litigation where the court needs to see all the documents that are really material to the issue of determining that fact, and that really is core to the interests of justice.

In this case, there are some data requests which are really typical of follow-on claims and fall into my first category. But then there are some areas where we are very much talking about a detailed factual issue which really needs proper document disclosure to ensure there's a fair determination of that issue. In particular, that relates to the major OEM issue which I think has already been touched on, but this is the question as to what was the effect of the cartel.

So the finding in the decision is that the infringement related specifically to fixing prices of the major OEM customers but the question in these proceedings wider than that is: what effects did that have outside the major OEM prices, what about prices for other customers?

In that regard, whilst there may be a data angle to that -- I'm sure the economists will look at the prices for both types of customers -- there's also very much a factual investigation there, and this goes to how the different sales channels within the cartelists worked together. Did the spot market price come first, or did the two

channels talk to each other? Did they say: if you're charging X, a major OEM customer, this price, then we'd better make sure we don't charge any less, for example, on the spot market, or the other way round. And that interaction is obviously very much a factual issue.

THE CHAIR: When you say "different sales channels", what are we talking about? Are we talking about the spot market, what else?

MR BARTLETT: I can take you to Mr Bokan's witness statement, which gives you a bit of detail on this. But what we're talking about is we have the major OEM customers, we have other contract customers who are buying, they're not major OEMs but they're buying DRAM under a long term contract of some form. And then they're talking about spot customers, but in fact Mr Bokan also talks in his witness statement about other sales divisions they have relating to some direct sales to customers under a slightly different brand.

So Mr Bokan develops that further in his evidence, and that was a witness statement which was presented in the preliminary issue trial on limitation. That's at bundle 2, tab 8, and it's worth for your record having that, and that's paragraph 18 to 45 where Mr Bokan talks about these different sales channels.

It's plain, therefore, that this -- well, we've already seen witness evidence on these sorts of issues from Micron, and obviously that's going to need to be tested properly by disclosure of documents. It's worth keeping in mind, of course, that this is evidence which is by its nature outside the knowledge of the Claimant and it really can't be tested other than through proper document disclosure from Micron in this particular situation, but more generally.

In that situation where the Claimant cannot test the evidence -- you know, it was 20 years ago, operations within a company which it has no knowledge of -- if there isn't proper document disclosure and Micron was allowed to just avoid having to

search properly, it would really go against all principles of justice, I would submit, to allow that evidence, the evidence that's likely to be given just to stand untested, and it would really subvert the process of determining these factual issues. That's really a fundamental point which I'd submit Micron really does not properly address.

Moving on to relevance, if we're talking about the relevance of the requests: the document requests we've made, are they relevant to the issues? As I said, there are very few disputes here. The disputes relate to the data requests and really it is just the geographical scope we're now talking about. The time period was a matter of dispute, but now that seems to have been agreed and Micron have agreed to give a properly wide time period from 1992 to 2007. That can be seen in the requests table which is at tab 321 of bundle 3.

So turning to geographical scope, OTC seeks disclosure of worldwide data. So we're talking here about the data the economists need to produce a model on overcharge. And OTC seeks worldwide data, not just data that's UK-specific, which is what Micron's providing or offering to provide.

I'll start by noting this approach is quite -- seems quite inconsistent with the approach Micron took at the preliminary issues trial, where its evidence was asserting that US prices of DRAM would impact on the price of DRAM in Europe. If I could take you to the preliminary issues judgment, paragraph 106, page 228 of bundle 1, and if perhaps you could read paragraph 105 first, it just explains the context here.

Then in paragraph 106, you see after the comma on the third line:

"The defendants were entitled to adduce evidence that the price of DRAM in the US market would impact on the price for DRAM in Europe."

So what you can see is the position for various reasons relating to limitation, but anyway of Micron at that stage was the US prices impact European prices. And that's not at all surprising because obviously -- well, this is a global market and I'll

come on to that. But it's a global market where prices are global, manufacturing is global. In the UK, we don't buy DRAM only from manufacturers in the UK. There'll be a few very hi-tech plants spread around the world where we buy it from. And equally demand is global and some of the customers, like the major OEMs are global, and they're buying globally. And Mr Bokan confirms that UK customers --

THE CHAIR: Yes, I've got that point.

MR BARTLETT: To support this point, we have evidence from Ms Horn, who's an economist at Grant Thornton. Her witness statement is at tab 4 of bundle 2, page 123. You'll be able to go to section 3.3, which starts at page 130. It's headed "The geographical extent of the data". If I can ask you to read 3.1 to 3.3.9, that section, that just explains from an expert perspective why the worldwide data is required.

THE CHAIR: Okay. Yes.

MR BARTLETT: So our position is that any economic analysis of prices will need to consider supply and demand and how they interact. All these factors are worldwide factors, so obviously one needs to have price data that's worldwide, and to try and create an economic model based on UK data, we don't know what the effect would be, but it would bind us in some way.

What we say is Micron shouldn't be allowed to confine this data set in a way that we don't know what the outcome would be. It is possible that it might not have an adverse impact, but what we can say is it obviously will have some impact on the analysis, and they would be selecting that sort of bias into the outcome at this stage, which we say is simply not appropriate.

There are a couple of points made by Micron as to why this isn't necessary. One reason they say, which comes in RBB's letter at paragraph 43, they say:

"Since the Claimant is based in the UK, it appears highly unlikely to me that

information on sales made by Micron in other countries are likely to be more relevant to the assessment from sales made by Micron in the UK."

But that is simply an assumption which may or may not be right, but it's not appropriate in a sense to determine that now.

Then RBB's other reason at paragraph 44 of their letter again seems to be a makeweight. They say:

"Economists may want to look at market-wide data for supply and demand rather than just Micron's data."

That is said to justify not needing to have worldwide price data. But we say that's no good reason, the fact that they may also look to market wide data.

Finally, I would say there hasn't really been any proper suggestion that they couldn't provide the worldwide data. I note, again going back to Mr Bokan's evidence mentioned that Micron had a global pricing tool and that their model N database, which is one of the databases they say they looked at, was based in the US. That's paragraph 30 of Bokan, page 554 of volume 2. So it should therefore be eminently doable.

In conclusion on that, our concern is if you cut out a large part of data, you just create a real risk of bias in any analysis that's carried out, and then it's inappropriate to take that risk now.

But that's worldwide data. You may have picked up there was an issue regarding SRAM, a different type of memory. The point there was the Claimant had sought data relating to SRAM as a potential comparator product. So this would be instead of looking at a time-based comparison, we're looking at a comparator product. However, that isn't pursued following further consideration by Ms Horn in her witness statement. She couldn't be confident that it would be an appropriate comparator. So that is not pursued and that isn't an issue any longer.

So moving on then, relevance isn't really the point of dispute, apart from that one point. Reasonableness and proportionality is, however, the big dispute.

THE CHAIR: Yes.

MR BARTLETT: This really -- well, we don't dispute obviously that's a relevant consideration. The way it plays out is Micron say they shouldn't search really any significant sources of data.

The point I think I will address quickly is what has Micron provided to date? Is it then reasonable to search the Micron file, which is this large pool of something like 240,000 documents, using a computer assisted review with predictive coding? The third point is sort of linked to that: if it weren't reasonable to search the whole file in this way, would it nevertheless be reasonable to search a subset of that file, which is the 26,000 documents which they have identified already as likely to be relevant based on keyword searches? Then there is a fourth point as to hard copy documents. They have 15 boxes, which seem to include 15 lever arch files, and should they be searched.

We say all these sources should be considered in the context we're here talking about: looking for qualitative documents and documents that will be used to test the evidence, not just some additional data that might be informative for an expert.

As to Micron's disclosure, what they have produced so far, they say it's substantial, but really when you look at it, it is limited to very limited sales data, the documents on the Samsung case file, and that's really it. They haven't searched any other repositories as yet, and that's confirmed in section 40 of Hitchin 5.

So, turning then to the Micron file, the first point is it plainly relates to the DRAM cartel and Micron originally said they thought it was a copy of the Commission file. But they then went back from that and said, oh well, it seems to be too big to be a copy of the Commission file. So there's some uncertainty but there appears no

doubt that it relates to the DRAM cartel in general.

OTC's position is this must obviously be searched in an appropriate way and that's the real question. It's not can we avoid looking at these documents at all; it's, you know, how do we do this in a sensible way.

Micron's reasons for not searching it seemed to come down to cost, different languages, privilege and irrelevance. So, as to cost, my skeleton and Osborne Clarke's letter of 23 November explain about the use of a computer assisted review process using predictive coding. We explain that that is sort of well accepted way of doing things nowadays and that should enable the volume of documents to be reviewed in a reasonably efficient manner. What predictive coding does is it allows -- the computer learns as you review it. So you review 100 documents. The computer then starts thinking, well, if those are relevant then these other documents will be relevant and it groups it. It keeps on learning and so the idea is you only have to review a relatively small number of documents and the computer meanwhile picks out all the 'relevants' and the 'irrelevants' and when you get to a point of a percentage where you're happy that you're 90 per cent right, then you sort of say okay, that will do.

So this is, you know, recognised in the CPR, a widely used process and it's an efficient way of doing the job.

THE CHAIR: So you say that's for the quarter of a million electronic documents?

MR BARTLETT: Yes. We say that would be an efficient way of dealing with that number of documents. It's not the only way but it's an efficient way and, by way of comparison, we note Granville and OTC themselves had over a million electronic documents in the LCD proceedings which they reviewed and disclosed circa 20,000 documents. So these things are not -- you know, whilst they sound like large numbers, they're not undoable.

Then as to language, we say the presence of different languages does of course add a bit of complication but it's not an insurmountable obstacle and it's not a reason not to give disclosure. I mean, it may be all the key documents possible are in a different language, but that plainly isn't a reason for not doing it.

However we accept that it may be that some sort of phased approach to different languages is appropriate. That's just a point of detail that can be worked out.

As to privilege, well, what they say is, oh well, some of documents might be privileged because, when we searched them, we saw law firm names in some of the documents. Well, sir, I mean, that simply isn't a good reason for not reviewing documents. In the context we understand that a lot of these documents may well relate to proceedings either dealings with the Commission, dealings with the DOJ or perhaps other court proceedings in the US. So of course firm names are going to appear. But in any event, I mean, even if there are privileged documents in there, then they just don't disclose a privileged document. So that's not a good point.

Then there's an item about irrelevance and they say many of the documents might not be relevant because they seem to relate to the US and some mention Rambus DRAM, which is a particular type of DRAM. But, I mean, this is again a point of no weight. Of course we would hope that the majority of the documents do not need to be disclosed because we hope that we aren't going to have disclosure of 244,000 documents. One would expect a small portion to be disclosed but the fact that they relate to the US simply is not a good point. We know that the DOJ had an investigation and US lawyers have been dealing with issues relating to the DRAM cartel and Micron themselves have said the US then impacted on the EU. So that really isn't a good point.

As to Rambus DRAM, well, it's a type of DRAM which we understand tends to be used more in PC servers than in other types of PCs, just because it has, I think,

some error correction. But, anyway, there is no reason why a document might not refer to both and be relevant, even though it is true that there were some separate proceedings relating to Rambus which don't concern us.

I won't take you to it now, but there is detail as to what went on in the US in terms of investigations and court proceedings in a disclosure report that was actually put in by Infineon earlier in these proceedings before it settled. That's at tab 81 of bundle 1 and paragraphs 4.1 to 4.3, page 688. You can see just discussion about all the class actions and the different proceedings that went on in the US.

It's also worth pointing out that Infineon there specifically noted obligations, the stringent obligation to preserve documents because of US litigation. So, you know, the point, it applies to them, it obviously applies to the other defendants. There were not going to be binning all their relevant documents. Despite there being a lot of talk of document destruction policies, plainly they would not be binning them.

So really those are the points on the Micron file as a whole. We say it's perfectly possible to search them. Of course you can't exclude a repository of documents just because it has a lot of documents.

Then turning to the 26,000 documents, this is a pool of documents that's been selected from the 244,000. Micron have applied key words which they say that are likely to indicate relevance. They have got this pool which you would have obviously thought would be reviewed but they say, no, it's still too disproportionate to review this pool of documents despite its obvious relevance, they say because on their estimate it would cost over £400,000 to review these documents. That's in Hitchin 5 where he suggests £412,000.

Osborne Clarke have set out in correspondence exactly why this is really just an untenable figure, and it was set out in my skeleton. But, on the basis of discussions with external document providers, reputable companies like FTI, what

would they charge to do this job and there are two sort of figures, just to show you. There's one figure which is, if you just do a first level review using paralegals and, you know, you're assuming a £50 an hour rate, they get through X documents and they've used the lower end of what one normally gets through in an hour, 30 documents in an hour, then you would expect it to cost about 40,000. But if you do a full managed review, that FTI were proposing, first level review then a second level review and quality control checking and hosted on their system, then it's £85,000, and that's all set out in the skeleton and in Osborne Clarke's letter of 23 November, which is at tab 136 of bundle 3, page 651.

I should add I believe there was a letter late last night from Micron trying to again justify their 412,000 figure, which seemed to be based on ideas that, oh well, there needs to be lots of senior associate and partner time looking at all these documents. So, I mean, we would submit it just isn't the point. The point here is can one do a review in an effective and efficient way to sort out a pool of documents to be disclosed. This isn't a matter of how much time A&O partners want to spend reviewing interesting documents. That's not just the point. What Osborne Clarke have shown is that's perfectly doable. I mean, 26,000 documents is obviously very reviewable at a moderate cost and so we would submit there really is no reason not to review at a minimum those 26,000 documents.

That then takes us to the hard copy files. They've identified 15 boxes of hard copy files and including those 15 lever arch files and these are all said to relate to the Commission investigation. However, Micron's skeleton at paragraph 12 said it would be entirely disproportionate to look at these. The likelihood of finding relevant documents not forming part of the Commission file is very low.

So the idea that it would be entirely disproportionate to look at 15 boxes is far fetched, I would submit. I mean, OTC itself has carried out a review of over 100

boxes already. So 15 boxes is not a very large volume of documents. As to the point that, oh well, the relevant documents are probably in the Commission files, so we don't need to look at these. Well, that's purely speculative but also it misses the point as to what goes into the Commission file and the Commission file are the documents that the Commission relies on in support of its statement of objections. They don't have to prove quantum, they're not looking at the major OEM issue, they don't have to prove the actual effects. All they're trying to show is, you know, the basic finding of infringement.

So the fact that the Commission hasn't referred to something does not mean that it's not going to be relevant here.

So we would submit that Micron's refusal to search even those sort of 15 boxes and files is really verging on -- well, wholly unreasonable and it seems to just sort of indicate an approach of, oh, if we offer nothing then hopefully we'll get halfway in the middle. But it's not a reasonable approach and we would say there's no proper reason for suggesting those hard copy documents shouldn't be searched. So --

THE CHAIR: Would that be a convenient moment?

MR BARTLETT: I believe those are all the points I have on those disclosure issues, so that would, I think, be a convenient moment.

THE CHAIR: Okay. I'm getting a bit concerned about the time. I mean, I'm not criticising you, but I would say that all the points you've made were already well made in your skeleton argument. There's no need to go over what's already in the skeleton argument. I suggest that for all advocates you should concentrate on responding to any points in the other parties' skeletons and if there's any particular bits of the evidence you would like me to read, to make sure that I've got a note of that, otherwise we're going to run out of time and I need to get through everything today.

MR BARTLETT: That's understood.

THE CHAIR: All right. So -- yes.

(1.06 pm)

(The luncheon adjournment)

(1.52 pm)

Submissions by MR JOWELL

MR JOWELL: Thank you, Mr Chairman. I will attempt to be as swift as I can and I will come to the four main categories of documents that my learned friend seeks.

But I should make at the outset four general points which are important to bear in mind in my respectful submission.

The first is that the jurisdiction to order disclosure in this Tribunal is not typically exercised by way of standard disclosure orders. It is always the case in this Tribunal that it is necessary to establish that the documents are necessary and proportionate and, as the comment of Mr Justice Birss in the Vodafone v Infineon Technologies case has been oft quoted, where he said:

"While of course more [disclosure] can be better…it is relevant to ask how much more would it be and how much better would it make the result."

Now, that comment was made in the context of a very large claim for damages, cartel damages, in the hundreds of millions. This is a case in which it is even more important to bear that in mind because the true value of any damages claim, if it exists at all, is going to be in the very low single figures and so there is an enormous danger that the costs of disclosure could very easily dwarf the amount of any award of damages and indeed make any settlement rapidly impossible simply because of the amount of expenditure that the sides have incurred.

The second point that is important to bear in mind is that it is not the case that the

Claimant has in some way had no disclosure. On the contrary, they've had a good deal of disclosure. They've had the whole of the Commission file and they've had a lot of data that we have already provided and we have offered to provide a good deal more voluntarily. I mean, we've really been bending over backwards in correspondence to offer up as much as we reasonably can and you'll see, if you turn to our skeleton argument at paragraph 9, we go through the additional disclosure that we have already offered.

In paragraph 9 we note that we've agreed to add an additional repository, the legal drives, to the relevant databases over which the previously agreed searches would be conducted. We've agreed to provide the Defendant's UK-wide DRAMs sales and data sets, showing sales volumes, revenues and profit margins for an extended period of time: not just the previous period but an extended period. We've offered to conduct further reasonable and proportionate searches across all of the Defendant's databases for board minutes and financial committee minutes, third party reports on costs, pricing, average aggregated price sales data, data relating to DRAM production and so on. We've offered, you see in paragraph 10, a new version of the case file index and we've offered to disclose our underlying data sets and codes. We've offered to conduct a key word search of 402 documents and we have offered, importantly, to search the 15 hard copy lever arch files which contain the documents we believe were provided to the European Commission.

So it's just not right to say that we haven't and will not provide substantial disclosure.

The third point to bear in mind is that this case will inevitably turn largely on the analysis of data, not documents. In order to ascertain whether there has been any overcharge in respect of these non-major OEMs, the crucial exercise is going to be to look at the statistical evidence and a regression analysis based upon the data that's been provided and these additional documents, this additional data that we're

offering, will enable that precisely to be done.

And the final point is this. My learned friend talks about this missing link, as it were, which he wants to establish between the prices of major OEMs and the prices for others, for effectively the spot market, and he referred you to Mr Bokan's evidence.

We have already been ordered at the last CMC to provide the underlying documents that were referred to by Mr Bokan, and you can see that, Mr Chairman, in your order at tab 37/319. We came back on that, and if I may show you what was said. It's in the core bundle, tab 53, I believe, page 504. You will see we referred to the documents we were ordered to provide and we say we conducted reasonable and proportionate searches over the three databases from the relevant period to which Micron retains access: the legacy sales database, the SAP database and the model N databases. But we did not locate any documents responsive to these searches.

The Defendant took additional steps to locate responsive documents. Mr Bokan was asked about the following categories: pricing policies, pricing tools and guidelines, information on the relative pricing of the distribution channels, and pricing quotations, and Mr Bokan stated that any relevant documents would be controlled and managed by the sales operation team; and the sales operation team, after conducting further searches internally, considered that they do not have, nor are they aware, of any available relevant documents from this period and that any relevant documents, if still in existence, would be on the relevant databases.

So it's simply speculation to suggest that any of these other sources my learned friend refers to, which I'll come on to, are going to contain the sort of narrative information about this link between the two sets of prices that he seeks. These infringements occurred a long time ago and the documents just are not going to be there realistically, and we've already carried out searches for that link.

Against that background, if I could then come onto the specific categories he seeks.

The first that he seeks is worldwide data. This appears to be, on the face of it, a reasonable request, but we sought to explain the two reasons why it isn't. The first is, I need to take you to the RBB letter, which you'll find in the witness statements volume at tab 16/1318. This is the letter from our economists and they sought to explain at 1323 why in fact the global figures are not necessary, and perhaps I could invite you to read or cast your eye over paragraphs 38 to 45.

To add to this, the second reason is explained in the latest bit of correspondence, which… perhaps I can just read out what has been written. We stated, by Allen & Overy:

"We made enquiries with our client as to the availability of its worldwide DRAM sales data over the agreed temporal scope. Our understanding is that such data is not readily available and that it would be difficult for our client to obtain if even possible to do so."

So we say therefore to conduct searches for worldwide data would be disproportionate, even if such data were deemed irrelevant, which the Defendant denies.

All of that said, if it transpired that, notwithstanding what RBB say here, their expert still insists that they require global data, and it appears that they do, or at least Mr Bartlett does, then we don't object to conducting a reasonable and proportionate search of a global database insofar as they are readily available. But as you will see from the correspondence I've just read out, we don't think they are reasonably or readily available, and we don't see why we should be effectively going to try and look at these incredibly historic databases when our expert is telling us that they're just simply not necessary. So that is the first category.

Now, things get worse as one goes through because the next set of documents sought are those that derive from 244,000 electronic documents that are in effect,

this sort of document dump that Allen & Overy has received. Based upon the topics the Claimant has identified, we have sought to come up with a list of search terms that were run across that enormous universe of documents, and those search terms brought it down to still some 26,000 documents, which we estimate would cost approximately a little over £400,000 to review.

We say that in the context of a claim worth at most a few million, to spend that sort of sum just on the off chance that you might find some narrative document which casts some light upon the relationship between minor OEMs and major OEMs is simply not worth it, it doesn't make economic sense. Of course they say, well, FTI could do it cheaper and you don't need your senior solicitors reviewing this exercise. But it does require a substantial exercise because one has to look at these documents, consider whether they are privileged, consider whether they are relevant, and so on, and only a small fraction of the 411,000, I think 50,000 of it, is attributed to senior lawyers. The rest are junior lawyers in the Belfast office, I believe, where they carry out this review task.

So we say that is a disproportionate exercise and it's effectively a fishing expedition. Even more of a fishing expedition is to suggest that we should go back to the 244,000 electronic documents, carry out some unspecified search based upon artificial intelligence or predictive coding and then come up with some other subset of those documents which we then have to review, this would be -- bear in mind they've got the Commission file, they've got all the underlying documents about the infringement itself and there's no particular reason to suppose that this universe of documents has these kind of linkage documents they are really after.

THE CHAIR: How do you get from the 240,000 to the 26,000? It's a keyword search --

MR JOWELL: Keyword search --

THE CHAIR: That suggests that the 244,000 are in some sense searchable, then.

MR JOWELL: I think they are in some sense, yes. But I think there are difficulties, as I understand it, with the nature of the documents in many cases and the extent to which they can be searched. But if one steps back, what is one actually looking for here? It is a fishing expedition and it's an enormously expensive one, however you cut it.

THE CHAIR: Why should it cost -- I mean, on Allen & Overy's figures it's about £20 a document. It seems extraordinary.

MR JOWELL: The discrepancy of the figures with FTI are based on different hourly rates, a different estimate of the number of documents per hour, and then the inclusion of a third level review. Those are the three main drivers of the exercise. But this is a genuine estimate, this is what they've been quoted. As I said, this is not Allen & Overy head office, this is in Belfast. So we say this is not a sensible exercise in a very small damages cartel where you have the data and have got the Commission file. One has to step back and think about is this in proportion? The answer, in our respectful submission, is it is not.

One then comes on to the final category, which are the hard copy documents. As I showed you from our skeleton argument, we have already offered to review the 15 lever arch files of hard copy documents and to the best of our understanding, or to the best of the understanding on my instructions, those are the documents we believe were those provided to the European Commission as part of their investigation. The boxes are a wider set of documents relating to the European Commission investigation.

What one has to bear in mind here is that Micron was a leniency applicant, a successful one, and, as such, it was obliged to co-operate throughout the administrative procedure and to provide the Commission with all relevant information

and evidence relating to the alleged cartel that came into its possession. So there is no reason to suppose that insofar as there are relevant incriminating documents, they would all have gone into those lever files we are already reviewing. So to make them go back to review 15 boxes additionally is simply unnecessary and there's just no proper basis to suppose that that is going to reveal material additional relevant documents.

Those are our submissions on those four categories. Unless I can be of further assistance.

THE CHAIR: No, thank you.

Submissions in reply by MR BARTLETT

MR BARTLETT: Sir, if I could just make a few brief points in reply. There's general comment by Mr Jowell that he now says the claim is worth nothing other than a few million. I appreciate obviously the claim value at the moment appears to be 7 million without interest which, with a conservative rate of interest, is something like 16 million, and with the higher rate of interest is circa 26 million. Those are all after being reduced -- taking off the settlement proportion. So there's no real basis for his comments about it being worth nothing more than a million or so. On the contrary, they're quite contrary to the approach Micron's taken on costs management.

Mr Jowell stated that Micron have been very generous and offered to provide lots more disclosure. He mentioned the legal database, that I think is a bit of a red herring. He accepts that is likely certainly to contain privileged documents, so it's not really very helpful as a source. He mentioned that lots more things had been searched and he talked about the Bokan documents, documents mentioned in Mr Bokan's evidence. But to be clear, he mentioned that the only searches are over what they defined as the relevant databases, and those are simply three databases

with the sales data in them. So those are not significant searches. There's no suggestion that they've actually looked at the factual documents in the relevant locations, being the Micron file really and the hard copy boxes.

Mr Jowell stated now that the case will turn very much on the data, not the documents. That's a convenient submission to make now, of course. When it comes to the trial, their position will no doubt be different, and in fact the Claimant's position is there is a close correlation between spot market price and the major OEM price, and the response of Micron will be, ah, but that's not going to show anything, you know, this led to that, not the other way round. So of course there is a significant factual dispute there and this isn't a case of a fishing expedition. There is a claim under way, there are real issues in dispute and they need to be determined.

Briefly, Mr Jowell said on the worldwide data, he mentioned this letter from last night from Allen & Overy saying it might be difficult to find the data. I'll just say that's a last-minute letter which is very unclear and there is no evidence as to the point.

THE CHAIR: Do I have that letter?

MR BARTLETT: I'm not sure if it's been handed up or not.

MR JOWELL: It's at the very back of the bundle.

MR BARTLETT: Secondly, Mr Jowell made submissions about the contents of the 15 boxes and the lever arch files. I'll just say as to that there is no real evidence as to what they contain. There's just been general comments: they might contain this, they might contain that. As I said, it appears that Micron has very little idea of exactly what's going on where. We would say none of these points really undermine the Claimant's position, which is that there should be a proper disclosure exercise here, albeit carried out in the most efficient way that it can be carried out. But there does need to be disclosure.

THE CHAIR: Thank you.

As I made clear before, I'm going to reserve my judgment on the scope of the disclosure, so we should move onto the next item on the agenda.

MR BARTLETT: So turning I think to OTC's application for disclosure against Samsung.

MS LUKACOVA: I apologise. I wonder whether I have a different version of the agenda. The one I have that I understand was agreed has as item number 2 the Defendant's application for further disclosure.

MR BARTLETT: My apologies, I think that may be correct.

Mr Jowell, over to you.

MR JOWELL: Yes, I can deal with this relatively shortly. There's only one category of documents we seek that is outstanding and we've not managed to agree between ourselves. That relates to the parallel proceedings that have been going on as between Granville, the related company, and OTC and Innolux in relation to the LCD cartel. There have been proceedings in the Competition Appeal Tribunal and judgment is awaited in that matter.

That of course relates to the LCD cartel, but there is, at least at a high level, an overlapping issue with this claim, which is namely the extent to which the Claimant is likely to pass-on its increased costs in higher prices to its own customers, and that is an important defence in these proceedings and was an important defence in those proceedings. Now, of course we accept that the elevated cost in question is a different component cost, it's the cost of the LCD rather than the cost of the DRAM, but nevertheless the evidence as to the Claimant's price-setting processes is going to be common to both. So we have sought disclosure of the skeleton arguments, transcripts, expert reports and witness statements insofar as they deal with pass-on in those proceedings, and particularly

those are likely to throw up the existence of potentially relevant documents on the pass-on issue in these present proceedings. The Claimant has inexplicably, in our submission, refused to disclose those documents, notwithstanding their obvious probative value and the relative ease with which it must be possible to provide them. So that is our application.

Submissions by MR BARTLETT

MR BARTLETT: It's worth just saying to start with obviously this application started off as a very wide-ranging application, seeking a huge amount of disclosure from the Claimant in effect when they had already provided standard disclosure. I only mention that in the overall context of proportionality and the requests going both ways.

The fact we are where we are now in terms of most of this being agreed is because the Claimant has taken a very pragmatic approach to trying to offer reasonable additional steps just to check everything they've done so far in order to avoid argument, not because there's any particular flaw in their disclosure exercise. It just illustrates the complete difference in approach that has been taken.

So yes, the application now is limited to some documents from the LCD proceedings. It is worth starting, however, by pointing out though that the application as made in Hitchin 4 and at the time that applications were required to be made was not an application as wide as the application now made in the skeleton. The application then was only for details of what disclosure was ordered, copies of transcripts and copies of skeleton arguments. So our understanding is that is the scope of the application that should be made now, and it was only a last minute addition in the skeleton when they started mentioning expert evidence with witness statements. So they haven't been properly considered by OTC or addressed in evidence.

As to the point of transcripts and skeletons, the position of the Claimant is they're concerned about introducing documents which will lead to chains of enquiry, longer letters and more cost. In circumstances where although in broad terms there are similar issues in LCD, it's worth noting that in that claim -- there are two claimants, Granville and OTC -- OTC became insolvent, went into administration in January 2002. That was quite soon after the start of the LCD cartel which started in October 2001. So there's only a small period where OTC has a claim, so the vast majority of the claim and the argument was about Granville's position, not OTC's position, and that really is reflected in the evidence and the documents.

So it's one point which goes to really why this isn't going to be very helpful, and probably an unwelcome distraction. There was no witness evidence from OTC in those proceedings, so this is not a matter of hiding any witness evidence being given and, as we said, the expert evidence was primarily focused on Granville. In addition, there obviously was a confidentiality ring in those proceedings, there are issues regarding what is confidential to Granville rather than OTC, there are duties to the other parties.

So opening up old questions as to what can they see, we're just concerned this will be a train of enquiry which will go on and on and take quite a lot of time to deal with, so the Claimant's position in those circumstances is there shouldn't be any order made. I mean, obviously some documents will be on the court file and that should be the end of the matter.

THE CHAIR: Thank you.

Submissions by MR JOWELL

MR JOWELL: Briefly, first of all, it's not entirely about Granville, it's also about OTC, there is a relevant period of overlap. Secondly, if there are further enquiries made

and those turn out to be disproportionate, they can be stopped at that point. But that's no reason to stop the initial disclosure of these documents which can be easily provided and are clearly potentially highly relevant. And far from causing additional expense, the provision of these documents is likely to save expense because it should enable us to focus in on those documents that have already been identified in previous proceedings as relevant.

As for the fact that expert reports were not specifically referred to, there can't seriously be any additional evidence that is required in relation to that minor augmentation of the original request. It's obviously convenient to deal with it all on the present occasion, rather than us coming back to you on the subsequent one --

THE CHAIR: I suppose it's likely the judgment will deal with some of the issues.

MR JOWELL: It may, but then it won't give us the granular detail you'll get from these documents, which is going to be no doubt useful.

THE CHAIR: Yes, thank you. Yes.

MR BARTLETT: I'm turning now then to the application for disclosure against Samsung, OTC's application. I think the starting point here is to date, Samsung has given us the Samsung case file to Micron and Micron has disclosed that, but other than that, there's been no disclosure from Samsung. Whilst now it takes the position that there should be no further disclosure, it's worth noting what was said before the first CMC. If I can just take you to Covington & Burling's letter at volume 2, page 173.

THE CHAIR: Page or tab?

MR BARTLETT: Sorry, that's page 173. It's tab 36, volume 3, the correspondence volume.

THE CHAIR: Yes.

MR BARTLETT: If you go to paragraph 4, the gist of this is that they were saying at

the time of the first CMC: look, we're going to be disclosing the Commission's accessible file we shouldn't be disclosing anything else before that because you may find the documents are resolved by -- or your needs are met by the Commission file, so you should review and consider that first before coming back to us. Well, we are now in a position where obviously, unsurprisingly from our perspective, we have reviewed the Commission file, OTC has reviewed it, and it hasn't answered those questions. So we now come back to seek disclosure.

The issues raised by Samsung really come -- there are a number of headings. There's first the question of what documents do they actually have. Then there's the general point they make, which is should they provide lesser disclosure because they're a Part 20 defendant, because of their status as a Part 20 defendant. And then thirdly to what extent -- there's an issue over group companies which partly comes up in Micron's application as well over to what extent they should make efforts to obtain documents from group companies.

As to what documents it has, as to the data, I don't think there's any suggestion that it doesn't have sales data. It just says it shouldn't have to provide the data, and to date it's only looked for data that relates to OTC or its own suppliers, it hasn't looked wider. But then there's the question of does it have the documents it gave to the Commission, which is the wide pool of documents that as a leniency applicant it has to give to the Commission, which would be much greater than the contents of the file. On a quick reading I think of Samsung's evidence, one might assume that it didn't have that. But I think when one reads more closely, it is clear it should still have this information, it just doesn't want to search it. If I could take you to Samsung's disclosure report, which talks about what sources of documents it has, that's volume 1 at tab 48, page 471.

THE CHAIR: Yes.

MR BARTLETT: This was provided in the normal course at the early stages before disclosure was given. What you can see there on the first page is that there are a range of sources of documents they hold. In Germany and the UK, they have electronic documents on data carriers, they have further documents in Belgium and South Korea, generally held by lawyers. But they're obviously holding significant quantities of documents and that again is not surprising, given everything that's been going on in relation to the DRAM cartel in the US and with the Commission.

So I submit it's reasonable to assume they still have the documents. If you look at Mr Helmer's witness statement, so this is the statement put in by Covington & Burling, that's at volume 2, tab 17, page 1509. Mr Helmer's statement. What one can see there --

THE CHAIR: Sorry, which page?

MR BARTLETT: Sorry, page 1512. It starts on 1511 and then goes over to 1512.

You can see at (b), he explains that documents were collected and extensive searches were carried out at the time of the investigations. Then what he says at (c) is that information was provided to the Commission. Then he says at the end of (c): "I believe the SSEL case file is now the best source of any documents relevant to the DRAM cartel and DRAM business more broadly."

And that is I think relied on by Micron's -- I mean, Samsung's counsel is suggesting that's all they have already and you don't need to look any further. But of course what it's not saying is they don't have all the documents they gave to the Commission. It's just saying, "I believe it's the best source based on the above", and the above simply explains they've given everything to the Commission and then the Commission put what it thought was most appropriate in the case file.

What we're saying is it is not the best source in our view. What is the best source will be the file of documents that they provided to the Commission. Nowhere in

Mr Helmer's statement does he say they do not have those documents, and I'm sure he would have said that if that were the case.

So our starting point is they do have the relevant documents -- well, the pool of documents that could be searched.

The second point that Samsung say: they say repeatedly SSEL is just a sales entity and so it's not going to have all the relevant information. To some extent, it may be true that it does not have all the production information relating to the manufacturing processes, but of course sales information in general is going to be relevant to this claim, in particular the major OEM issue we've discussed. So it is possible it won't have all the relevant information relating to production, but it's not a reason for not providing disclosure. If it doesn't have some documents, then it won't be able to produce them.

So where Samsung says in its skeleton at 24 that the only significant source of relevant documents in SSEL's control is the case file and that's already been disclosed, we say, that is not sustainable on the basis of the evidence. Their disclosure report has explained they have various sources of documents; what their evidence explains is they gave a lot to the Commission and then they just say: we now think the best source is the SSEL case file. But there is a gap there between -- there's no evidence to say they don't have broader documents and, on the contrary, their disclosure report confirms they do have broader sources of documents.

So there are documents that could be searched. Samsung doesn't really comment on the requests -- well, there is a table of requests. Samsung provided comments, but its comments on the requests simply cover the same points that are addressed in the skeleton, so I won't take you to that because I don't think there are any additional points in that table. But for reference, Samsung's comments on the request table are in volume 1, tab 80, page 681.

So that's true, they have documents. The next point: what's our position? Should Samsung have to provide lesser disclosure because it's a Part 20 defendant, and this is their point of principle. Our position, OTC's position --

THE CHAIR: Just going back: what do you say is the relationship between the Samsung case file and the documents you say were provided by Samsung to the Commission?

MR BARTLETT: We say the Samsung case file -- and I don't think this is disputed -- the Samsung cases file is the accessible version of the file the Commission gave back to Samsung. So it's the documents that the Commission relied on in its statement of objections to make its case against Samsung. But our point there is that what the Commission needs to prove its case is not the same as what is relevant to us now to prove our case. They don't need to prove the effects, they don't need to prove what any overcharge was. They only need to prove there was the infringing conduct.

So the case file is inevitably much narrower than the wider pool of documents which might go to issues such as quantum. All the issues of quantum are not relevant to the Commission, so it doesn't need to rely on them. The case file has been produced and has been reviewed and, unsurprisingly, as I explained in our cases, it produces actually very little of use.

Turning then to the point of principle, did Samsung have to give less disclosure because they're a Part 20 defendant? Well, the Claimant accepts that when considering reasonableness and proportionality, the Tribunal can obviously take into account the role of the Part 20 defendant. But what we would say is one can't simply look at one other case and see what happened there, because the role of Part 20 defendants can obviously vary widely. There's clearly a power to order disclosure and the basic position in the CPR is that they should provide disclosure on the

issues. But as to what searches are reasonable and proportionate, we accept you can take into account its role in the proceedings.

But when looking at Samsung's role, it isn't an innocent third party that is providing, for example, disclosure by way of a third party disclosure order. Obviously third parties can be required to provide information, this isn't an innocent third party. This is a party to -- well, who is not party. This is a party to the proceedings and Samsung is of course an addressee of the Decision who played a very significant role in the underlying wrongdoing. So they are one of the key evidence sources in relation to the effects of the cartel, and that can't be avoided.

Samsung mentions the Vodafone case when they were only ordered to give very little disclosure, but that seems to be on the basis of the assumption that they were liable for 3 per cent -- I think it's 3 per cent of the overall wrongdoing, and that was a case in which it seemed there was a lot of complicated disclosure, and the idea of them being a very small player giving a very large amount of disclosure would be inappropriate. But that isn't the case here. We're talking about one of the main players in the wrongdoing being found liable by the decision. Plainly, they are an important source of documents, and ultimately of course it is in Samsung's interests that there is a just process here which results in a fair decision, and that decision obviously can have an impact on Samsung in relation to the contribution claim.

The starting point must be what is necessary, reasonable and proportionate in terms of achieving justice and determining the issues here that are in dispute. Samsung has a role to play in that it has a larger pool of documents that are relevant, and it is a very significant role given its involvement in the cartel.

The fact that it is not playing an active part in the proceedings is a different point because disclosure isn't only provided by parties to defend their own position.

Disclosure, you know, can be required in the interests of justice and to resolve the issue in a fair and appropriate way. But, as we said, in this case it will ultimately impact them as well, so it is in their interests ultimately to provide disclosure.

I think that just leaves the group companies point. SSEL is now a dormant company but it's being kept -- there's a prospect of a solvent liquidation but nothing is happening pending these proceedings being determined.

But it's plain the company relies on the support of other entities in the group because it has no employees. So for example, the witness statement I mentioned was given by the group's general counsel, Mr Helmer. That was the one we just saw at volume 2, tab 17, and Samsung's disclosure statement refers to having had support from Samsung SDS Europe, and so does Samsung's correspondence. And obviously with no employees of course, they have to act through other employees of the group.

So Mr Helmer says that SSEL does not have in its possession or control, nor does it have a right to possession, inspection, or to take copies of documents or data held by Samsung Electronics Co or any of its subsidiaries. What Mr Helmer is saying for Samsung is: look, there's no right to those documents, and so they would say that should be the end of going beyond the boundaries of this.

Our position is that's no reason not to take reasonable steps. We're not asking the Tribunal to pierce the corporate veil and pretend they aren't different entities. But it's no reason not to take all reasonable steps to obtain data sets from those entities where they are within the same economic undertaking. And reliance on these sort of distinctions over control is to some degree inappropriate in a competition law context where they were all found -- well, within that economic undertaking to be -- there are several addressees of the decision and they're all liable, so they actually must have shared data at that stage.

But all we are seeking in our proposed order in respect of group companies, is that they take reasonable steps to obtain relevant data sets so we are not looking -- that's just focusing on the narrow issue of the data from those group companies. So we're trying to keep that pretty narrow and confined and take reasonable steps to obtain that, rather than making an order over a company which isn't party to these proceedings, which we accept would go beyond what a tribunal might be comfortable with.

So in summary, we say Samsung plainly has potentially relevant documents in the pool of documents it gave to the authorities. It's not only a party to proceedings now, but it is also a cartelist with a significant involvement in the underlying wrongdoing and a degree of responsibility for the effects on the market. So it should also provide disclosure in accordance with the requests and in that regard, the relevance is not actually disputed, the disputes are all around whether they should have to carry out any searches.

So those are my submissions on that issue.

THE CHAIR: Thank you.

MS LUKACOVA: Sir, I have to go back to where I started in the beginning of this hearing, which is that OTC is trying to have it both ways, and the tension is evident even from the wording that they're using. They say there is no need for my client to be a party to these proceedings, and that Micron could have just brought a contribution claim subsequently after determination of the main claim, while at the same time saying that Samsung, or rather SSEL, has a role to play and there is a tension between those two.

What I also need to reiterate is that my submissions in support of the stay were based on the assumption that we do not need to provide any further disclosure and that our position could in principle change if we were to be ordered to provide

disclosure -- it could change depending on what that order would say.

A final point I would make is that these submissions are being made in circumstances where OTC has been saying there's no overlap between the issues in the main claim and the Part 20 claim, and so another thing I would say is that depending on what exactly ends up being ordered, in addition to it potentially reopening the question of the stay, we might be looking to seek the costs of the disclosure exercise in circumstances where, on OTC's own account, the issues in the Part 20 claim are not relevant to the main claim.

Now, going through the different categories of disclosure sought, I understand that may have narrowed down to sales data and then what OTC regard as a gap between what had been provided to the European Commission versus the SSEL case file that had been disclosed by Micron following provision by my client.

Looking at sales data first, the first point to be emphasised is that this request is being made in circumstances where while OTC hasn't brought a claim against SSEL, SSEL has already searched for sales both to OTC but also to intermediaries pleaded in OTC's claim. Those searches have come back with nil returns, so at a minimum no direct sales to OTC and no indirect sales from SSEL to OTC by the pleaded intermediaries.

Now, by way of illustration of the sort of factors the courts have looked at as regards disclosure by Part 20 defendants, I would like to have a brief look at the Vodafone decision in the authorities bundle, tab 7, page 71.

This is an action about a cartel concerning smart card chips. There was a European Commission decision finding that a cartel had existed between 2003 and 2005. Vodafone then brought a follow-on claim and also a stand-alone claim in respect of a period outside the scope of the European Commission decision, and then the defendants brought Part 20 claims.

So in this case, any sales to Vodafone by the defendants or the Part 20 defendants were indirect via intermediaries -- that's mentioned in paragraph 3 -- and one of the questions the court wanted to look at was what chips purchased by Vodafone had come from the defendant or the Part 20 defendant.

Some initial matching had been done on some limited initial disclosure, and then the relevant results of that initial matching are described at paragraph 67, that's on page 82. Paragraph 67 is at the bottom of the page. So “In relation to this, Samsung [-- so this refers to the Part 20 defendant --] submits its position is different for a different reason. As best one can tell, those chips represent only 3% of the sales to Vodafone, that is on the basis of the matching approach” --

THE CHAIR: Sorry, which bit are you reading?

MS LUKACOVA: It's page 82, paragraph 67 at the bottom of the page. Perhaps I'll let you to read that paragraph.

THE CHAIR: Yes.

MS LUKACOVA: So 3 per cent of the sales only, based on what was also fairly limited evidence at the time. But nevertheless, if I can take you to paragraph 82 next. The issue in question was what further disclosure ought to be provided by the defendants and also the Part 20 defendants, and this could be done either on a wider or a narrower basis. So the outcome in relation to that issue is set out in paragraph 82, which is the penultimate paragraph at the bottom of page 84.

THE CHAIR: Yes, I've read that.

MS LUKACOVA: Oh, very well. Thank you.

What I take from that is that an indication, albeit early indication, as to the volumes of sales were a relevant factor in circumstances where they were very low like here, where we have no sales, no direct sales and no indirect sales to pleaded intermediaries, and what the defendants were disclosing was also relevant. So it is

noted there about halfway through the paragraph:

"In my judgment, given that disclosure is going to come from Renesas, [that's the defendant] and Infineon [the defendant] on a wider basis, there is no reason to require a wider disclosure than Samsung and therefore I will make a different order."

So certainly here, it was thought that what the defendants were providing would be sufficient, and I note at this point that one point my learned friend didn't make is why disclosure from SSEL is thought to be necessary in these proceedings in circumstances where Micron is already providing data.

So at a minimum they've already agreed to provide data on a UK-wide basis. They've also offered to provide data on a worldwide basis. My learned friend, Mr Bartlett, criticises Micron's submissions asserting that there wouldn't be much data on a worldwide basis on the basis there's no evidence. So on the face of it, we're looking at a situation where Micron will be disclosing in all probability worldwide data. There's no evidence suggesting that that data is inadequate.

THE CHAIR: Do we know -- I know there's problem because of Samsung's status within the group, but do you know what percentage of sales were made to OTC by Samsung? I mean, what's the figure to compare with the 3 per cent?

MS LUKACOVA: Well, so far zero, because we have run the search -- if we're talking about SSEL, the company --

THE CHAIR: Yes, but the group as a whole, do you know what the position is?

MS LUKACOVA: I don't believe we do. I don't -- if I could take instructions briefly.

We don't have the data, I'm afraid. That is linked to some of the other issues that we'll be looking at, which is that our database only has SSEL data and we do not have access to other companies' data. So it is all linked.

THE CHAIR: What about your ERP (SAP) database, which is something referred to in Mr Bartlett's skeleton argument?

MS LUKACOVA: So that is our sales database that we do have, so that is the SSEL sales database. But it only contains SSEL sales data and that is also what has already been searched, both as regards sales to OTC, zero, and also to pleaded intermediaries, also zero.

Just something to flag in relation to Vodafone briefly without -- we don't need to go to the specific paragraphs, but the estimate of the claim there was -- the value of the claim was £150 million. The estimated costs between all parties were £30 million. So we're looking at a very different ratio there and yet proportionality was a major concern there as well, and the paragraph references are 19, 23, and 25. So that's in circumstances where the estimated value of the claim was five times the estimated value of costs.

So in this case we're looking at a situation where there were no direct sales to OTC, no indirect sales to pleaded intermediaries. Micron has agreed to provide disclosure certainly in relation to UK-based sales data, they have also effectively offered to do the same in relation to worldwide data. There is no evidence to suggest that that data is inadequate. OTC hasn't actually submitted that the disclosure coming from my client is necessary, and in the circumstances I would submit it would be unreasonable to order my client to disclose any of this data.

Moving on to the SSEL case file documents, the difficulty with this request, or one difficulty with this request, is that it first appears in my learned friend's skeleton argument and so this isn't something we've had any opportunity to put in evidence on so far. I've taken instructions insofar as I was able. I'm very happy to relay them. This would normally be the point where someone would jump up and say, "Actually, this should be in evidence", and if anyone were to take that point, and actually generally I would submit there would be prejudice to my client if that request were to be dealt with now when we haven't had a chance to fully consider it and also critically

to put in evidence.

There are several reasons --

THE CHAIR: So far so good. I'd get on with it, nobody seems to be standing up.

MS LUKACOVA: Very well. So firstly the assertion by my learned friend that the SSEL case file is very -- sorry, there's likely to be a substantial gap, they seem to assume. What we say is that the SSEL case file is in fact very likely to contain most documents that had been submitted to the Commission. There are reasons for that which we would have described in evidence, and also I should say we don't know that there is a gap. We don't know that there is any gap but in any event it's likely to contain the majority of what had been submitted.

The reason for that is because the case was initially meant to be the subject of the standard process rather than the settlement process. So what happens about the standard process is that the case file that is made accessible is not limited to documents supporting the statement of objections and it is in fact normally the entire repository of all documents in the case, including those that the European Commission did not rely on. So we would say that any gap between what was disclosed and what has been disclosed in this case is unlikely to be material.

In terms of what we still have, my instructions are that we may not have it all. We would certainly not be able to guarantee that we have it all. We are aware that this mostly is contained in the CDs, and we are aware some of them have been corrupted and we would have to run further enquiries in order to ascertain what there actually is.

THE CHAIR: Where are they, in fact?

MS LUKACOVA: I'm not entirely sure. May I just double check?

They are at the Covington buildings in various locations, so my instructing solicitors have them somewhere. Like I say, some of them may have been corrupted, we

couldn't guarantee we have it all anyway.

In terms of what would need to be done to compare the two, I'm told that that would be a very significant exercise because remembering that the SSEL case file which had been disclosed in this case comprises about 1,700 documents, I'm told that the exercise in trying to compare these two pools of documents would be largely manual because the indices to these different sets -- well, certainly the index to the SSEL case file doesn't match necessarily what my solicitors have, and also it would all need to be disentangled because the SSEL case file as provided to Micron of course contains other peoples' documents as well, so those somehow need to be isolated from the SSEL originating documents and it would be a very significant exercise, I'm told.

As to what we could have done if this had been raised in plenty of time before the hearing, well, we could have adduced evidence of the various facts that I've just relayed. But in addition to that, we could of course have ascertained exactly what there is, how much of it is corrupted, and so on, but then also critically we could have run sample checks to test what we are saying is the position, which is that there is unlikely to be a significant gap at all. So we could selected -- I'm not sure, we would need to think about it, but we could have selected a bunch of documents and tried to test --

THE CHAIR: How many documents are we talking about?

MS LUKACOVA: I think -- may I just double check?

We don't know because the reality is that there's some CDs essentially which have not been reviewed for numbers of documents or anything like that, this only has been raised in the skeleton argument rather than in the application as it ought to have been. So we haven't had an opportunity to run any sample checks in support of what my client believes is the position, which is that in fact what there is has

already been disclosed because the process was different. Whilst there might have been a gap had this been a settlement process case from the beginning, this being a standard process case, the likelihood is that what is on those CDs is already part of these proceedings.

THE CHAIR: Okay.

MS LUKACOVA: US proceedings, OTC is requesting documents in relation to the US proceedings. The short answer to that is that we don't have any. SSEL was not a party to any of the US proceedings and so we don't have any such documents.

THE CHAIR: Okay.

MS LUKACOVA: Then in relation to remaining requests, my understanding is that that long list of requests was potentially superseded by the request for the documents disclosed to the Commission, but it may actually be helpful if OTC could just confirm so that I know whether or not I need to say anything further about the remaining requests.

MR BARTLETT: Just to be clear, the application is for the requests as set out and attached to the application originally. It's simply a source of documents that we have mentioned is the pile of documents that will have been given to the Commission. That's simply one of the sources we respectively searched.

MS LUKACOVA: Understood, thank you. That's helpful. In that case, in relation to the remaining requests, the position is essentially as set out at Helmer 1, which is, by way of overview, that the SSEL case file is the best source of relevant documents because SSEL documents were searched at the time, anything relevant was disclosed. SSEL was a leniency applicant. To receive leniency credit, it needed to provide evidence of the suspected infringement representing significant added value. So everything was searched, relevant documents were disclosed. The scope of the investigation was unclear at the time, so the searches were for all documents and

information within the possession and control in respect of all aspects of the DRAM business, rather than being limited to what ended up being the subject matter of the decision itself. Anything that wasn't disclosed, therefore irrelevant to the DRAM cartel and, in any event, unlikely to be still within the possession or control of my client that has been dormant since 2015 and due to data retention policies.

So all of this information is in Helmer 1, witness statement bundle, tab 17. I don't think we need to go back to it.

THE CHAIR: I'll look at that.

MS LUKACOVA: Very well. Then there's the point that some of the documents being sought never would have been in SSEL's possession or control in the first place because prior to becoming dormant, it was an active sales entity -- no activity or involvement in DRAM manufacturing or capacity decisions or planning or investments. It never received or held any information in relation to it.

As to the suggestion that we should be searching for or requesting other entities' data, that data is not in my client's possession or control, and I mean that in the broad sense as per the rules in respect of requesting copies or inspection. No right to possession, inspection or to take copies. The suggestion that -- I'm not sure, perhaps I should just clarify that Mr Helmer is the SSEG general counsel, so SSEG being effectively the German equivalent of SSEL.

I understand that SSEL still being an existing company, albeit dormant, has directors who provide instructions. So what I need to say is there is no such thing as reasonable steps requesting documents from the other companies. We just don't have access to them. This is a long established position and there would be no purpose to doing that, and there is no wording to that order that I can look at and say, yes, that's a reasonable request because we already know that it isn't going to go anywhere.

I believe that concludes my submissions.

THE CHAIR: Thank you.

Submissions in reply by MR BARTLETT

MR BARTLETT: I'll just make a few brief points in reply. Just first turning to the Vodafone case, if you still have that open, it's tab 7 of the authorities bundle, page 84. I think we would submit that the 3 per cent is possibly something of a red herring. The point that one can see from paragraph 82 of the judgment there is that the judge was looking at the potential financial contribution or liability of Samsung as one of the participants, so obviously we're considering the just and equitable share. It seems in that case, for whatever reason, they were assuming that the volume of commerce, so the actual chain -- the link between Samsung and the precise sales that are involved to this loss -- was the relevant way of looking at that. It's accepted that may be the relevant way in some situations. But the general question -- and we would submit that in a case like this where Samsung says you can't trace any of its DRAM to OTC, for whatever reason, there are very incomplete records. But even if that's true, it doesn't mean it wouldn't be found to be liable -- it doesn't mean that a just and equitable share would not be significant where it was, for example, responsible for something like 60 per cent of the market, or a high market share. And I think it is very likely that market share might well be a better proxy, for example, for the just and equitable share, because one is looking at the effect of the cartel on the market. The cause of harm isn't just that someone sold one product at an inflated price, the cause of harm is whether or not your products went to the person, you caused the whole market to be inflated.

So we would say market share is likely to be a relevant consideration in this case. What that points to is the fact that Samsung is likely to have a significant share here.

So the fact they say we can't show any direct sales is not actually a relevant point, though they are a significant player.

As to the submissions around the SSEL case file, although I think what that really referenced was to the source of documents that were actually provided to the Commission, I have to say I don't accept there's anything new in the skeleton. The application was always for disclosure in accordance with the document requests. The source of documents we would expect to be searched is basically those documents that were identified by Samsung in its disclosure report originally. Now that's been perfectly clear to Samsung. We have simply been pointing out that when they said it will all be in the case file, when you look at the evidence there, it wasn't really saying that at all. It was saying -- it's an assumption to say, well, the best evidence is likely to be the case file. There was no clear -- well, there wasn't a statement that we don't have the other documents and now it's been confirmed that in fact they probably do have the other documents as we had understood.

So there is no evidence, and they could easily have put in evidence and would have put in evidence, if it were correct, that there is no difference between the case file and the wider pool of documents they gave to the Commission.

The comment made in submissions was: oh, well, it will be difficult to look at that and try and compare the documents. I don't think that really holds any water. The simplest thing is: how many documents are there in each? If there are 10,000 documents in one pool and 1,000-1,700 in the SSEL pool, you know you're dealing with a very different pool of documents. It is implicit in everything to date that they actually are holding lots of documents. They don't actually refer to CDs, but in their disclosure report they referred to portable data carriers, which presumably means memory sticks and things.

So the lawyers are holding these documents, we've previously asked and they've

never looked at them, and now they say: actually we're holding nothing more than the SSEL case file. There's no evidence of that and if that were the case, we submit that would have been put in. Instead, the evidence was much more limited and has basically been we don't think we should search anything because it's all too complicated, and anyway you've got the case file which will do.

So we don't accept that there's any new application being made. The application was as put originally and we don't accept there's any reason to believe they don't have wider documents than those which are on the SSEL case file. There is simply no evidence to that. Unless I can assist you further, I think those are all the points I need to address.

THE CHAIR: Thank you.

Submissions by MS LUKACOVA

MS LUKACOVA: Just briefly, there's no evidence as to market shares in relation to OTC's focus on the 60 per cent -- alleged 60 per cent market share. That isn't how this application has been argued before and there is no evidence of any of that.

I would note there's still nothing at all about the necessity of any of this data in circumstances where Micron is providing substantial disclosure, and that alone would be a reason to dismiss this application.

As for the suggestion that had what we are saying been true, we would have put it in evidence and we would have said that in evidence, I trust that can be withdrawn or not pursued. There's no basis for that whatsoever.

THE CHAIR: Thank you. What are we on to next? Yes, we'll have a five-minute break anyway for the transcribers. What is next actually, though?

MR JOWELL: Well, let me just on that. Clearly in light of the fact that the proceedings on contribution are going to be stayed, we don't consider it's appropriate

to pursue our application for disclosure from them, which relates largely to our evidence that is relevant to the extent of their volume of sales. But I should correct one thing just to ensure the Tribunal is not under a misapprehension: there is evidence, very clear prima facie evidence, that DRAM manufactured by Samsung was ultimately purchased by OTC. Quite how, by what chain it did so, is unclear. Clearly not directly from SSEL, but there is clear evidence that Samsung DRAM did make its way to OTC. But, in light of the stay, I don't pursue our application for disclosure.

THE CHAIR: That's helpful, thank you. So is it costs management next? Are we finished with disclosure? Yes, okay. Five minutes then.

MR BARTLETT: Cost managements also costs.

THE CHAIR: Yes.

Can I just say where I am currently on costs management, just so you know my starting point. It's that I do think it's helpful for the Tribunal to have some idea as to what costs are being incurred and with that in mind, I would -- my current view is the Tribunal should order costs budgets to be exchanged but not with a view to making any cost management order for the time being. It's just so the parties know and the Tribunal knows what the current position is as far as incurred and anticipated costs are concerned. Anyway, we can carry on with that after five minutes.

(3.09 pm)

(A short break)

(3.17 pm)

MS LUKACOVA: Sir, I've asked to be able to make one very quick clarification as regards my learned friend's statement towards the end of his submissions explaining that they're no longer running their application. Just to make it clear, it isn't common ground that there is clear evidence of sales from somewhere within the Samsung

corporate group. The relevant correspondence, if that is something you would like to have a look at, is in the correspondence bundle, tab 93, and then 112 is where we've set out our position.

THE CHAIR: Okay.

MS LUKACOVA: Thank you.

MR BARTLETT: Just in a continuing vein, would it be helpful to say on the point of necessity, it was said I hadn't responded on the point of necessity of Samsung's disclosure. That has been addressed previously but just to be clear, the Claimant's point is disclosure from both is necessary, and so both have different sources for documents.

So I think it's agreed we'll move onto costs management.

THE CHAIR: Yes.

MR BARTLETT: It's helpful to have had the guidance from yourself as to the way you see it, and I'd say that's consistent with the Claimant's position at the moment. The Claimant's application originally was for an order imposing costs management at this hearing. But following on from the position of Micron being that budgets couldn't properly be assessed at this stage because they need to be changed to reflect directions, et cetera, the Claimant has changed its view and explained that all it seeks at this hearing is the updated costs budgets filed with budget discussion reports. So those are the subsequent reports just when each side comments on the budgets, and then it's up to any party to make an application if it thinks it appropriate to impose costs management.

But that is all we seek at this stage, which I think accords with your suggestion as what might be the most appropriate way forward. So unless I can assist you more --

THE CHAIR: No. I mean, I did notice in the Vodafone case that Mr Justice Birss seemed to adopt a similar approach in terms of getting the parties to say what their

incurred and estimated costs were without necessarily making a case management order, just so that the court was in a position to make appropriate case management directions.

MR BARTLETT: Yes. I mean, the Claimant's position is of course in part this feeds into appropriate directions, but also we would wish to leave open the question of applying further, because we do consider that there's reasons why one might, but we think a better time would be at that subsequent stage. That's all I would submit at the moment.

THE CHAIR: All right. Yes.

Submissions by MR JOWELL

MR JOWELL: So of course we've already submitted costs budgets.

THE CHAIR: Yes.

MR JOWELL: So really it's a question of submitting updated costs budgets.

THE CHAIR: Yes.

MR JOWELL: We have no particular objection to that, save that it should be accepted it can itself be a costly endeavour. It's clearly sensible to do that after we know your ruling.

THE CHAIR: Yes, of course.

MR JOWELL: And also, if there is to be -- and this seems to be close to common ground -- that there should at least be some form of a stay or period for potential ADR. It should ideally come at some point after that as well so that one doesn't expend, you know, as it were, yet more calculating cost.

THE CHAIR: Would it not be relevant to ADR to know what the costs are?

MR JOWELL: It might, but --

THE CHAIR: What I had in mind was simply an exchange of budgets rather than the

discussion or whatever.

MR JOWELL: Just the budget?

THE CHAIR: Yes, just the budget.

MR JOWELL: We have no objection to that.

THE CHAIR: Okay.

MS LUKACOVA: Could I check whether that is intended to cover SSEL's costs as well, despite the stay? Because in the event -- well, in circumstances where the Part 20 claim has been stayed and there isn't any obvious work for us to be doing at all, other than potentially on an ad hoc basis in terms of keeping an eye on things, I would respectfully submit that the right course of action would be to exempt us from that and see how it goes in the circumstances.

THE CHAIR: Well, that would seem right. I can't see that there's any point in Samsung producing a budget at the moment. All right, so we're on to security for costs are we not?

Here again, I have the benefit of quite full argument, so there's no need to go over the same ground as you've already covered in your skeleton.

MR JOWELL: I'm grateful. If I may, I have a few points.

There are of course two issues for the Tribunal: whether to order security for costs and, if so, the precise amount. I know this tribunal will be very familiar with the principles on which security for costs are granted. If I may, however, take briefly to some of the main authorities, particularly because there does appear to be some point of dispute on the relevance and meaning of stifling.

If I could start, if I may, with the recent judgment of Mr Malik KC sitting in this tribunal which neatly summarises the authorities. It's in the authorities bundle at tab 9.

THE CHAIR: Yes.

MR JOWELL: If I could invite you to go, please, to page 118.

THE CHAIR: Yes.

MR JOWELL: You'll see he sets out helpfully the Competition Appeal Tribunal rules and you'll see in rule 59(4):

"The Tribunal may make an order for security for costs if it is satisfied that, having regard to all the circumstances of the case, it is just to make such an order, and one or more of the conditions in paragraph 5 or paragraph 6 applies."

And one of the conditions you see at the foot of the page:

"The claimant is a company or other body and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so."

You'll see over the page the Tribunal guide to proceedings, paragraph 5.1.58 is quoted:

"The Tribunal will only order security for costs if it is just to do so in the circumstances of the case. Among the circumstances to which the Tribunal will have regard are: whether it appears that the application is made in order to stifle a genuine claim or would have that effect; the stage of the proceedings at which the application is made and the amount of costs which the claimant has incurred to the date of the application; the claimant's financial position, whether it's impecunious and, if so, why it is impecunious and particularly if the impecuniosity can be attributed to the defendant's infringement, the likely outcome of the proceedings and the relative strength of the parties' cases if that can discerned without prolonged examination of voluminous evidence, any admissions by the defendant and open offers. But the defendant should not be adversely affected in seeking security because it had attempted to resolve the matter using alternative dispute resolution."

That is essentially in large part a codification of the common law under the CPR and the judge in this case helpfully goes on to set out some of the key authorities. You see in particular on page 122 he quotes from the judgment of Lord Justice Peter

Gibson in Keary Developments, which is one of the leading authorities. He notes -- you'll see the quotation at subparagraph 2:

"The possibility or probability that the plaintiff company will be deterred from pursuing its claim by an order for security is not, without more, a sufficient reason for not ordering security. By making the exercise of discretion conditional on it being shown that the company is one likely to be able to pay costs awarded against it, Parliament must have envisaged that the order might be made in respect of a plaintiff company that would find it difficult in providing security. The court must carry out a balancing exercise. On the one hand, it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim. The court will properly be concerned not to allow the power to order security to be used as an instrument of oppression, such as by stifling a genuine claim by an indigent company against a more prosperous company, particularly when the failure to meet that claim might in itself have been a material cause of the plaintiff's impecuniosity. But it would also be concerned not to be so reluctant to order security that it becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on the more prosperous company."

Over the page, you'll see on page 123 at subparagraph 6:

"Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that in all the circumstances, it is probable that the claim would be stifled. There may be cases where this can be properly inferred without direct evidence ..."

And he refers to the Trident case where there was evidence to show that the

company was no longer trading and it had previously received support from another company, which was a creditor of the plaintiff company, and therefore had an interest in the plaintiff's claim continuing. But the judge in that case didn't think on the evidence that the company could be relied upon to provide further assistance to the plaintiff. That was a finding which this court held could not be challenged on appeal:

"However, the court should consider not only whether the plaintiff company can provide security out of its own resources to continue the litigation, but also whether it can raise the amount needed from its directors, shareholders or other backers or interested persons. As this is likely to be peculiarly within the knowledge the plaintiff company, it is for the plaintiff to satisfy the court that it would be prevented by an order for security from continuing the litigation."

Now, just pausing there: it doesn't seem to be in dispute that the condition in the rules, in rule 5(b), is met; namely that the company will be unable to pay the Defendant's costs at the conclusion of the proceedings if ordered to do so. That is because, whilst the Claimant has retained some ear-marked funds of two million for security for costs, I don't think it is sensibly contested that that would be sufficient to pay the Defendant's reasonably incurred costs of these proceedings. I'll come on to the amount of the shortfall in due course, but it is clear that two million will not suffice for the Defendant's costs.

Now if one considers the factors that are mentioned in the guide, it's clearly not the case again that it can sensibly be alleged that the Claimant's impecuniosity is to be laid at the foot or at the door of the Defendant. There are multiple causes of the Claimant's insolvency, and indeed there were numerous competition law infringements of which they claimed to be victims. There's not even evidence that those competition law infringements were themselves the cause of the insolvency,

let alone this particular one.

Nor, although this is strictly a follow-on claim, is this a case where it's possible to make a clear assessment that this is a claim with high prospects of success, and that's for the reason I know the Tribunal has well in mind, which is whether there is a link between the immediate subject of the cartel, the major OEMs, and the Claimant.

If anything, this is a rather speculative claim that is based upon a knock-on effect. But we accept of course that this is not a claim where one can assess the prospects of success in either direction, certainly not without the use of data. The application for security is brought, we respectfully suggest, at the appropriate stage in the proceedings. It is not made either too early or too late. It is brought at the point in time from which in the near-ish future costs will start to ramp up and will soon exceed the 2 million ring-fenced amount the Claimant has.

It's well established that the key issue here is really whether in this kind of case this will lead to the stifling of a valid claim. The burden is, as the case law shows and as I've already shown you, clearly on the Claimant to show on the balance of probabilities that it will be stifled by the order for security. It must provide evidence to show not only that it can't provide the security out of its own resources, but also that it can't provide those -- the security by obtaining access to the resources of others, including its backers, and that includes, as the case law makes very clear, also its creditors and its shareholders.

It is correct, as the Supreme Court made clear in the Goldtrail Travel judgment which my learned friend refers to, that the ultimate question is whether the Claimant can obtain the security, not whether the creditor can. But nevertheless, it is indirectly relevant to consider the position of the creditor because when one considers whether the Claimant can have recourse to that creditor to obtain the security that's necessary.

If I could just show you that in the Goldtrail judgment, which is in the next tab at page 138. You'll see in paragraph 27, Lord Wilson says:

"It is clear that even when the appellant appears to have no realisable assets of its own with which to satisfy it, a condition for payment will not stifle its appeal if it can raise the required sum. As Lord Justice Brandon said in the York Motors case, cited with approval by Lord Diplock, the fact that the man has no capital of his own doesn't mean that he can't raise any capacity. He may have friends, he may have business associates, he may have relatives, all of whom can help him in his hour of need. It seems that in particular, and as exemplified in the present case, difficult issues have surrounded the ability of a corporate appellant without apparent assets of its own to raise money from its controlling shareholder, or some other person closely associated with it."

And this is the context of what follows.

When, in response to the claim of a corporate appellant that a condition would stifle its appeal the respondent suggests that the appellant can raise the money from its controlling shareholder, the court needs to be cautious. The shareholder's distinct legal personality, which has always to be respected, save where he has sought to abuse the distinction, must remain in the forefront of its analysis. The question should never be "can the shareholder raise the money", the question should always be "can a company raise the money".

If I may respectfully add to that: effectively it's "can the company raise the money including from others including its creditors".

A useful summary of the law is also found in an extract from Zuckerman which we have included in the bundle which you'll find at tab 15. I would draw your attention in particular to paragraph 10.328 to 10.329. Perhaps I could just invite you to read those paragraphs, and if I may also 10.330. **(Pause).**

THE CHAIR: Yes.

MR JOWELL: I would just highlight, if I may, the point made in that final paragraph that does confirm that the recourse to creditors is part of the enquiry; and also the last sentence of 10.328 which notes -- and that derives from the Court of Appeal course law that:

"If the jurisdictional conditions are satisfied, the court would normally order security for costs, unless doing so would stifle a genuine claim."

If we then consider has the --

THE CHAIR: Are you finished with the authorities?

MR JOWELL: Yes.

THE CHAIR: What do you say about Mr Justice Marcus Smith's judgment in tab 11 in the Absolute Living Developments Ltd case?

MR JOWELL: Yes, I was going to come back to in reply. I'm happy to deal with that now.

THE CHAIR: He does deal specifically with the position of the creditors there.

MR JOWELL: Yes, he does. But the context needs to be appreciated. If one goes to page 156 and you see paragraph 30:

"In paragraph 85, Mr Davis set out a list of the parties who might, but who in the event, he says, cannot assist the claimant in funding any order for security". It is appropriate that I read extensively from paragraph 85.

"Having taken steps to investigate the issue, the claimant cannot obtain assistance from a third party who might reasonably be expected to provide assistance if they could. In accordance with standard practice, the liquidator wouldn't be prepared to provide funds to stand as security for costs and nor would her firm. The liquidator has rejected the possibility of approaching the creditors to provide funds to stand as security for the following reasons: (1) the largest creditor by proof of debt lodged,

24 million-odd, is the primary defendant in this claim. The liquidator is not able to approach the entity that purports to be the largest creditor in this liquidation for security for costs".

Pausing there, this point is entirely accepted by the defendant who makes no criticism of the failure to approach DS 7. Going on with paragraph 85.

"The majority of the remaining creditors are the unit buyers. The number of claims that the liquidator has received to date is 514. The liquidator has considered approaching those unit buyers but rejected the idea because they are not to her knowledge wealthy people and are very unlikely to be in a position to provide funds to stand as security in circumstances where they have lost considerable sums on account of the unlawful conduct of the defendants'."

So the position was put in evidence and it was explained that the largest creditor was obviously the defendant itself. So they're not available and all of the others were people who had effectively not -- well, were not wealthy people and had bought small amounts which they lost so were not going to realistically put up funds.

The important point is that he never finds effectively that the claimant in that case discharges its burden -- the burden that is on it -- to establish the fact that creditors are not able to put up funds. And that, I'm afraid, is the key difference with this case, and if I could show you the evidence there is. We don't have a statement from the liquidator. We do have a statement from Mr Bartlett and if I could show you that, it's in the fourth witness statement of Mr Bartlett at tab 6. If you turn to page 521, we see the heading, "Micron's application will have the effect of stifling a genuine claim then paragraph 58, he says:

"In Micron's draft order for security, Micron seeks security in the vast amount of £9.8 million. It seeks an outcome whereby, if the Claimant is not to reach a settlement with Micron at the proposed mediation, it should be barred in continuing

its claim until and unless it produces a further sum in excess of 6.8 million by way of security for costs."

That's not our position. It's simply that we are seeking security for costs in the ordinary way.

Unsurprisingly, the Claimant is not in a position to produce this vast additional sum of money by way of security. It has already ring-fenced the sum of 2 million for the purpose of meeting an adverse costs order in the claim. The sum is held by Osborne Clarke and the Claimant is prepared to provide a solicitor's undertaking in respect of such funds. Then he says at 87:

"I understand from the liquidator that the Claimant does not have significant available funds that could be ring-fenced as security for costs in addition to the 2 million already ring-fenced taking into account the liquidator's obligation."

There's then a reference to the possibility of obtaining ATE insurance in the next paragraph, I don't think I need to read out to you. Then he says in paragraph 89:

"In these circumstances, I consider that requiring the provision of further security as requested would prevent the claim from being pursued."

So there's simply no evidence that the liquidator has asked the creditors or considered the position of the creditors. There's not even any evidence about who the creditors are. One assumes they must be some large banks, but we don't know. But there's just no evidence there at all in order to overcome the burden that is on a Claimant in these circumstances.

What's more, if you look at the next sentence of paragraph 89, Mr Bartlett says:

"Furthermore, the grant of an order requiring the provision of security for a lesser amount but still a significant amount would (1) still risk stifling the claim."

So a lesser amount than the 6.8 million, he doesn't even suggest would stifle the claim. He simply says it would risk stifling the claim. And now of course the claim

against the Part 20 Defendant has been stayed, it will not be necessary for us to obtain security in the amount originally sought.

So we say it's absolutely clear they do not establish that the claim would be stifled in the sense required by the authorities which requires one to consider the ability of the Claimant to obtain the sums from creditors. There's just no evidence about creditors at all.

It's mentioned that in some way we're seeking to apply unfair commercial pressure by this. It's actually the case that the shoe's on the other foot because the real unfair commercial pressure is the fact that a defendant in our position would be forced to effectively say: well, any amount that I expend above 2 million, I'm going to lose anyway, so I'm not going to be able to enforce any costs order. That's an enormously unfair commercial pressure to impose upon a defendant, because it effectively has to go into the litigation knowing that even if it succeeds, it will only be able to recover a fraction of its costs.

If one then turns to the question of the amount of security, we have provided a costs budget. It's in the core bundle at tab 57. I don't think I need to take you to it, but you'll see the amounts we estimate incurring are 5.9 million, so we would now seek on the basis that there's 2 million already there to have security in the amount of 3.9 million.

But the Claimant can't deny that we are -- even if it may say that amount is excessive, it can't deny we are far off because its own assessment of its own costs of these proceedings, which you see in the core at tab 54, are 4.4 to 5 million. So at a bare minimum, it must be that the Defendant should accept that a reasonable assessment of our future costs would not be less than that. There's no reason going forward to suppose that the Defendant should incur any less costs in this action than the Claimant.

THE CHAIR: Where do we assume the Claimant's getting the money from to pay for its own costs?

MR JOWELL: We don't know, but it's a very good question. We assume it has backers indeed, or creditors are backing it. Of course it's also the case that -- I mean, if one thinks about the inherent probabilities, they have -- we know they've entered into a number of settlements with other defendants in relation to this same claim, though we don't know the amounts they received, but they must have been reasonably substantial. It's implausible to suppose that the creditors are simply going to drop this claim just because they have to put up an additional 2 or 3 million. Unless I can assist further, those are our submissions on security.

THE CHAIR: Do you know the amount of the claim in the LCD proceedings?

MR JOWELL: I think -- well, there's the nominal amount and then what is actually realistically sought. But we don't -- I think it's -- my learned friend will be able to answer that better than I can.

THE CHAIR: All right. Thank you.

Submissions by MR BARTLETT

MR BARTLETT: As you appreciate, security is addressed in some detail in section G of my skeleton, including some of the case law, and I won't go through the particular points --

THE CHAIR: No, it's really just this one point, isn't it, whether or not it's incumbent on the -- or whether or not Claimant has gone far enough in establishing that he doesn't have access to any more funds over and above the 2 million ring-fenced amount, with the consequence that an order for security would stifle the claim?

MR BARTLETT: Sir, I would suggest there are a few more points; I accept that is one significant point. The amounts claimed and the budgets put forward both in

terms of incurred costs and future costs also do have to be looked at because actually it's not correct what Mr Jowell said that OTC obviously accepts that the costs will be significantly more than -- the recoverable costs will be significantly more than 2 million. There is also a point, I think, as to the timing of that application.

Mr Jowell on the timing point suggested this is an ideal time to make the application when almost -- he said when the security might almost be run out, when they've already spent over a million of costs. We would submit on the contrary, that is not at all appropriate because of course the lost investment would be huge in terms of the impact of such an order on the Claimant at this stage, and that's why security for costs applications should obviously be made early on, rather than later on in the proceedings.

I would suggest there are a few issues there, and just turning to the cases, turning quickly to Hearst v A.V.E.L.A, which is a point Micron refers to in terms of a suggestion about sort of full and frank evidence. That is at tab 5. Well, I think the point that can be made clearly is this was a case relating to an appeal and the comments made at paragraph 25 are specifically related to security in respect of an appellant. I would submit that is a different scenario. There is obviously a right -- there is a right and really an ECHR right in terms of bringing the right to a fair trial, but an appeal is always discretionary and so it isn't the right comparison there to suggest that the considerations are the same both in terms of that right to pursue a claim and that right to pursue an appeal.

I think that is clear from paragraph 25 of AVELA, and it's also worth on that case noting at paragraph 26 that that was a case where the facts were very different. You had companies who plainly had individuals behind them who could finance but were choosing not to finance. That's paragraph 26.

The point then as to thCommercial Buyers, a case you have been taken to already

I think, we would submit it's clear there that obviously there is this interest in enabling follow-on claims to be brought. Mr Jowell obviously suggests at times that the claim is purely speculative, which it plainly isn't, but then he does accept that he can't prejudge issues as to that. But, you know, the purpose here is plainly to facilitate the bringing of claims rather than to put obstacles in the way and that's particularly relevant when you think of an insolvent Claimant providing 2 million already by way of security. This is not in any way a case where a liquidator is acting inappropriately, recklessly et cetera. This is putting down very significant amounts by way of security.

THE CHAIR: Where did they get the 2 million?

MR BARTLETT: So if I could come on to the position of -- obviously I will come onto the position of the Claimant in terms of what they can say about their finances and why they have been quite brief in what they have said and the point about whether they have funding and/or other settlements. So I will address that point.

I would just say you asked my learned friend about the Absolute Living case which we have referred to in the skeletons and what I would emphasise there is it is talking about the public interest there of ensuring -- well, of allowing companies in liquidation to bring claims and the focus very much should be on the company not the creditors. So that's paragraph 22. That's quite clear. The question is can the company raise the money and we will come on to that factual point.

Paragraph 35 emphasised -- no, I'll move on from that point. In general the public interest of the creditors is one of the points that is key from here.

I think many of the quotes that my learned friend took you to as to companies and their backers were not actually in an insolvency context. I think almost all of those comments were in the context of a company which plainly has backers, so the shareholders choose to put money in. But when you're talking about an insolvent

company, you're talking about it in very different situation, practical situation. Before coming on to the specifics of OTC's situation, in general you might have a whole range of creditors. The idea that one creditor or it's easy simply to raise funds from creditors because they may have an ultimate interest in the proceeds is by far from straightforward because of course, one, in a situation like this it's events 20 years ago, they have very little focus on these sort of proceedings. But the proceeds will of course be spread around a large number of creditors. So it's by no means appropriate to compare creditors with a shareholder. For example, a sole shareholder of a company is in a completely different position from creditors.

THE CHAIR: Well, I don't know how much creditors there are?

MR BARTLETT: No. So in this situation -- I mean, there isn't evidence as to the number of creditors. We may on instructions be able to provide some further information on that.

So as to the position of OTC, and it is in evidence that it is not funding, it does not have a funder behind it. So it has funded the 2 million. It's explained in the witness statement that it first took out an ATE policy. So if you turn to Bartlett 4 -- in fact I will just ask -- I will just find exactly where it is.

THE CHAIR: Which tab number?

MR BARTLETT: Sorry, it's tab 6 of bundle 2. So we'll find the precise reference but OTC had ATE insurance and this was explained to my client, which was purchased on the fully deferred and contingent basis, so it paid nothing upfront. That results in a much higher cost. It then, when it obtained some funds in a settlement, used a pot of money to in a sense end the policy and just used that money as security instead. It may be in fact that it's in a recent letter. Yes, we'll just check. It may be one of the most recent letters from Osborne Clarke. We'll check.

But it used that money to fund that, so it then ceased the ATE insurance. It is the

case that obviously it has received some settlement proceeds, because it has settled claims against various defendants in these proceedings, there were six or so. So it has settled some of those proceedings and it is those funds that have enabled it to pursue litigation and incur its costs and obviously it has to -- but it doesn't have any external funder to support those costs and so the liquidator has said, and there's, I submit, no reason to doubt it, that it couldn't stump up these sums and continue the claim.

Now, Mr Jowell says, oh well, there should be evidence as to going and talking to creditors and all the efforts it takes to really substantiate that. But when one thinks what would it have to do. At the moment the application is for another 6.8 million. Now, the liquidator has said, you know, categorically that is not possible. Now Mr Jowell is probably saying, well, it could be any amount in between but obviously the liquidator couldn't go and work out whether he might be able to get some small additional amount or where the cut off would be. But what he's said is any significant amount would risk stifling the claim. But, you know, what he has answered clearly is, well, 6.8 million, there's absolutely no way that would be feasible and what the evidence explains is, you know, getting further insurance -- so Micron has suggested well, you could use your money to go and buy insurance and that's addressed in Bartlett 4.

To explain -- it's paragraph 88, so it's tab 6, paragraph 88. Some of the details of the practicalities of ATE insurance are explained there, when this is a real cost. If it's spent its million pounds on buying a policy for 8 million, we would never get that money back and, even if it won, it would be a sunk cost. It couldn't recover it from Micron unless Micron were willing to undertake to cover that cost in the event that it was unnecessary in the long run.

So the evidence addresses the possibilities of ATE insurance and explains the

significant costs involved and admittedly it addresses the high watermark really of their claim, which is another 6.8 million, and I think one can see fairly -- I mean, it's fairly self evident that no one would lend 6.8 million to put into a pot of money in circumstances where one is dealing with claims which might be, you know, not vast claims but somewhere in the region of 10 to 15 million.

So there's a limit to what the Claimant and the liquidator would really provide now in terms of detailed information, because if it said what funds does it have available, it would then have to say, well, I've allocated, you know, that from my legal costs and, you know, X has been paid out. It would be very hard to give a full complete picture of what is obviously complicated, because they've got one claim which they've pretty well completed, one claim which they have to incur costs on. So it's very difficult for the liquidator to provide something very granular without providing a lot of information about confidential settlements, for example. So it has been ruled, you know, that those amounts are confidential and shouldn't be disclosed in other proceedings.

So, you know, the liquidator is stuck in a difficult position. He can't say I received X from this defendant and I used this money to do that, and that seems to be what Mr Jowell is saying, you know, what did you do with your settlement monies. What the liquidator has said, and there's no reason to doubt it, is he would not be able to provide funds now for the amount, if that would stifle the claim. But absent -- well, it's very difficult to see how the liquidator could actually give precise information which isn't taking on extensive privileged information which obviously can't be disclosed. That is the difficulty because, you know, all its finances are linked to this litigation and any related claims.

THE CHAIR: I mean, can I assume that the 2 million and the money that's being used to pay for the Claimant's own costs there are derived from settlement amounts

then?

MR BARTLETT: Yes. That is the case and I think it's fair to say that is confirmed in one of Osborne Clarke's letters. So it is reasonable to infer, and it has been stated, that the Claimant has received the proceeds in settlement funds but it obviously has a number of financial commitments, has or has had financial commitment, and, you know, in the current financial position of the Claimant, and it can't say exactly what its future financial position will be, because it might, for example, achieve funds in the LCD claim. So --

THE CHAIR: What is the amount of that claim?

MR BARTLETT: As with these claims, it very much depends on what the overcharge comes out at. But it could vary -- well, on the Defendant's case it is I think nil, because the overcharge was nil. On the Claimant's case it could exceed 30 million.

So it's somewhere in that range. But that's Granville and the Claimant, OTC. OTC's portion of that is a small proportion. So that is only probably circa 10 per cent of that. So it's a small part.

As I say, the liquidator is only able to in a sense make a statement based on the current position now, taking into account liabilities et cetera, and that's the basis of on which the evidence was put in. But providing a forecast would be impossible because we don't know the outcome of the LCD proceedings and providing a historical breakdown of where it's received its money would involve extensive privileged information.

So there is a real practical difficulty in providing, you know, granular detail on the position.

THE CHAIR: Are there any other settlement amounts in the offing? I mean, is --

MR BARTLETT: I don't think there's anything -- so at present there is the LCD claim

which I'm assuming we will see the judgment in the new year and there is this claim. Those are the only active claims going on here. So it seems unlikely -- well, subject to the parties in these claims, no, there aren't other --

THE CHAIR: I mean, supposing, taking the Claimant's figures in the LCD case, OT Computers was to receive £3 million: how would that affect OTC's ability to continue with the claim?

MR BARTLETT: Well, if OTC receives significant payment from a judgment in LCD, obviously that will be money it receives. OTC would then probably provide information as to whether that then enabled it to have free cash to allocate to this. I couldn't, without instructions and without -- you know, confirm the precise position now. But it is true that it could come into funds as a result of any judgment. It's also possible that any judgment might be appealed, you know, and then they might say there should be a stay of enforcement because it's insolvent. Who knows? So it's just very difficult to predict precisely where we will be.

But it is for that reason, of course, that practical reason, that the liquidator from the earlier on took the sensible and cautious step of putting aside what it considered and OTC submit is a reasonable significant sum of £2 million and that has to be considered in the context that recoverable sums are often significantly less than the amount spent by defendants or any party and that's particularly the case if one chooses to instruct the very largest firms on this sort of matter. It is inevitable that there will be a big gap between what one pays to one's lawyers and what might be recoverable and I mean that goes to the point as to the amounts of their budget and we can address that. But just by applying guideline rates, the guidelines rates that are set out by the court's guide for summary assessment, just by applying those rates cuts their costs very significantly. I think the solicitor costs for incurred costs go from something like 950 down to somewhere closer to half a million.

So, you know, there is going to be a very big gap between what might be recoverable and when we're talking about security, we have to be talking about what's reasonably likely to be recoverable and think about the whole question of where is the balance, this is a balancing act, what's in the interests of justice here, and it's not all about saying there must be absolute certainty that Micron, the Defendant, is paid all its recoverable costs. That isn't the exercise. There's always some uncertainty, but it's a balancing exercise here with the interests of creditors, the interests of justice, the right to bring a claim, and, should that be stifled in this situation where they have acted eminently reasonably in putting aside this money.

So we would say, yes, as to OTC's disclosure, it has done what it can reasonably. This is not a situation, like a company which simply refuses to say what money the sole shareholder has and it's just not that sort of situation. There were very genuine reasons why it's not possible without, you know, breaching numerous confidences and dealing with privileged issues to explain the precise financial position. But the liquidator has said that there is absolutely no way it would be able to produce the sort of security that's requested and that is, you know, a liquidator with -- a professional organisation with extensive experience of bringing claims. So this isn't the case of sort of cowboys bringing a claim in an ill advised basis and then getting into trouble.

As has been mentioned in the evidence, you know, the 2 million was a figure that was also the security provided throughout the LCD claim, well, 2.3, right up to trial and the reference to the law firms was not to try to compare and contrast international firms. Is was just to say this was an eminent legal team dealing on the other side. So, again it's comparable.

So we would say there is no reason to second guess what evidence has been given on behalf of the liquidator because there are genuine reasons why they couldn't

provide much more information in what is actually a very complicated situation.

But as to the amounts claimed, I mean, obviously it seems part of it, the Samsung part of it, would have fallen away, it appears; but there are detailed comments on the future budget in the Precedent R form that's been provided by OTC and it's worth saying as a general point, in order to request security of this amount, one needs to provide pretty good evidence of why one thinks one's going to incur these costs, otherwise this process becomes a farce. One can just turn up with here's an estimate, some very high figure. So there needs to be really good, clear evidence of what those costs are likely to be. But what's been produced is a costs budget with very large figures and very little information, and the same goes to the incurred costs. They raise numerous questions and they simply do not form a satisfactory basis for making any order as to the amount and in fact Mr Jowell's side, Micron, accepts that the costs budget is not fit for purpose because it was all based on not understanding the directions that might be given et cetera. So the idea that one could use that as a basis for estimating, you know, future costs we would say is completely -- well, it's not satisfactory evidence and OTC has provided detailed comments on what it thinks an appropriate figure is and it's worth noting that its offered costs in the Precedent R amount actually to circa 2 million, I think, and that's with applying guideline rates and then looking at sensible reductions in terms of hours, in terms of, you know, how many fee earners attend trial et cetera.

So the idea that 2 million is not a relevant figure is not at all right. There are very good reasons set out in the Precedent R why estimated costs going forward should be far, far lower and there's also evidence in Bartlett 4 about the costs incurred to date and why those are themselves far higher than one would expect and really, on assessment, one would accept far, far lower figures and that's set out at paragraph 99 of Bartlett 4.

But in some cases, just in terms of disbursements, there are just terribly high figures. So Bartlett 4, paragraph 100, refers to the fact that Micron's claiming £546,000 of incurred disbursements, with no break down. So they're seeking security for costs which will have a significant financial impact on the Claimant on the basis of an assertion that £546,000 of disbursements. What on earth have they been incurred on to date? You know, reasonable fees for CMCs and defence, if you have to think what would be allowable on assessment, are going to be relatively modest, especially with the comments as to the value of the claim. What has been done in terms of disclosure, which again is a modest exercise, you know, there is just very little reason to believe that any costs like anywhere near that would be referable and no response has been provided to those comments and there's no break down. So on the incurred costs, the solicitor costs come down to 546,000 just once you've applied guideline rates, not even questioning their time. Just on guideline rates.

So the idea that at this stage what Mr Jowell says is an early stage in proceedings, the "oh, we've now run up to a million and a half of costs", or something, it's the idea that that's reflective of what might be recoverable, you know, I would submit that there is just no way at all that on assessment one would be recovering one and a half million pounds of costs before you've done a proper disclosure exercise.

THE CHAIR: I think Mr Jowell did suggest that -- I appreciate that the Claimant's costs in this sort of claim might well be a bit higher but I think it was suggested that the Claimant's own estimate of its total costs was higher than the 2 million.

MR BARTLETT: Yes. There are a couple of points. I think Mr Jowell accepts that they are high. There is a point as to the quality of the information they've provided, both in respect of incurred costs and future costs. We would submit the quality of the information is far, far too limited. When you're making a decision which is very significant in terms of financial impact, because, as the evidence explains, for

example, if they were to take out an after the event insurance policy, assuming an insurer was happy to provide a policy for 6 million, and it would go to trial, that is a lost cost of let's say 50 per cent of that money, 3 million. So these are very significant decisions that are being made, based on just, you know, a very broad brush summary of costs, no proper break down, no real way of testing those, and the OTC has tested both the future costs and the past costs but there has been no -- you know, that hasn't been resolved. But on OTC's position, you know, the reasonable costs going forward are closer to say a bit over 2 million and the past costs are -- you know, the recoverable would be much, much lower, probably closer to 5 or six hundred thousand.

So you'd then I suppose raise the question of the comparison with OTC's costs and, as to that, in terms of incurred costs, there are a number of points which are addressed in Bartlett 4 in the witness statement --

THE CHAIR: Well, don't worry. If they're addressed I'll --

MR BARTLETT: Yes. I mean, in very headline terms you have they've carried out a full disclosure exercise, standard disclosure exercise, which is very extensive. They have had to deal with multiple defendants. They've been dealing with four/five defendants. They have had to investigate a claim, bring a claim, from knowing nothing. So there are a lot of reasons why incurred costs are very difficult and going forward to trial there are significant differences between a claimant and a defendant in terms of the work that has to be done, particularly in preparing for trial a lot more comes down to the claimant.

So we would submit that in fact a lot of the adjustments that have been made in the Precedent R, the proposals, you know, are based on, for example, the hours that have been put forward by the Claimant and expert fees have been allowed the same as the Claimant. So this isn't an exercise where OTC has put forward artificial

comments on their Precedent R. It's really trying to align it with that.

So on that basis, sir, I won't take you to the detail of Precedent R now, because that might be too much for anyone at 4.20.

THE CHAIR: Yes. Do you have anything else to say? Thank you very much, Mr Bartlett.

MR JOWELL: Very quickly I'll rattle through the points. First my learned friend referred to the Hearst judgment and then he said that that doesn't apply, the burden of full and frank evidence doesn't apply. But it does apply and certainly there's good authority that there's an obligation of full disclosure actually on a claimant in these situations if they wish to assert that they would be stifled and indeed what is said in the Hearst judgment is he notes this:

"If I were to believe that the making of an order for the giving security would have the effect of stifling the appeal, I would be concerned as to the justice of making such an order. The problem with that consideration is that no effort has been made to show that the making of an order for the giving of security would in fact have such a stifling effect. It has certainly been asserted that it will have that effect, but it's now established that an appellant has to prove it."

And then he quotes from Keary, which is the leading case.

Now, the difficulty that my learned friend has is there's simply a gigantic hole in his evidence because he simply does not address the fact that there is no evidence of the Claimant's financial position, still less that of its backers and creditors, and he can't say that somehow he's been taken by surprise of this point because it is a point that we made in our original application. Just for your note, it's in Mr Hitchin's fourth witness statement, which is at tab 13 at page 776 at page 55, where he makes precisely that point. He says:

"No evidence of the Claimant's financial position or that of its backers or creditors is

provided in Osborne Clarke's 3 November 2023 letter."

But did they come back with that evidence? No, they came back with no evidence. They came back merely with a second-hand assertion from the liquidator.

What's particularly notable is of course that, although he refers to the evidence on ATE insurance and he says, well, we would lose effectively that investment, but he doesn't suggest that security can't be obtained by way of ATE for a relatively modest amount. He says £1 million in the evidence would obtain £6.8 million worth of ATE insurance. Well, if we're now talking about half that figure, then one assumes that half a million pounds would do so and it's simply implausible to suggest they won't be able to stump up half a million pounds to buy adequate ATE insurance if that's necessary to continue the proceedings.

As regards the amount, we don't accept for one minute that going forward the costs of the Claimant will be any greater than the costs of the Defendant. This is not a case now where you're going to have multiple defendants who can share costs or share experts. If anything, the remaining costs of the Defendant are going to be higher than those of the Claimant because the Claimant has effectively completed its disclosure whereas we have still got quite a bit of disclosure to do. Quite how much will depend upon your other orders, but certainly, even on what we've volunteered to do, we have some considerable further and expensive disclosure to do. So there's every reason to suppose in fact, if anything, that the costs of the Defendant will exceed those of the Claimant in the current case.

Those are my additional points. Thank you.

THE CHAIR: Thank you.

So that just leaves a few loose ends, does it not, in terms of the -- well, there is the application for removal of certain documents from within the confidentiality ring. There's directions for mediation and the pre-trial timetable. I'm not sure quite to what

extent those are hotly disputed.

MR JOWELL: I think there's perhaps no dispute of principle on the need or the desirability of a stay for mediation. There is some dispute I think on possibly the attendance of the Part 20 Defendant. We think it's very important that the Part 20 Defendant should be part of that process if the process is to have reasonable prospects of success. Of course we accept that one can't force anyone ultimately to mediate. They can always walk away. But we think it would be regrettable if they weren't included.

We also think that there's plenty of time within the timetable to allow for the three months stay that we have proposed rather than simply one month, which the Claimant has proposed. The trial is not until March/April 2025 and on our directions we've comfortably managed to get to trial.

So we respectfully recommend our directions but we're of course in your hands.

THE CHAIR: Yes.

MR BARTLETT: There is the issue, which I can take very briefly, as to the confidentiality ring. There's really just one point if I could address on that.

I think the principles as to why one should use confidentiality rings are I think well understood. Most documents have been agreed. The documents that haven't been agreed to be removed are basically the sales data that Micron has provided and it's a very simple point. This is not commercially sensitive data that could be used by our client for some improper purpose, which really is the question here.

There is already obviously a duty not to use these documents for any purposes except in the proceedings, in the same way as any other disclosure document, and the idea that 20-year old data could be commercially sensitive vis a vis a claimant who is, you know, ultimately represented by Grant Thornton, not even in the same industry, we say there's just no basis for that at all our concern is that this will just --

it's an important building block that will underpin everything in the proceedings going forward with the experts and at trial and so, if that building block is within the confidentiality ring, we're just going to create a huge amount of material that might or might not also be within the confidentiality ring for no good reason. Our experience from other proceedings is this just adds unfortunately significant cost to it, because everything has to be sort of marked confidential and we have to work out what needs to be redacted et cetera. But we say there's just no proper basis for saying -- we accept it may possibly be confidential, but it's not commercially sensitive in any way.

MR JOWELL: We've sought to accommodate all of the requests in relation to confidentiality, but I'm afraid we hit dead lock when it comes to our sales data because in those circumstances we do have obligations of confidence under our contractual arrangements with our customers or at least with many of them, and so we're simply not in a position to unilaterally waive confidentiality in the specific sales data, you know, the amount that was charged to a particular customer on a particular occasion.

We don't believe that this will cause any major difficulties because when the experts refer to this data they're not going to be referring to specific customer invoices or amounts charged, they'll be referring to it on aggregated basis and so we would simply maintain the position that this should remain in the confidentiality ring for now. If problems emerge, future applications can be made.

THE CHAIR: All right. Well I -- yes.

MS LUKACOVA: I do apologise. I assumed that Mr Bartlett was about to comment on mediation. So just quickly on that.

What I would respectfully propose is that the only direction that ought to be given is to simply stay the Part 20 claim and leave it at that. I did also have a comment about the confidentiality ring insofar as it concerns OTC's draft order. Now SSEL is content

to consider requests for documents originating from it in the SSEL case file. The only problem with the wording of the draft order -- I'm not sure whether you have it in front of you.

THE CHAIR: I do, yes.

MS LUKACOVA: It's on page 4, paragraph 6.1C. It's the wording in brackets. So where it says "any documents in the SSEL case file that originate from the Defendant or the Part 20 Defendant". So far so good, but then I would submit that the wording in brackets needs to come out on the basis that what paragraph 6.2 then does is to expect SSEL to be considering these requests and it can't be doing that on behalf of other companies essentially.

So it can only be considering these requests and handling these requests on its own behalf and therefore the wording in brackets in my submission needs to come out.

THE CHAIR: Thank you. I've noted that.

MR BARTLETT: Just as to directions, the Claimant has no objection to mediation. The Claimant does seek directions to trial. As we have a trial date it's important that we have deadlines for any disclosure that is ordered, we obviously don't yet know the form of that order, and for witness statements and expert evidence. But it may be that that timetable is better considered once judgment is given on the other points.

THE CHAIR: Yes. I mean, how long do you say should be allowed for mediation?

MR BARTLETT: We say one month. We say till the end of this year. If the --

THE CHAIR: Well, that's clearly not enough given that we're running to the holiday season.

MR BARTLETT: Well, if it's to be a formal mediation, then possibly January. I mean, our concern is just it's just about slip -- you know, things pushing back too far. But I mean, January would be acceptable.

THE CHAIR: Can you remind me, a trial date has been fixed, has it?

MR BARTLETT: Yes, I think the trial window has been given and I think it's April. Is it April? I think it may have been pushed back to April 2025.

THE CHAIR: April 25. All right.

Very good. Anything else? Thank you very much.

(4.32 pm)

(Hearing concluded)