

1 This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be
2 placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to
3 be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive
4 record.

5 **IN THE COMPETITION**

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

6 **APPEAL**

7 **TRIBUNAL**

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

12 Tuesday 17th September 2024

14 Before:

15
16 Justin Turner KC
17 Sir Iain McMillan CBE FRSE DL
18 Professor Anthony Neuberger

19
20 (Sitting as a Tribunal in England and Wales)

22 BETWEEN:

25 **Claimants**

26 **PSA Automobiles SA & Others**

27 **V**

28 **Defendants**

29
30 **Autoliv AB & Others**

31
32
33
34 **A P P E A R A N C E S**

35
36
37 Colin West KC & Sean Butler (Instructed by Hausfeld & Co. LLP) on behalf of the
38 Claimants.

39
40 David Scannell KC & Derek Spitz (Instructed by White & Case LLP) on behalf of the
41 First to Fifth Defendants.

42 Sarah Ford KC & Prof. David Bailey (Instructed by Macfarlanes LLP) on behalf of the
43 Sixth to Tenth Defendants.

44
45
46
47 Digital Transcription by Epiq Europe Ltd
48 Lower Ground 46 Chancery Lane WC2A 1JE

Tuesday, 17th September 2024

(10.30 am)

MR TURNER: Some of you are joining us via live stream on our website. I must start with the customary warning. 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 a breach of that provision is punishable as a contempt of court.

Just give me a second, please. Right. Who is starting?

MR WEST: Good morning, members of the Tribunal. If I can just do some introductions because there are some new faces before you today in this case. My name is Colin West and I appear with Sean Butler for the Claimants. Autoliv are now represented by Mr David Scannell KC and Mr Derek Spitz, and ZF/TRW, as before, are represented by Ms Sarah Ford KC and Professor David Bailey.

MR TURNER: Mr Scannell, are you being present at trial?

MR SCANNELL: Yes, I will be representing at the trial.

MR TURNER: I am grateful. Thank you.

MR WEST: This is the pre-trial review in this matter for the trial due to commence on 1st October. The Tribunal should have had skeletons from the Claimants and from the Autoliv and ZF/TRW Defendants respectively. There is an agenda for the PTR at tab 1 of the PTR bundle and subject to the Tribunal, rather unimaginatively, I propose just to go through the agenda. I should say that some of these agenda items do relate to issues of substance and it is really a matter for the Tribunal whether it wishes to hear any arguments on these points of substance which are touched upon in the skeleton arguments. In my submission they are really points for trial, but we are in the Tribunal's hands about that.

1 **MR TURNER:** So list of issues first. Is that right?

2 **MR WEST:** List of issues first.

3 **MR TURNER:** I have an amended version.

4 **MR WEST:** I am glad to say that that has now been agreed I think just this morning.

5 So I have copies of the agreed version.

6 **MR TURNER:** Is that the same as the one I have in colour? Perhaps hand it up just

7 to be on the safe side.

8 **MR WEST:** I think the coloured amendments have now gone into mine.

9 (Handed)

10 The changes are not of substance. It was just the changes to parties' names and one

11 editorial amendment.

12 **MR TURNER:** Yes. So we had one issue which arose from this and that's really

13 whether it is going to be efficient to deal with financing losses prior to a determination –

14 first as to whether the claim succeeds, of course and then quantum because there

15 may be an inter-relationship between the size and the way financing losses are

16 approached. Is there any reason why that needs to be heard in advance of our

17 judgment, why it can't be consequential?

18 **MR WEST:** Well, it would require calling witnesses, which would be unusual for

19 a consequential order hearing. There are three witnesses, one for each of the

20 Claimant OEMs to address the evidence on the financing losses. So in my

21 submission – this is a new point. I wasn't aware of this point.

22 **MR TURNER:** I am sorry we have produced it.

23 **MR WEST:** Ordinarily if it requires witnesses, they would be heard at the trial. I am

24 not aware that there –

25 **MR TURNER:** How long is cross-examination on financing losses going to take?

26 **MR WEST:** I think the cross-examination of the 'Claimants' witnesses as a whole is

1 two and a half days. We have provided at the moment for half of a day for all of the
2 financing evidence in total.

3 **MR TURNER:** That's half a day of cross-examination.

4 **MR WEST:** Yes, for the three witnesses. I am not aware that their evidence is that
5 the costs of financing depend on the size of the overcharge. They simply give
6 evidence as to the overall costs of financing.

7 **MR TURNER:** Maybe but normally if one was considering what interest rate should
8 apply or how to approach that sort of determination after trial, it would just be done on
9 witness statement evidence. It wouldn't normally be necessary to have
10 cross-examination. Why is it necessary to have cross-examination in this case?

11 **MR WEST:** That's really a question for my friends, because these are my witnesses.
12 I don't know if they wish to address your Honour.

13 **MR TURNER:** Sorry to spring this on you, Mr Scannell. You may need to think about
14 it, but –

15 **MR SCANNELL:** I am grateful to you, Mr Chairman, for the advance notice of the
16 point. We do intend to cross-examine the financing losses witnesses and we say that
17 it is important, because we say that the factual evidence which has been put forward
18 in relation to interest rates doesn't actually correspond to the legal requirements to
19 prove financing losses. So we do have to cross-examine the witnesses.

20 Mr Chairman, you are quite right to expect that what those witnesses would say is that
21 the interest rate that the company that the witness worked for at the relevant time was
22 subject to a particular figure at a particular time, but we don't have that clear indication
23 from the witnesses. We are going to have to cross-examine them to try to get to the
24 truth of what the interest rates were from time to time.

25 **MR TURNER:** I am sorry, Mr Scannell. My fault. Just remind me who the witnesses
26 are in relation to this issue.

1 **MR SCANNELL:** We have Mr Bertino for Fiat, Mr Laxenaire for PSA and Ms Teusen-
2 Krapp for Vauxhall / Opel.

3 **MR TURNER:** So they are witnesses of fact.

4 **MR SCANNELL:** They are witnesses of fact. Yes.

5 **MR TURNER:** And then –

6 **MR SCANNELL:** An important further element to their evidence is working out
7 whether or not those companies that they worked for were actually subject to the
8 payment of interest at particular times. So some of the evidence, as we will show the
9 Tribunal, shows that these companies were, in fact, debt free at particular times. So
10 we need to establish with them what those times were, because we don't at all accept
11 that they have any basis for claiming financing losses at times when they didn't actually
12 have to pay interest on any debt

13 **MR TURNER:** Might the analysis be different if the award or judgment says losses
14 were £100,000 or £1,000,000,000. Would that be a factor that impacts how one
15 approaches those financing losses?

16 **MR SCANNELL:** The same principles would apply irrespective of the
17 causation -- irrespective of quantum, if they want to claim financing losses over a nine
18 year period of the claim and then going all the way forward to the present day, they
19 are going to have to show that they actually had interest to pay in particular years and
20 they are going to have to explain what the rates of interest that their companies were
21 subject to actually were.

22 **MR TURNER:** Doesn't that depend on the sum to some extent?

23 **MR SCANNELL:** Certainly, as to the scale of the answer that emerges at the other
24 end, yes, but the principles that apply are the same whether the quantum is large or
25 small.

26 **MR TURNER:** Principles. Right. Just elaborate. I mean, that is not normally the case

1 in financing that the principles are the same whether large or small.

2 **MR SCANNELL:** I want to be sure I am being absolutely fair to you, Mr Chairman,
3 and that I understand your point correctly. Is your point, for example, if one were
4 dealing with a very small overcharge?

5 **MR TURNER:** Yes.

6 **MR SCANNELL:** Then it wouldn't necessarily be the case that that would have any
7 effect at all on the borrowings of the company.

8 **MR TURNER:** Or not as much as if it was several hundred millions, say.

9 **MR SCANNELL:** In short, yes. That is a fair point to make, but, of course, one is not
10 dealing in the context of financing losses with a hypothesis that the company has all
11 of the money that it says represents the totality of the overcharge at one time. So one
12 doesn't on the counterfactual imagine that Vauxhall / Opel has, say, an extra
13 £150 million that it receives, rather on the counterfactual one takes it that there is no
14 overcharge and so the cost savings are greater for the company year on year but the
15 amount of that cost saving is not going to be a huge sum. It is going to be a relatively
16 modest sum in comparison to the overall quantum of the claim.

17 **MR TURNER:** One option would be to cross-examine but defer argument, to
18 cross-examine the witnesses. If the witnesses have been scheduled, one option
19 would be to go ahead to cross-examination if it is going to be limited to half a day. Is
20 that right, Mr Scannell, it will be limited to half a day?

21 **MR SCANNELL:** We absolutely do want and need to cross-examine those witnesses.
22 We are down, as it stands for half a day on 7th October to cross-examine them.

23 **MR TURNER:** Yes. Then we could – the Tribunal could decide to hear further
24 argument later if needed, to actually defer the argument. At least the witnesses then
25 have been cross-examined.

26 **MR SCANNELL:** Yes, although to be clear to the members of the Tribunal, when

1 I open this case for Autoliv, I will be making the submissions that we wish to make in
2 relation to financing losses so that each of you will know where I am coming from when
3 I am cross-examining those witnesses.

4 **MR TURNER:** Well, you can make them briefly, yes. We will consider that. Thank
5 you.

6 Mr West, did you have anything to add, or Ms Ford?

7 **MR WEST:** From our perspective, deferring argument is certainly preferable to
8 deferring the cross-examination because the last thing we want to do is all have to
9 come back on another occasion for a separate mini-trial on this point.

10 Just to pick up on one of Mr Scannell's points, I don't accept that simply because
11 a Claimant is debt free it cannot claim financing costs.

12 **MR TURNER:** We don't have to get into the weeds on that. Do you have anything to
13 add, Ms Ford?

14 **MS FORD:** I adopt Mr Scannell's submission on that particular point. I would simply
15 add that this also feeds into the cross-examination of Mr Hughes, the Claimants'
16 economic expert, because he has done the exercise of quantifying. So it may be that
17 even once one has heard the cross-examination of the factual witnesses, there are
18 still matters that need to be explored with Mr Hughes as well.

19 **MR TURNER:** Yes.

20 **MR SCANNELL:** We absolutely anticipate that there will have to be
21 cross-examination, both of the factual witnesses on financing losses and Mr Hughes
22 insofar as he deals with financing losses.

23 **MR TURNER:** Right. Okay. Very good. Can we just park that for now and go on to
24 the next item? So the relevance of the OSS Decisions -- sorry. Perhaps my question
25 is deliberately not specific, but I am grateful for the submissions on that, but the real
26 point of the question was the extent to which it is open to this court to draw inferences

1 from the OSS1 and OSS2 Decisions. I think, if I can find the paragraph numbers,
2 I think you both raised potential inferences at least -- was it paragraph 32 in the
3 Claimants' skeleton and 43(a) of the Autoliv Defendants' skeleton? You have
4 indicated that you will be inviting the court to draw inferences on what went on in
5 the -- I have now lost all my notes. It is paragraph 32 of your skeleton and I think was
6 it 45(a) of the First to Fifth Defendants' skeleton, but I wasn't sure whether there was
7 any relevant law as to the extent to which we can have regard to similar factual
8 evidence and whether it is legitimate to draw inferences from what has gone on before.

9 **MR WEST:** For context, given that where there is a binding recital and it is accepted
10 to be binding and there is not a dispute about binding recitals, that is taken to be
11 a finding of fact and in the ordinary way in my submission it is open to the parties to
12 make submissions about what inferences fall to be drawn from that factual finding, but
13 those are really points for trial in my submission. I am not aware of any specific
14 authority.

15 **MR TURNER:** Can we just have a look at paragraph 45(a) of the First to Fifth
16 Defendants' skeleton? It says:

17 "As Autoliv understands the Claimants' case, they contend that the OSS decisions are
18 relevant in two respects: (a) First, they appear to contend that the fact that Autoliv
19 admitted the infringements in those Decisions makes it more rather than less plausible
20 to infer that Autoliv and ZF together participated in a single cartel (or several cartels)
21 which targeted OEMs other than the OEMs named in those Decisions."

22 That's really the point, and I understand from your skeleton argument that is part of
23 your case.

24 **MR WEST:** Yes. Clearly where one has Defendants which are admitted cartelists,
25 that is in my submission a point in favour of the Claimants' case, which is that they
26 were also cartels in relation to the supply to Claimants.

1 **MR TURNER:** What we will need addressing on is whether that's something we are
2 entitled to take into account as a matter of evidence or law or however you wish to put
3 it. I am not asking you to answer that now. Mr Scannell, do you understand that?
4 This is --

5 **MR SCANNELL:** I do understand the question, number one. Number two, in principle
6 we have no difficulty with the notion that the Tribunal is entitled to draw inferences
7 from any fact before it, and I don't either disagree with what my learned friend has just
8 said in relation to a binding recital in a Commission decision. That binding recital is
9 a fact in the case and the Tribunal can draw inferences from the fact that that is
10 a finding that the Commission has made. We fundamentally disagree.

11 **MR TURNER:** That's not an inference. That's a finding the Commission has made.

12 **MR SCANNELL:** It is both, with respect. So the Tribunal can note that the
13 Commission has made a finding. So a fact has been admitted and that's a finding the
14 Commission has made.

15 **MR TURNER:** Yes, of course.

16 **MR SCANNELL:** From the fact that the Commission has found that fact one can draw
17 inferences as to other conduct. Where we disagree with the Claimants is as to the
18 inferences that are properly available from those facts. So he would say that the fact
19 that there is admitted cartelism makes it more, not less, likely that the same companies
20 participated in different cartels, which they did not admit to the Claimants, despite the
21 existence of a leniency regime which forces them to be full and frank to the
22 Commission and despite the fact that the Commission found that they were. We
23 fundamentally disagree with that. So where the disagreement lies is in the available
24 inferences that can be drawn.

25 **MR TURNER:** I understand. I am not asking you to answer all this today. So if you
26 need to think about it. The point may be made, as I understand it, look, you have

1 shown a pattern of behaviour of being cartelists. So when you come to another OEM
2 and necessarily in a case like this with limited evidence available to the Claimants, the
3 Claimants can invite this Tribunal to say one of the things you have to put into the
4 scales when considering this alleged cartel behaviour is the fact that these are known
5 cartelists. You are not taking, as I understand, an evidential legal objection to that
6 inference being drawn.

7 **MR SCANNELL:** No. I don't think and I don't say that it would be an error of law on
8 the part of the Tribunal to draw such inferences as it considers to be available from
9 the facts before it, but even as to that inference there are, of course, many other things
10 to put into this exactl same scale.

11 **MR TURNER:** I understand that.

12 **MR SCANNELL:** Both as a matter of fact and as a matter of cost.

13 **MR TURNER:** It may be there is no inference to draw then. That is understood.

14 **MR WEST:** May I reply? The inference is not necessarily the same as one of the
15 previous convictions in other matters, because we say this is one and the same matter.
16 So it is not, for example--

17 **MR TURNER:** I understand. I am not trying to fully ventilate this issue. Whether there
18 was going to be a legal objection there I think is helpful to know at this stage.

19 So is there anything-- so we have an agreed-- so there is nothing else I think on the
20 agreed list of issues and we have done the OSS 1 and OSS 2 Decisions. Where do
21 we go to next?

22 **MR WEST:** The witnesses.

23 **MR TURNER:** Yes. You presumably received a letter saying we had a difficulty with
24 availability on --

25 **MR WEST:** So we have not yet had an opportunity to discuss a revised timetable with
26 the Defendants, but we will propose revised timings for the witnesses and maintaining

1 essentially the same principle as previously, which is procurement witnesses and then
2 witnesses on pass-on and finally financing witnesses. The only possible --

3 **MR TURNER:** It is the availability of Mr Carosso, isn't it?

4 **MR WEST:** It is the availability of Mr Carosso which again we are investigating, but it
5 may be necessary in the circumstances for Mr Carosso to give evidence remotely, in
6 which case we shall put in an application in short order for that to be permitted. We
7 are investigating when.

8 **MR TURNER:** The plan is obviously to bring him -- he could intervene in the first two
9 days. When you say he is not available on another day, I assume you meant on 4th.

10 **MR WEST:** Yes. We will also investigate that possibility.

11 **MR TURNER:** For any day, so he could be moved around. Did you have anything to
12 add?

13 **MR SCANNELL:** I don't know, Mr Chairman, if you want now to consider all of the
14 implications of not sitting on 3rd as opposed just to the issue relating to Mr Carosso
15 and, of course, Mr Saturnus is also down to be cross-examined after him.

16 **MR TURNER:** Yes. So you will need to find another day.

17 **MR SCANNELL:** Indeed.

18 **MR TURNER:** We have some spare days. If necessary, we will add an extra day on
19 to the end. I am sorry. We only sprung this on you yesterday.

20 **MR SCANNELL:** I did wonder, and I preface what I am about to say that I have not
21 discussed this either with my learned friend Ms Ford or with Mr West. As the trial
22 timetable currently stands we have the second part of ZF's opening also on
23 3rd October. It is obviously undesirable for ZF's opening to be split in two some way.

24 **MR TURNER:** Sorry. Just talk me through that again. So we have the Defendants'
25 opening starting on 2nd.

26 **MR SCANNELL:** Indeed.

1 **MR TURNER:** And finishing?

2 **MR SCANNELL:** AM on 3rd. So not sitting on 3rd will leave us part heard on ZF's
3 opening.

4 **MR TURNER:** Yes, I see.

5 **MR SCANNELL:** I did wonder if it might be sensible in the circumstances to begin on
6 30th September, which is currently down as a reading day.

7 **MR TURNER:** That's not something we are able to do unfortunately.

8 **MR SCANNELL:** I understand.

9 **MR TURNER:** It may have to be split. Sorry. Apologies for that.

10 **MS FORD:** A slightly different suggestion to address the same concern. It didn't seem
11 to make sense to have half a day of opening just happening on 4th October. So what
12 we were minded to suggest would be that we do our opening on 4th and then the
13 factual witnesses begin the first day on the 7th. Given we understand the Claimants
14 have indicated they only need two days in total for the Defendants' witnesses and that
15 there were some they were contemplating whether they needed to call at all, it seems
16 the factual evidence could then be fitted in the whole of week two.

17 **MR TURNER:** That obviously would be -- can I leave it for the parties to discuss and
18 if you need us to adjudicate on anything, we can do that.

19 **MR WEST:** We will obviously consider that, although I understand Mr Saturnus is not
20 available on 7th, but he is on 4th. He may have to clear that date.

21 **MR TURNER:** Yes. Anything else?

22 **MR WEST:** The Tribunal is also not sitting on 24th. We need to consider the
23 implications of that. Autoliv has suggested we might sensibly move the start of the
24 oral closings to the beginning of the following week in any event. That might be more
25 sensible in particular if we are not sitting on 24th in any case.

26 **MR TURNER:** Shall we decide that in opening when you have planned your cross

1 and you have got a better feel for how long we think it is going to take?

2 **MR WEST:** We then move on to -- there is not an update on French and Italian
3 authorisations compared to what is in the skeleton argument.

4 **MR TURNER:** Yes, I had forgotten that.

5 **MR WEST:** Hopefully that will be resolved in short order, although, as I mention, it
6 may be necessary to raise a further request of Mr Carosso.

7 Moving on to the German law experts and whether they should be cross-examined.

8 **MS FORD:** I apologise for interrupting. I wonder if before we move on from the factual
9 witnesses could I put down one marker which concerns the possibility of a translator
10 being present. This is something that we are exploring. It wouldn't be simultaneous
11 translation, because our witnesses, even those who are working in a second
12 language, have given their statement in English, but one point that we are exploring is
13 whether it might be prudent to have a translator present on a standby basis in case
14 there are linguistic difficulties.

15 **MR TURNER:** Sitting next to the witness?

16 **MS FORD:** They would be sworn in the usual way and it would essentially be just in
17 case there are linguistic issues. I just wanted to indicate it is a matter we have in mind
18 and are considering. It depends to a certain extent where the Claimants land in terms
19 of which witnesses they are planning to cross-examine.

20 **MR WEST:** We have no objection to that. We will also take a view on whether that is
21 necessary for any of our witnesses.

22 **MR TURNER:** Okay.

23 **MR WEST:** German law. Just before we address the point of cross-examination of
24 the German law experts, there are just two short points in Autoliv's skeleton argument
25 which I would like to pick up briefly on German law. As the Tribunal is aware, there
26 are two issues between the German law experts. This is all to do with the running of

1 limitation periods. The first is when the running of the limitation period starts. That's
2 known as the termination issue, because it depends on whether the running of time is
3 suspended until the infringement comes to an end. A cessation issue I am reminded
4 is the terminology we have used.

5 The second is the suspension issue, which is whether the Commission investigation
6 suspends the running of time.

7 Now just in relation to the first of those points, the cessation issue, Autoliv mention in
8 their skeleton, and this is common ground between the experts, that there is a decision
9 of the court in Dortmund on this point, which holds that cessation does apply.

10 **MR TURNER:** Yes.

11 **MR WEST:** And what I was not clear from my friend's skeleton about is whether it is
12 their intention to seek to persuade the Tribunal that that decision is wrong.

13 **MR TURNER:** I thought they weren't, but I may have misunderstood.

14 **MR SCANNELL:** We are not going to try to persuade the Tribunal that the decision
15 of a German court is wrong.

16 **MR TURNER:** That's what I understood from your skeleton.

17 **MR WEST:** It appears to follow from that that the cessation issue falls away, unless
18 I misunderstood.

19 **MR TURNER:** I am not sure it does.

20 **MS FORD:** Sir, I understand the position of the Defendants' joint expert is that the
21 German decision is potentially wrong and that it is only a first instance decision and
22 therefore it is not determinative of what the position is as a matter of German law. So
23 to that extent for our part, I think consistent with the position that has been taken by
24 the expert, we would be saying that it is wrong.

25 **MR TURNER:** Okay.

26 **MR SCANNELL:** We certainly will be contending that the German decision isn't the

1 end of the story and so --

2 **MR TURNER:** No, I understand from your skeleton.

3 **MR SCANNELL:** What I had in mind was that other element of it as opposed to getting
4 into the weeds of a German decision and saying: "That's wrong as a matter of German
5 law". Ms Ford is quite right. There is also a question which is raised by the
6 Defendants' German law expert as to whether it is a matter of German law that would
7 be upheld on appeal, but I didn't mean to say that we would be suggesting that there
8 couldn't be an appeal in relation to it and therefore it has to be accepted as a once and
9 for all conclusive finding.

10 **MR TURNER:** I don't quite understand how this Tribunal can overrule a decision of
11 a German court really and say it is wrong. Is that what you are envisaging, Ms Ford?

12 **MS FORD:** Well, the Tribunal has to reach a finding of fact as to what is the position
13 as a matter of German law.

14 **MR TURNER:** German courts opined on this position.

15 **MS FORD:** They have opined --

16 **MR TURNER:** Unless it is self-evidently wrong.

17 **MS FORD:** Sir, you're applying an additional test and I hesitate to endorse whether
18 that's the correct test as a matter of German law (inaudible).

19 **MR TURNER:** No, I am not talking about the German law, but, I mean, we have
20 a decision.

21 **MS FORD:** You have a decision which is a first instance decision, and I understand
22 the German law experts' position is that it is an indicative order which is not binding,
23 and it is open to this Tribunal to make a finding of fact as to the position under German
24 law which is not consistent with that decision.

25 **MR TURNER:** Theoretically open. Yes.

26 **MS FORD:** That, as I understand it, is our expert's position. So that is what we --

1 **MR TURNER:** It may be your expert's position. It is whether you are going to be
2 making that submission. You are inviting this Tribunal to say it was wrong.

3 **MS FORD:** Certainly our present position is consistent with what the expert says.

4 **MR WEST:** There we are. It appears the point is still in issue.

5 On the other point about suspension of the running of time by virtue of the Commission
6 investigation, I believe it is common ground that there is not a decision directly on point
7 under German law. The Tribunal has the wording of the relevant statute and the
8 relevant principles of interpretation advanced by the experts. As I understand it, the
9 Tribunal will have to decide one way or the other whether the Commission
10 investigation suspended the running of time in this case.

11 The reason I mention it is simply my friend's skeleton argument at paragraph 55.

12 **MR TURNER:** Autoliv?

13 **MR WEST:** Yes, Autoliv, which says:

14 "Autoliv respectfully agrees with the Tribunal that it is not necessary to cross-examine
15 the experts on this difference, because if the point is not decided under German case
16 law, the Tribunal is not going to determine what the law would be."

17 I was not quite sure what that meant, but clearly the Tribunal does have to determine
18 what the law is and how it applies to the facts of this case.

19 **MR TURNER:** Sorry. This is European law or German law?

20 **MR WEST:** This is German law. The German law provides for the running of time to
21 be suspended by an investigation.

22 **MR TURNER:** That's a German -- sorry. I should know this. This is a German statute
23 or a ...

24 **MR WEST:** Yes.

25 **MR TURNER:** I mean it is not informed by an EU regulation?

26 **MR WEST:** Not directly, no.

1 **MR TURNER:** No.

2 **MR WEST:** But the issue between the parties -- there are two. I should have perhaps
3 taken this a bit more slowly. There are two issues on this question of suspension.
4 One is how broad was the Commission investigation as a matter of fact.

5 **MR TURNER:** Yes, I picked that point up.

6 **MR WEST:** If, in fact, it was limited to the named OEMs, the question is does that
7 nevertheless suspend the running of time for related claims and that's the point of
8 interpretation of the materials which the Tribunal will have to decide in my submission
9 one way or the other, because --

10 **MR TURNER:** Right. You say we will be assisted by cross-examination on that.

11 **MR WEST:** Well, cross-examination is a slightly different question. The point here
12 I am making is simply that if this is intended to suggest the Tribunal can somehow not
13 decide that, I don't follow that. The Tribunal will have to decide it one way or another
14 if it arises.

15 **MR TURNER:** If it arises.

16 **MR WEST:** If the Tribunal says that the investigation was broad enough to encompass
17 these claims then it doesn't arise as a matter of fact.
18 Then on the question of whether there needs to be cross-examination, our position is
19 really that it is a matter for the Tribunal whether it thinks it would be assisted by
20 cross-examination of the expert witnesses. We think there is some potential that how
21 the witnesses respond in cross-examination may be of assistance to the Tribunal in
22 evaluating their evidence. Equally if the Tribunal thinks that's not likely to assist it, it
23 is more time and it is more cost, which I can see the value in avoiding.

24 **MR TURNER:** Yes, and the Defendants have suggested no cross-examination, as
25 I understand their skeletons. Well, you have read their skeletons I assume.

26 **MR WEST:** Yes.

1 **MR TURNER:** Ms Ford, I will come back to you. You are suggesting, you say it is up
2 to us. I mean, are you making an application to cross-examine?

3 **MR WEST:** I am suggesting it is a matter for the Tribunal. So it is not a case where
4 the Tribunal would be refusing an application that I have made.

5 **MR TURNER:** Yes.

6 **MR WEST:** I am saying if the Tribunal thinks it would be of assistance, then we would
7 support cross-examination, but if not we are not asking for it.

8 **MR TURNER:** When do we have to make our mind up?

9 **MR WEST:** There is an item on the PTR agenda. We need to make arrangements
10 for them to attend if they are to be cross-examined because these individuals would
11 be attending in person.

12 **MR TURNER:** Which day are they to attend at the moment?

13 **MR WEST:** 21st October.

14 **MR TURNER:** So we are a little way off, aren't we?

15 **MR WEST:** The skeletons are due I think a week from today. So the Tribunal may be
16 assisted perhaps by what the skeletons have to say about this.

17 **MR TURNER:** Yes, and obviously we have not read into the case in detail, having
18 only just received the bundle. So, I mean, we have expressed a view that we are
19 extremely doubtful that cross-examination will assist and remain of that position, but
20 that can be reviewed on the first day of trial. Will that satisfy you?

21 **MR WEST:** We will ask him to keep the date in his diary for the time being.

22 **MR TURNER:** It can be remote, if need be.

23 **MR WEST:** It can't be remote because that's not permitted in Germany.

24 **MR TURNER:** Okay. Right. Yes. That includes expert evidence as well as factual
25 evidence.

26 **MR WEST:** Probably.

1 **MR TURNER:** Ms Ford.

2 **MS FORD:** A couple of points of clarification. Mr West had said that the position as
3 a matter of German law is not directly influenced by European law. Our understanding
4 is that the German law has implemented the Damages Directive, which is the source
5 of the law – so it is European law.

6 **MR TURNER:** That's why I asked the question.

7 **MS FORD:** Just as a matter of clarification that's certainly our understanding of the
8 origin of these points. In terms of whether or not the Tribunal will be assisted by
9 cross-examination, we have indicated in our skeleton that we are in the Tribunal's
10 hands on that point, but in the light of the exchange that has just occurred with the
11 Tribunal, particularly in relation to -- I should clarify a submission I made earlier. I am
12 told that it is not a judgment that has been handed down by the Dortmund court. It is
13 an indicative order, which is a preliminary assessment only and doesn't have any
14 precedent value within the German system.

15 Now there is obviously a live issue between the experts as to how that order should
16 be approached and what force it has. It does seem to us in the light of the exchange
17 with the Tribunal that the panel might be assisted by cross-examination.

18 **MR TURNER:** An option would be would this be suitable for hot tubbing for an hour
19 the two experts.

20 **MS FORD:** Certainly any opportunity to allow the German experts to express their
21 views on this matter so that the Tribunal actually have a way of approaching this
22 decision would seem to be a useful one. In relation to hot tubbing one thing we are
23 mindful of, and it is a point we have made in relation to the economic experts as well,
24 is that that means that a fair burden falls on the Tribunal to direct the questions to the
25 experts as opposed to cross-examination where the advocates would be directing the
26 cross-examination, but we again are in the Tribunal's hands as to what approach

1 would be most useful.

2 **MR TURNER:** Let's pencil in an hour on 21st October for hot tubbing the German law
3 experts, but that may well be -- that will be reviewed and at least then they have it in
4 their diary. We may well when we are better read into the case form the view that we
5 are not going to be assisted. I am sorry. That's not giving the parties certainty, but
6 I think that may be an appropriate way to proceed at the moment.

7 **MR WEST:** That I think leads us on to the economic experts, item 5. The economic
8 experts' joint memorandum has now been filed and is included in the PTR bundle.

9 **MR TURNER:** Yes. We have seen that. Thank you.

10 **MR WEST:** At tab 16. The experts did their best to mould their documents in
11 accordance with the Tribunal's requirements. So there was limited time to rework the
12 whole document.

13 In addition to that template, the Tribunal will have seen there is also a brief
14 section about materiality at the beginning, setting out the materiality of the various
15 disputes.

16 At tab 15 of the bundle -- the Tribunal may not have seen this -- this is a new note of
17 4th September, so prior to the joint experts' statement, by Dr Majumdar, where he
18 makes a couple of particular points about one sensitivity, particular sensitivity to do
19 with the dates of RFQs. The Tribunal has probably not seen this before, but it's not
20 necessary to go into it in detail. It is addressed in the joint experts' statement.
21 Mr Hughes is considering whether there's anything else he may wish to say by way of
22 response to it. Obviously this was received on 4th September, so it postdates his reply
23 report. If there is, we will obviously put in any brief responsive note from him as soon
24 as we can.

25 **MR TURNER:** So we were contemplating that the economic experts be hot tubbed.

26 **MR WEST:** Well, this is the next issue. That was number 5, issues arising from joint

1 memo – then 6, format of expert evidence.

2 This was the question of hot tubbing, which again --

3 **PROFESSOR NEUBERGER:** Just one question. If there is some further exchange
4 between Mr Majumdar and Mr Hughes, is there an intention to update the joint expert
5 report accordingly or will that remain as it is?

6 **MR WEST:** I think it must depend on the nature of the material. If it is for technical
7 calculations, etc, that may not be necessary.

8 **PROFESSOR NEUBERGER:** Fine.

9 **MR WEST:** So then moving on to 6, again this is a matter for the Tribunal whether it
10 would be assisted by some hot tubbing as well as cross-examination where I think all
11 of the parties take the view that it is really a matter for the Tribunal, bearing in mind
12 that many experts -- many authorities take the view it is of more assistance than
13 traditional cross-examination alone in getting to the nub of what's really in dispute and
14 narrowing and resolving the expert issues, but it does place something of a burden on
15 the Tribunal in directing the questions, although given that we now have the joint
16 experts' statement, that may be of assistance to the Tribunal in identifying the
17 propositions which need to be put to the witnesses.

18 **MR TURNER:** I think we were of the provisional view that hot tubbing would be
19 extremely helpful in this case. In terms of format and subject to views of the parties
20 that could be addressed – would obviously be dealt with topic by topic. At the end of
21 the topic counsel would have the opportunity to ask questions of clarification, but
22 clarification only at that stage and then at the end when the hot tubbing is finished,
23 then cross-examination could take place at that stage. Obviously having been through
24 the hot tubbing, it would be of narrow compass.

25 In terms of timing, at the moment we have five days set aside, which would seem to
26 be ample from our perspective. It may be hot tubbing would take place over two to

1 three days and that would leave up to a day for cross-examination. Obviously
2 I appreciate you don't know what questions we are going to ask, but does that sound
3 a sensible way of proceeding?

4 **MR WEST:** Can I clarify, when you say topic by topic, that's so any clarification
5 questions from the counsel are topic by topic but the experts are answering individual
6 question by individual question, as it were, so that one expert answers the question
7 then the other does, rather than the experts addressing the matters topic by topic.

8 **MR TURNER:** Yes. It will be hot tubbing in the usual way focusing on one topic -- let's
9 say it is pass on -- asking questions on that, then giving you an opportunity to
10 ask -- hopefully it won't be necessary -- but any questions of clarification arising out of
11 that but that won't be cross-examination in the conventional sense at that stage, and
12 then there will be an opportunity for cross-examination at the end.

13 **MR WEST:** That's very sensible if the Tribunal is happy to take the burden upon it.

14 **MR TURNER:** Ms Ford, you are looking doubtful.

15 **MS FORD:** No. I want to ensure I have correctly understood the timing. As
16 I understand what the Tribunal is contemplating, it will be three days of hot tubbing
17 and two days of cross-examination.

18 **MR TURNER:** No, we would not envisage two days of cross-examination, no. The
19 matters will have been explored by the hot tubbing.

20 **MS FORD:** Well, indeed.

21 **MR TURNER:** So cross-examination should be short. So we are envisaging a day of
22 cross-examination. How you divide that will be subject to further discussion.

23 **MS FORD:** That, of course, only leaves the two Defendants half a day to
24 cross-examine Mr Hughes. That does strike us as a little bit limited.

25 **MR TURNER:** Most of the cross-examination you will be approaching from the same
26 perspective. So we would not anticipate the two Defendant groups cross-examining

1 separately. You will have to coordinate your cross-examination. Obviously insofar as
2 there are areas where your interests divide, that's a separate matter of course.

3 **MS FORD:** Sir, absolutely. Just to be clear, we will be dividing the topics between us
4 so there is no intention of duplication. Nevertheless, we do envisage the Tribunal will
5 be assisted by having the opportunity to hear a reasonable amount of
6 cross-examination and there is a concern that half a day to cover all the topics that
7 Mr Hughes has covered in his report is relatively limited.

8 **MR TURNER:** It is relatively limited, but that's the point of having the hot tubbing.
9 I mean, we are not going to take a day out of the diary. We will leave the five day
10 period for now, but that doesn't mean you have two days of cross-examination. At the
11 moment we have a day of cross-examination and you can then persuade us you need
12 more time when we get there and explain why.

13 **MS FORD:** I am grateful.

14 **MR SCANNELL:** Autoliv is happy with the suggestion that the Tribunal makes in
15 relation to hot tubbing and thinks it is sensible.

16 Just in relation to the concern expressed by my learned friend, to the extent that there
17 is a sense that the points that the Defendants want to get across to the Tribunal in
18 relation to Mr Hughes lies behind that concern, I would suggest that it is all the more
19 important that we have uninterrupted opening statements so that the Tribunal is well
20 aware before it hot tubs these experts what the concerns are that the Defendants
21 have.

22 **MR TURNER:** We will conscientiously read the experts' reports. If the opening is
23 interrupted, that doesn't mean we will pay any less attention or be any less capable of
24 taking the points on board. There are clearly some extremely important issues in
25 relation to the expert evidence. Mr Majumdar's report is extremely helpful in that it
26 does set out what the areas of differences are quite clearly. So even at this stage we

1 have those very much on board and they will be taken account of when we do the hot
2 tubbing and then you will have an opportunity to explore them further insofar as that
3 is necessary. These are clearly very important issues in the case.

4 **MR SCANNELL:** Yes.

5 **MR WEST:** I am grateful. I think that takes us then to the trial bundle. There are no
6 outstanding confidentiality issues relating to documents. The Tribunal may recall there
7 were one or two passages in witness statements where the position was parked
8 pending trial, so those are also not points for today.

9 Then (b), contents of hard copy trial bundle. Given that the Tribunal has asked for
10 a hard copy of the trial bundle, we are proposing to provide the pleadings and the
11 witness evidence and experts' reports and orders.

12 There is a logistical issue about the disclosure bundle just simply due to the size of the
13 bundle, and although the number of documents in the bundle is a very small proportion
14 of the overall disclosure, nevertheless there is a large volume of documents in the
15 bundle, and it may be that the number which are ultimately referred to at the trial is
16 again only a proportion of that.

17 So what we propose is instead of providing a hard copy of the whole of the disclosure
18 bundle as it were, to provide a core bundle of disclosure documents.

19 **MR TURNER:** That seems very sensible, Mr West. You can obviously update that as
20 necessary. Clearly what we will want in hard copy are all the e-mails relied on in your
21 pleadings and any documents you are particularly going to focus on.

22 **MR WEST:** Yes, that is what I was proposing.

23 **MR TURNER:** We will have to leave it to your judgment. If we need extra hard copies
24 of things during the course of the trial, we can request them.

25 **MR WEST:** Then deadline for adding documents. I am not sure anyone is actually
26 asking for a specific deadline. The trial bundles, as I understand it, have to be lodged

1 by Friday. The position at the moment is still that the Defendants haven't asked for
2 any documents to be added to the disclosure bundle in the trial bundle. If they are
3 going to do that, we would really like to know what those documents are sooner rather
4 than later, given the pending deadline for lodging the bundle.

5 **MS FORD:** There is an intention to provide some additional documents to go into the
6 bundle. We will certainly do so as soon as we can. As a matter of practicality, we
7 recognise the Claimants' desire to get the bundles out, but that obviously shouldn't be
8 driving the extent to which parties can as appropriate add certain further documents
9 to the bundle, should that need arise.

10 **MR TURNER:** Yes. Okay. In terms of giving witnesses advance notice of which
11 documents you will be putting to them how does that -- what are the proposals for
12 that? Obviously it is not satisfactory with a lot of documents in the case that a witness
13 is suddenly shown a document for the first time when they go into the witness box.

14 **MS FORD:** Yes. Presently there are no proposals to address that. It is a point we
15 put down a marker in our skeleton about, that the Claimants have added a large
16 volume of documents to the trial bundle but have not made clear specifically how they
17 fit in.

18 **MR TURNER:** So I think obviously documents that have been referred to by witnesses
19 of fact and experts are fair game for cross-examination, but if other documents are
20 going to be put to the witnesses of fact or the expert witnesses, I think at least three
21 clear days' notice would be appropriate or otherwise you need to seek permission of
22 the Tribunal.

23 Any concerns with that, Mr West?

24 **MR WEST:** It has just been raised now. No immediate concerns.

25 **MR TURNER:** Okay. That will be the default position.

26 **MR WEST:** Sorry. I should just mention under the new rules about witness

1 statements one is not supposed to show documents to witnesses. I assume that this
2 would be a process outside of that practice direction, so there would be no issue with
3 showing these documents to witnesses.

4 **MR TURNER:** If we want to ask the witness questions about this e-mail or this
5 document -- I don't know what it would be -- obviously they would be -- the whole point
6 would be that they would look at it and would be shown it in advance; the same
7 applying to experts as well.

8 Just one other thing on experts. Taking Mr Hughes' statement -- sorry. I have not just
9 got to grips with the bundles yet. Bear with me a second. I am grateful. Thank you.
10 So taking Mr Hughes' statement, for example, he spends quite a lot of time
11 discussing -- so if you take, for example, section 2.4 discussing the body of evidence,
12 indicating there were explicit communications between cartelists, these points of fact,
13 I wouldn't expect any cross-examination on these factual -- I understand why
14 Mr Hughes has had regard to this. But it is not for him to say what the e-mails mean.
15 It is going to be for the Tribunal. So we do not envisage any cross-examination of that
16 type of fact during the cross-examination of expert reports.

17 Ms Ford, does that make sense?

18 **MS FORD:** Sir, it absolutely makes sense. We very much agree these matters of fact
19 are not matters that should be traversed by an expert. It may be there is some
20 cross-examination that arises out of the extent to which the expert is traversing matters
21 of fact in those circumstances, but the intention is not to go into factual matters of
22 which he has no personal knowledge.

23 **MR TURNER:** The expert keeps saying, "I know this is for the Tribunal".

24 **MS FORD:** In my submission maybe there are some matters that need to be explored
25 about the extent to which he is engaging in that exercise, but that's not to say
26 cross-examination about factual matters about which he has no personal knowledge.

1 **MR TURNER:** We will have to see about that, see how we progress.

2 **MR WEST:** There may also be a difference between referring to factual evidence and
3 something which is canvassed between the experts, which is whether there is
4 a mechanism.

5 **MR TURNER:** Yes, I understand, and I understand that is why he has referred to this
6 material. I am not saying that was improper, but it is obviously going to be for the
7 Tribunal plainly.

8 **MR WEST:** I am not aware of any other business unless anyone else is.

9 **MR TURNER:** We need to decide the financing losses point, so can we rise for
10 five minutes, unless you have any other points.

11 **(Short break)**

12 **MR TURNER:** So our provisional view is on financing we will hear cross-examination,
13 but that's on an understanding it is limited to half a day, but we are likely to defer
14 argument on the matter until after we have given judgment on liability and quantum.

15 **MR WEST:** I am very grateful. Two requests for clarification.

16 **MR TURNER:** Sorry, because I will forget if I don't get in first. It would really assist
17 me in particular and maybe other members of the Tribunal if we could have a list of
18 acronyms. There are so many acronyms in all the documents, and that would be -- on
19 a single piece of paper that I can -- it doesn't have to be completely comprehensive,
20 but if you could use some sensible judgment as to what needs to be included or not.

21 **MR WEST:** We will put that in hand. Two requests for clarification were raised during
22 the very brief adjournment. One is in relation to three days' notice of documents to
23 witnesses. Is that three days prior to the witness being called or three days --

24 **MR TURNER:** Yes, prior to the witness being called.

25 **MR WEST:** Secondly, does the Tribunal propose to give any direction or indication as
26 to when the Defendants should identify the documents they wish to have added to the

1 trial bundle, because at the moment it has been left open?

2 **MR TURNER:** Ms Ford, you said you had some documents. Obviously --

3 **MS FORD:** I thought that there are a number that are ready to go in today. I hesitate
4 to suggest an arbitrary deadline beyond which no further documents can be added,
5 because, of course, as the Tribunal appreciates, that's simply not the way these
6 matters work.

7 **MR TURNER:** That applies to all the parties.

8 **MS FORD:** Indeed.

9 **MR TURNER:** Yes. If you could -- obviously -- because bundles are being prepared
10 currently, aren't they? So it would be helpful if you could get a provisional list over
11 today, and then other documents which you are contemplating, if they could be done
12 by the end of the week.

13 **MS FORD:** We will do our best, but I don't want a complete cut-off.

14 **MR TURNER:** It is not a complete cut-off. It is your best endeavours to add other
15 documents by the end of the week.

16 Mr West, that --

17 **MR WEST:** Does that apply to all?

18 **MR TURNER:** Of course that applies to all parties. I mean, documents may get added
19 to the bundles, but we expect them to be of narrow compass and not great tranches
20 being added.

21 **MR WEST:** I am grateful.

22 **MR SCANNELL:** Mr Chairman, may I just clarify the point that the Tribunal has just
23 made in relation to financing witnesses? So, if I understand the position, argument on
24 the financing losses points will be deferred until after the Tribunal reaches its --

25 **MR TURNER:** Provisional view, yes.

26 **MR SCANNELL:** -- rulings on liability and quantum, and one understands that.

1 As I mentioned earlier this morning, I am proposing nevertheless to open our case on
2 financing losses so the Tribunal knows where we are coming from when we
3 cross-examine the witnesses, because we feel that will be of assistance to the
4 members of the Tribunal.

5 **MR TURNER:** A short ...

6 **MR SCANNELL:** Perhaps we will not close on it.

7 **MR TURNER:** You can discuss the details in due course. Obviously we need to
8 understand the cross-examination. I appreciate that. So identifying the issues, that
9 would seem to be –

10 **MR SCANNELL:** Otherwise the Tribunal may very well wonder where we are coming
11 from in relation to some of the questions and I don't think the Tribunal –

12 **MR TURNER:** Of course we might anyway, yes. Insofar as there's any
13 cross-examination of the experts I assume that is going to be again of reasonably
14 narrow compass and that can take place during the course of the trial.

15 **MR SCANNELL:** On financing losses there will certainly be some questions, but they
16 won't be overly broad.

17 **MR TURNER:** At the moment – we can clarify this in opening – don't assume that it
18 will be a subject for the hot tub, so you may need to take those points in
19 cross-examination.

20 **MR SCANNELL:** I am grateful for that indication.

21 **MR TURNER:** But we will clarify that on the first day of the trial.

22 **MR SCANNELL:** Yes. Again, Mr Chairman, having heard some remarks on financing
23 losses in opening, that might assist the members of the Tribunal to focus their minds
24 when it comes to hot tubbing and be inspired to ask particular questions.

25 **MR TURNER:** Of course, yes. Was that everything?

26 **(11.41 am)**

(Hearing concluded)

1
2
3
4
5
6
7
8
9
10
11
12