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IN THE COMPETITION

Case No.: 1632/5/7/24

APPEAL

TRIBUNAL

Tuesday 4 February – Wednesday 5 February 2025

Before:

Justin Turner KC

Lesley Farrell

Tony Woodgate

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Claimants

ASDA Stores Limited & Others

v

Respondent

Bremnes Seashore AS & Others

A P P E A R A N C E S

Anneli Howard KC, Julian Gregory, Alastair Holder Ross on behalf of ASDA Stores Limited & Others

Emma Mockford on behalf of Bremnes/Grieg Seafood

Tim Johnston on behalf of Cermaq

Paul Luckhurst and Rayan Fakhoury on behalf of Leroy Defendants

Charlotte Thomas on behalf of Salmar ASA

Daniel Jowell KC and Gerard Rothschild on behalf of Mowi Defendants

Conor McCarthy on behalf of SSF Defendants

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Tuesday, 4 February 2025

(10.30 am)

Housekeeping

THE CHAIR: Good morning.

Can I just start and have a little bit of a moan about bundles, please. They are not in compliance with our very modest guidance, but it really would be helpful if they could be better organised. For example, I read the claimants' skeleton argument with reference to an expert report of Mr Tokvam tab 63, which is very helpful. I managed to find it in tab 63, and observe it is his third expert report. Could I find his second or first? No, because they are not in the index as expert reports of Mr Tokvam. They were referred to by reference to the law firm. And his first report is an exhibit to a fact at the same time.

Then another 15 minutes of my life goes past I will never get back. It would be really helpful if all bundles could be labelled A, B, C, D, E, expert reports in one, on the label "expert reports". I shouldn't really have to explain.

Also, it is a required to put labels on the inside of bundles, not just on the outside of bundles.

So sorry to start off with a moan, but I would be really grateful.

Also, there is a very, very large amount of paper for a relatively short hearing. I don't know if the juniors can in future just consider if all this paper is necessary or if we can have a slightly simpler set of bundles. That would be helpful.

Sorry, you were going to say something.

MR JOWELL: I was just going to start by introducing everybody. Can I start off by apologising for the state of the bundles. It is a frustration to many of us.

For my part, I intend only to go to the core bundle in my submissions. I should say, I appear for the 8th to 10th defendants, the Mowi defendants, with Mr Rothschild;

1 Ms Howard KC appears for the claimants, with Mr Gregory and Mr Holder Ross;
2 Ms Mockford appears for the defendants 1, 3 and 4, the Bremnes/Grieg defendants;
3 and Mr Johnston for the second defendant, the Cermaq defendant; and Mr Luckhurst
4 and Mr Fakhoury for the 5th and 6th defendants, the Leroy Defendants; Ms Thomas
5 for the SalMar defendant, the 7th; and finally, Mr McCarthy for the 11th to 13th
6 defendants.

7 With the permission of the tribunal, we would intend to take matters in the following
8 order.

9 First, I would intend to address you on the issue of forum conveniens -- or forum non
10 conveniens; then Ms Mockford will address you on the question of material
11 non-disclosure, and she will also address the principles of strike out and in particular
12 the application to her client; and then the other defendants will add any additional
13 submissions on those various points, including in my case briefly on strike out.

14 THE CHAIR: Okay.

15 MR JOWELL: We are hoping to be done certainly by the end of today, hopefully a bit
16 earlier than that because we obviously will need to give Ms Howard adequate
17 time -- equal time --

18 THE CHAIR: I think it is probably best to hear topic by topic --

19 MR JOWELL: If you prefer - that's- another way of doing it --

20 THE CHAIR: -- I think we would like to leave material non-disclosure to the
21 end -- unless it causes major problems --

22 MR JOWELL: No, I don't think it causes major problems, I'm sure we can rearrange --

23 THE CHAIR: -- forum non conveniens, strike out, and then material non-disclosure,
24 and yes, it would be helpful to hear from both parties on each of those three topics --

25 MR JOWELL: Very well, we can certainly do it that way, if that is more convenient.

26 On that basis, then, I would then plan to start off on the forum non conveniens -- there

1 may then be some very short supplemental submissions and then a response.

2 MS HOWARD: I think there is a link between the forum non conveniens and the
3 individual strike outs.

4 THE CHAIR: We were aware of that.

5 MS HOWARD: So it might make sense to deal with those two topics together and
6 then we will reply on them. We will be making individual points as part of forum non
7 conveniens as well.

8 THE CHAIR: If you feel that is better.

9 MR JOWELL: For our part, we think they are distinct.

10 THE CHAIR: They are obviously related, and clearly they anchor defendants, we
11 appreciate that, but they are topics that we think we would probably prefer to separate
12 out. I think we are particularly interested in the law relating to the strike out and the
13 substantive law, what's required.

14 So, yes, if we could take the forum non conveniens first.

15
16 Submissions by MR JOWELL

17 MR JOWELL: I am grateful. I will certainly be addressing it on the pessimistic
18 assumption, if you like, that our strike outs fail, so we don't need the strike out for the
19 forum non conveniens point.

20 So that you have a road map, I intend to structure my submissions in the following
21 order. I want to start out, if I may, by taking you through some parts of the particulars
22 of claim to show you what are the issues that are likely to arise in these proceedings;
23 I then want to take you through to remind you, I am sure, of the law on forum non
24 conveniens; and then finally, I wish to take you through some of the evidence and
25 make submissions on the facts as relevant to your assessment.

26 So if I can start, then, with the pleaded case, and if you could take that up, please, it

1 is in the core bundle at tab 1.

2 THE CHAIR: If we could be sent a Word version of the particulars of claim. I don't
3 know if we have a Word version.

4 MS HOWARD: There was just one piece of housekeeping, which was we have put
5 an application in to amend the particulars of claim, which I wanted to address you with
6 because the amended particulars of claim have been put in the bundles -- it is in the
7 hearing bundle at tab 147. What we have done is -- it might make sense to do that as
8 part of housekeeping as we go on.

9 THE CHAIR: Stating the obvious, a pleadings bundle with the form pleadings -- tab 2
10 would have been more convenient. I have not got to tab 147 yet.

11 MS HOWARD: I am sorry, the electronic versions have been, I think, updated
12 yesterday.

13 THE CHAIR: We don't have any electronic versions here today (inaudible) because
14 we're in the Rolls Building.

15 MS HOWARD: So yes, it's 147 at page 2736.

16 We have amended the APOC to reflect the changes made about the state
17 of decision -- I was going to quickly walk your Lordship through the traders --

18 THE CHAIR: I am aware you have done this. I am pleased.

19 MS HOWARD: Yes. The other update I needed to inform the tribunal is we are in the
20 process of agreeing a consent order about the status of D6. You will see that on the
21 front page D6 is struck out.

22 THE CHAIR: I see that.

23 MS HOWARD: Yes. That's the main point. Then the point on -- if I can just scroll
24 through quickly to paragraphs 2 and 4, you will see those are the changes about the
25 status of the decision.

26 THE CHAIR: Yes.

1 MS HOWARD: We have withdrawn the point that the decision is binding on the
2 tribunal.

3 THE CHAIR: Yes.

4 MS HOWARD: But we are maintaining the point that the decision will be binding on
5 the Norwegian defendants as addressees.

6 THE CHAIR: Yes.

7 MS HOWARD: So we say that is an important distinction.

8 Then at paragraph 61, which is at page 2753, we have just clarified the effects of
9 pricing on both Norwegian and Scottish salmon. So that's at paragraph 61, and you
10 will also see it at paragraph 65.

11 THE CHAIR: Thank you.

12 MS HOWARD: So I do not think those changes are controversial, it is just part of our
13 practice to keep the pleadings updated.

14 MR JOWELL: First of all, there can be no question of us consenting to an amendment
15 because to consent to an amendment would be to submit to the jurisdiction, which is
16 precisely what we are not doing, and applying not to do.

17 In addition, insofar as non-disclosure is concerned, one has to determine the matters
18 on the basis of the application and the particulars, as they appeared in the application
19 to serve out. So whilst of course we have no objection to these points being made,
20 I intend to take you to the particulars as they stood at the time of the application.

21 MS HOWARD: What has happened in other kind of jurisdiction hearings where there
22 has been amendments like this, the tribunal tends to hold over the approval of the
23 application to amend to the end of the hearing. That way, if there are any other
24 developments that need to be reflected, we make all the amendments at one stage as
25 part of the consequential order.

26 I am grateful, thank you.

1 MR JOWELL: So if one starts off with the original particulars of claim, you will see that
2 in paragraph 2, it was originally stated in the final -- it makes reference to the
3 Commission investigation, and in the final sentence it states, on page 5:

4 "It is anticipated that the EC investigation will culminate in due course by one or more
5 infringements which once final will be binding on the relevant addressees and the
6 tribunal."

7 Again, in paragraph 4 they make the same point. They say -- they assert that the EC
8 investigation commenced prior to the end of the Brexit implementation period, with the
9 effect that the infringement decision issued by the EC will be binding upon the
10 addressees and the tribunal.

11 Of course that as now acknowledged, is not correct. It will not be binding on the
12 tribunal, and it will also not be binding upon the addressees, so far as the UK is
13 concerned because the ambit of the Commission investigation and any Commission
14 decision will extend only to the territorial ambit of the EU as it now stands and will not
15 extend to the UK.

16 THE CHAIR: Where does that leave us? If the Commission find there was a cartel
17 taking place in Norway, how does that fit into that submission?

18 MR JOWELL: It will be on the authority of the evidence judgment in the Court of
19 Appeal --

20 THE CHAIR: Yes.

21 MR JOWELL: -- it will technically be admissible --

22 THE CHAIR: So we are just straight into it --

23 MR JOWELL: - it's not a matter that the tribunal is obliged to give any weight to, as
24 one sees in the Qualcomm case, for -example - no weight is to be given to the findings
25 of other tribunals. -It may be that they will be given some weight, but it certainly would
26 not be a matter that would in any way detract from the obligation of this tribunal to hear

1 all of the evidence before it, including the --

2 THE CHAIR: I understand.

3 MR JOWELL: -- and come to a view of its own.

4 It is difficult to see, really, how the tribunal would give it any significant weight, given
5 that it would be a matter that would be going potentially to the -- the matter in issue on
6 which this tribunal must come to its own view.

7 I am aware, of course, that there may be no Commission decision at all -- I mean, in
8 the United States, for example, the parallel Department of Justice investigation
9 culminated in it being discontinued. There was no finding of infringement in the
10 United States.

11 Certainly, my client, and I believe all of the others, vigorously contest the existence of
12 any cartel. My client would intend to appeal any decision of the European Commission
13 finding a cartel, and certainly would not consider itself bound to accept it, even if it
14 became final in this jurisdiction.

15 So Ms Mockford will take you through the significance of this error for the purposes of
16 material non-disclosure. What I want to focus on really is the nature of the alleged
17 infringement in the particulars, and what that tells us really about the nature of the
18 case that would come before this tribunal.

19 I should start, if I may, by just making a few distinctions which are relevant to the
20 markets in question and which are uncontroversial. I am going to try to set them out
21 in an uncontentious way.

22 First of all, there is, as is noted in paragraph 11, a distinction between wild salmon and
23 farmed salmon, and we are concerned in this case only with farmed salmon and with
24 products derived from farmed salmon.

25 Secondly, there is a distinction between Norwegian farmed salmon and Scottish
26 farmed salmon. And as you will see from our evidence, these are different qualities

1 and different prices. The extent of those differences may be in dispute, but there are
2 undoubtedly significant differences, and certainly competition authorities held that they
3 exist in separate markets.

4 Then finally, there is a distinction between spot sales of salmon, whether that being
5 Norwegian or Scottish or other, and long term contract sales.

6 So spot sales, as you would imagine, are those at which prices, volumes and other
7 sales conditions are agreed per sale, based on the market conditions on the day of
8 sale; long-term contracts on the other hand are sales typically of around one year or
9 longer, with prices fixed in a typically -- typically fixed in advance or for a fixed price
10 for a long contract.

11 So those are just important distinctions to bear in mind.

12 So I would say that in summary the particulars of claim consist of potentially four main
13 allegations. Let me state them at the outset and then I will try to make that good.

14 The first main allegation is that there was collusion on the Norwegian spot market for
15 Norwegian farmed Atlantic salmon.

16 That is the first allegation.

17 The second allegation is that the effect of that alleged collusion was to increase the
18 spot prices for Norwegian salmon reported on the salmon -- the Nasdaq salmon index,
19 or its predecessor index.

20 So that's the second allegation.

21 The third allegation is that the increase, or alleged increase, of spot prices for
22 Norwegian salmon on the Nasdaq salmon index had an effect of increasing prices
23 charged globally, on the global market, for all farmed salmon, both Norwegian and
24 Scottish. And they say that because that Nasdaq -- they allege that that Nasdaq index
25 is a reference point for pricing or influences other pricing.

26 Then the fourth allegation is that they, the claimants, purchased within the relevant

1 period farmed salmon or products derived from farmed salmon.

2 If one turns to page 31 which -- you will see a heading "The infringements", you can
3 see this broad structure from there. You see the first allegation, the collusion itself, in
4 subparagraph a and the first part of subparagraph b. It states:

5 "The defendant groups exchanged commercially sensitive information, relating to
6 sales prices et cetera, that reduced normal uncertainty in the Norwegian market for
7 spot sales of farmed Atlantic salmon supplied in the EEA, including the UK. The
8 exchange of commercially sensitive information and/or the other arrangements
9 entered into by the defendant groups artificially inflated, maintained or reinforced spot
10 prices for farmed Atlantic salmon in Norway."

11 If you go back to page 22, please. You will see in -- 21, rather -- you will see in
12 paragraph 64 the basis of this, which is the quotation from the EC press release. You
13 will see from the quotations in that paragraph that that makes it very clear that the
14 allegation of collusion is of collusion on the Norwegian spot market for Norwegian
15 farmed salmon. It is expressly limited, you see in the fourth paragraph, to spot sales,
16 and it is expressly limited to Norwegian farmed salmon.

17 Indeed, as far as the Commission is concerned, the collusion was even narrower. It
18 only extended to certain types of Norwegian farmed salmon, to what they call fresh,
19 whole and gutted Norwegian farmed salmon not to frozen salmon or processed
20 products. You see that also acknowledged -- you don't need to turn it up, but also in
21 the first sentence of paragraph 12 of the Particulars of Claim. The collusion is alleged
22 to have occurred exclusively in Norway and you see that on page 24 in the first clause
23 of paragraph 69, where it stated:

24 "Although the collusion took place in Norway ..."

25 Now, if one goes then back to page 31, paragraph 80, we now see -- I think that's step
26 1, the collusion in Norway in relation to spot sales for Norwegian farmed salmon. Then

1 we have what I call the second stage. If we continue in paragraph 80, subparagraph
2 b, you will see that it goes on to say:

3 "... which in turn increased the spot prices reported on the Nasdaq salmon index ..."

4 Just pausing there, that's my stage 2, which is then the increase in the index.

5 If you go back to page 10 of the particulars, you see in paragraph 17, a bit more about
6 that. If we pick it up in the second sentence, it says:

7 "At the start of the cartel period, from 2011 up until spring 2013, Norwegian salmon
8 exporters reported sale prices to NOS Clearing ASA, the Norwegian clearing house
9 specialising in freight and commodities markets, itself owned by Nasdaq Inc, the US
10 corporation that owns multiple US and New York stock exchanges, on a weekly basis,
11 which were then used to create a spot price index."

12 Then over the page:

13 "On 10 April 2013, the largest salmon farmers and exporters, including the Norwegian
14 defendants, announced a new spot price index based on their weekly sales price. This
15 is what is now known as the Nasdaq salmon index. Since that time at least until the
16 end of the cartel period, a panel of ten Norwegian salmon producers or exporters
17 report their weekly transaction prices for fresh Atlantic superior salmon head on gutted,
18 to the European market. And the resulting spot price is known as NQ salmon. The
19 producers or exporters on the advisory panel included at all material times
20 representatives from the defendant groups representing 50 to 60 per cent of all
21 Norwegian salmon exports. The Nasdaq salmon index provides ..."

22 And then it goes on to make a further allegation I will come on to.

23 It notes in 19 that during the relevant period the Nasdaq salmon index published 11
24 indices comprising an overall index price and separate weighted average prices for
25 farmed Atlantic salmon from Norway across ten different weight classes.

26 So the spot price index, as you see from there, is created first by a Norwegian clearing

1 house and then by a Norwegian advisory panel.

2 If one goes to page 22, one sees in a little more detail how it is said the collusion
3 affected this Nasdaq salmon index. One can see in 66b, they say:

4 "Applying a coordinated strategy to fix, raise, skew or stabilise spot prices of farmed
5 Norwegian salmon through the Nasdaq salmon index ..."

6 Then over the page, you see in c and d it notes:

7 "Participating as a member of the advisory panel and disclosing weekly reports on
8 their spot sales, thereby substituting coordination for competition and facilitating the
9 super competitive spot pricing reported by the Nasdaq salmon index. The role and
10 conduct of the Norwegian quantities and members of the defendant groups on the
11 advisory panel was not independent or objective, but tainted with conflicts of interest
12 to further their own commercial interests."

13 And then you see further details in d, e and f about the various ways in which it is said
14 that the Norwegian members of the advisory panel artificially elevated the spot prices
15 on that Nasdaq salmon index.

16 That, then, is the second stage. The initial stage is the collusion on spot price; the
17 second stage is the effect upon this Nasdaq salmon index. And all of that is taking
18 place, of course, entirely in Norway. Certainly, the elevation of the Nasdaq salmon
19 index is not alleged to have taken place at all in the UK.

20 Indeed, the UK defendants make clear that in their evidence they have nothing to do
21 with the information reported to the Nasdaq salmon index.

22 Just for your note, you can see that in Mr Gallaghers' statement for the SSF
23 defendants, which again for your note is in tab 32, page 371, paragraph 51 to 53.

24 Those are the first two stages. Then the third stage is an alleged knock-on or indirect
25 effect --

26 THE CHAIR: Sorry, it says the Nasdaq salmon index is published where?

1 MR JOWELL: Well, I think it is published everywhere, if you like, but it is derived
2 from -- it's heart, if you like, is in Norway, as you see --

3 THE CHAIR: So it is not published in New York?

4 MR JOWELL: I don't know. I don't want to give evidence on where it is published. It
5 might be published in New York and elsewhere as well. My point is that it is derived
6 from information that is exclusively Norwegian, from this advisory panel, and it is
7 certainly nothing to do with the UK.

8 Now, the third stage, which is then this -- an alleged knock-on or indirect effect of the
9 alleged elevation of the Nasdaq salmon index on farmed salmon and derived products
10 worldwide. And the basis for this allegation is pretty slender, but one sees it in, for
11 example, paragraph 66b -- to a point that I skipped over a moment ago -- top of
12 page 23, where they say, the salmon index -- they say it is used as the global price
13 benchmark, it is alleged, by producers as the reference point to set the prices of farmed
14 Atlantic salmon and derived products worldwide, including in their contracts with the
15 claimant group.

16 So what is alleged is that the salmon index is introduced as a -- is a global price
17 benchmark for farmed salmon worldwide.

18 Now, that allegation clearly goes well beyond the Commission's statement of
19 objections, at least as described in the press release, which is restricted to Norwegian
20 fresh salmon spot prices and makes no mention of this global effect.

21 But in any event, we see the allegation and one sees it also on page 11, for example.

22 THE CHAIR: Is that not just the Commission being more concerned with objective
23 than effect?

24 MR JOWELL: One would expect that it would advert to that, if the Commission doesn't
25 typically hold back from alleging that there may be further effects, if there are those
26 further effects. But there we are. I simply make the observation, it is going well beyond

1 what the Commission is alleging.

2 Then you see my point for present purposes is simply this: if you look at, for example,
3 the end of paragraph 18, again it says:

4 "The Nasdaq salmon index provides the base line benchmark for whole prices of
5 farmed Atlantic salmon globally including in the UK."

6 Again, we see a reference to an alleged global effect in paragraph 68 on page 24.

7 Again, it talks about -- in paragraph 68 on page 24, it says that:

8 "There was an economic aim of maintaining and reinforcing global higher prices for
9 farmed Atlantic salmon."

10 And that's again stated in paragraph -- just for your note, paragraph 6a and
11 paragraph 20.

12 So the third stage is an international or a global effect. The basis that the
13 Nasdaq -- that the Norwegian Nasdaq salmon index has the global effect seems to be
14 largely based on the proportion, the large proportion, of farmed salmon that comes
15 from Norway.

16 So if one goes -- if one sees in, for example, page 8, paragraph 11, one sees the final
17 sentence:

18 "Over 50 per cent of the global production of farmed Atlantic salmon is from Norway
19 and approximately 7 per cent from Scotland."

20 So this is an allegation of the use of the Nasdaq salmon index as an international
21 benchmark.

22 So therefore those are the first three steps: the collusion in Norway in spot prices for
23 Norwegian salmon; the effect on the Nasdaq salmon index set by the advisory panel
24 in Norway; and then a global knock-on effect essentially because the Nasdaq salmon
25 index is used as a reference point for all, it is said, farmed Atlantic salmon and other
26 relevant products internationally.

1 That is the basis that one then sees in paragraph 69 of the particulars of claim, that
2 this cartel affected the prices of all exports of farmed salmon and salmon products,
3 whether produced and sold from Norway or produced and sold from anywhere else,
4 including anywhere in the EEA, and indeed from Scotland in the UK.

5 And one sees then a summary in paragraph 91a, on page 38. You see the allegation
6 that the cartel had the effect of raising the prices that the defendants or any other third
7 party suppliers charged for the supply of relevant products.

8 They say in (i):

9 "The reported prices on the Nasdaq salmon index were affected by the defendant's
10 unlawful collusion and manipulation as pleaded above, such that any increase in the
11 Norwegian spot prices tend to increase or maintain the level of weighted average
12 prices reported on the Nasdaq salmon index, such that they were higher than they
13 otherwise would have been, and ultimately had a direct influence on the prices for the
14 relevant products charged to the claimants."

15 I would say "ultimately had an indirect influence on the prices charged for the relevant
16 products" might be more accurate. But there we are.

17 So those are the initial stages.

18 Then the fourth and final stage is simply the allegation that the claimants purchased
19 the relevant products, which are defined in paragraph 14, effectively encompass all
20 farmed salmon derived products, including even pet food.

21 And in paragraph 93, on page 41, we see that the allegation is then that they bought
22 the products and they extend their claim to products bought, whether from Norway or
23 from sellers in the UK or from sellers in the EEA, and whether the sellers are cartelists
24 or any non-cartelists.

25 So based on that, what can one apprehend about what the issues are going to be at
26 trial?

1 No doubt, when the claimants first brought this claim based upon what they thought
2 would be a binding Commission decision, they no doubt anticipated that the first stage
3 would not really -- the existence of the collusion in Norway, would not be in dispute.
4 That would be established, they thought, by the existence of the Commission decision.
5 They may well also have anticipated that the second stage, at least there was an effect
6 on the Nasdaq salmon index in Norway, would also be established.

7 But we now know that neither of those things will be the case in this jurisdiction.

8 So the first key issues for trial will be: was there any unlawful collusion in Norway in
9 relation to spot prices for Norwegian salmon? And of course that will encompass many
10 sub-issues like: if there was collusion in Norway, who were the parties that participated
11 in that collusion? How long did that collusion last? What precise products did the
12 collusion extend to? And on so.

13 The second main issue that any trial of this matter in this jurisdiction will involve will
14 then be, well, supposing there was that collusion in Norway in relation to the spot
15 prices for Norwegian farmed salmon, did it affect the Nasdaq indices set in Norway,
16 and if so, to what extent.

17 Again, there will be a number of sub-issues the tribunal will have to wrestle with: what
18 was the extent of any elevation of the various indices -- you will see there were
19 a number of them -- and over what time period were each of them elevated?

20 Those issues are going to really turn on a very close consideration of how those
21 Nasdaq indices were formed, how the advisory committee was run and operated in
22 practice.

23 So those will be the first two issues. And unless the claimants succeed in establishing
24 those two issues, then of course their claim does not get off the ground.

25 The third issue then is then assuming there was that collusion in Norway and it did
26 lead to an elevation of the Norwegian Nasdaq industries, did that in turn then, effect

1 the prices charged for farmed Atlantic salmon sold globally? And that will involve an
2 investigation of the global Atlantic salmon market which, as we've seen, principally,
3 although not exclusively, comes out of Norwegian products, as the preponderance of
4 farmed salmon is Norwegian rather than Icelandic, and Scottish and so on.

5 Now of course, we reject the idea that there is a single farmed salmon global market,
6 but if there is such a single global market, then it would be centred more on Norway
7 than anywhere else.

8 Then if, and only if, all of those issues are found in the claimant's favour does one then
9 come on to a final issue, which would be how much salmon and how much of the
10 salmon products did the claimants buy. One might then get into subsidiary questions
11 about whether if there was an overcharge, whether that was passed on by the
12 claimants to their own customers, whether they are entitled to interest on any damages
13 and so on.

14 But those are subsidiary issues that only arise if it is first established, as I have said,
15 that there was collusion in Norway, that there was an effect on the Nasdaq in Norway
16 and the global prices were affected.

17 That, I think, sets the scene.

18 May I turn then to the law. As regards the defendants that are domiciled outside the
19 UK, the law -- that's the Norwegian defendants in this case -- it is common ground that
20 the claimants were obliged to establish three requirements. First, that the claimants
21 had reasonable prospects of success; second, that they had a good arguable case
22 that one of the jurisdictional gateways in paragraph 6.1 of practice direction 6B of the
23 CPR is satisfied; and third, that England is the proper place to bring the claim.

24 To be absolutely clear, we do not contest the first two requirements so far as the
25 Norwegian defendants are concerned. I proceed on the basis of the assumption that
26 there is a serious issue to be tried against all the Norwegian defendants, and I also

1 proceed on the assumption that there is a good arguable case that at least one of the
2 three jurisdictional gateways is satisfied.

3 Others will argue in due course that there is no serious issue to be tried against the
4 UK defendants, or certain of them, but again, that is not relevant for this part of the
5 application.

6 I will proceed on the basis that there is a serious issue to be tried also as against the
7 UK defendants.

8 As regards those UK defendants, although they are served as a right because they
9 are resident here, nevertheless the tribunal has a discretion not to exercise its
10 jurisdiction to hear the claims against them, and instead to stay or dismiss the claims
11 on the grounds of forum non conveniens.

12 It is important to stress that this discretion does exist because the claimants
13 appear -- I am not sure whether they are under a misapprehension or they are simply
14 trying to downplay it to such an extent that it has gone to a vanishing point -- but
15 certainly in their original skeleton argument for service out, and indeed in their current
16 skeleton argument, they may, it seems to me, be labouring under a misapprehension.

17 That misapprehension is that because they bring the claims against the UK defendants
18 here, as it is said, as a right because they are resident here, therefore if our strike out
19 against the UK defendants doesn't succeed, then the claims against those UK
20 defendants must proceed here. And then they say, well, that then is a very strong
21 basis for not declining jurisdiction against the Norwegian defendants.

22 You see that point made in paragraph 22 of their skeleton argument.

23 Now, I regret to say that if that is the claimant's understanding, then it is another
24 misapprehension on their part because whilst it certainly used to be the case when we
25 were in the European Union, then as a result of Article 4 of the Brussels Regulation
26 and Article 2 of the Lugano Convention, where a defendant was domiciled here there

1 was no discretion on the part of the English court or tribunals to decline jurisdiction on
2 the grounds of forum non conveniens.

3 That used to be the case, but it is no longer the case. It was the case really
4 because -- or it was established to be the case -- in the famous or infamous case of
5 *Owusu v Jackson* in the European Court of Justice.

6 That rule in *Owusu v Jackson* excluding the doctrine of forum non conveniens for UK
7 domiciled defendants had a profound effect. What it meant was that an arguable case
8 against a UK defendant would inevitably proceed here, and there was nothing you
9 could do about it unless you fell within one of the very, very rare exemption exceptions.

10 It also meant that if you had other defendants resident in the EU or the EEA, you could
11 invoke Article 8 of Brussels Regulation or Article 6 of the Lugano Convention and you
12 could bring them in. All you needed to do was establish there was a risk of
13 irreconcilable judgments as against ...

14 Even if you had co-defendants that were outside the EU or the EEA, you could still
15 have a very good shot at bringing them in as well because you could say, well,
16 otherwise there will be multiplicity of proceedings, because the proceedings against
17 the UK defendants would proceed anyway.

18 But that is old law. The UK is no longer in the EU; it is no longer bound by the Brussels
19 Regulation or the Lugano Convention, so the rule that you may absolutely sue
20 a resident in the UK no longer applies. We are back to the good old days -- or the bad
21 old days, as you see it -- of the common law rules and the *Owusu* position.

22 So the courts and tribunals now once again have a discretion to decline jurisdiction
23 and to state proceedings against a UK domiciled defendant on the grounds of forum
24 non conveniens.

25 Just to show you the distinction, let me take you to a case, if I may, which was when
26 we were still in the EU. It is tab 47 of the authorities bundle, file D. It's the

1 Supreme Court judgment in Lungowe v Vedanta in the judgment of Lord Briggs.

2 If one goes to page 1846, please. Perhaps if I could just invite you to read paragraphs
3 38 and 39, which rather neatly describe the Owusu v Jackson and the post Owusu
4 Jackson position, bearing in mind this is when we were still in the EU.

5 THE CHAIR: Yes.

6 MR JOWELL: So we are now back, as it were, to the two-handed more flexible
7 approach under the common law.

8 THE CHAIR: The tail doesn't have to wag the dog.

9 MR JOWELL: Exactly. The old common law rules are very clear, they give the courts
10 and the tribunals in this country a discretion to decline jurisdiction on the basis of both
11 forum non conveniens, when the defendant is resident overseas, and forum non
12 conveniens when the defendant is resident here. The principles are the same. The
13 only difference really is where the burden of proof lies as between the foreign and the
14 UK defendants.

15 Now, the locus classicus of the forum conveniens jurisdiction is of course the judgment
16 of Lord Goff in Spiliada in the House of Lords. It is found in the authorities bundle at
17 tab 10. And we quote in our joint skeleton argument at paragraph 30, a useful
18 summary of the Spiliada principles found in the recent judgment of Mr Justice Butcher
19 in the Mercedes Benz case which is in the authorities bundle and perhaps we can just
20 turn that up from the quote in our skeleton which you'll find in the core bundle at tab
21 48, at page 501.

22 THE CHAIR: Sorry, I'm working off a -- which paragraph?

23 MR JOWELL: It is paragraph 30.

24 You will see in the quotation:

25 "The question in both service and service out cases is to identify the forum in which
26 the case be suitably tried in the interests of all the parties and the ends of justice --"

1 THE CHAIR: We have read that.

2 MR JOWELL: Of course. So now, as regards the -- so you will see where the burden
3 of proof lies. An interest question is: what does the court do in cases where some of
4 the defendants are within the jurisdiction and some of the defendants are outside of
5 the jurisdiction?

6 The answer is that which one sees in the Mercedes Benz case, which we quote in
7 paragraph 31 of our skeleton, which is that the court should recognise that it is
8 addressing a single piece of multi-defendant litigation and seeking to decide where it
9 should, as a whole, be tried. So in effect you put aside there are different burdens of
10 proof and you come to a single view, just based on which is the most appropriate of
11 the two contesting jurisdictions.

12 Incidentally, the fact that permission was given to serve out on an ex parte basis on
13 paper is neither here nor there. That doesn't affect --

14 THE CHAIR: I mean burden of proof is not the term really, is it, it is more
15 a presumption, I expect.

16 MR JOWELL: A presumption, exactly. But effectively, what this is saying is well one
17 needs presumption --

18 THE CHAIR: They cancel each other out.

19 MR JOWELL: They cancel each other.

20 THE CHAIR: Indeed.

21 MR JOWELL: What are then the factors? You have seen the quotation from
22 Lord Goff's speech, which is quoted by Mr Justice Butcher, which is in the fourth
23 subparagraph within paragraph 30. He notes, referring to The Abidin Daver, to the
24 test of what is the natural forum as being that with which the action had the most real
25 and substantial connection.

26 So it is:

1 "...the connecting factors in this sense that the court must first look, and those will
2 include not only factors affecting convenience or expense, such as the availability of
3 witnesses, but also other factors such as the law governing the relevant transaction
4 and the places where the parties respectively reside or carry on business."

5 But it is important also to bear in mind that what the court doesn't take into account
6 are mere juridical advantages and disadvantages of different jurisdictions.

7 Perhaps if I can just take you to the Spiliada to show you that -- forgive me -- in tab 10.
8 Page 396 of file A, you will see:

9 "The treatment of a person."

10 Lord Goff said this:

11 "Clearly the mere fact that the plaintiff has such an advantage in proceedings in
12 England cannot be decisive. As Lord Sumner said of the parties in the Sociite' du Gaz.
13 case, I don't see how one can guide oneself profitably by endeavouring to conciliate
14 and promote the interests of both these antagonists, except in the ironical sense, in
15 which one says that it is in the interests of both that the case should be tried in the
16 best way and in the best tribunal...(Reading to the words)...systems applicable in the
17 appropriate forum overseas."

18 So that one is not concerned with all that sort of thing.

19 Now, another authority for the identification of relevant factors can be found in VTB
20 Capital v Nutritek, a judgment of the Supreme Court, which you will find in tab 33,
21 which is in bundle C of the authorities bundle.

22 Just for completeness, I should note that at 1349 of the bundle, paragraph 11, tab 33,
23 just for your note you will see there is a heading, "The legal principles regarding the
24 appropriate forum", which starts at paragraph 11 on page 1349.

25 I don't think I need to read you that, it is pretty familiar. But if one goes forward to
26 1361, you see above paragraph 43 there is a heading, "The factors relevant to the

1 appropriate forum". The first factor that is dealt with in this case is the governing law,
2 and that's because that was the real bone of contention in that case. That was the
3 basis on which the Court of Appeal below had overturned the trial judge.

4 You will see that unlike the Court of Appeal, the Supreme Court didn't see the proper
5 law as a decisive point in that case. So you see in paragraph -- one sees in
6 paragraph 48, for example:

7 "Although Mr Justice Arnold wrongly concluded Russian law governed alleged torts,
8 he also considered the exercise of his discretion on an opposite basis, namely that
9 English law applied and thus, as I understand him, accepted the submission that this
10 would not be a strong factor in favour of England, as well as saying that it was clear
11 that the Russian courts could, if necessary, hear evidence of English law. His
12 judgment, therefore, addresses the position on a correct hypothesis. Even if, contrary
13 to my view, the judge's conclusion as to the appropriate forum was limited by
14 an assumption that Russian law governed the alleged torts, I cannot conceive, in light
15 of what he said in paragraph 194, that it would have made any difference to his
16 conclusion, if he had concluded that English law governed. The key issues in this
17 litigation will, on the face of it, be factual, not legal."

18 As you will anticipate, that is a point I make also in relation to these proceedings.

19 The next factor that is referred to is the place of commission of the tort. You see in
20 paragraph 51 they say this:

21 "The place of commission is a relevant starting point when considering the appropriate
22 forum for a tort claim. References to a presumption are in my view unhelpful.
23 A preferable analysis is that viewed by itself and in isolation, the place of commission
24 will normally establish a prima facie basis for treating that place as the appropriate
25 jurisdiction. But especially in the context of an international transaction such as the
26 present, it is likely to be over-simplistic to view the place of commission in isolation or

1 by itself when considering where the appropriate forum for the resolution of any
2 dispute is...(Reading to the words)... predominantly in Moscow. It is difficult to avoid
3 the conclusion that VTB was effectively following suit on decisions taken there.
4 A further significant aspect of the facts which are said to have rendered the
5 representations untrue existed in Russia."

6 And so on.

7 So again, as you anticipate, I will be saying in the present case again the commission
8 of the tort is an important factor, and it was clearly in Norway --

9 THE CHAIR: Remind me, what is the tort in this case?

10 MR JOWELL: The tort here was effectively fraudulent misrepresentation and
11 conspiracy.

12 THE CHAIR: Right.

13 What happened -- sorry, I have not studied this. What was the result?

14 MR JOWELL: The overall outcome was --

15 THE CHAIR: The appropriate forum was Russia?

16 MR JOWELL: Yes.

17 THE CHAIR: And that's what Mr Justice Arnold held at First Instance?

18 MR JOWELL: Yes. The Court of Appeal held that because it was governed, he had
19 failed to find it was governed -- that the tort was done by English law, and he said that
20 that should have meant that it was governed -- that English was the appropriate forum.
21 You see here effectively the Supreme Court is saying: well, no, even if you assume
22 that English law applies, that's not the decisive factor here, what matters is that
23 everything effectively happened in Russia.

24 THE CHAIR: Right -- in terms of the appellate courts interfering, how does that fit in
25 with judicial discretion --

26 MR JOWELL: Well, one of the points this case makes is they are very, very reluctant

1 to interfere and it is very much a matter for the trial judge.

2 THE CHAIR: Can you just point me to that passage? If not now, then later.

3 MR JOWELL: I will find it later.

4 THE CHAIR: Of course, of course.

5 MR JOWELL: But that is absolutely the main thrust of Lord Mance, the majority's
6 views in this case.

7 My learned junior assists me with paragraph 94. We have it on the authority of Lord
8 Templeman, in the *Spiliada*, no less. He said:

9 "The determination of the appropriate forum is pre-eminently a matter for the trial
10 judge."

11 THE CHAIR: Thank you.

12 MR JOWELL: If one then goes on to the next factor, what is interesting to see is the
13 factual focus which you see on page 1364, above paragraph 57. Again, you see there
14 VTB's case is that:

15 "... deceitful representation, as I said, emanated from the respondents in Russia, but
16 were communicated to VTB and relied upon by VTB in London, where VTB also
17 suffered its loss. This analysis is important when considering where the tort was
18 committed and what law governs it, but a wider view is necessary when considering
19 the appropriate forum, that if one has denials of any liability raised as issues, whether
20 the representations were inaccurate, whether if so any or all of the respondents knew
21 of their inaccuracy and whether they joined together by common design to make the
22 alleged representations, and what impact any inaccuracy of such representations had
23 ..."

24 Again, quite closely analogous in many ways to the collusion in our case.

25 It says:

26 "Taking the Ernst & Young 2007 report, the factual focus will be on the dairy company

1 and on the respondent's understanding of their affairs and financial position, matters
2 which are clearly likely to be more appropriately examined in Russia, where the
3 companies, their records and the relevant company witnesses are."

4 THE CHAIR: So what was the loss that was suffered in London?

5 MR JOWELL: I think it is the "entering into a transaction" paragraph, if I recall
6 correctly.

7 THE CHAIR: Perhaps we can just have a look over the adjournment. How the
8 damage works vis-à-vis Russia and London would be helpful.

9 MR JOWELL: I can come back when I find the precise --

10 THE CHAIR: Or tomorrow, whenever is convenient.

11 MR JOWELL: Yes, certainly.

12 Then, on page 1365, we see witnesses. Paragraph 62, they say:

13 "This is a factor at the core of a question of appropriate forum. It was covered fully
14 and helpfully by Mr Justice Arnold in his judgment. In summary, it is clear that the
15 issues in evidence will be focused overwhelmingly on matters which happened in and
16 concern Russia, and that the documentary evidence on both factual and expert
17 matters is likewise likely to be overwhelmingly Russian and to be found in Russia,
18 where it can be heard in Russian without translators."

19 THE CHAIR: I appreciate you are on the law, but one forgets. How is it going to work
20 if we stay the action in the UK --

21 MR JOWELL: Yes.

22 THE CHAIR: -- what's going to happen? Is there going to be an action in Norway?

23 MR JOWELL: There might well be an action in Norway. There is nothing to stop an
24 action in Norway. If one stays, there will be.

25 THE CHAIR: So how will the Commission investigation tie in with what will happen
26 in -- how will it progress? Assuming we stay, how will this matter get resolved as with

1 regard to the UK market? What's the sort of natural order of things?

2 MR JOWELL: They will simply bring their claim in Norway.

3 THE CHAIR: As a follow-up?

4 MR JOWELL: No, as a stand-alone claim, because it also incidentally won't be binding

5 in Norway, as I understand, because Norway is not in the EU. I am not sure we have

6 evidence as to the extent to which the Norwegian courts -- I will be corrected if I am

7 wrong, but I don't think we actually have evidence from either side on the status of any

8 European decision in Norway.

9 THE CHAIR: Yes.

10 MR JOWELL: But my understanding is that because Norway is not -- like the UK, is

11 not in the EU, my understanding is that it wouldn't be formally binding under EU law in

12 Norway. Whether the Norwegians will regard it as binding, I don't think I am in

13 a position to give evidence, because I don't actually know.

14 THE CHAIR: It might be still not -- even if it is just highly persuasive, it's not entirely

15 clear to me at the moment how the practical matter of the Norwegian proceeding -- in

16 the end, will all these matters actually principally be determined in a foreign place?

17 The Commission might determine (inaudible) another matter but these factual matters

18 will have been resolved for practical purposes by the Commission, such that there will

19 never actually be in effect an inquiry in Norway.

20 MR JOWELL: No, I do not think that's correct, if I may.

21 THE CHAIR: Either because it is binding or because it is highly persuasive or --

22 MR JOWELL: Well, I don't think we know whether it will be highly persuasive or not --

23 THE CHAIR: You have quite a lot of Norwegian evidence.

24 MR JOWELL: Yes.

25 THE CHAIR: Nobody actually dealt with that point?

26 MR JOWELL: So far as I am aware, none of the Norwegian lawyers have dealt with

1 the question of what would be the status of the Commission decision in Norway. But
2 because Norway is not in the EU, it would not be formally binding in Norway. And my
3 client, as I said, will vigorously contest --

4 THE CHAIR: You are putting to us that, on the one hand, you have Norwegian
5 witnesses and Norwegian documents, all being processed and dealt with in Norway --

6 MR JOWELL: Yes.

7 THE CHAIR: And then on the other hand, you are saying you are not sure what will
8 happen in Norway because you don't know if the Commission decision will be binding
9 or how persuasive it would be --

10 MR JOWELL: Forgive me, I am saying with confidence that it would not be binding
11 because they are not within the UK -- whether Norway has a similar approach to our
12 approach in the Evans case and the Qualcomm case in effectively giving a discretion
13 to the trial court to take that decision into account, I am not in a position to give
14 evidence and I genuinely don't know --

15 THE CHAIR: Even if this is a form of discretion, whether in practice, a Norwegian
16 court will, save in exceptional circumstances, follow a Commission decision --

17 MR JOWELL: Well, that cuts both ways, in a sense, doesn't it? Because if my learned
18 friend wanted to put forward evidence and said, well -- if it were the case that the
19 Commission decision is effectively binding in Norway, then that itself would be a good
20 reason for saying, well, then, it is better to go in Norway.

21 THE CHAIR: Would the Norwegian proceedings be stayed within the Commission
22 decision?

23 MR JOWELL: Would proceedings in this country be stayed pending --

24 THE CHAIR: That matters less, which one we get to --

25 MR JOWELL: The answer is: I don't have the evidence and I don't know. But I don't
26 think it matters for present purposes --

1 THE CHAIR: It must matter -- if we are saying, look, on the one hand you are
2 envisaging a hearing in Norway, with Norwegian witnesses, and Norwegian
3 documents and the nuance of the Norwegian language, and on the other hand that is
4 all being done in the UK, but if actually it is never going to be done -- for practical
5 purposes, unlikely to be done in Norway, that illustration rather falls apart.

6 MR JOWELL: In my respectful submission, we are proceeding on the assumption that
7 there will be a trial in Norway because the decision will not be binding in Norway, and
8 on that basis we are assuming that there will be all of that evidence in Norway. But if
9 we are wrong about that, and if the decision is binding in Norway, then I say we have
10 an even stronger case.

11 THE CHAIR: I can see the argument. It is not really the point I am putting to you.

12 MR JOWELL: Because then they can bring their case and say: well, here's the
13 decision, let's move on.

14 THE CHAIR: Then all the arguments about language and the availability of witnesses
15 and translators, then that all falls away if that is the case. You may have other points
16 instead, but it is those particular --

17 MR JOWELL: If that were the case, if it were binding, then those points would fall
18 away. But one would have an alternative point, which would be it is so much
19 easier -- and we have not approached it on that basis -- because Norway is outside
20 the EU we have approached it on the basis that the decision is not binding in Norway,
21 and therefore there will be a full trial in Norway.

22 THE CHAIR: Understood.

23 MR JOWELL: And no evidence has come in on the other side saying anything else.
24 So that's where we are, and I think we have to proceed on the assumption that there
25 will be a full trial in Norway. But that the decision, if it has any status, will have an
26 equivalent status to the one that it would have in this country. There is no evidence to

1 point in any other direction.

2 So again, you see those factors. The additional factors in this case were the aim of
3 the alleged tort and the question of the fair trial, which was -- it was not said there that
4 there could not be a fair trial in Moscow, and similarly it is not suggested there won't
5 be a fair trial in Norway.

6 There are some other statements of the law. I think I probably don't need to go to it.
7 One is the judgment of Mr Justice Marcus Smith in the Microsoft v Sony case, where
8 he adverts to some of these same factors, and in particular notes the importance that
9 may come of translation and the possibility of mistranslation.

10 You will see that just for your note in --

11 THE CHAIR: Could you turn it up briefly?

12 MR JOWELL: I think I am on time, so it may be we can go to it. If one goes to tab 40
13 in bundle C --

14 THE CHAIR: Yes.

15 MR JOWELL: And if you go to 1661, you see paragraph 187 he mentions -- he's
16 quoting from the textbook of Adrian Briggs. He notes that the factors that need to be
17 taken into account are:

18 "... easily stated in general terms. They comprise the personal connection which the
19 parties have to England, the factual connections which the events have with England,
20 the question which law should apply, the possibility of there being a list pendens in
21 another course, and for the possibility that other persons may become party to and
22 affect the overall shape of the litigation."

23 So those are the general topics that he identifies.

24 Then if one goes to 1664, we see at (iii) he notes the submission that the language
25 and the location of the parties' witnesses and documents pointed away from England.

26 He says as to this:

1 "The vast majority of the company's and natural persons involved in the cartel are not
2 present in England. Their documents will not be in English, they will likely be in
3 Japanese or Korean, and although these documents can be translated, the fact is that
4 nuance and some meanings is always lost in translation however good the translator."

5 It then says Microsoft did not contest this --

6 THE CHAIR: I have read that.

7 MR JOWELL: You can see it -- if you can read that to yourselves.

8 Then if I can show you another high authority, which is Lungowe v Vedanta, again,
9 which is tab 47 in bundle D.

10 If you go to 1854, paragraph 66, it is under the heading:

11 "Is England the proper place in which to bring the claim?"

12 Again, perhaps if you can just read to yourselves paragraph 66.

13 THE CHAIR: Yes.

14 MR JOWELL: Then finally, if I can take you to the Court of Appeal in the Limbu
15 Kumar v Dyson case, tab 76 in bundle F, the judgment of Lord Justice Popplewell. If
16 you could read to yourself, please, on page 3115, paragraph 22.

17 THE CHAIR: Yes.

18 MR JOWELL: Again, I anticipate that last statement that one gives greater weight to
19 those who are the principal parties or chief protagonists obviously is important here,
20 because the real defendants here are the Norwegian defendants who are alleged to
21 have actually participated in the collusion.

22 So that's the law.

23 I would just, I think, be fairly straightforward to state now why --

24 THE CHAIR: Excuse me. You have the transcript, I see in here. I just wonder if it
25 might be a good moment to have five minutes for the shorthand writer (inaudible).

26 (11.45 am)

1 (A short break)

2 (11.52 am)

3 MR JOWELL: Mr Chairman, you asked me before the adjournment what was the loss
4 in the VTB v Nutritek case and I said I understood that there was a transaction that
5 was entered into in the UK.

6 THE CHAIR: Yes.

7 MR JOWELL: I was going to show you the nature of the transaction that was entered
8 into in the UK.

9 If one goes to tab 33 in bundle C. If one goes to page 1347, you see paragraph 3:

10 "VTB's case was induced in London to enter into the facility agreement and an
11 accompanying ..."

12 Paragraph 2 refers to a facility agreement and paragraph 3 says that:

13 "VTB's case was induced in London to enter into the facility agreement and an
14 accompanying interest rate swap agreement by misrepresentations made by Nutritek
15 for which the other respondents are jointly and severally liable."

16 THE CHAIR: There was an inter partes (inaudible).

17 MR JOWELL: And the allegation is that the misrepresentations were fraudulent.

18 THE CHAIR: So what was the facility agreement? It was just some contract.

19 MR JOWELL: You see it described in paragraph 2.

20 THE CHAIR: Thank you.

21 MR JOWELL: The other point I should mention is you asked me about the location of
22 the salmon index, the Nasdaq salmon index. I am told it is administered and published
23 by Nasdaq Copenhagen, so Denmark. You see that in paragraph 39 of the particulars
24 of claim and apparently 371, paragraph 51 of the witness statements.

25 So against the background of those particulars and the law, what I would like to do is
26 just address you briefly on why we say the main points as to why Norway is clearly the

1 more appropriate forum for the resolution of this dispute, and then to address the
2 points that are made briefly, the points that are made by my learned friend in her
3 skeleton argument.

4 The first and fundamental point is the factual -- the obvious factual -- connection of the
5 claim to Norway. In particular it is Norway where all of the wrongful acts are alleged
6 to have occurred, and indeed where the immediate alleged anti-competitive harm to
7 the markets is alleged to have arisen.

8 The second main point is that the location of the key witnesses are in Norway and
9 Norwegian is their native language.

10 The third main point that the location of the key documents are in Norway and in
11 Norwegian, and the availability of native language will minimise expense and potential
12 for distortion involved in the translation of evidence.

13 If we start with the factual connections of the claim to Norway and where the wrongful
14 acts occurred, I have shown you that the three main sets of factual allegations that are
15 at the heart of this claim. The allegation that there was collusion in Norway to fix spot
16 prices of farmed Norwegian salmon; the investigation of that will be an entirely
17 Norwegian exercise. And if there is no collusion established -- or no unlawful
18 collusion -- then the claim does not get off first base.

19 This is inevitably a complex issue. It is one, as I have described, with a number of
20 sub-issues, and all of these sub-issues will require an investigation into events and
21 evidence.

22 THE CHAIR: You say the collusion took place in Norway.

23 MR JOWELL: Yes.

24 THE CHAIR: Obviously, I assume you will be saying there was no collusion --

25 MR JOWELL: The alleged collusion.

26 THE CHAIR: The place where meetings took place or where parties to telephones

1 calls were, you are assuming they took place in Norway, those alleged meetings or
2 alleged calls? We don't actually have that. Those Norwegian companies --

3 MR JOWELL: That is what is assumed. I showed you paragraph 69, it says:
4 "... although the collusion took place in Norway."

5 So that is common ground.

6 THE CHAIR: All right, but that may be no more than a reference to the fact they are
7 Norwegian companies. We don't actually know whether the Norwegian companies
8 were meeting in the US or --

9 MR JOWELL: We do. Let me show you the factual evidence momentarily. Yes, we
10 do know that all of the discussions that are in play all took place in Norway. I will show
11 you the evidence to that effect momentarily --

12 THE CHAIR: From the same in the rejections, we know that, yes. That's fine, I'll --

13 MR JOWELL: If there was collusion on spot prices, then the second question is: did
14 that affect the salmon indices? Those indices, as we have seen, were run by
15 Norwegians from Norway. Insofar as there is any expert evidence required on the
16 operation and compilation of those indices, it is going to be Norwegian expert
17 evidence. Or likely to be. Any relevant data is likely to be based in Norway. Perhaps
18 now Denmark. And almost certainly there will be no UK data relevant to that stage of
19 the analysis.

20 Once again, this is a foundational -- a central issue on which they must succeed. If
21 they can't establish elevation of the Nasdaq salmon index, then the whole claim fails.
22 Again, as I have indicated, this embraces a whole range of sub-issues.

23 Then the next issue, then, if they succeed on those two, as I have said, if those
24 Norwegian spot indices were elevated, were wider farmed salmon prices globally
25 affected.

26 Now, because the UK is part of the global farmed salmon market and the claimants

1 bought some salmon here, we acknowledge there may be some information and data
2 in the UK. But again, overwhelmingly, most of the information and data is going to be
3 in Norway because that is where half of the world's farmed salmon is sold from. So
4 again, that is going to be a Norwegian-focussed enquiry there, the question of whether
5 there was a knock-on effect. And as I've said, all of these points will be in dispute in
6 any trial in this matter, wherever it takes place.

7 If we then turn to the evidence, and this goes both to the point that you made about
8 the location of the alleged events. If we start with the evidence of the Cermaq Group,
9 which is in the core bundle at tab 17 -- forgive me, there is quite a bit of this, so I am
10 going to ask you, if I may, just to read the relevant paragraphs to yourself.

11 You see the first statement of Mr Scully of Clifford Chance. If you go to paragraphs
12 30 to 33, please, which is on page 214.

13 THE CHAIR: The document is in Norwegian.

14 MR JOWELL: Paragraph 33.

15 THE CHAIR: Yes.

16 MR JOWELL: Then if one goes to the next statement in tab 19, you will see the
17 statement of Mr Frey of Freshfields on behalf of the Bremnes/Grieg defendants.

18 If you go, please, to page 229, and if I can invite you to read paragraph 43, you see
19 he's stating in the middle there that there are discussions relating to the pricing of
20 spots sales will have occurred between Norwegian employees domiciled in Norway,
21 for the most part in Norwegian.

22 If you also look at paragraph 46 over the page.

23 THE CHAIR: Yes.

24 MR JOWELL: Then if I could invite you to go to tab 21, you will see the statement of
25 Mr Stuart of Cleary Gottlieb for the Leroy defendants. If you could go, please, to
26 page 259, and read paragraph 21.

1 THE CHAIR: Yes.

2 MR JOWELL: And Mr Wulff, who is the chief operating officer of Leroy in Norway,
3 also gave a statement. We see that in tab 24. And if you go to page 282 of that -- this
4 is of course from the horse's mouth -- I invite you to read paragraphs 17 through to 27.

5 THE CHAIR: Yes.

6 MR JOWELL: Then if you go, please, to tab 27, you will see the statement of
7 Mr Macaulay of Skadden, my instructing solicitor. And if you go to page 312 and if
8 I could invite you to read paragraphs 7 and 8.

9 Finally, the evidence of Mr Gardner, for the 7th defendant, SalMar, you see in tab 30.

10 If I could ask you to go to page 345, paragraph 10.

11 THE CHAIR: Yes, okay.

12 MR JOWELL: I think an overwhelming picture, really, of all of these communications
13 on the spot prices being conducted, as you would expect, by Norwegians in Norwegian
14 in Norway.

15 If one then considers the location of the documents, this also points to Norway. It is
16 important to note it is actually highly likely within this case that there will be issues of
17 translation, because they have arisen, as you'll see, from the evidence in a number of
18 cases in the proceedings before the Commission. So again, if I could ask you -- if we
19 could do this whistlestop tour of going through the evidence. If we go to --

20 THE CHAIR: Do you want to just give us the references, the documents being in
21 Norwegian.

22 MR JOWELL: Certainly. Yes. So Mr Scully of Clifford Chance which is tab 18,
23 page 219, paragraphs 6 to 10; Mr Frey of Freshfields, tab 20, page 247, paragraphs
24 21 to 22; Mr Stuart, tab 22, paragraphs 24 to 25 at page 269; Mr Macauley, tab 27,
25 page 313, paragraphs 11 to 16; and Mr Gardner at tab 30, paragraphs 11 to 12,
26 page 345.

1 If you read those passages, you will see that I think a number of them advert to the
2 fact that in the Commission investigation they have been realistic in which the
3 Commission has --

4 THE CHAIR: The dispute over translation.

5 MR JOWELL: Yes, the dispute over translation. And sometimes whether something
6 is collusion, unlawful collusion or not unlawful collusion can really turn on quite subtle
7 differences in the meaning of words.

8 Those are the key points which in our submission make this a Norwegian dispute. The
9 factors that are raised by the claimants are essentially, as we understand, them
10 fourfold. They rely on the domicile of the claimants and of the defendant UK
11 subsidiaries; they rely on the fact that their loss was suffered in the UK; they rely on
12 English as the applicable law; and then they rely finally on the possibility of the UK
13 consumer directive claim.

14 If I can address those factors discretely.

15 So the first factor, the domicile of the claimants and some of the defendants, doesn't
16 really go very far.

17 THE CHAIR: It is a point -- it is really the tail wagging --

18 MR JOWELL: Right, indeed.

19 THE CHAIR: -- if you are right on your other points, the fact that (inaudible) included
20 within the claim as a UK defendant, seems to be perhaps not Ms Howard's best point.

21 MR JOWELL: Indeed. And the real defendants are indubitably Norwegian
22 defendants, and it is their acts that are going to be the focus of the trial investigation.

23 THE CHAIR: Yes, indeed.

24 MR JOWELL: Now as to the suffering of loss in the UK, it is true, of course, that most
25 of the purchases of the relevant products -- most, I think not all, I think -- most of them
26 have been in England. But that is hardly -- certainly not by comparison with the factors

1 that we rely on. And the reality is that the amount, the quantity of the farmed salmon
2 products purchased by the claimants is not a matter that is likely to be in dispute.

3 We don't anticipate, for example, that we are going to wish to cross-examine Ocado
4 witnesses on the amount of smoked salmon or pet food that they purchased.

5 THE CHAIR: You will be pointing, I imagine, to cross-examine witnesses on, not on
6 the quantities, but on how the prices were set, particularly if you are saying it is
7 long-term contracts or to what extent you are having regard to your competitors,
8 pricing relative to competitor, pricing relevant to the spot price. That is going to be
9 a fairly major part of the case, isn't it?

10 MR JOWELL: I doubt it, in our submission, because we anticipate that what will be an
11 issue, is was there collusion, first of all? Did it affect the Nasdaq price? As I say.
12 Then, is there then a global market for this, for salmon products?

13 If we succeed in establishing any one of those steps --

14 THE CHAIR: Although it is put as a global price, and one can understand why, this
15 tribunal is going to be concerned with the UK prices, and they may or may not be
16 reflective of the global price. You may have evidence there is no such thing as a global
17 price.

18 MR JOWELL: We will, that's right.

19 THE CHAIR: Then one would need to look specifically at the UK and there would be --

20 MR JOWELL: I think the allegation is more it is the sellers who are pricing by reference
21 to the spot prices on the Nasdaq --

22 THE CHAIR: I don't know what the power of the supermarkets is to put pressure on
23 prices or to --

24 MR JOWELL: The selling -- I mean, if one is investigating what the selling price is at
25 the supermarket, that would be one thing, and then you would be investigating what
26 price their competitors priced at. If you are looking at the buying prices --

1 THE CHAIR: The two may or may not be entirely independent. All this is going to
2 be -- particularly if there is a consumer action as well -- there is going to be an
3 enormous --

4 MR JOWELL: We will come on to consumer action.

5 THE CHAIR: -- a weighty topic -- unless you are making concessions it is going to be
6 a weighty topic, the extent to which prices supermarkets paid are impacted by the spot
7 prices.

8 MR JOWELL: That is true. But that, in my submission, will be focused on whether
9 there is a global salmon market --

10 THE CHAIR: If you say there isn't a global salmon market, let's assume there isn't
11 a global market.

12 MR JOWELL: If there isn't a global market, then their case fails, and that is that. That
13 is the basis on which it is pleaded.

14 THE CHAIR: We will see what Ms Howard says about that.

15 MR JOWELL: If the case is either there was no conclusion in Norway, or there was
16 no elevation of the Nasdaq index, or there is no be global market affected by the
17 Nasdaq indices, then if any one of those things is not established, their claim as
18 pleaded fails. That is simply how it is pleaded.

19 If --

20 THE CHAIR: I understand the submission.

21 MR JOWELL: -- if the global prices are not affected.

22 What one is concerned with, when one is looking at an overcharge by a cartel, it's not
23 the activity of the supermarkets and what they have priced their own products, it is
24 how the sellers are pricing.

25 THE CHAIR: I understand.

26 MR JOWELL: So it is the sale price by the salmon producers. The question is: do

1 those salmon producers price by reference to the Nasdaq or not? That's the key
2 question. That does not turn on how much salmon or the focus is not there on the
3 claimants, or on their pricing. Certainly that's not the principal focus.

4 Where they have suffered loss -- where they have bought the product at the end of
5 this chain of causation -- the amounts of that will simply be demonstrable on the face
6 of the relevant invoices. It will be a mechanical exercise based upon that purchase
7 documentation.

8 All of the focus of the investigation into whether the salmon prices were relevant will
9 be on events in Norway.

10 The next point that is relied on by the claimants is the contention that English law is
11 the applicable law.

12 Now, there are two answers to that. One is a short answer and one is a long one. The
13 short answer is that despite the claimant's assertions that there are some sort of
14 difficult points of law or questionable points of law that arise here, there are none that
15 are identifiable or obvious, or indeed likely to arise.

16 There is -- the issues in this case are almost certain to be entirely, or very largely,
17 factual: did the alleged collusion occur? And if so, in what form and to what extent?
18 Did it cause the elevation of prices on the Nasdaq? Is there a knock-on effect on
19 global prices? And so on.

20 THE CHAIR: Sorry, excuse my ignorance, do the Norwegian courts follow EU law?

21 MR JOWELL: They have the EEA rules that are very similar -- essentially the same.

22 THE CHAIR: So they follow --

23 MR JOWELL: Yes.

24 THE CHAIR: CJEU case law?

25 MR JOWELL: Well, EFTA case law, the equivalent.

26 THE CHAIR: So most of the law that we are dealing with in this case will be applied

1 in the same way by the Norwegian courts and the UK courts?

2 MR JOWELL: Yes, indeed.

3 THE CHAIR: Subject, of course, to the information.

4 MR JOWELL: Yes, indeed. There is no suggestion that there is somehow some
5 special rule in Norwegian law that is different and that they have some special
6 jurisprudence. So the law is essentially the same and the law will not be in contention.

7 This is a case about the facts. That's the short answer --

8 THE CHAIR: Famous last words is all I can say to that, yes.

9 MR JOWELL: The longer answer is this: one needs to consider the basis here on
10 which it is said that English law applies. Now, in both England and in Norway, what is
11 applied -- the rules that are applied are those that are in the Rome II Convention,
12 regulation, on the non-contractual claims and the UK had this as a retained law. In
13 Norway, they have regard to it. It effectively applies (inaudible). If one looks at that,
14 you see it in the authorities bundle, tab 82 which is in volume G.

15 And the rule that is applicable here, and you see it is article 6, subparagraph 3, on
16 page 3482. 3a is the sort of general rule, if you like:

17 "The law applicable to a non-contractual obligation arising out of a restriction of
18 competition shall be the law of the country where the market is or is likely to be
19 affected."

20 Now the primary market that is affected by this alleged restriction of competition is
21 Norway. That's certainly the initial market that is affected. Then there is, on the
22 claimant's case, also a global market.

23 Certainly, if anything, that would be a point to Norway -- or certainly at the very height
24 you would say: well, Norway and the world, and possibly the UK if that is part of the
25 world, but not exclusively certainly to the UK.

26 THE CHAIR: The collective interests of consumers are likely to be affected --

1 MR JOWELL: A is not applicable here. That's an act of unfair competition. That is
2 rather different. What we are concerned with here is a restriction of competition.

3 THE CHAIR: I am just reading. I am catching up.

4 MR JOWELL: Yes.

5 THE CHAIR: Article 6(1).

6 MR JOWELL: 6(1) we are not concerned with. An act of unfair competition is different
7 from what we are concerned with, which is a restriction of competition.

8 THE CHAIR: Yes, understood.

9 MR JOWELL: So it is 3(a) and 3(b) which are the specific --

10 THE CHAIR: Yes.

11 MR JOWELL: So 3(a) points to the law of the country where the market is or is likely
12 to be affected. So if you take that provision on its own, you would say: well, Norway,
13 and possibly global markets.

14 THE CHAIR: Why not the UK?

15 MR JOWELL: Well, if you say that the UK market -- the way they put it is: we are part
16 of a global market.

17 THE CHAIR: I have that submission, but leaving that aside, we are going to be arguing
18 about what is pleaded in this case is going to be the impact on the UK, so we are
19 concerned with the UK markets. So how does this --

20 MR JOWELL: Not only, because some purchasers are from outside the UK, from the
21 EEA, from producers in the EEA. So it is not only -- even on that basis it is not just --

22 THE CHAIR: Why is it Norway?

23 MR JOWELL: Well, the restriction of competition that is alleged is a restriction that
24 derives from a collusion that took place in Norway, and --

25 THE CHAIR: It doesn't say where the collusion took place -- where the act of
26 restriction took place, it talks about the market where it is affected --

1 MR JOWELL: Yes -- but certainly a market affected and alleged to be affected as
2 a part of the claim is the Norwegian market --

3 THE CHAIR: I imagine it is a very small market compared to the UK market.

4 MR JOWELL: I am not sure that is correct. They say 50 per cent of salmon -- so far
5 as the salmon market is concerned, the wholesale purchase of salmon --

6 THE CHAIR: -- out of Norway, into Norway. They have lots of salmon.

7 MR JOWELL: Yes, but the only point one can make is that there are multiple markets
8 here affected, the first of which, the primary one of which, is the Norwegian market.

9 Insofar as there is an effect on the UK market, it is an effect that is indirect. And at the
10 end of a long causation.

11 One then has 3(b). This is really the provision that is principally, I think, relied on.
12 Perhaps if you just take a moment to read it, it is a rather convoluted clause.

13 THE CHAIR: Yes, okay.

14 MR JOWELL: Effectively, what that is saying is if you have a UK defendant, for
15 example, and if the UK market is one of those of the markets directly and substantially
16 affected, and if you bring your claim in the UK, then you can choose to opt to apply
17 English law. If you join other defendants, you can also then apply English law to them
18 too.

19 Now, the first point to observe goes back to the point I was making a moment ago,
20 which is that it is conditioned on that market being one that is directly and substantially
21 affected. In our submission, the UK is affected, if anything, in that category, according
22 to the allegation of the claimant. So that we actually don't accept that on this basis,
23 that English law would apply. This is an indirect (inaudible) and the UK market is
24 affected indirectly.

25 But the point I wish to make is simply this: even if that is wrong and there is an arguable
26 case that the English market is directly and substantially affected, the application of

1 English law is essentially purely because England is the lex fori because this is the
2 case where you happened to have brought the claim.

3 In other words, the allegation that English law applies depends on the fact that the
4 claimant is allowed to choose the lex fori as the applicable law. So the contention that
5 English law applies here as a reason to hear the claim here is essentially circular,
6 because English law only applies because the claim happens to have been brought
7 here.

8 So in those circumstances, we say the notion that English law applies and should be
9 given some independent weight, is wrong. It is a bootstraps argument.

10 The final point that is raised is the possibility of a collective claiming. It is true that
11 there is an application for certification of a collective claim that has been made to the
12 tribunal. It is also the case that we have challenged, all of us -- or will challenge -- on
13 jurisdictional grounds that claim. It is also the case that that claim is at an early stage;
14 service on all the defendants has not yet been made; it has not yet been certified --

15 THE CHAIR: So one option -- it may not exist by the time (inaudible) talking about.

16 MR JOWELL: Yes.

17 THE CHAIR: That is one possibility. The other possibility is it may decline jurisdiction,
18 for very similar reasons.

19 MR JOWELL: Yes, indeed.

20 THE CHAIR: (Inaudible) sanction.

21 MR JOWELL: Yes.

22 THE CHAIR: I have seen some of the evidence relating to class actions in Norway.

23 MR JOWELL: Yes.

24 THE CHAIR: Have there been a number of class actions of this type?

25 MR JOWELL: What is clear -- I will show you the evidence in a moment -- well, it was
26 an issue asserted in the evidence put forward by the claimants that collective

1 | claims were not possible in Norway. In response to that, we put in evidence from
2 | Professor Andenas --

3 | THE CHAIR: It is now accepted they are --

4 | MR JOWELL: It is accepted. Indeed it is possible to have both opt in and opt out
5 | claims. The only response really that the claimants have to that is the evidence that
6 | they put in to top that, was to say, "Well, it may be more difficult in Norway to find
7 | funding for opt out claims".

8 | THE CHAIR: You are into the procedural advantages.

9 | MR JOWELL: Indeed, you are, a classic instance.

10 | In this country we have seen that one has had changes, both legislative and judicial,
11 | in relation to the availability of funding --

12 | THE CHAIR: I'm not even sure where we are at the moment, there's another case
13 | called --

14 | MR JOWELL: Indeed. There are different views as to how stringent or not stringent
15 | one should be in relation to this. If Norway makes the choice to be slightly more
16 | stringent in relation to funding, then that is a classic instance of a juridical advantage
17 | or disadvantage that the court --

18 | THE CHAIR: Should we look at that evidence --

19 | MR JOWELL: Certainly.

20 | THE CHAIR: -- on the funding issue -- I am not sure we need to look at anything
21 | else --

22 | MR JOWELL: No. I will just show you first, if I may, Professor Andenas' evidence,
23 | just show you the basic agreement. You will see that in tab 36 of the core bundle at
24 | page 499.

25 | It starts at 479. I will just show you, if I may, the conclusions, to be brief.

26 | Paragraph 55, he says:

1 "I understand that the claimants in these proceedings argue that it would not be
2 possible for the consumer claimants in these proceedings to bring an equivalent claim
3 in Norway. My conclusion differs which can be summed up in these three points. The
4 introduction of class actions in Norway in 2005 explicitly opened up an opportunity to
5 bring both opt in and opt out actions in Norway. The legislative intent has been made
6 clear and has been supported by the existing case law and the authoritative
7 commentaries, and several opt out actions have been launched since its inception.
8 Case law, even though limited at this stage, shows how opt out class actions can be
9 very practical.

10 "The existing case law does not bar funding the arrangements for prior opt out actions
11 in general, but has clarified that class members cannot be held liable for any costs
12 pertaining to the opt out action, including costs for funding of the action."

13 The responsive evidence from Mr Tokvam, which I think might be the third report you
14 referred to at the outset, tab 9 --

15 THE CHAIR: How does this differ -- I mean, class members cannot be held liable for
16 costs pertaining to the opt out; this is including costs of funding and costs available to
17 the other side, is it?

18 MR JOWELL: Yes.

19 THE CHAIR: He's dealing with both, is he?

20 MR JOWELL: I think he is, yes.

21 Then page 171 in tab 9, you see the response. He says -- his comments, he refers to
22 the conclusions of Professor Andenas, including the last point that the case law does
23 not bar funding arrangements for opt out actions, provided that class members are not
24 held be liable for costs, including those related to funding.

25 And he comments:

26 "I agree with Professor Andenas' conclusions --"

1 THE CHAIR: Sorry, I am being very slow. Liable for costs means liable to pay the
2 other side's costs?

3 MR JOWELL: Yes, I think that's the sense in which Professor Andenas means.

4 THE CHAIR: He is not saying after an event insurance is not available -- for those
5 costs --

6 MR JOWELL: I don't want to missummarise it, but what he says in response is he
7 agrees with the conclusion there is no legal bar preventing class actions from being
8 brought by consumers domiciled in the UK, and:

9 "I agree with the legal analysis on which this conclusion is based. I further agree with
10 the explanation of the rules for finding opt out class actions."

11 And he further agrees that there is no legal prohibition on third party funding on opt
12 out class actions. And then he says:

13 "However, with regard to the availability ...(Reading to the words)... I have some
14 additional views ..."

15 Which he explains in more detail below.

16 You will read it, but you will see the conclusion on 174. He says:

17 "In summary, Norwegian law provides a legal framework for bringing opt out class
18 actions, including those involving non-Norwegian class members under the CPC.

19 While third party funding is permissible, the recovery of funder's investment in opt out
20 actions is considerably restricted in practice since class members cannot be made
21 liable directly or indirectly for costs."

22 Actually, that would be the same here, really.

23
24 THE CHAIR: Well, that's what I'm trying to get to grips with.

25 MR JOWELL: No, indeed:

26 "Moreover, I'm not aware of any case law relating to the entitlement of a funder to

1 | undistributed funds ..."

2 | That may be a more germane point but again --

3 | THE CHAIR: Well that's hugely uncertain here.

4 | MR JOWELL: Indeed:

5 | "In opt-in actions, funding arrangements can theoretically include provisions for cost

6 | recovery and separate agreements relating to third party financing. However, I am not

7 | aware of any such financing agreements being implemented."

8 | He accepts the problem doesn't exist in relation to opt in actions.

9 | THE CHAIR: He does say on the previous page:

10 | "External third party financing ...(Reading to the words)... currently no companies

11 | established in Norway that offer such financing."

12 | I was not sure of the relevance of there being established in Norway, really.

13 | Presumably one would go to the city.

14 | MR JOWELL: No. In my respectful submission, this is -- the points that are made

15 | here, the countervailing points -- are (a) very unimportant, and secondly, are plainly

16 | squarely within the category of juridical advantage or disadvantage that the tribunal

17 | should take notice of.

18 | There is no suggestion that justice cannot be done here. In any event, they are not

19 | even talking about the present claim, they are talking about a collective claim.

20 | THE CHAIR: Yes.

21 | MR JOWELL: So we are all at one stage removed.

22 | THE CHAIR: Yes.

23 | MR JOWELL: So we say that the reliance on the collective claim, which we challenge

24 | and which we apply also to set aside, is irrelevant and premature. It's not suggested

25 | that this case couldn't be brought in Norway.

26 | THE CHAIR: But there is nothing to stop the class action being brought here and this

1 action going to Norway. It may be unsatisfactory when you have both ends to tie
2 together --

3 MR JOWELL: Indeed.

4 THE CHAIR: -- but if the Norwegian action preceded the class action --

5 MR JOWELL: Yes.

6 THE CHAIR: -- it may be unsatisfactory, but it is not impossible.

7 MR JOWELL: It's not impossible. It is really a matter for debate in relation to the
8 collective actions. It is a debate for another day.

9 It can't materially affect this present claim. If Norway is the forum conveniens for this
10 claim, when you consider all the factors -- and we say it plainly is -- then that cannot
11 change just because of the possibility of a collective claim being brought here, which
12 is not yet certified -- may never be -- and which is itself subject to a jurisdiction
13 challenge that remains unresolved.

14 So those are my submissions on forum non conveniens. Unless you have any --

15 THE CHAIR: No, that's very helpful.

16 MR JOWELL: I think Mr Johnston may have a few words to say.

17
18 Submissions by MR JOHNSTON

19 MR JOHNSTON: Members of the tribunal, I think you are going to hear now from me
20 and then from Mr Luckhurst and Ms Thomas, just briefly supplementing what
21 Mr Jowell has said in relation to our individual clients.

22 I appear on behalf of Cermaq, the second defendant. You should have a brief
23 supplemental skeleton from Cermaq, which is in the core bundle at tab 39.

24 I propose to mirror the brevity of that skeleton argument. I don't anticipate being more
25 than ten minutes or so.

26 Just three points by way of context that are specific to my client.

1 The first of those is that my client, D2, you will have identified has not brought
2 a strike-out application, and that's because the claimants have never sought to add
3 any member of the Cermaq Group in the UK as a party to this claim.

4 So for our part at least, this has always been a claim exclusively brought in respect of
5 a Norwegian company and in respect of an alleged infringement purportedly carried
6 out in Norway.

7 The second contextual point is that Cermaq is not a party to the collective proceedings
8 either, so the claimants in that matter at least have concluded they don't want or need
9 to bring a claim that encompasses my client.

10 The third contextual point concerns the scope of the alleged losses that the claimants
11 are said to have suffered as a consequence of my client's actions.

12 Now, there is a complexity here which concerns the extent to which these factual
13 matters are confidential. Out of an abundance of caution, can I ask you to turn to the
14 confidential bundle itself, and to tab 11 --

15 THE CHAIR: Explain to me why this is relevant to the forum conveniens argument.

16 MR JOHNSTON: It is relevant because it goes to what kind of evidence is going to be
17 in issue and what matters are going to be in issue vis-a-vis my client. The submission
18 in a nutshell is that there are no direct purchases from my client within the scope of
19 this claim. There are a very limited number of indirect purchases in respect of one
20 year. And in respect of --

21 THE CHAIR: Let's assume you are right about that, how does that help us on the -- if
22 we decide that -- if we are not attracted to Mr Jowell's submissions, let's assume for
23 a moment, but you have a bit of a point that you going to go to, where does that leave
24 us?

25 MR JOHNSTON: I think it goes to two points here. The first is one asks the question,
26 "What is going to be in issue?", and vis-a-vis my client, what will be in issue, save in

1 | respect of one claimant who purchased indirectly in one year will be the overcharge
2 | claim. So it will be a question of econometric analysis in respect of products, not the
3 | subject matter of direct or indirect sales, not the subject matter of the Commission
4 | investigation: was there an umbrella overcharge? We say that's relevant when asking
5 | the question: what is the appropriate forum?

6 | Because there will obviously be a very substantial dispute as to the existence of the
7 | cartel. You have heard Mr Jowell on that. That will be canvassed in detail.

8 | Then as regards Cermaq, the question will then become a question of the economists
9 | disputing umbrella overcharge.

10 | Just to revert briefly to a question you asked Mr Jowell, which was also whether there
11 | will be a dispute about price setting, I don't recall Mr Jowell saying: we don't think that
12 | would be central. But even if it were, that would be a point that would point to either
13 | forum, we say, because that would be a dispute where you would have Norwegian
14 | witnesses, from Norway, giving evidence, saying: this is the process by which the
15 | prices under these contracts are negotiated. And you would have your Ocado witness,
16 | saying: this is the process by which these prices are negotiated.

17 | So it wouldn't be a point, even if it were right that it was central, that leaned towards
18 | this jurisdiction or Norway --

19 | THE CHAIR: Positioned in the North Sea.

20 | MR JOHNSTON: -- it would be a score draw, if I can put it that way --

21 | THE CHAIR: Can we have a look at the evidence?

22 | MR JOHNSTON: So the evidence is in the confidential bundle at tab 11. It starts on
23 | page 131. Tab 11, page 131. Rather than read it to you --

24 | THE CHAIR: Where do you want me to start?

25 | MR JOHNSTON: If you could start at B, at the bottom of page 131, paragraph 27B.

26 | Then we see over the page --

1 THE CHAIR: Yes.

2 MR JOHNSTON: You see the thrust of the submission which is that this is going to
3 be a case that concerns the existence of the cartel, the effect of the cartel --

4 THE CHAIR: You are in the proceedings for the purposes of whether or not there is
5 a cartel, but you -- there are no relevant --

6 MR JOHNSTON: Sorry, I missed the last --

7 THE CHAIR: There are no relevant sales by you --

8 MR JOHNSTON: Precisely.

9 THE CHAIR: -- with the exception of the exception.

10 MR JOHNSTON: With the exception of one year to one claimant.

11 THE CHAIR: Do we have a value for that?

12 MR JOHNSTON: I don't have a value for that. If I can --

13 THE CHAIR: It doesn't matter.

14 SPEAKER 3: But the nub of point is then that vis-a-vis my client, this is going to be, if
15 I can put it this way, a very lively dispute as to the existence of the cartel and the
16 effects of that cartel on the Nasdaq prices, and so on and so forth. And then we are
17 going to get to the economists. And it is going to be an econometric dispute --

18 THE CHAIR: You are not suggesting this proceeds -- that the case proceeds in the
19 UK, but you are excluded from it?

20 MR JOHNSTON: Sir, I am not. I am not suggesting that my client would be -- should
21 be hived off in some way, or is special in some way. What I am doing is drawing your
22 attention to the practical realities, and others will address you as regards their
23 particular clients.

24 THE CHAIR: I understand.

25 MR JOHNSTON: If I can make one passing observation vis-à-vis confidentiality. My
26 client has not made an application in relation to confidentiality today, but we do wish

1 to put down a marker. We have tried to address this in correspondence, but we have
2 been rebuffed this week. You have seen the information that is said to be so
3 confidential that I cannot speak it out loud in this tribunal. We do say it cannot possibly
4 be confidential in the sense argued for by the claimants --

5 THE CHAIR: Sorry, what are we talking about?

6 MR JOHNSTON: I am talking about the matters that are marked in orange in the
7 confidential bundle. So the identity of our intermediary is said to be confidential in the
8 relevant year; the identity of the supermarkets --

9 THE CHAIR: We can deal with that on another occasion, I don't want to get into the
10 legal matters for the moment.

11 MR JOHNSTON: If it arises at all because we are in this jurisdiction, then it can be
12 thrashed out on another occasion. But put it this way, my clients were disappointed it
13 couldn't be thrashed out before we got here.

14 Having covered those matters, I really only want to make one submission relevant to
15 the matter of forum, which is to reinforce the force of Mr Jowell's submissions by
16 reference to one paragraph of my client's witness evidence that he gave you the
17 reference for, but didn't take you to. So he took you to paragraphs 30 to 33 of
18 Mr Scully's statement, the third. He encouraged you to read from paragraph 6 to 10
19 of his second.

20 If I may ask you just to turn to paragraph 6 --

21 THE CHAIR: Give me the tab number again.

22 MR JOHNSTON: Tab 18, page 219, paragraph 6, which without waiving privilege,
23 I understand from --

24 THE CHAIR: We will read it.

25 MR JOHNSTON: I am very grateful, thank you.

26 What Mr Scully is doing there is just fleshing out by way of his second witness

1 statement the practical realities of this, and the point we draw attention to in
2 particular -- and I would encourage you to read paragraphs 7, 8, 9 and 10 -- is the fact
3 that every single document cited in the statement of objections vis-a-vis my client
4 between my client and a third party is in Norwegian.

5 What he goes on to explain is something you have already seen and you have already
6 been addressed in respect of, which is the fact that there are lively disputes with the
7 Commission as to nuance. Because of course reading these kinds of documents
8 requires a very detailed, careful nuanced understanding of precisely what is being
9 said. The allegation is --

10 THE CHAIR: Maybe. I mean --

11 MR JOHNSTON: I am very grateful, I will not labour the point.

12 THE CHAIR: -- I am not entirely persuaded that nuance is important, and as I have
13 not seen the documents yet, I can't really ...

14 MR JOHNSTON: No, indeed, and there is a practical reality that arises there. But the
15 question of nuance is important because experience with these cases is very clear
16 that a document that will frequently be fought over bitterly, where one side said, "Well,
17 this is an obviously incriminating document", and the other side says, "No, no, it is not
18 an incriminating document at all, you are misunderstanding what was being said in
19 this often very brief email between two --"

20 THE CHAIR: I can understand what inferences are to be drawn will be highly
21 contentious.

22 MR JOHNSTON: Yes.

23 THE CHAIR: The extent to which that turns on the nuance of the language, we are
24 not in a position to resolve that.

25 MR JOHNSTON: No, indeed, it is a wider conceptual point, and I encourage you to
26 read the remainder of Mr Scully's statement where he explains this has been precisely

1 in issue with the Commission.

2 I think possibly just one other point at this stage, reverting to the question about the
3 binding or otherwise nature of the Commission's decision, which you canvassed with
4 Mr Jowell. We are obviously not in a position to give evidence, but we will, if it would
5 assist, go away overnight and try to revert with some assistance on that point.

6 But just to revert to your question to Mr Jowell, which was, in effect: if it is binding,
7 does all of this question about witnesses and documentation and so on and so forth
8 fall away?

9 We could say: no. The reason being that there are only really two possibilities in this
10 case: either it is binding in Norway, in which case there would be great convenience,
11 if I can put it that way, in having it in Norway; if not, the choice is between having it in
12 a jurisdiction where the documents are in the same language and the witnesses are
13 able to give evidence in their first language, or in the United Kingdom where they are
14 not.

15 So we do say that binding or otherwise, Norway is clearly the proper and most
16 appropriate forum.

17 The second point, just to pick up briefly, is to touch on the second stage of the
18 claimant's case. As Mr Jowell laid it out for you this morning, the second stage was
19 spot prices on the Nasdaq are affected by the collusion.

20 Just to work that through, were the Commission's decision to be binding in Norway,
21 then that second question would almost certainly not be covered by the Commission's
22 investigation. So the Commission will look and it will identify whether or not there is
23 an infringement, whether there are infringing communications.

24 It is highly unlikely they will then go on and do a detailed analysis of precisely how the
25 spot market prices are set and precisely who feeds into them. So even if it were right
26 that the Commission decision binds in Norway, there will still be a substantial part of

1 the analysis that must be conducted by reference to Norwegian documents and
2 Norwegian witnesses, and that will require, as with all of the other matters we have
3 been discussing, cross-examination and so on and so forth.

4 So, members of the tribunal, that is the very brief view from Cermaq's perspective, if
5 I can put it that way. I will pass over to Mr Luckhurst.

6 Submissions by MR LUCKHURST

7 MR LUCKHURST: I act for the Leroy defendants, that's D5 and D6. D5 is the Leroy
8 Seafood group, the Norwegian company as the tribunal will have seen; D6 is an
9 English company. It is relied on in the particulars of claim in paragraph 76C as
10 a connecting factor to the UK for the purposes of forum. That claim has been
11 discontinued, so obviously that now falls away.

12 Mr Jowell took you to the key evidence on the Leroy Seafood Group that I was going
13 to show you. That was Wulff 1, at paragraphs 17 to 27, pages 228 to 283 of the core
14 bundle, as the chief operating officer of Leroy Seafood group, from the horse's mouth,
15 as Mr Jowell put it, referring to price setting and sales functions based in Norway and
16 conducted by Norwegians predominantly speaking Norwegian.

17 Mr Jowell also mentions the other point that I really wanted to emphasise, which is
18 Mr Stuart's second statement, paragraphs 24 to 25, where he makes the point that
19 translations really have been in issue in the EC Commission investigation. And
20 Mr Leroy has taken you to certain translations there. So that would be an issue --

21 THE CHAIR: Have those translation issues been resolved now or are they still
22 ongoing? I am sorry, is that necessarily a question --

23 MR LUCKHURST: I don't believe so. I will check and correct that if it that is wrong.

24 THE CHAIR: Thank you.

25
26 Submissions by MS THOMAS

1 MS THOMAS: Tribunal, working the way down the list before lunch time, I act for
2 SalMar, the 7th defendant, which as you heard, is in the same position as Mr
3 Johnston's and Mr Luckhurst's clients, in the sense that I have no strike-out
4 application, I participate in the challenge brought by the defendants collectively. You
5 have a very short two-page skeleton argument from me, highlighting the material
6 features of SalMar's evidence. I will trespass on your time just to make three points.
7 The first is the issue of the scope and status of the Commission decision in Norway.
8 You had an offer to spend(?) to potentially come back to overnight, which may be
9 sensible. I wanted to show you one document which I think you might not have seen
10 so far, which may assist in clarifying some of the positions we will get to this afternoon.
11 This is the press release concerning the SO, which the Commission issued on 24
12 January 2024, and which obviously precipitated the claimants' -- at least the position
13 prior to the claimants' decision to bring this claim in February 2024. You can find that
14 in the hearing bundle, tab 3, page 492.

15 THE CHAIR: 492 -- which page are you on?

16 MS THOMAS: Page 492.

17 THE CHAIR: Yes.

18 MS THOMAS: Obviously this is a short press release which detailed the issuance of
19 the SO, I just wanted you to cast your eyes part way down the page, which says:

20 "If the Commission's ...(Reading to the words)... is confirmed ..."

21 Have you found that paragraph?

22 THE CHAIR: Yes.

23 MS THOMAS: "... the conduct will infringe Article 101 ...(Reading to the words)...
24 restrictive business practices."

25 The obvious point to make is that the Commission doesn't mention Article 53 of the
26 EEA, and has not received it under Article 53 of the EEA.

1 The second document I would like to show you is --

2 THE CHAIR: Sorry, not that this is not helpful, but I just wonder if the parties could
3 just liaise on this and let me know what the position is. If it is not agreed, I can't really
4 resolve it; if it is agreed, then you must tell me tomorrow or --

5 MS THOMAS: I think it may be helpful to return to it overnight. The reason I think it
6 may be material is because it is relevant in part to Ms Mockford's submissions which
7 are coming and I don't want the tribunal to be proceeding on a misapprehension. In
8 particular if I may show you the claimant's argument permission to serve out at core
9 bundle tab 2, page 52.

10 You will see at paragraph 14(a) at the top of that page, a statement that:
11 "The Commission informed the defendants of its clear own view that they breached
12 Article 101 TFEU and/or Article 53 the EEA."

13 So this issue of whether the EEA applies has been a serious source of confusion in
14 this case, along with others that Ms Mockford will be addressing you on. I think it will
15 be helpful for us to come back overnight, but my understanding is the EEA does not
16 apply in respect of fish products.

17 THE CHAIR: Sorry, it doesn't --

18 MS THOMAS: There is no application in this case because it is limited in scope, and
19 the scope doesn't encompass fish products.

20 THE CHAIR: Ah right, so it is not really loose language that the Commission doesn't --

21 MS THOMAS: Yes.

22 THE CHAIR: -- so it won't be binding -- or may not even be particularly persuasive,
23 yes.

24 MS THOMAS: Well that will be a matter for the Norwegian courts.

25 THE CHAIR: Yes, of course.

26 MS THOMAS: Yes. I am grateful for your tone of surprise, sir, which justifies me in --

1 THE CHAIR: (Overspeaking) Yes, that would be helpful. We don't want pages of
2 anything, but just a paragraph explaining the position would be very helpful, thank you.

3 MS THOMAS: Of course, I think a short note may be of assistance. I am conscious
4 that anything that we do say may effectively be a matter for Norwegian law, and so
5 we'll have to consider what you can properly say, but I thought it would be helpful to
6 the court's understanding, and the claimants can of course tell us if they disagree.

7 THE CHAIR: Yes. Thank you very much, yes.

8 MS THOMAS: My second point is really to add my voice to the chorus on the points
9 you have heard so far on the significance of the Norwegian elements of this case,
10 which really therefore do arise, Because of the point I have just made, and in particular
11 that SalMar feels most strongly about the issue of mistranslations, a matter that has
12 arisen in the context of the Commission investigation, where the language of the
13 procedure is English. For that reason, it really does consider that the Norwegian court
14 is best placed to consider the types of communications at issue in this case.

15 My third point, which I won't take any time on at all really before lunch, is to point out
16 one feature of the claimants' evidence, where Ms Quierin at paragraph 48.3.3, for your
17 note, of her witness statement -- I don't ask you to go to it -- relies as a factor in favour
18 of English jurisdiction that there are contracts with English jurisdiction clauses in this
19 case. I wish to draw to your attention that in SalMar's evidence, they pointed out that
20 the contracts under which they sold the allegedly cartelised products contained
21 Norwegian jurisdiction clauses --

22 THE CHAIR: Sorry, can you show me that, because I'm not ...

23 MS THOMAS: I can. Would you like me to show you Ms Quierin's evidence first?

24 THE CHAIR: Yes.

25 MS THOMAS: That is at core bundle, tab 5, page 127.

26 THE CHAIR: Yes, which paragraph?

1 MS THOMAS: Paragraph 48.3.2.

2 So it is a point relied on in passing, as it were, one of the factors in favour of English

3 jurisdiction. Of course there is no suggestion that the clause is binding in any sense,

4 but they're a factors that points in favour of English jurisdiction.

5 THE CHAIR: What am I meant to be looking at here?

6 MS THOMAS: Paragraph 48.3.2.

7 THE CHAIR: Yes, "Some of claimants that are subject to the laws of England and

8 Wales", yes.

9 MS THOMAS: Yes.

10 THE CHAIR: I have that. I thought you said they were Norwegian.

11 MS THOMAS: I don't dispute that. I simply draw your attention to SalMar's evidence

12 which is in the confidential bundle at tab 14, page 160.

13 THE CHAIR: Yes.

14 MS THOMAS: The relevant paragraphs have confidentiality markings, I share

15 Mr Johnston's queries as to whether they are really confidential, but I would just invite

16 you to read, in particular, paragraphs 56 and 57.

17 THE CHAIR: D7.

18 MS THOMAS: D7 is SalMar, my client.

19 THE CHAIR: Yes. And C6? Just C6, not the other --

20 MS THOMAS: These being direct sales.

21 My Lord, I won't trespass into the confidential content, I won't say anything further. But

22 the short point is, as is openly stated in my skeleton argument, that those paragraphs

23 confirm that there are jurisdiction clauses in favour of Norwegian courts in respect of

24 those relevant contracts.

25 THE CHAIR: Sorry, what does the jurisdiction clause in the contracts have to do with

26 anything, really?

1 MS THOMAS: Simply that the claimants have put it in issue, and therefore I wish to
2 point out that it is at best a neutral factor, and if anything a factor in favour of Norway,
3 to the extent it's relevant at all.

4 THE CHAIR: Right. I mean we are concerned with obviously the relevant competition
5 law that applies, we're not really concerned with the contractual law.

6 MS THOMAS: I don't think either party suggests that the jurisdiction governs
7 competition law. This is a responsive point to the claimant's evidence.

8 THE CHAIR: Yes. Thank you very much.

9 Are we done?

10
11 Submissions by MR McCARTHY

12 MR McCARTHY: Apologise, I just had one very brief point I can make on behalf of
13 the SSF defendants. I don't need any more than a couple of minutes, you'll be
14 relieved, just for me to make this point.

15 The SSF defendants are all domiciled in Scotland, so UK domiciled defendants. In
16 relation to them, the claimants rely on the point that the UK domicile of SSF and other
17 UK defendants presents a substantial connecting factor with the United Kingdom.
18 I just wanted to briefly avert the tribunal's attention in relation to that, as we say when
19 the evidence is looked at in relation to SSF in particular, that's a very, very weak point
20 and certainly doesn't change the locus of this case from Norway.

21 Sir, I don't need, unless it would be helpful, to take you to Mr Gallagher, the managing
22 director's evidence on this, but if I just highlight briefly the central points.

23 His evidence is set out in his first witness statement at paragraphs 51 to 56. These
24 are the key points we draw from that material.

25 The first is that SSF was not involved in and made no contribution to the Nasdaq
26 salmon index or its advisory panel, clearly the key institutions and bodies which are at

1 the centre of the claim. It hasn't attended Nasdaq meetings, if there are such
2 meetings, and has never submitted pricing information to Nasdaq.

3 Indeed, it couldn't be a member of the Nasdaq index or the advisory panel, because it
4 is neither Norwegian producer or exporter.

5 In addition, the overwhelming majority of SSF's turnover in the region of 91 per cent is
6 generated from the sale of Scottish salmon, not Norwegian salmon. By volume, the
7 volume is well over 90 per cent.

8 We set that out in recent correspondence pursuant to an RFI from the claimants.

9 In addition to that, two of the entities, one is -- SSF Limited is the parent company from
10 the SSF Group; D12 is a holding company, so it has no relevant sales activity. We
11 are not sure why it has been added on that basis, but it is an improper defendant, we
12 say.

13 Then D13 has been involved -- is essentially a production company, a farming
14 company. It has no relevant sales of Norwegian salmon.

15 So in that context, the position that the SSF defendants has nothing whatsoever, we
16 say, to change the locus of this.

17 THE CHAIR: So far as there are some sales.

18 MR McCARTHY: Yes.

19 THE CHAIR: You say I think 98 per cent Scottish salmon, 90 per cent by value. The
20 remainder is Norwegian. Who is actually selling it?

21 MR McCARTHY: The evidence on this is set out in Mr Gallagher's second statement.
22 But the position in relation to that is that -- I don't have the statement in front of me,
23 but the position is, I think, that by volume just over one per cent --

24 THE CHAIR: But who is making the sales?

25 MR McCARTHY: Sorry, just to explain, one per cent are resale and then a further
26 approximately just over 7 per cent by volume are -- on a commission basis. So SSF

1 Limited, but not the other two, receive a commission --

2 THE CHAIR: So there is some involvement with D11, just to be clear --

3 MR McCARTHY: Precisely.

4 THE CHAIR: -- but you say not D12 and 13?

5 MR McCARTHY: Precisely so.

6 THE CHAIR: Yes.

7 MR McCARTHY: And we say that economic activity as reflected in the turnover is

8 very limited, but that's perhaps a separate point to come back to.

9 THE CHAIR: Thank you very much.

10 MS MOCKFORD: For Bremnes/Grieg, just to make clear that I don't have anything

11 further to add and gratefully adopt Mr Jowell's submissions.

12 THE CHAIR: Thank you.

13 (1.04 pm)

14 (The luncheon adjournment)

15 (2.00 pm)

16

17 Submissions by MS HOWARD

18 MS HOWARD: My Lord, members of the tribunal, I am not sure whether the

19 microphones are working for the transcript. If you don't hear me, please ask me to

20 speak up as I think there is a problem with the technology.

21 The defendants' extraordinary arguments -- and I know that is a high claim to put but

22 I do put it that highly -- are that UK customers that are affected by a cartel that took

23 place outside the UK cannot sue here for losses in the form of the higher prices that

24 they have paid for the product purchased here in the UK.

25 Now that contention means that the last ten years of tribunal and High Court

26 jurisprudence, with the key cases like Trucks, Vattenfall, Power cables, Britned, Power

1 Cables, where the events of the alleged collusive behaviour have all taken place
2 outside of the UK, now need to be revisited in the light of Brexit.

3 That limitation would effectively confine competition damages cases in this jurisdiction
4 to cases where the cartel events have taken place here.

5 That has serious questions for the tribunal's duty to ensure the effectiveness of the
6 private enforcement of competition law, the Manfredi principle of securing effective
7 compensation for losses and all harm that's been suffered, and the importance of the
8 vindication of those rights that have been expressed by the Supreme Court in
9 Merricks.

10 Now the place of the collusive acts may be entirely arbitrary and entirely at the
11 cartelists' preferences for holding their clandestine activities. We only have to look at
12 the number of cartels taking place across Europe, they may be in hotel or in
13 a motorway cafe, and we submit that that arbitrary random choice should not override
14 all other factual connections.

15 So in the exercise of the tribunal's discretion, when weighing up the connecting factors
16 between competing fora, we submit that the tribunal should look at all of the connective
17 factors, but also with all elements of the claim in mind, with a view to the interests of
18 the parties as well as the efficient administration of justice.

19 That wider consideration of the interests of justice not just concerns the parties to this
20 litigation, but also the effective use of the tribunal's resources, but also other claims
21 that may be in the pipeline or that may already be pending where there may be
22 efficiencies and synergies that can be combined.

23 Now the elements of this claim are not just confined to collusion. Yes, the infringement
24 is one element which took place in meetings, emails and telephone calls, but there are
25 also the other elements of the effects of the collusion. And we say that the Nasdaq
26 salmon index did have global effects on the global market for salmon as a commodity

1 product, and in this particular case on both the direct and indirect sales of Norwegian
2 salmon, also for direct and indirect sales of Scottish salmon and their derived products.

3 That is because all of the defendants are the leading world producers of farmed
4 Atlantic salmon.

5 The Norwegian market, as I will show you -- I am going to try you take you to some
6 evidentiary materials -- is the largest part of the global market and the defendants are
7 responsible for over 60 per cent of exports of Norwegian salmon to Europe.

8 I would express that during the relevant period we are looking at -- 2011 to 2019 -- the
9 UK was part of the EU, and therefore the decision is likely to have direct relevance to
10 effects on prices of salmon here in the UK.

11 It is no coincidence that the dawn raids that were carried out by the Commission, with
12 the assistance of the CMA in 2019, included dawn raids to two UK premises, one of
13 Mowi's subsidiary, D9, and then Scottish SSF, D11.

14 So there will be documents relating to the EU -- to the UK, that are on the Commission
15 file.

16 But I am going to take you to some evidentiary materials to show you that there is
17 a basis for the claimant's case on effects.

18 Then lastly, we have to look at quantum. As your Lordship very correctly identified,
19 there will be issues relating not just to causation, evidence on negotiations, those are
20 matters for evidence in disclosure at trial, not a mini trial now.

21 But there will also be relevant questions of pass on, what were the supermarkets' costs
22 and pricing decisions, the centre of gravity for those inquiries will very much be
23 UK-based, and then also interest and financing losses.

24 So we submit that when you look at the claim as a whole over all of these elements,
25 although the events of the cartel may predominantly be in Norway -- and it is not
26 common ground that those events were completely confined purely to Norway, there

1 were wider implementation and wider effects and I am going to take you to some
2 materials on that -- but also the wider aspects of the case will directly raise evidence
3 and witnesses here in the UK.

4 So just standing back for a moment, a cartel, especially one conducted by email,
5 phone calls, may not be limited to one country in isolation. Indeed, it may be very hard
6 to pinpoint the exact place where the events took place.

7 Even if it did take place in a motorway cafe on the Autobahn, it is trite that a cartel will
8 have wider price effects than the consequences. So the epicentre, a bit like a nuclear
9 reactor in central Europe, will have repercussions across board because of the global
10 international marketplace that we operate in, and in particular the exports here from
11 Norway to the rest of Europe, including the UK.

12 So it is a very different factual context to the VTB case that my learned friend,
13 Mr Jowell, took you to this morning, that was predominantly relating to a case of
14 misrepresentation between two counterparties. It is over simplistic in this case to see
15 the events of a cartel as being confined to one country.

16 Although the epicentre of the collusion may take place in one country, the
17 implementation by not just the cartelists but -- in this case the Norwegian defendants,
18 but by other members of their corporate group is likely to extend and reach out into
19 other countries, and we say especially so here in the UK.

20 And I want to take you to some evidence for that.

21 So aside from the cartel collusion and its implementation, there is another aspect,
22 which is the price effects. Because we say here -- and my learned friend took you to
23 paragraph 69 of our particulars of claim -- there are a kind of -- if you look at it a bit
24 like an earthquake, there is a ripple effect.

25 The collusion of the salmon index, firstly, has direct effect on prices of Norwegian
26 salmon -- and when I am talking Norwegian NAFS, I am talking about the head on

1 gutted salmon -- which the defendants sold to the claimants here in the UK.

2 Then there are indirect effects on Norwegian salmon products, both the head on gutted

3 and the derived products, which the claimants derived through intermediaries. So

4 there is a supply chain from the defendants in Norway, through intermediary

5 wholesalers and processors, that may be established in diverse EU countries, but also

6 in the UK, who then sold them on to the claimants in the UK.

7 So there is indirect effects there for Norwegian salmon.

8 But we also say that because of the Nasdaq salmon index being a global benchmark,

9 it acted as a reference price or it influences prices of Scottish salmon. That's whether

10 it is by direct sales from the defendants or their subsidiaries in the UK or through these

11 indirect supply chains.

12 Lastly, there are umbrella effects where the claimants have purchased both Norwegian

13 or Scottish salmon from non-cartelists, but those prices were affected by the cartel.

14 So what I would like to take you to, first of all, is our pleading. This is not just a simple

15 infringement; we have pleaded a single and continuous infringement.

16 If I can take you to paragraph 66 of our particulars of claim, which is in the core bundle

17 at tab 1, page 22. You will see here that we have pleaded a multifaceted infringement,

18 a complex infringement, comprising different elements set out at A to F.

19 Also, importantly, it's involving not just the Norwegian defendants, but also members

20 of the defendant groups. So we say it is not confined to the six Norwegian cartelists,

21 but other members in their groups.

22 You will notice in our particulars of claim we have named other entities. We have not

23 named them as defendants because we were trying to keep matters proportionate, but

24 as I take you through some of the evidentiary materials, you will see references to

25 Ocean Quality that we have pleaded in paragraph 35 of the particulars of claim, which

26 was a joint venture between Bremnes and Grieg.

1 So Ocean Quality, when you see, as we set out at paragraph 35 on page 14, up until
2 December 2020 -- so for the entirety of the relevant period of the
3 claim -- Ocean Quality was owned 40 per cent by D1 -- that's Bremnes -- and
4 60 per cent by Grieg ASA -- that's D3.

5 And you will also see a reference to Morpol being a subsidiary of Mowi. So these are
6 examples where not just the Norwegian defendants, but other subsidiaries within the
7 group and connected to the UK defendants have been implicated in the arrangements.
8 What I want to try and do now is to take you through each of the elements that we
9 have pleaded at paragraph 66 and to try and show you some evidentiary materials in
10 support of those. That is a tall order for a claimant to have to do when they are in
11 a position of complete information asymmetry about the goings on of a secret cartel.
12 Obviously, the defendants know exactly what was going on --

13 THE CHAIR: Why do we need to do this?

14 MS HOWARD: I am trying to show you that the epicentre, the gravity of this case, is
15 not confined to Norway, but the tentacles of the cartel reached out to other states,
16 including the UK.

17 THE CHAIR: I understand.

18 MS HOWARD: With a view to showing you that there will be implementation in the
19 UK, effects in the UK and likely evidence here.

20 THE CHAIR: I see.

21 MS HOWARD: If you will bear with me, I think this is important. Also this goes
22 probably well beyond what I need to do to establish there is a serious issue to be tried,
23 but I am really doing this in the context to show you that the forum of the UK tribunal
24 here --

25 THE CHAIR: I understand, yes.

26 MS HOWARD: -- is appropriate.

1 So I want to keep paragraph 66 on the one hand, and if you can also open up some
2 materials from the US proceedings, which are in the hearing bundle at tab 13. I have
3 version 5, but it is tab 13, the third American amended complaint.

4 THE CHAIR: We don't have electronic bundles, you see.

5 MS HOWARD: I'm sorry. You have hard copy bundles?

6 THE CHAIR: We have hard copy bundles. We normally do have both, but because
7 we are in the RCJ, we don't.

8 MS HOWARD: It is tab 3 of the hearing bundle, and within that it is number 13 on the
9 index.

10 THE CHAIR: Thank you very much. I will need a page number, I think.

11 MS HOWARD: 208, I think it is.

12 So this was an annex -- it is part of the exhibit to the first statement.

13 THE CHAIR: I have two page numbers on this.

14 MS HOWARD: Yes, I am working off the --

15 THE CHAIR: I am guessing the higher number will be the bundle number.

16 MS HOWARD: -- which is the 208 -- it's the one on the left.

17 THE CHAIR: Unfortunately it doesn't appear on all pages. Okay, yes. That's the
18 cover sheet, "third consolidated amended ..."

19 MS HOWARD: Yes, thank you, I am grateful, my Lord.

20 Just to give you some context for this amended complaint, this was a class action
21 brought on behalf of direct purchasers in the Miami division of the Southern District
22 Court of Florida. This direct purchaser class action was eventually settled by the
23 Norwegian defendants in 2022 for approximately 85 million.

24 Obviously they didn't make any admission of liability, but you will see the settlement
25 agreement is the next tab at 14.

26 There was also a further class action for indirect claims, for indirect purchases, that

1 | were settled for a further £35 million. That settlement agreement is at tab 15.

2 | But as part of these proceedings, the US direct purchasers sought disclosure of both

3 | administrative files from the DOJ proceedings and the European Commission.

4 | You will remember the European Commission intervened to try to restrain their

5 | disclosure in the middle of their ongoing investigation, but it wasn't successful and the

6 | file was disclosed to the US plaintiffs. This third complaint was then amended to reflect

7 | the evidence that had been provided on the file.

8 | So although this is only a pleading, and although no doubt it has been skewed by

9 | American lawyers' pleading, there are references to documentary evidential materials

10 | within this document that have come from the Commission file.

11 | So what I am trying to do is to show you that for the basis of what you pleaded of the

12 | single continuous infringement, there is direct documentary evidence that supports it.

13 | Now my learned friends have really focused on the collusion. If you look back at 66,

14 | of the prices, the exchange of information, and that's represented in (a) and (c).

15 | And we don't deny that the direct collusion took part in Norway. But that's not the sole

16 | element, we say, of the claim in this case, because we also say that the Nasdaq

17 | salmon index did act as a global benchmark, not just for prices in Norway, but

18 | worldwide. Salmon is essentially a global commodity product, and there are some

19 | useful factual materials in the US proceedings that will show how even though this

20 | was a small market, it had wider effects.

21 | If I can take your Lordships first to paragraph 125 -- that's on page 242 -- I am going

22 | to just generally read from 125 down to approximately 130, but the key points you

23 | might want to just read those -- rather than me reading them out to you -- but the

24 | important points that come out of these paragraphs is that Norway is the most

25 | important benchmark for salmon prices around the globe, and the defendants were

26 | able to manipulate and coordinate their prices by exchanging weekly spot

1 transactions.

2 Now they were limited to sales within Europe -- not just within Norway, but within
3 Europe, and they were done on a weekly basis. The spot price then serves as
4 a benchmark for the sale of salmon around the world.

5 Obviously this pleading has a US perspective, but we would say by analogy we are
6 able to show that there was a similar fact on prices in the UK.

7 THE CHAIR: All right.

8 MS HOWARD: 126 says that the salmon's production sold on the Norwegian spot
9 market is very small -- you see the percentages there, 1 to 2.5 per cent -- but it has
10 had a much broader impact.

11 If you look at paragraph 128, over the page, it says that in 2013 the Nasdaq salmon
12 index was changed. So it was changed from the NOS benchmark to the Nasdaq
13 benchmark with a shift of focus:

14 "The composition of the panel of reporting companies was changed to include salmon
15 producers with an export licence and subsidiaries of salmon producers engaged in
16 exportation."

17 So it's not just a cartel that's confined to Norway, it also included exports of salmon
18 from Norway to other countries. It also meant that their subsidiary companies, like
19 Morpol, could also be included, and it gave them a direct ability to manipulate.

20 It also says it included group sales between different companies in the same group,
21 so it has a broader emphasis than just Norway.

22 We can see further down the effect that the Nasdaq index had on global prices. So if
23 you go to paragraphs 155 to 156, on page 250, there, there is reference to Russia had
24 impacted a ban on Atlantic salmon from Norway, but there are references here to
25 internal documents and quarterly reports, emphasising that there is likely to have an
26 immediate effect on the company's earnings because of the proportion of output

1 | destined to the spot market.

2 | So they recognise that the Russian ban will have an impact.

3 | But if we look at 163 to 164, they say that because of their coordination, they manage
4 | to protect themselves from the effects of the Russian ban.

5 | At 163, SalMar talks about the genuinely shrewd sale of volumes at spot prices has
6 | contributed to better margins for the segment, and Leroy refers to having a record year
7 | with record high levels.

8 | So there is evidence here -- admittedly it is scattered -- that prices of sales around the
9 | world are being sold at spot prices.

10 | If we just scroll a bit further down --

11 | THE CHAIR: I know that is disputed -- or will be disputed -- but we are not attempting
12 | to resolve that today. It is clearly arguable that it is having an effect -- as I understand
13 | it, it is not being said it is not arguable at this stage. This is not really an issue between
14 | the parties at the moment, is it?

15 | MS HOWARD: No, and it is a matter for trial and evidence. And we are not conducting
16 | a mini trial here, but I am showing that there is evidence that although the Norwegian
17 | collusion took place in Norway, there were wider affects around the world, including
18 | the UK.

19 | THE CHAIR: Yes, I see that.

20 | MS HOWARD: The only point I wanted to say -- there are some graphs particularly at
21 | paragraph 203 that show how all of the defendants' prices -- so 203 is on 265 -- the
22 | graph on page 265 shows very clearly how the prices of Ocean Quality and Leroy track
23 | the Nasdaq --

24 | THE CHAIR: Indeed. Unless I picked up the wrong end of Mr Jowell's stick, as
25 | I understand this is progressing on the basis that the manipulation, if it has taken place
26 | in Norway, would arguably have had an impact on prices in the UK. So we are

1 proceeding on that basis.

2 MS HOWARD: That's right. So in order -- in collecting the prices that have been
3 paid -- obviously the prices that the claimants have paid for their transactions will be
4 based in the UK. You have heard that evidence.

5 The negotiations -- the defendants say they were conducted in Norway, but there's
6 two sides in negotiations --

7 THE CHAIR: There is potentially a Norwegian party, which is why we ended up
8 suggesting it might be in a non-SIAC(?) characteristic.

9 MS HOWARD: It is a two-sided negotiation.

10 THE CHAIR: Clearly it is for supplying the UK and at least one party is negotiating
11 from the UK, it would seem --

12 MS HOWARD: That's right. The evidence we have presented, particularly in the
13 confidential schedules and the annex to Ms Quierin's third statement show that the
14 claimants have bought some supplies directly from the Norwegians, but also through
15 intermediary wholesalers and processors that are located predominantly in the UK,
16 but for some they are in -- there are other intermediaries based in Ireland and others
17 based in other European countries.

18 So there will be evidence of those negotiations with intermediaries in the UK.

19 And then some claimants have bought directly from the UK subsidiaries of the
20 defendants here in the UK. That's particularly the case for Mowi, for D9 -- Mowi
21 UK -- that sold directly, and also for SSF.

22 THE CHAIR: You are talking about Scottish salmon at the moment.

23 MS HOWARD: That's right. SSF is D11, which is the joint venture.

24 THE CHAIR: Yes.

25 MS HOWARD: And at the time D12 and D13 --

26 THE CHAIR: Sorry, you are talking about Scottish salmon as opposed to --

1 MS HOWARD: Yes, Scottish Sea Foods.

2 THE CHAIR: -- you are talking about Scottish salmon --

3 MS HOWARD: No, I am talking about the party, SSF.

4 THE CHAIR: You said they bought directly from UK subsidiaries; are you referring to

5 Norwegian salmon, which is a small amount, or Scottish salmon?

6 MS HOWARD: Both.

7 THE CHAIR: Both, right.

8 MS HOWARD: I am afraid we are having to react quite quickly to information that just

9 came in overnight. We asked the defendants to provide figures of their sales to the

10 claimants of both Norwegian and Scottish salmon, and to give an estimate of the

11 volumes of those figures.

12 THE CHAIR: I see.

13 MS HOWARD: We have had, I think, three letters in so far this morning --

14 THE CHAIR: We can pick that up in the morning, maybe.

15 MS HOWARD: -- we will try to compile that into a table for you, so you can see.

16 In any event, the defendants tried to say that: oh, gosh, sales in the UK were just

17 a minute proportion of our overall global business. And they paint it in single-digit

18 percentages. But obviously that is a mask because the UK market, compared to the

19 rest of the world, including the US, is obviously going to be dwarfed in comparison.

20 What you need to look at is the actual value and volume of the figures affecting each

21 of the claimants.

22 Now my learned friend for Cermaq tried to dismiss the sales from ASDA. Do you

23 remember he said it is possibly 98 per cent Scottish salmon and 2 per cent Norwegian

24 salmon? Well, those are direct sales of Norwegian salmon by D2 to ASDA. And that

25 is significant -- there are figures of the value and the volume of that, if I can just take

26 you to the confidential bundle.

1 THE CHAIR: Why does this matter? I understand this may matter for the strike out;
2 why does this matter for the forum conveniens arguments?

3 MS HOWARD: Again, it is showing you that the centre of gravity and the effects of
4 this cartel did not just operate in a vacuum in Norway; it did translate directly into sales
5 here in the UK.

6 THE CHAIR: Yes. So your primary case is it doesn't matter whether it is Norwegian
7 salmon or Scottish salmon, they are all linked and related and -- anyway --

8 MS HOWARD: Yes, we say it is -- north Atlantic salmon --

9 THE CHAIR: 2 per cent, 98 per cent; 5 per cent, 95 per cent; 80/20 -- I am not sure
10 where that takes us.

11 MS HOWARD: We say even if they paint it as a small percentage, actually in terms
12 of value and volume it is approximately 10 per cent of ASDA's total claim value -- are
13 represented by those sales of Norwegian salmon from Cermaq. So it is quite
14 a substantial amount.

15 THE CHAIR: Okay.

16 MS HOWARD: On the confidentiality point, I just wanted to flag the reason why we
17 are claiming confidentiality. That is because all the claimants are direct competitors,
18 so they are sensitive about details of their supply chains being revealed.

19 THE CHAIR: Let's grapple with that another day if we have to.

20 MS HOWARD: So coming back to paragraph 66, I would like to make one further
21 point. At F, we talk about how the defendants have implemented or have -- whether
22 it is knowingly or unknowingly, have implemented the cartel directly into the UK. There
23 is also evidence of that in the third complaint.

24 THE CHAIR: Just point me to that in the pleading. Which paragraph are you in, in
25 your particulars?

26 MS HOWARD: This comes into paragraph 67. We talk about members of the

1 defendant groups either directly participated in, or they implemented or they gave
2 effect to the cartel arrangements in the United Kingdom, and that's either directly
3 implementing or through their negotiations with the claimants.

4 THE CHAIR: Right.

5 MS HOWARD: So if I may take you back to the hearing bundle of the third amended
6 complaint. There are three paragraphs I need to take you to, 151, 158 and 159. The
7 first one is --

8 THE CHAIR: Sorry, which document are we in again?

9 MS HOWARD: We are back in the third amended complaint. So that's back in the
10 hearing bundle, tab 3, number 13.

11 THE CHAIR: I have it, yes.

12 MS HOWARD: It is at page 249.

13 So paragraph 151 talks about SalMar and Leroy being particularly close because of
14 their joint ownership of Scottish Sea Farms -- that is D11 -- so it was easy for them to
15 put limits on their competition. First of all, we say in March 2014 -- this is recording,
16 again, evidential materials from the Commission file -- that SalMar's sale and
17 marketing director confirmed to its CEO, and Witzoe who I think is Leroy -- and I will
18 check -- that SalMar would not compete with SFF in the UK.

19 THE CHAIR: I do apologise, I have lost track of where you are reading from.

20 MS HOWARD: Sir, I am reading from paragraph 151.

21 THE CHAIR: Sorry, I missed that. I am with you now.

22 MS HOWARD: Okay. There are some names being bandied around, and you will
23 see in paragraph 150 the definitions of the names --

24 THE CHAIR: Yes.

25 MS HOWARD: -- and which companies they belong to.

26 THE CHAIR: Yes.

1 MS HOWARD: Here it refers to -- and we presume this is from a document from the
2 file -- March 2014, SalMar's sale and marketing director -- so that is D7 -- confirmed
3 to Witzoe -- now Witzoe is also the controlling shareholder -- that SalMar would not
4 compete with SSF in the UK. There is then references to non-competes being taken
5 in France as well.

6 But 158 is particularly important. That's on page 251.

7 If you read from the third line down, again, April 4, 2014, so very specific. Presumably
8 there was a document. SalMar's, Mr Witzoe explained to the CEO that he had
9 attended a meeting with Leroy and they had discussed a pricing model for their salmon
10 based on Nasdaq spot prices.

11 At the same time, Witzoe and Beltestad -- so that's Leroy and SalMar, so D7 and
12 D5 -- were communicating with Jim Gallagher as SSF. So that's Mr Gallagher who
13 has given evidence in these proceedings on behalf of D11. And they were
14 communicating with him via email. In one of those emails Mr Gallagher referenced
15 a recent conversation with Witzoe -- that's SalMar -- and perhaps Beltestad as
16 well -- that's Leroy -- regarding Nasdaq prices. Gallagher confirmed that as they had
17 discussed, SSF would make sure its prices were ahead of Nasdaq prices on
18 a week-to-week basis.

19 So that element there, now there may be a legitimate explanation that obviously SSF
20 was just communicating with its parent companies who owned the joint venture, but at
21 the very least we say this shows that SSF directly implemented the Nasdaq prices on
22 a week-to-week basis in respect of its sales of Atlantic salmon in the UK.

23 So evidence of direct implementation --

24 THE CHAIR: We are going to come on to direct implementation in due course, yes.

25 MS HOWARD: The next sentence is also important because Mr Gallagher also
26 directly asked Witzoe -- so again, so he asked SalMar, that's D7 -- to contact

1 Beltestad -- D5 -- to confirm what prices Leroy was offering. So there we can see what
2 looks like the start of an involvement in a hubs and spokes information exchange in
3 relation to a direct competitor's prices that Leroy was offering, presumably in the UK,
4 so that they are not going to compete on price.

5 Just to finish that point, there is another reference in this document where -- and this
6 is page 132 -- the last line, on page 244:

7 "Although Leroy was not a member of Nasdaq, an executive from Leroy AS [that's D5]
8 wrote to an American colleague in January 2017 and stated that virtually all Leroy fish
9 is priced weekly based on Nasdaq prices."

10 So even just that one little snippet shows you that there is evidence here, both of prices
11 around the world being framed in relation to Nasdaq prices and directed --

12 THE CHAIR: This was indicated -- we understand that point and that is arguable.

13 MS HOWARD: So this is really to try to show that although the place of the alleged
14 infringement took place in Norway, that shouldn't be the overriding consideration. You
15 also have to look at where the cartel was implemented, where it took effect, and most
16 importantly where the harm was suffered. We say that because of that, the
17 UK -- certainly the tribunal is the most appropriate forum.

18 Coming next to how we are going to ensure the interests of justice and the parties,
19 I would like to make some observations on the status of the decision. This is not just
20 confined to the allegedly material non-disclosure. We do think it's important because
21 the decision will be a repository of very useful evidential materials, and certainly the
22 European Commission file will also be relevant. And those documents have all been
23 translated into English. As you know, English is the working language of the European
24 Commission.

25 THE CHAIR: Yes.

26 MS HOWARD: So there is a body of ready based materials along with relevant

1 materials on the DOJ file, that will all be in English and available to the tribunal fairly
2 rapidly. And obviously the UK is not bound now post-Brexit by Regulation 1 of 2003,
3 nor by the damages directive, so it can get access to those materials and doesn't have
4 to wait for the European investigation to conclude.

5 THE CHAIR: When do you expect the European investigation to conclude?

6 MS HOWARD: The latest we have -- obviously the defendants will probably know
7 more than I do -- the oral hearings took place in September of last year. Normally, it
8 takes approximately a year to 18 months for a final --

9 THE CHAIR: From the oral hearings?

10 MS HOWARD: From the oral hearing. That's an average.

11 THE CHAIR: Okay.

12 MS HOWARD: We don't know whether there will be settlement discussions or
13 cooperation elements. It would suggest not, from the defendants' position. But if there
14 aren't protracted negotiations over settlement, it may be less.

15 A rule of thumb, we would think the end of this year, the beginning of next year.

16 So it's clear -- I would like to make two points about the status --

17 THE CHAIR: If this matter proceeds, there is likely to be a decision from the
18 Commission before this tribunal forms a view?

19 MS HOWARD: Absolutely, yes. Yes. And in fact -- I mean, this is another point I will
20 come to -- I think by the time the case management of this case is decided, it will
21 probably be, you know, timely in terms of disclosure and evidence.

22 Now the decision post-Brexit is not binding on the tribunal, but that doesn't mean it
23 has no relevance at all. My learned friends' attempt to try to whitewash this as
24 something that's not really entirely irrelevant because it's confined to spot market, and
25 Norwegian salmon and Norway.

26 But it is highly relevant and persuasive. And we have the FX ruling -- I am not going

1 to take you to it -- at paragraph 102, that modifies the Qualcomm test. So we can
2 have a look not just at the underlying facts, the factual statements in the Commission
3 decision, but also you can have regard to the Commission's findings -- and inferences
4 and finding --

5 THE CHAIR: This is in Evans, you say?

6 MS HOWARD: This is in Evans.

7 THE CHAIR: Can you remind me of that.

8 MS HOWARD: Yes, it is in authorities bundle 69, page 2748.

9 THE CHAIR: Which tab did you say?

10 MS HOWARD: I am sorry, I am working electronic, so I don't have the bundle number.
11 It is tab 69.

12 THE CHAIR: Just give me the paragraph again.

13 MS HOWARD: It is paragraph 102.

14 THE CHAIR: What were you pointing to in particular?

15 MS HOWARD: I am just having to switch screens?

16 THE CHAIR: "The CAT will also consider ...(Reading to the words)... some of which
17 fall short on requires on any conclusions end the ultimate merits ... might identify
18 relevant evidence ..."

19 Plainly that must be right:

20 "... may demonstrate lines of inquiry.

21 "The CAT will be conscious of risks of being invited to ...(Reading to the words)... to
22 a disproportionate satellite litigation."

23 MS HOWARD: So ultimately, this is a statement that you are entitled to have regard
24 to, both under section -- even if section 60A doesn't apply, because it will postdate the
25 end of the Brexit implementation period. As a court, you are entitled to have regard to
26 relevant statements from the EU institutions post-Brexit, under section 6(2).

1 THE CHAIR: It is very difficult to know what that means. It is so easy to say and so
2 difficult to know. I mean --

3 MS HOWARD: Ultimately, it is relevant nevertheless --

4 THE CHAIR: If it is shifting the burden of proof, is it -- I mean, either you are accepting
5 a conclusion or not. Clearly if it is providing a road map to how documents might link
6 together, that's one thing.

7 MS HOWARD: Yes.

8 THE CHAIR: Or explaining how the structure -- but if there is a finding like there was
9 a meeting in Oslo on this date and Bob said to Bill X, and the Commission had found
10 that, do we accept that or do we -- does that shift the burden of proof to show that it
11 didn't take place? What does it mean in practice?

12 MS HOWARD: When the decision is first handed down, then -- like the SO, the SO
13 creates a prima facie evidence of infringement. So we would say the decision creates
14 a similar prima facie evidence of infringement but stronger, because the defendants
15 have had the chance to rebut the Commission's provisional objections and they have
16 been confirmed. But it is still open to appeal before the general court and before the
17 Court of Justice, so it will not be final.

18 So it's not binding on you, obviously. Also the amount of weight will need to be
19 calibrated as to whether there are appeals and who has appealed.

20 Where there is an actual factual finding of a meeting that is supported by underlying
21 documentation and emails on the file, you are entitled to draw the weight that you think
22 is appropriate to that evidence, and whether the defendants are --

23 THE CHAIR: I have to say I find this very difficult. You are saying it is a presumption,
24 but this is not specific to competition law, this issue. The extent to which you pay
25 attention to other tribunals --

26 MS HOWARD: No.

1 THE CHAIR: -- is a matter of general law. If it is now a finding of another court creates
2 a presumption in the UK, that's quite a bold submission.

3 MS HOWARD: It is. But I am involved in the Dieselgate litigation in the High Court.
4 I can bring copies to you tomorrow, but the High Court in Crossley 1 has not just had
5 regard to but has found that the German KBA decisions on defeat devices in vehicles
6 is binding. Now that was because it was done in the context of a harmonised regime.

7 THE CHAIR: Binding is easy. I can do binding.

8 MS HOWARD: So it is difficult for me to opine in the abstract, obviously, without sight
9 of what the Commission's findings -- or even provisional findings -- are at the
10 moment --

11 THE CHAIR: In the end, this is a neutral point because it is going to apply whether it
12 is out in Norway or out in the UK. It is the extent to whether something is -- the impact
13 of the nonbinding Commission decision.

14 MS HOWARD: Yes. In terms of Norway, so Norway is part of the EEA and part of the
15 EEA Agreement. They are not bound -- there is no direct effect in Norway. It is
16 a dualist state.

17 THE CHAIR: Yes.

18 MS HOWARD: So under the EEA Agreement, the member states have -- the EFTA
19 states have the discretion whether to implement regulation 102/2003 or the damages
20 directive, or whether to follow the case law of the Court of Justice, and likewise with
21 the decision. But they do have a principle of homogeneity, so they will try to ensure
22 consistency where they can. So I think it is a similar approach to here, in that they
23 have this principle of homogeneity, so we would say that is a similar position to
24 Qualcomm and FX.

25 THE CHAIR: But that seems a reasonable working hypothesis that there is not
26 a cigarette paper between the two approaches, but we still don't know what the

1 approaches are and we still don't know whether we are going to have to read
2 Norwegian documents or not. Is the Norwegian court effectively going to be
3 rubber-stamping or consider highly persuasive a decision of the Commission? Or is it
4 going to say: I am not sure about that, let's get all the emails out and have a look at
5 them.

6 MS HOWARD: I would not have thought the Norwegian court could second
7 judge -- certainly not in advance of the appeal process, because it will be bound by
8 that Masterfoods and Delimitis case law that it will have to stay its proceedings and
9 stop taking an adverse decision running counter, at least, through the Masterfoods
10 and Delimitis case law.

11 I am not an expert on Norwegian law, but that's my understanding of it.

12 The FX case is being appealed and the appeal is due to be heard on 1 and 2 April on
13 this point, the status of the decision, so we may get some guidance from the Court of
14 Appeal.

15 THE CHAIR: Sorry, it is being appealed?

16 MS HOWARD: Sorry, Supreme Court on 1 and 2 April.

17 THE CHAIR: Wow, okay. On this point?

18 MS HOWARD: It is on that point, but obviously I think the FX decision is a pre-Brexit
19 decision.

20 THE CHAIR: Yes.

21 MS HOWARD: So they are probably not going to comment on what happens when
22 you have a decision post-Brexit.

23 THE CHAIR: Yes.

24 MS HOWARD: I think this is one of the first few cases to go through involving the
25 implications of Brexit on Commission investigations and decisions.

26 But regardless of what the status is for the tribunal -- and you will see from the

1 amendments that we made to the particulars of claim -- the claimants maintain their
2 position that once this decision, assuming it is going to be a reached decision,
3 becomes final, it will be binding on the addressees; it will be binding on the Norwegian
4 defendants as addressees. And that the principles on abuse of process that the Court
5 of Appeal has set down --

6 THE CHAIR: Sorry, clearly it is binding on them, I understand that, but binding on
7 them in which jurisdictions?

8 MS HOWARD: So the decision will relate to the collusion in relation to the exports of
9 salmon from Norway to Europe. And we say at that time, from 2011 to 2019, the UK
10 was still part of Europe, so findings that relate to exports of salmon to Europe will
11 equally be applicable to exports to the UK. So it will be hard for them to gainsay the
12 findings of the Commissions in relation to products sold --

13 THE CHAIR: Is that common ground?

14 MS HOWARD: It's not common ground, it's a novel issue of law.

15 THE CHAIR: Yes, it sounds like --

16 MS HOWARD: So in terms of strike out or summary judgment, there shouldn't be
17 strike out or summary judgments on an issue of law that clearly needs to be
18 determined.

19 THE CHAIR: Where is this in your skeleton, by the way, the position of law?

20 MS HOWARD: It is still in our pleadings --

21 THE CHAIR: The pleadings are being amended.

22 MS HOWARD: It is probably at the end.

23 THE CHAIR: Don't worry. Keep going. Your junior can pass you a note.

24 MS HOWARD: I think it is paragraph 79C, on page 2640. There we accept because
25 of FX it is not binding, particularly given corporate weight for the tribunal, but anyway
26 it will be binding throughout the EU on the addressees. And we say there are strong

1 | policy reasons why it would be improper for the defendants to deny its findings --

2 | THE CHAIR: I am sorry --

3 | MS HOWARD: It's 79C.

4 | THE CHAIR: 70C. Yes.

5 | MS HOWARD: So if they don't exhaust their rights of appeal or if they do exercise

6 | their rights of appeal before the EU courts and fail, we say similar abuse of process

7 | arguments apply, that it would be improper and inappropriate of them to force

8 | claimants to re-litigate from scratch and to prove the infringement, when there are

9 | findings from the Commission and a whole body of evidence on the Commission file

10 | that would have been accepted by the EU --

11 | THE CHAIR: So you say historical events, even though it is not binding, it should be

12 | binding because it is historical events --

13 | MS HOWARD: We say assuming it goes the course, and it is confirmed on appeal --

14 | THE CHAIR: Yes.

15 | MS HOWARD: -- that this will relate to exports of salmon from Norway to Europe at

16 | a time when the UK was part of Europe, and those findings therefore apply to both

17 | direct sales and --

18 | THE CHAIR: Not persuasive, nor binding on --

19 | MS HOWARD: We say contrary to --

20 | THE CHAIR: -- the parties in this tribunal.

21 | MS HOWARD: Yes, it will be contrary to public policy for them to deny findings that

22 | have been made.

23 | THE CHAIR: It is public policy --

24 | MS HOWARD: -- well, it's abuse of process, so common law rules on abuse of

25 | process are derived from public policy --

26 | THE CHAIR: You are not claiming it is an estoppel or --

1 MS HOWARD: It's not as high as an issue estoppel, but it is the common law rule of
2 defence litigating, as the Court of Appeal in Volvo has set out on the Trucks. Now that
3 related to a settlement decision. And obviously the Trucks did --

4 THE CHAIR: It sounds like a really difficult point to me, but yes, okay, I understand
5 the point.

6 MS HOWARD: So in terms of less, establishing the collusion and the actual cartel,
7 we say there will be a body of materials from the Commission file which are in English
8 and will be available.

9 THE CHAIR: Yes.

10 MS HOWARD: And we will be able to get those from the defendants.

11 If the defendants have concerns about the translations and they feel there have been
12 nuances, well, they have their rights during the administrative procedure to make those
13 points to the Commission. They can also raise them on appeal before the general
14 court and the Court of Justice if they feel there has been some material distortion of
15 the evidence.

16 THE CHAIR: You are saying it is unclear whether they can now raise them in this
17 court?

18 MS HOWARD: Well, they can raise them in this court because --

19 THE CHAIR: -- or this tribunal?

20 MS HOWARD: -- we are no longer a EU court.

21 THE CHAIR: They can raise -- you just said as a matter of public policy it should all
22 be binding --

23 MS HOWARD: Again, if we come down to this prima facie evidence of an
24 infringement, if you take the Commission decision as a prima facie statement, the
25 burden then reverses on to the defendants to try and show that the Commission got it
26 wrong and that the weight that the tribunal should give to those findings should be

1 different. So it would be a matter for argument at the trial.

2 THE CHAIR: You would not be precluding of the challenging translations -- you don't
3 say as a matter of law they can't do that?

4 MS HOWARD: It depends how much recognition you are going to give to the fact --

5 THE CHAIR: I am asking what your position will be.

6 MS HOWARD: Yes, if they are EU entities and they are bound by this decision
7 throughout the rest of Europe, it seems a bit strange if they can seek to unpick it
8 completely in this jurisdiction.

9 THE CHAIR: On the narrow point of translations, they want to say this decision was
10 reached on the basis of an incorrect translation; will they be entitled to call translators
11 before this tribunal and get us to look at that again? If they have persuaded us that it
12 was actually not referring to a meeting of Nasdaq salmon, but was referring to going
13 salmon fishing, will we be entitled to explore that?

14 MS HOWARD: It depends what kind of finding they are attacking. If they are attacking
15 a factual event --

16 THE CHAIR: We are talking about translations of document. There is no ambiguity
17 of what I am saying -- will they be able to challenge the EU's translation of documents,
18 and then consequently matters that flow from that?

19 MS HOWARD: If you look at section 60A of the Competition Act, then you can have
20 regard -- you are obviously not bound by the Commission decision and you can look
21 at intervening events or arguments -- you could not preclude them from making those
22 argument, but ultimately it is up to you to decide, you know, what weight is to be given
23 to the competing arguments.

24 So coming back to the connecting factors in favour of competition between the
25 different fora, in our skeleton at paragraph 68, we have set out the for and against for
26 the UK. My learned friend, Mr Gregory, is going to deal with the UK defendants --

1 THE CHAIR: We will deal with that later.

2 MS HOWARD: -- parties, but we say that is an important consideration.

3 THE CHAIR: I understand. The fact we are not hearing it now doesn't mean we won't

4 feed it into the forum conveniens arguments.

5 MS HOWARD: That's right. We say that in reality if you have regard to the

6 infringement, then the bulk -- and the decision and the file materials prove the

7 infringement -- then the rest of the evidence about causation, effects and loss will be

8 UK-centric because we will be looking at what the negotiations were between the

9 claimants --

10 THE CHAIR: They certainly won't be Norwegian-centric, put it that way.

11 MS HOWARD: Yes.

12 THE CHAIR: They will either be a mixture of UK, Norway, maybe other places in the

13 world, but it is not something which drags the action into Norway.

14 MS HOWARD: If you look at the confidential schedules and also the annex to

15 Ms Quierin's third statement, which again is in the confidential bundle, you will be able

16 to see --

17 THE CHAIR: Can you just show me that?

18 MS HOWARD: Let me take you to an example of one of them, if that helps. I will just

19 pull mine up, sorry.

20 If I take C7 -- I don't want to read it out --

21 THE CHAIR: We don't need you to read it out. That's fine.

22 MS HOWARD: What we have attempted to do in the time that we had available and

23 on the best available evidence we had at the time, we tried to give you a sort of

24 long-hand version of each claimant's purchasing practices and where they got their

25 purchases from.

26 So if I take you to this at paragraph 10 --

1 THE CHAIR: Yes, we are looking at this.

2 MS HOWARD: -- with Morrisons, you will see that they made direct purchases of
3 farmed Atlantic salmon, directly from the defendants' groups, and they are listed there.
4 Some of them are in Norway, but others are based both in Norway and Scotland, for
5 direct purchases.

6 THE CHAIR: I see.

7 MS HOWARD: We have not split those between Norwegian salmon and Scottish
8 salmon, but we have in the RFI, which my learned friend, Mr Gregory, will give you the
9 synthesis probably tomorrow -- we'll try to break down some of these sales to show
10 you the split between the two.

11 But they have also made indirect purchases. You will see at paragraphs 12 to 14 there
12 is reference to the explanation of where they bought them from intermediary
13 processors and wholesalers, and also the umbrella purchases from other
14 cartelists -- which is not known at the moment -- and then umbrella purchases.

15 THE CHAIR: "Indirect purchases of farmed Atlantic salmon --" I won't read any
16 more -- you don't know who the third party intermediary --

17 MS HOWARD: Yes, we did. If you look at tab 10 in this bundle --

18 THE CHAIR: Yes.

19 MS HOWARD: -- I am sorry, I have it sideways which is not very helpful -- there is
20 an annex to the third statement of Ms Quierin.

21 THE CHAIR: Sorry, I have not looked at this, yes.

22 MS HOWARD: -- which again is confidential. And there is a table here each for each
23 claimant. I am just trying to find some Morrisons ones. I am sorry, I am trying to read
24 sideways, and unfortunately the colouring doesn't make it particularly easy to find.

25 THE CHAIR: There is no need to read it out. We know where it is now.

26 MS HOWARD: In each of those columns we have then listed out which exact company

1 they negotiated with.

2 THE CHAIR: Yes.

3 MS HOWARD: Who provided -- you will see there is direct purchasers -- direct
4 purchasers from other producers or primary processors; there is the indirect and
5 umbrella purchasers and we tried to list them out.

6 Some of them you will see of those indirect -- they will have UK limited numbers, but
7 others are based in Ireland, in Norway and in other members states.

8 So we are not expecting to go on a fishing expedition across all member states of the
9 EU, it will be the claimant's evidence of those transactions in account that will prove
10 those purchases.

11 If you go back to the schedules of loss, there you will see the volumes and the value
12 of the purchases.

13 THE CHAIR: Where am I looking now?

14 MS HOWARD: Again, I am just going to the Morrisons one, schedule 7. Just showing
15 you how this works, I am looking at page 94. You will see we have split the table
16 according to each of the defendant groups and you can see, first of all, the
17 volume -- section 1 is the estimated volume of commerce, both during the cartel period
18 and the run-off period.

19 THE CHAIR: What are the units here?

20 MS HOWARD: Those are KG, kilogrammes. And this is the head on gutted.

21 THE CHAIR: It's not a value?

22 MS HOWARD: If you scroll down to the next page, in section 2, we then have the
23 estimated value of the commerce. That's the total value of the commerce from each
24 of the defendant groups during the cartel.

25 THE CHAIR: The units of the value is --

26 MS HOWARD: Millions of pounds.

1 THE CHAIR: Millions of sterling?

2 MS HOWARD: Yes, that's right. Then we calculated the estimated overcharge losses
3 with the financing losses to give you the estimated total losses for each claimant from
4 each defendant group.

5 THE CHAIR: Yes.

6 MS HOWARD: So although the defendants tried to apply a lens of their total global
7 sales to say this is minuscule, when you look at it in terms of UK sales, these are quite
8 significant sums and they represent -- because of the seven claimant groups being the
9 leading supermarkets, there is a high proportion of sales of salmon products in the
10 UK.

11 THE CHAIR: Yes.

12 MS HOWARD: Coming back to the connective factor, we say it is important that the
13 loss was suffered here in the UK. We can evidence that. The evidence and the
14 witnesses in establishing causation and loss are likely to appear.

15 We are likely to have -- my learned friend referred to the fact that some contracts have
16 Norwegian law clauses; other contracts have English law; other contracts have
17 Scottish law. In any event, the claimants have elected to apply English law. You may
18 not find that to be a decisive factor, but we submit it is because there will be complex
19 issues of law in these proceedings. It is the first post-Brexit case to be going through
20 the tribunal, and there will be -- as you can already see -- arguments about what the
21 effect of the decision is on the UK post-Brexit, and that will be determined by English
22 law.

23 Having those issues -- very complex issues -- determined in the Norwegian courts
24 through a filter of Norwegian is going to be extremely difficult, with additional expense
25 of foreign law experts and translations as well.

26 Then lastly, we have referred to the UK consumer collective claim. Now, it is correct

1 that it hasn't been certified yet, and therefore the defendants are contesting jurisdiction
2 in those proceedings as well.

3 But there is going to be an overlap between these proceedings and the collective
4 claim -- so there will be the whole establishment of the infringement, the whole effects
5 of the infringement, the price effects; establishing the overcharge will be common to
6 both sets of proceedings.

7 It will be an irony if the tribunal, having issued its umbrella proceedings order and
8 successfully bringing complex claims like Trucks together in one forum involving
9 different levels of the supply chain, so that these issues can be consolidated and dealt
10 with efficiently, for these proceedings to then be split off to Norway when there is going
11 to be an overlap in parallel with the consumer claim.

12 My learned friends say: well, we don't even know that claim is going to be certified, the
13 tribunal is going to dismiss jurisdiction in that claim as well.

14 But those consumers have a statutory right under the collective proceedings regime
15 introduced by the Consumer Rights Act, and as vindicated by the Supreme Court, they
16 have a statutory right to bring their proceedings here.

17 THE CHAIR: It doesn't mean it there won't be forum conveniens arguments --

18 MS HOWARD: I would suggest that the adoption of a statutory regime -- which is
19 aiming and presupposes that it is trial to vindicate individual rights, as the
20 Supreme Court recognised, is going to be a very weighty factor in assessing forum
21 conveniens in that -- and those proceedings. The prospects of consumers bringing
22 proceedings in Norway or funders being willing to fund them at risk with no definite
23 prospects of recovering their costs, or indeed their return on their investment, is
24 a Will-o'-the-wisp.

25 THE CHAIR: Okay.

26 MS HOWARD: So we would submit that there is a strong anchor of that consumer

1 claim here in the tribunal. The tribunal is the only forum in the UK entitled to hear that
2 claim under the statutory regime, given the overlap, first in establishing the
3 infringement and its effects, but secondly in establishing quantum, because the
4 elements of pass on and where the harm has been suffered and by whom is going to
5 be common to both sets of proceedings.

6 If the tribunal is going to have to adjudicate those issues anyway in their consumer
7 claims, then it is much more efficient for these proceedings to be joined and
8 case-managed with the consumer claim, and having the risk of irreconcilable
9 differences between the UK and Norway is a compelling reason why the UK is an
10 appropriate or the most appropriate forum.

11 Lastly, turning to the defendants' arguments, I have already addressed you
12 extensively on why we say the place of the infringement should be decisive.

13 Yes, this is a stand-alone claim, but it is not a complete stand-alone we would submit.
14 We will have the decision, we will have the EC file to prove the claim, which is all in
15 English and readily available. The defendants have already had to make it available
16 once in the US. It has already been redacted; it has already been filtered for privilege.
17 Those documents can just be handed over, whereas they would not be able to be
18 handed over in Norway when the proceedings are still ongoing.

19 The location of witnesses and documents we say is not really decisive either way. The
20 defendants adopt a very defendant-centric approach to how unfair it would be for their
21 executives to have to come and give evidence here. It is true that Norwegian is their
22 native language, but it is very clear that they all speak a level of English that is far
23 superior to the average Brit's ability to speak Norwegian.

24 THE CHAIR: It may be, but we can't really form a view on that. The fact is that
25 a number of witnesses may require translation.

26 MS HOWARD: They may, but the court is sophisticated enough to deal with

1 translation -- equally the Norwegian courts are, but the fact that the defendants have
2 all instructed -- or in many cases instructed -- UK law firms who are advising them both
3 in the Commission investigation and are instructed here suggests that there will be
4 synergies in them having the same lawyers who broadly speak English.

5 THE CHAIR: Anything else?

6 MS HOWARD: I will just take instructions.

7 There was a letter from Simmons, who are the lawyers acting in the consumer claim.
8 They sent a letter -- it is contested by the defendants who are probably going to object
9 to them sending this letter. I don't know whether the tribunal has seen that?

10 THE CHAIR: I can't bring it to mind. There is so much paper in the case, I can't bring
11 it to mind. Just give me a précis.

12 MS HOWARD: Simmons are acting for the claimant's claim. They have written to
13 give the views of their funder as to whether they would be able to bring that claim in
14 Norway. They say their funder would not be able to recover -- they wouldn't be able to
15 recover their costs of the litigation and their funding investment, their return on their
16 investment, in Norway, therefore it makes it practically impossible to bring these types
17 of class actions in Norway.

18 THE CHAIR: Any objections to us reading that?

19 MR JOWELL: We don't object to you reading it de bene esse, but we do say it is
20 entirely inadmissible to rely on a letter not based on sworn evidence -- of course we
21 are not going to stop you from reading it, but we say it is entirely inadmissible and can't
22 be capable --

23 THE CHAIR: If you can find the reference.

24 MS HOWARD: So the key paragraphs are 2.4.

25 The leading Norwegian practitioners take the view that the Supreme Court decision
26 on funding in the Sector Alarm litigation mean that preclude the possibility of opt out

1 | proceedings being brought where there is private litigation funding because the funder
2 | cannot be paid out of any damages awarded to the class.

3 | Since that decision, they are not aware of any opt out consumer actions having been
4 | filed in Norway.

5 | They then return to --

6 | THE CHAIR: It is very much in debate whether that's the position in the UK, isn't it?
7 | I mean, the statement judgment which is going to the Court of Appeal on this very
8 | point --

9 | MS HOWARD: Yes.

10 | THE CHAIR: -- next month, I think; is that right?

11 | MR JOWELL: That is right. Also, we do say that you can't rely upon evidence that
12 | contradicts your own evidence. 2.4 says "contrary to Professor Andenas'
13 | observations", but these claimants put in their own expert evidence which you saw.

14 | THE CHAIR: Yes. It is agreed -- I suppose so. There is no one --

15 | MS HOWARD: So there is a distinction between the theoretical possibility of bringing
16 | a class action in Norway and actually the practicality of bringing it, and whether these
17 | claims are actually practically possible to be funded. I think what Simmons is saying
18 | here --

19 | THE CHAIR: If the class have not intervened -- they have written this letter insofar as
20 | it goes -- but they have not intervened in these proceedings --

21 | MS HOWARD: No, they have not intervened, but they just wanted to -- at
22 | paragraph 2.9, they claim the views of their own funder, who said they would not be
23 | prepared to fund similar proceedings in Norway because of the uncertainties --

24 | THE CHAIR: Are they going to say that? I am sure they mean it too, but they are not
25 | going to say it at this stage --

26 | MS HOWARD: There is a dispute between the parties and the evidence of Mr Tokvam

1 does not agree that it is possible to bring proceedings in class action. It is more
2 nuanced than that. They say that the funding arrangement means that they cannot
3 bring the proceedings in Norway as a class action --

4 THE CHAIR: Just give me the reference for that.

5 MS HOWARD: Thank you. I think this is in the third --

6 THE CHAIR: His third one is --

7 MS HOWARD: Tab 9.

8 THE CHAIR: It is in two places now I have discovered. Tab 9, yes.

9 MS HOWARD: His conclusion is that whilst third party --

10 THE CHAIR: Where are you reading, from the conclusion?

11 MS HOWARD: I am on the second paragraph.

12 THE CHAIR: Sure, yes.

13 MS HOWARD: It is says that the funder's investment in opt out actions is considerably
14 restricted in practice because class members cannot be made liable directly or
15 indirectly for costs. So they are not able to recoup the costs --

16 THE CHAIR: You can't get costs from class members in the UK, can you, in an opt
17 out class action? Somebody behind you is trying to ...

18 MS HOWARD: It is not recovering from the user, but in the UK obviously you have
19 your distributed damages and then from is the waterfall of where the damages go, so
20 the funder will recoup their investment from the distributed damages. That's how all
21 the --

22 THE CHAIR: Or the undistributed damages.

23 MS HOWARD: Sorry.

24 THE CHAIR: As I understand the matter that is going to the Court of Appeal is whether
25 funders can recoup their damages from the -- recoup their costs or their fee, to be
26 precise, from the damages before distribution. It is accepted they can obviously get

1 | their fee from damages which are not going to be distributed.

2 | MS HOWARD: Yes.

3 | THE CHAIR: Those left over.

4 | MS HOWARD: Yes.

5 | THE CHAIR: But it's not clear whether in all cases there will be any undistributed

6 | damages or whether those undistributed damages will be sufficient to pay the very

7 | considerable fees these funders require -- or demand at least.

8 | So I am not sure at the moment -- there seems to be some uncertainty in this

9 | jurisdiction as to what the position is, which is why the Court of Appeal are looking at

10 | it, and I am not clear what the position is in Norway one way or the other. That's not

11 | to say they are different, but those differences have not yet crystallised out.

12 | MS HOWARD: I think the conclusion is a bit of a truncated summary. So his opinion

13 | is set out at the bottom of page 172 where he refers to the Supreme Court, where you

14 | have a self-financed class rep they won't be have able to have any protection for their

15 | work and will only be protected if the defendant is ordered.

16 | In the event of undistributed funds in excess of the sums --

17 | THE CHAIR: Slow down, you are going quite quickly.

18 | So where are you now?

19 | MS HOWARD: If you read from the bottom of 172, over the page to 173.

20 | THE CHAIR: "In my opinion ..."?

21 | MS HOWARD: Yes:

22 | THE CHAIR: So they will not be able to recover their costs from the sums awarded to

23 | the class.

24 | MS HOWARD: That's right.

25 | THE CHAIR: So that's the judgment we raised --

26 | MS HOWARD: That's right.

1 THE CHAIR: -- in Apple saying you could. But I'm not saying it was uncontroversial,
2 and that's the one going to the Court of Appeal.

3 MS HOWARD: So there are three points. One is that the class rep will not be able to
4 get protection for their work or have their costs covered. The class rep is not going to
5 be able to bring the claim because they might be exposed --

6 THE CHAIR: So the class rep can't get insurance?

7 MS HOWARD: I am not sure what the position on the insurance is. The class rep
8 can't recover the costs unless the defendants are ordered to pay, but also the
9 payments from the third party --

10 THE CHAIR: The class representative costs? What are the class representative
11 costs?

12 MS HOWARD: Effectively it is the entire litigation because the class rep essentially is
13 liable for them.

14 THE CHAIR: You mean the cost of the lawyers?

15 MS HOWARD: Yes, but their own costs and the adverse costs.

16 THE CHAIR: Adverse, I have in mind, would be -- so how do the lawyers get paid
17 then in an opt out case in Norway?

18 MS HOWARD: I think that's what he's trying to say. That here the class rep will be
19 exposed to paying those costs because it won't be able to recover them from the class
20 members --

21 THE CHAIR: You say "from the class members", that's an ambiguous statement. It
22 can mean from phoning up class members saying, "You owe me a fiver because you're
23 1 millionth of a claim"; or it could be "I am going to take five pounds out of your
24 damages". It is a sort of --

25 MS HOWARD: I think the Supreme Court really do -- if you look in the paragraph
26 above, it says the Supreme Court said that any part of the financing of the law suit is

1 not permissible for the class representative to recover the costs from the
2 compensation that is awarded to the class members.

3 THE CHAIR: Right. So where does the Norwegian Supreme Court envisage the
4 funding is going to come from?

5 MS HOWARD: I think they said there would have to be legislation to enable this to go
6 through. They couldn't order it to come out of the damages.

7 THE CHAIR: So that's effectively saying there is no such thing as opt out
8 proceedings?

9 MS HOWARD: Effectively, yes. So it is not common ground that opt outs are
10 practically feasible in Norway.

11 THE CHAIR: That's not really what he's saying, is it, taking the report as a whole?

12 MS HOWARD: His conclusion, just at the top before the heading, is:

13 "My opinion is that the vast majority of ...(Reading to the words)... for financial
14 reasons."

15 He explains that it is really the only way you have invested -- a public interest
16 organisation that will be willing to take on this risk. But for a normal kind of like we
17 have here, for a class rep trying to bring it --

18 THE CHAIR: I am not sufficiently informed by this.

19 MS HOWARD: I think it is difficult to deal with it --

20 THE CHAIR: I have read it, carefully, and I have to say it wasn't clear to me.

21 Anyway, I think we have the point --

22 MS HOWARD: The Simmons letter refers to various articles in the letter which we can
23 make available.

24 THE CHAIR: -- not in evidence -- you have a translation of the relevant paragraphs of
25 Norwegian Supreme Court which alight on this issue, then I will look at that, but I really
26 don't want to go into correspondence.

1 MS HOWARD: There is an English translation of that ruling.

2 THE CHAIR: Do you want to --

3 MS HOWARD: There's a separate bundle of enclosures to RB3, and at tab 6 of that
4 bundle on page 299 there is an English translation of that Supreme Court ruling.

5 THE CHAIR: So which bundle?

6 MS HOWARD: It is called RB3, "Enclosures".

7 THE CHAIR: You see what I mean by having difficulty finding papers. RB3,
8 "Enclosures"; tab?

9 MS HOWARD: The English translation is at tab 6 on page 299.

10 THE CHAIR: We will look at that, thank you.

11 MS HOWARD: I am grateful.

12 THE CHAIR: We need five minutes for the shorthand writer.

13 (3.23 pm)

14 (A short break)

15 (3.31 pm)

16 Reply by MR JOWELL

17 MR JOWELL: Thank you. My learned friend's first point was to observe that the
18 consequence of our submissions was that a number of former cases -- she mentioned
19 Vattenfall, and Trucks and others -- would post-Brexit all not have been decided here.
20 We emphatically reject that for two reasons.

21 First of all, in a number of those cases jurisdiction was not challenged, and no doubt
22 for good reason, because the old jurisdictional rules applied, by which one could not
23 invoke forum non conveniens at that. So it may be that some of them would have
24 been decided that they were forum non conveniens if that had been available.

25 But secondly, and more fundamentally, we don't take the case that -- I don't take the
26 position that all foreign cartels, or largely foreign cartels, must be heard overseas; it

1 will all depend upon particular facts of a particular cartel, and where it took place and
2 the nature of its ultimate effect in the UK.

3 So as many in this room will be familiar, in the case of many cartels, they are effectively
4 a sort of movable caravan of infringement, in which there is an industry meeting
5 typically -- or the fringes of an industry meeting, in one European jurisdiction. It then
6 moves to another jurisdiction and then to another. And then there is a phone call
7 perhaps in the UK, and so on and so forth. So it won't be possible in many cases to
8 say there is one particular place where the cartel takes place.

9 In those cases, obviously, it will be very difficult to say, well, there are some other
10 obviously more appropriate fora where the case should be heard.

11 But equally, if I turn it around, it can't be the case, surely, that simply because you
12 purchase what you say is the ultimately cartelised product in the UK, therefore you are
13 entitled necessarily to bring your claim in this jurisdiction, even if there is -- even if
14 everything else and all of the essential steps and all of the essential collusion and the
15 effect on the initial market took place in one other specific different jurisdiction, which
16 is also an available forum.

17 We say the facts of this case are actually quite particular. They are quite particular for
18 the reasons that I set out in the opening application, namely that the collusion occurred
19 exclusively in Norway. I am afraid, despite my learned friends' various references to
20 various American pleadings, she can't get away from her own pleading because it
21 says just that at paragraph 69.

22 THE CHAIR: The location -- I'm not quite sure we have -- the elements of the statutory
23 tort you need to have damage as well as --

24 MR JOWELL: You do, but --

25 THE CHAIR: -- so elements of the damage received in the UK and so -- so the location
26 of the conversations seems less important than your other points, such as the

1 language in which --

2 MR JOWELL: Indeed.

3 THE CHAIR: -- the language of the documents -- that seems to me be a practical
4 issue, whereas actually which bar they were sitting in seems --

5 MR JOWELL: No, I see that, except there is a further point which is that in this -- what
6 is very particular about these allegations is that the first of the initial collusion took
7 place in Norway in the Norwegian language and so on. But secondly, then the
8 immediate damage -- the immediate harm to the market proximately affected by that
9 collusion -- is also said to be in Norway at a very specific market, this particular spot
10 market for Norwegian salmon in Norway, and this particular set of Norwegian based
11 indices.

12 That is very important, because that is then said to be the reference point. It is the
13 elevation of those indices that is then said to be the reference point to everything else
14 that follows. That is really why -- therefore a close examination of how that particular
15 Norwegian market operates is going to be essential for the investigation, and all of that
16 is also going to be in the Norwegian language, with Norwegian witnesses and with
17 Norwegian documents and so on.

18 So this is a very particular case, not just for collusion, it is also going with the
19 immediate effects of collusion -- the immediate harm in fact, and the first and foremost
20 market affected is in Norway.

21 Then the next step, as my learned friend said, is that it is not a specific UK effect, it is
22 a global effect. It is then said that the market -- as she repeatedly emphasised -- this
23 is a global market. Why is it a global market? Because the Norwegian salmon is the
24 largest supplier to that global market. So again, it is a global market which has its
25 epicentre radiating from Norway.

26 Then the UK effects are really all derivative -- entirely derivative -- and indirect from

1 that. That's why, in this particular -- this is a very particular case, an unusual case
2 without a doubt, and that is why when one then takes the point about conveniens, all
3 of which is linked to their points regarding the documents and the witnesses, this is
4 a Norwegian claim.

5 Now, my learned friend took you to these American proceedings, I should stress that
6 the class action was settled at a time when the Department of Justice was still
7 investigating --

8 THE CHAIR: Mr Jowell, you can take things very shortly. We don't find that hugely
9 persuasive --

10 MR JOWELL: No.

11 THE CHAIR: -- as a self-standing --

12 MR JOWELL: No, but they too show an allegation of a global market again -- not
13 a specific US or UK, but again a Nasdaq spot market, which is then affected globally.
14 My learned friend refers to the fact that other companies within these various groups
15 are also alleged to be involved in the collusion. She referred to Ocean Quality, at
16 paragraph 35, and also to Mowi's Morpol at paragraph 53. Those are both Norwegian
17 companies as well.

18 So there is no basis for saying that on the pleaded case that there is any involvement
19 of UK companies in the collusion or in the advisory -- or in running the Nasdaq in
20 Norway.

21 So now my learned friend referred to the Evans case, and to the impact of the
22 Commission decision. The short point on Evans, really, is whatever precisely it
23 means, and whatever the Supreme Court does with it, it doesn't absolve a tribunal or
24 court from its duty to hear all of the underlying evidence, to hear the witnesses, to
25 consider the documents, for itself, and to resolve the ultimate questions of fact
26 primarily on the basis of the evidence.

1 It may be that it would be acceptable in the light of evidence in some cases to look at
2 what the Commission has decided, and be influenced to a degree by that. That's as
3 far as it goes, it doesn't absolve the tribunal of its basic function.

4 Ultimately, Mr Chairman, as you observed, this is a neutral point because I think it is
5 common ground that the status of a decision would be essentially similar here and in
6 Norway.

7 My learned friend mentioned this point on abuse of process. The suggestion was,
8 I think, that somehow the Commission decision would still be binding on the
9 addressees here as regards sales to the UK. We emphatically reject that. That is
10 a very ambitious submission.

11 The reason that it is wrong, what it overlooks fundamentally, is that the Commission
12 investigation is expressly limited to sales to the EU, that's to say to sales to the 27
13 remaining member states.

14 The Commission investigation's ambit does not extend to the UK, therefore any
15 decision that it is going to reach, any infringement decision that it may reach, would
16 equally not extend to the territorial ambit of the UK.

17 So in those circumstances there can just be no basis for saying it would be an abuse
18 of process where the Commission has expressly carved that out.

19 For your note, you can see that is in noted in Mr Frey's witness statement at tab 19,
20 paragraphs 35 and 36, where he observes it is limited to the current member states.

21 Now my learned friend says if the decision proves the infringement, then the remaining
22 documents in relation to causation and loss will be a mixture of UK and Norwegian
23 documents. But of course that is based on a false premise: your decision does not
24 prove the infringement. And this tribunal will have to look at all of those Norwegian
25 documents, examine all of those Norwegian witnesses, relevant to the collusion
26 element and its immediate effect on the Nasdaq, and indeed in relation to the wider

1 effect on the global market.

2 THE CHAIR: So the question of what one gets out of the Commission decision, if it
3 has been upheld on appeal, what it -- how one -- what persuasive means as a practical
4 matter, it may be a difficult question; do you agree or disagree with that?

5 MR JOWELL: I would agree. What I would say is certainly the tribunal --

6 THE CHAIR: We are going to have to look at the documents anyway.

7 MR JOWELL: Yes, that's my point. It does not absolve the tribunal of that duty. If the
8 tribunal were to approach this on the basis of some might say, "Well, the decision -- the
9 Commission has decided this and I know the documents don't look like that to me, or
10 I am not going to look at the documents, I am not going to hear the witnesses", we
11 would be instantly, I think, in the Court of Appeal, and rightly so. So at most it's
12 a makeweight, particularly to an ultimate question of fact which it is the tribunal's
13 jurisdiction to decide.

14 So then when one looks at the various schedules that my learned friend took you to
15 on the purchases, they really indicate purchases a bit all over the place: some from
16 UK, some from Norway, some from Ireland, some from Iceland, some through
17 intermediaries, some direct.

18 The basic point is that, yes, the loss may have been suffered here by these particular
19 claimants when they bought the products, but that isn't going to be the issue. That will
20 just be a question of toting up what these purchases were and what their value were.
21 The issues in dispute will all be -- the real issue in dispute will all be at those prior
22 stages.

23 So on the collective proceedings, my learned friend acknowledged that the issuing of
24 the collective proceedings were being challenged by us, that they may not be certified.
25 Then she proceeded to make her submissions as though it was assumed that they
26 would go ahead.

1 With respect, one can't assume they will go ahead. We have challenge to them. The
2 fact that they are brought under a statutory regime is neither here nor there when it
3 comes to our ability to challenge them on forum non conveniens grounds, certainly not
4 where it is common ground amongst the expert Norwegian lawyers that there is an
5 available alternative jurisdiction for collective claims in Norway.

6 We respectfully say that a fair reading of both the two experts' reports set out before
7 you makes it clear that that is indeed common ground. Even if it were the case that
8 they were only opt in collective actions in Norway, that would still, in my submission,
9 make my point.

10 But in fact there are opt in and opt out, and the furthest that Mr Tokvam's submissions
11 go is to say really it is not entirely clear -- although reading between the lines he seems
12 to suggest my -- my impression is he accepts it would be -- that the class
13 representative would be capable of being paid out of undistributed damages.

14 The fact that they may not be capable of being paid out of distributed damages, well,
15 Mr Chairman, as you noted, that is an issue in this jurisdiction as well and will shortly
16 be resolved by the Court of Appeal.

17 The point is that the kind of nuanced differences we have between the two different
18 types of collective regimes are precisely the kind of juridical advantages -- points that
19 Lord Goff indicated so long ago in *Spiliada*.

20 Those are my submissions in reply.

21 THE CHAIR: Anything in reply?

22
23 Reply by MR LUCKHURST

24 MR LUCKHURST: My learned friend submitted that the Norwegian defendants had
25 instructed English lawyers, and that these lawyers were acting for them in their
26 Commission investigation.

1 THE CHAIR: I didn't find that a persuasive point.

2 MR LUCKHURST: It is not correct.

3 THE CHAIR: It's not even correct?

4 MR LUCKHURST: No. Leroy were represented by a Norwegian firm, Wikborg Rein,
5 in relation to the Commission investigation, and they have instructed Cleary Gottlieb
6 in this jurisdiction because they are being sued in this jurisdiction. So it is circular to
7 suggest that that point is in favour of the forum conveniens point. That is it.

8 THE CHAIR: I am just a bit conscious, how are we doing on time? We are now going
9 to move on --

10 MS MOCKFORD: We are going to move on to strike out, I think. That clock is an hour
11 ahead --

12 THE CHAIR: Notwithstanding that, I am still concerned about the time.

13 MS MOCKFORD: I think we are still doing all right.

14 THE CHAIR: How long do you think you will be on this topic?

15 MS MOCKFORD: I anticipate being an hour on strike out. That will take me the rest
16 of today.

17 THE CHAIR: I have a guillotine of 4 o'clock tomorrow, just to warn you.

18 MS MOCKFORD: It may be helpful to sit early tomorrow, if at all possible.

19 THE CHAIR: Sitting before 10 is difficult. We can certainly start at 10.

20 So you are going to be an hour on this, then how long are we going to be on material --

21 MS MOCKFORD: I have budgeted for an hour on that as well. I think we are okay.
22 I think I should say in addition to my strike out submissions, there will be some
23 supplementary strike out submissions from the other teams who have strike out cases.

24 THE CHAIR: Yes, how long are they going to be?

25 MS MOCKFORD: I think no more than 45 minutes in total. So an hour and 45 minutes
26 from the defendants' side on strike out. I am in your hands how long you wish to sit

1 | tonight, but we could go to 4.30, if that was acceptable.

2 | THE CHAIR: Why don't we do that, go to 4.30 and then see where we are.

3 |
4 | Submissions on strike out by MS MOCKFORD

5 | MS MOCKFORD: Thank you, I am very grateful.

6 | In terms of strike out, there are three applications that remain live at this stage. One
7 | is brought by one of my clients, that's D4, Grieg UK. And their application document
8 | for your note is at core bundle, tab 12, page 186. I don't think we need to go to it right
9 | now, but it is paragraphs 16 to 19.

10 | Then there are the two Mowi defendants, D9 and 10, who bring strike-out
11 | applications -- those are Mr Jowell's clients, again it is the UK entities who make the
12 | strike out, and their application document is at core bundle, tab 14, page 196, and it's
13 | paragraphs 17 to 19.

14 | Then all three of the SSF defendants, so that's D11, 12 and 13, and their application
15 | documents at core bundle, tab 16, pages 201 to 204. Those are Mr McCarthy's
16 | clients. So it is the three of us who are going to be appearing before you on strike out.
17 | Leroy UK, D6, have brought a strike-out application; that has gone away following the
18 | claimant's concession and I understand they are not pursuing an application.

19 | I think you have understood I am going to be addressing my client's application, but
20 | many of the points of comment to all three have been outstanding applications. The
21 | hope is once I have addressed it, it will be quicker. That's the hope in any event.

22 | I have five preliminary points to make before turning to the bases on which the
23 | application is put.

24 | First, I think the law actually governing strike-out applications before the tribunal is
25 | common ground. Both our skeleton and my skeleton and the claimants refer to the
26 | classic dictum of Mr Justice Lewison as he then was in *Easyair v Opal Telecom*.

1 That's at paragraph 24 of the claimant's skeleton, core bundle tab 47, page 532, and
2 it is at page 610 of the core bundle in my skeleton, paragraph 5, tab 50 of the core
3 bundle.

4 I don't propose to take up time on that test, I am sure it will be familiar to the tribunal.

5 Second, though, I do want to make clear the basis on which my application is put and
6 clear the decks of some points that are not relevant. In particular, my application is
7 not put on the basis of decisive instruments or a lack thereof.

8 My learned friends spent a lot of time on that in their skeleton argument, but for the
9 purposes of this application I am content for the tribunal to assume in the claimant's
10 favour that the relevant Norwegian parents have decisive influence over the relevant
11 UK subsidiaries.

12 I think there may be a discrete point on decisive influence for Mr McCarthy's client, but
13 I will leave him to explain that.

14 Certainly for my clients, and I think Mr Jowell's, that's an assumption that we are quite
15 happy for the tribunal to make in the claimant's favour for the purposes of this
16 application.

17 Rather, the basis on which the applications are put is that the UK subsidiaries were
18 not engaged in the same economic activity, which is the subject matter of the alleged
19 cartel conduct. That is because what they were doing was farming and selling Scottish
20 Atlantic salmon and not making spot sales of Norwegian farmed Atlantic salmon.

21 For the reasons I am going to explain, we say that as a matter of law an identity of
22 economic activity is required in order for a subsidiary to be passed the same
23 undertaking for the purposes of attributing liability of their parents anti-competitive
24 conduct.

25 So it's not just decisive influence I say that matters as to whether someone is part of
26 the same undertaking, it is decisive influence, which we are content for you to assume,

1 plus identity of economic activity.

2 Third, I want to make quite clear that the effect of this strike out if it succeeded would
3 not be to knock out any of the volume of commerce claimed by the claimants. We are
4 not saying they can't claim for losses they may have suffered in respect of Scottish
5 farmed Atlantic salmon, or other relevant products, as defined in the claim form, the
6 particulars of claim, which you were shown this morning.

7 If they establish cartel conduct at trial in respect of Norwegian farmed Atlantic salmon
8 in the way that Mr Jowell has outlined and prove that the price of Scottish farmed
9 Atlantic salmon was inflated by that conduct, then in principle it is open for them to
10 claim that. The question is: who can they claim it from? My submission is that they
11 need to claim it from the parent companies who are responsible for the infringing
12 conduct.

13 THE CHAIR: Leaving aside the forum conveniens arguments, why does this matter?

14 MS MOCKFORD: It matters because we say that the claim shouldn't be pursued.
15 There is no credible claim against the UK subsidiaries and they are quite entitled to
16 have their claims struck out on that basis.

17 THE CHAIR: I appreciate they are entitled, but why does it matter? Does it make
18 a difference --

19 MS MOCKFORD: It does make a difference to how the conduct of the proceedings
20 goes. It makes a difference in terms of forum arguments --

21 THE CHAIR: Yes I understand the forum arguments.

22 MS MOCKFORD: -- we don't assume that the strike-out applications will succeed in
23 order for our position on forum to succeed. Absolutely not. But if the strike-out
24 positions do succeed, the position on forum becomes a fortiori.

25 THE CHAIR: Yes.

26 MS MOCKFORD: It also matters because claims which have -- which are hopeless,

1 | which is the strike-out test, should not be pursued, they are a waste of time and --

2 | THE CHAIR: In terms of the practicalities of the litigation, covering damages,
3 | disclosure, all those sorts of things, you say will make a difference?

4 | MS MOCKFORD: I say it will make a difference in the sense that there will be less
5 | clients that all the parties have to consult with. So that's important. And those things
6 | do make a difference to costs.

7 | I say it will make a difference in terms of who was having to -- it may make a difference
8 | in terms of who is having to bring forward his evidence and about what, because in
9 | particular this issue of whether under Norwegian and Scottish Atlantic salmon can be
10 | pulled together in the way the claimants suggest is not resolved now, it will just have
11 | been to resolved at trial.

12 | So my point is that there is a merit in grasping the nettle now and deciding it now --

13 | THE CHAIR: It's not going to be part of the damages element -- you said you are
14 | expecting in theory that they can claim for damages for inflated prices in Scottish
15 | salmon, but there is going to be an argument about that, isn't there?

16 | MS MOCKFORD: Of course there is. My point is that this strike out doesn't go to that,
17 | it does not knock that out, but we are still entitled to have a claim that is not arguable
18 | struck out --

19 | THE CHAIR: Yes, of course you are -- I am not suggesting you don't have that.

20 | MS MOCKFORD: -- it does have practical benefits for the conduct of the litigation. It
21 | might reduce the number of defendants by three. And you might think that's pointless,
22 | but in my submission, sir, it's not at all because it will reduce the number of people
23 | from whom we are having to take instructions, it will reduce the issues in the litigation
24 | going forwards because the question of whether the UK subsidiaries would be jointly
25 | and severally liable for the damage -- and they are separate legal entities -- and
26 | whether they would be jointly and severally liable for the damage caused by their

1 parent would not have to be resolved. And that would have concomitant cost and time
2 savings.

3 THE CHAIR: Yes.

4 MS MOCKFORD: But my point is it is not going to knock out a chunk of the
5 claimant's claim at this juncture.

6 Fourth, it is worth remembering at the outset that the UK subsidiaries are not
7 addressees of the SO nor part to the Commission's investigation, and they have not
8 been the subject of investigation by the US Department of Justice, or a defendant to
9 any of the claims brought in the US or Canada. You see that at Frey 1, paragraph 17.
10 So those things which underpin the claims against the Norwegian defendants do not
11 exist in relation to the UK defendants.

12 Fifth, allied to that last point, my fourth point, there is therefore no basis for saying that
13 the UK subsidiaries participated in the alleged cartel. We confess some uncertainty
14 about whether that was an allegation pursued in the particulars of claim, but I think it's
15 quite clear from the skeleton arguments that is not an allegation made by the
16 claimants.

17 The way they put their case against the UK defendants is squarely and only on the
18 basis of implementation and safe undertaking. There is no allegation that the UK
19 defendants participated directly in the cartel conduct.

20 With that construction in mind, what I am proposing to do, if it suits the tribunal, is to
21 address points in the following order. First, I want to deal with the contention that my
22 client D4, the person who brings the strike-out application, is liable because it was
23 part of the same undertaking as its infringing parents as the first basis of liability; and
24 second, the contention it is liable based on the domestic case law about knowing
25 implementation.

26 We are going to deal with undertaking first, then knowing implementation.

1 THE CHAIR: Just to warn you, I am having difficulty in distinguishing between those
2 two in some of the cases that have been referred to.

3 MS MOCKFORD: Well, in making that observation, sir, you are anticipating what my
4 submission is going to be, which is actually that the two have converged.

5 THE CHAIR: I see.

6 MS MOCKFORD: And the leading authority in relation to both of them now is Sumal.

7 THE CHAIR: Right. You may have to posit examples where you are plainly not part
8 of the same undertaking, but you are knowingly implementing. I suppose one could
9 hypothesise.

10 MS MOCKFORD: It is possible. I am prefacing what I am going to come on to say
11 and I hope make good, which is that even a domestic implementation case has always
12 required the implementing subsidiary to be part of the same undertaking --

13 THE CHAIR: There is even that --

14 MS MOCKFORD: -- that is imposing a higher test, and in those circumstances, my
15 submission is really Sumal is now occupying this ground, and there is not much space
16 left for the knowing implementation case law. That's where I am going to come to.

17 THE CHAIR: Yes.

18 MS MOCKFORD: With that in mind, I think we should start with Sumal, which is
19 authorities bundle, file H, I believe, hard copies, tab 105, and starts on page 4389.

20 I am going to take a little bit of time over this.

21 THE CHAIR: Yes.

22 MS MOCKFORD: This is the first page. You can see from this that it was a preliminary
23 reference and judgment was handed down on 6 October 2021. That's obviously
24 a post-Brexit case, and I am going to come on to the consequences for that in due
25 course.

26 Paragraphs 8 to 15 on page 4391 explain the factual background and the issues that

1 were referred.

2 And we see from paragraph 8 that Mercedes Benz Trucks Espana was a subsidiary
3 of Daimler, from whom Sumal acquired two trucks. So these are the basic facts, quite
4 straightforward.

5 Paragraph 9 explains that Daimler was found by the Commission to have participated
6 in the Trucks cartel, paragraphs 9 and 10 explain that.

7 At paragraph 11 we see that Sumal brought an action for damages against the
8 Spanish subsidiary due to the cartel in which its parent had participated. It lost at First
9 Instance, paragraph 12, on the basis that only Daimler as the addressee of the
10 Commission decision could be regarded as responsible for the infringement.

11 And it appealed and the referring court, paragraph 13, wonders whether the actions
12 for damages following decisions of the competition authorities made on findings of
13 anti-competitive practices may be brought against subsidiary companies, which are
14 not referred to in those decisions but are wholly owned by the companies referred to.
15 So that's the background.

16 Paragraph 15 points out the precise questions referred, and if I could ask you to read
17 paragraph 15 to yourself, please.

18 THE CHAIR: Yes.

19 MS MOCKFORD: You see that paragraph 1, the question is asked whether liability
20 can extend from parent to subsidiary, or only from subsidiary to parent. And 2 and 3
21 it asked about the positions required to extend it.

22 I note that 3 is entirely open-ended. So it is asking about the whole case law in this
23 area, what are the conditions required.

24 So the issue in a nutshell, when will a subsidiary be liable for the anti-competitive
25 conduct of its parents?

26 If we skip on to paragraph 38 on page 4396, we see the court answering that

1 question -- the starting part of that question. We get some quite familiar statements,
2 first of all, that the concept of undertaking has an autonomous meaning, an
3 autonomous concept of EU law, and the same scope of both public and private
4 enforcement.

5 At paragraph 41, the court notes:

6 "EU competition law in targeting the activities and undertakings ...(Reading to the
7 words)... unity of conduct on the market."

8 That's the critical thing, the unity of conduct on the market.

9 Paragraph 42, it goes on to explain that therefore when such an economic unit
10 infringes Article 101, it is that unit in accordance with the principle of personal
11 responsibility which has to answer for that infringement. So it is the whole undertaking
12 which is responsible, is the impression we are getting so far.

13 Paragraph 44 makes that clear:

14 "On that basis the concept of an undertaking through ...(Reading to the words)...
15 automatically entails the application of joint and several liability, amongst the entities
16 of which the economic unit is made up at the time the infringement is committed."

17 But there is a qualification that starts at paragraph 45:

18 "It is appropriate to observe that ...(Reading to the words)... may be very different from
19 one group to another. There are in particular some groups of companies that are
20 conglomerates that are active in several economic fields having no connection
21 between them."

22 Therefore, at paragraph 46, we see that the possibility for the victim of an
23 anti-competitive practice to invoke the liability of a subsidiary company rather than that
24 of a parent, cannot automatically be available against every subsidiary of the parent
25 company targeted, rather as the Advocate General observes -- I am going to come to
26 their opinion a bit later and we see here an explicit endorsement at point 58 of the

1 opinion:

2 "The concept of an undertaking ...(Reading to the words)... it is constituted must be
3 identified having regard to the subject matter of the agreement at issue."

4 Therefore, at 47:

5 "The same parent company ...(Reading to the words)... depending on the economic
6 activity in question."

7 If we go over the page to paragraphs 51 and 52, it continues to make the point and
8 draw it together.

9 What we see at paragraph 51 is that the conclusion is actually it is possible for the
10 victim of that infringement to seek to invoke the civil liability subsidiary of the parent
11 company rather than that of the parent company, but that cannot be done unless the
12 victim proves whether either by relying on a decision of the Commission or by other
13 means, if the Commission has not adopted a decision, that having regard first to the
14 economic organisation on legal links referred to in paragraphs 43 and 47 -- that is
15 basically the decisive influence point -- and secondly, the specific link between the
16 economic activity of that subsidiary and the subject matter of the infringement for which
17 the parent company was held to be responsible, then that subsidiary together with the
18 parent constituted an economic unit.

19 So what I say you can draw from 51 is that there are -- sorry.

20 THE CHAIR: No, no, go on.

21 MS MOCKFORD: There are two requirements necessary for something to be an
22 undertaking within the meaning of EU law for these purposes of attribution of liability
23 of subsidiary to parent. The first is decisive influence, but the second is this identity of
24 economic activity that is being discussed here.

25 We see that made completely certain at paragraph 52, where it is said:

26 "Thus in circumstances that [in the middle of the paragraph, I should say] such as

1 those at issue in the main proceedings the victim should in principle establish that the
2 anti-competitive agreement concluded by the parent company for which it is being
3 punished concerns the same products as those marketed by the subsidiary, and in
4 doing so the victim shows it ...(reading to the words)... of which the subsidiary together
5 with its parent forms part that constitutes the undertaking that committed the
6 infringement."

7 So Sumal is very broad in one sense. It says: once you have an undertaking you can
8 go after any member of that undertaking for liability, but there are two requirements
9 for getting an undertaking in the first place, and one of them -- and the one I emphasise
10 on the basis that this strike-out application is put -- is identity of economic activity and
11 the link between the subject matter of the infringement and the economic activity of
12 the subsidiary who is being sued.

13 I said at the start that Sumal was a post-Brexit case, but it has been applied by both
14 the High Court and the Court of Appeal since then, and in my submission it is therefore
15 binding on the tribunal.

16 The Court of Appeal case is the VW case, which is referred to in both mine and my
17 learned friend's skeleton argument. You will find it at tab 71 of the authorities. I think
18 that is file E of your hard copies, page 2841.

19 THE CHAIR: Shall we turn it up?

20 MS MOCKFORD: Yes, please. I just want to draw out of this the facts and the basis
21 on which the Court of Appeal was relying on Sumal and what it said about it -- tab 71,
22 page 2841.

23 We can just take the facts from the headnote, I think, and then go on to what they said
24 about Sumal.

25 This is a case in which the CMA commenced an investigation under the 1998 Act in
26 respect of anticompetitive agreements by certain vehicle manufacturers and trade

1 associations. What it did is sent notices to a number of different companies requesting
2 information from them. So the addressees of those notices included a German parent
3 company of a British subsidiary, who took issue with the imposition -- the fact that the
4 notice had been sent to them in the first place and the imposition of a penalty upon it.
5 So this whole case was about whether it was appropriate, whether the CMA had
6 territorial jurisdiction to request information from a parent company based abroad in
7 respect of conduct it was investigating in the UK.

8 At first instance, the tribunal upheld the German company's arguments, finding that
9 the relevant section of the Act did not have extraterritorial affect. This is the appeal in
10 which that decision was overturned.

11 So in very large part, the judgment is about extraterritoriality and not of much
12 relevance to us. But it does include some consideration of the points we are
13 discussing because the Acts use the term "undertaking" in the relative section,
14 section 26. We see that at paragraphs 83 and 84 which are on page 2869.

15 Because what the court said was that the term used in the domestic legislation should
16 be given its established EU law meaning, and that is what takes us into the Sumal
17 approach. We see at the start --

18 THE CHAIR: It is a pivotal characteristic of the term Sumal --

19 MS MOCKFORD: Yes, exactly, in the middle of paragraph 84.

20 It notes it is grand chamber judgment as well. If you go over to -- paragraph 86 on the
21 following page, it also says it is an important judgment.

22 THE CHAIR: Yes.

23 MS MOCKFORD: It then goes on to cite some of the relevant paragraphs we just
24 looked at -- I mean the paragraphs that were relevant to this issue, which were in
25 particular, about decisive inference. It could doesn't dwell on the paragraphs about
26 identity of economic activity. I think my learned friends rely on that absence of

1 indication of those irrelevant paragraphs from Sumal, but I say you can't read anything
2 into that because it just wasn't relevant to the facts of this case.

3 But what this is, is an endorsement from the Court of Appeal of the approach taken in
4 Sumal, and a suggestion that this is the approach that should be taken into the concept
5 of undertaking as a matter of both UK and EU competition law going forwards in this
6 jurisdiction.

7 The High Court case, just for reference -- I don't think you need to go there -- but it is
8 2022 judgment in ValueLicensing v Microsoft, which for your note is tab 62 of the
9 authorities. The relevant page is page 255 -- sorry, I think it starts on page 2550, but
10 paragraph 38 on page 2562 makes precisely the point I have been making in relation
11 to Sumal, namely the claimant has to show both the existence of economic,
12 organisational and legal links for decisive influence and the existence of a specific link
13 between the economic activity of that subsidiary and the subject matter of the
14 infringement.

15 So that's the law, I say, on what constitutes an undertaking in this area.

16 Turning then to the facts in relation to D4, my client, who is bringing the strike-out
17 application. My overarching submission is that there is no reasonable prospect of the
18 claimant showing that D4 performs the same undertaking as its Norwegian parent
19 companies because it was not engaged in selling the same product as them, which
20 forms the subject matter of the infringement.

21 I make three points in support of that submission. The first is what we need to do is
22 identify the relevant economic activity in which the Norwegian parents were engaged.
23 For that, we look at the SO which you have been taken to once this morning, so I don't
24 want to dwell on it particularly, but it is in the hearing bundle. Perhaps we could just
25 go to it briefly. It is in the hearing bundle, volume 1, tab 3, page 492.

26 THE CHAIR: Which?

1 MS MOCKFORD: Hearing bundle, volume 1, tab 3, page 492.

2 THE CHAIR: Yes.

3 MS MOCKFORD: The point has been made that the subject matter of the
4 infringement, the farming sale and distribution of Norwegian farmed Atlantic salmon.
5 We see that in the first paragraph, the second paragraph, the fourth paragraph. It is
6 throughout. That is the subject matter of the alleged infringement of competition law.
7 That's our anchor point, taking the Sumal approach. The question is: is the relevant
8 subsidiary engaged in the same economic activity as the subject matter of the
9 infringement?

10 That leads me to my second point, which is that that is not what D4 is doing. Its primary
11 business was farming and selling Scottish farmed Atlantic salmon. We can see that
12 from the evidence provided by my client's solicitors, in particular from Frey 1 and Frey
13 2. If we can take up Frey 2 in the first instance because that is where you will see the
14 most detail. Core bundle, tab 20, page 251.

15 Frey 1, paragraph 15 in a previous tab makes the general point that D4 was set up in
16 order to farm Scottish farmed Atlantic salmon. That's what it existed to do. Then more
17 details are provided in this paragraph 27 on page 251.

18 As it is explained there, the total sales made by D4 during the relevant period of
19 NFAS -- i.e. Norwegian farmed Atlantic salmon -- was less than 2 per cent.

20 THE CHAIR: Why does that matter? That's assuming it is 2 per cent --

21 MS MOCKFORD: My submission is that 2 per cent -- I am going to come on to explain
22 this, it is probably substantially less than 2 per cent -- for reasons he is to give -- is that
23 it's a de minimis figure.

24 THE CHAIR: Explain the law around de minimis in this context.

25 MS MOCKFORD: My submission is that this doesn't amount to the identity of
26 economic activity that Sumal tells you needs to exist between a parent and a

1 subsidiary in order for them to be part of the same undertaking.

2 THE CHAIR: You concede that 2 per cent would be --

3 MS MOCKFORD: Sorry, sir.

4 THE CHAIR: You would concede that 2 per cent of its business is the same?

5 MS MOCKFORD: I do. I have to concede that, but my submission is that it doesn't
6 get you over the threshold, because what Sumal tells you is that this is functional test
7 in order to assess whether this subsidiary should be liable for the conduct of its parent.
8 That is why we are engaged in this activity.

9 My submission is that 2 per cent is an entirely de minimis trivial figure in the context of
10 these international corporations which do have -- I conceded a precise reference
11 existed --

12 THE CHAIR: Sumal doesn't say what happens when you have overlap.

13 MS MOCKFORD: It doesn't. It says there needs to be a specific link between the
14 conduct of the subsidiary and the conduct of the parents going to the subject matter
15 of the infringement, which is why I say you need to start by looking at the subject matter
16 of the infringement.

17 THE CHAIR: Okay. But there are two separate points then, aren't there? How much
18 overlap there is, and whether it is de minimis. It could be very little overlap. It could
19 be enormous just because it is a very large company, or it could be just a very small
20 amount of salmon.

21 Your submission is that it is because it is doing other things -- because there is a lot
22 of Scottish salmon, it is a small percentage of that; you are not saying in absolute
23 terms the Norwegian salmon are very, very small sales, such that this tribunal
24 shouldn't be troubled with it?

25 MS MOCKFORD: Well, I am saying that -- the claimants referred to that in the past
26 couple of days -- just in anticipation of this hearing, made the request for further data

1 from the defendants in relation to some of these figures. We have sought to supply
2 that where we have been able to. We have not been able to give them everything that
3 they want. But the indications are that the 2 per cent comes out at something over
4 about 1 million kilogrammes of Scottish salmon. That's what we said in
5 correspondence.

6 THE CHAIR: That's not -- I mean, de minimis in what sense? If my wife asked me to
7 go to the supermarket and pick up a -- that amount of salmon, I would not call that
8 de minimis, you would have to get lorry after lorry after lorry -- what are the
9 criteria -- I understand your relative point, but in terms of your --

10 MS MOCKFORD: My point is that that is de minimis in the context of the business
11 activities --

12 THE CHAIR: It is submitted as both?

13 MS MOCKFORD: -- of this undertaking. 95 per cent of its sales were of Scottish
14 farmed Atlantic salmon. So the 2 per cent is 1 million -- my maths is not brilliant, but
15 98 per cent takes you to 75 million, I think.

16 THE CHAIR: Is there any authority that assists us in saying where you look when you
17 are trying to say is it engaged in the same economic activity -- you don't say "Look at
18 this activity", and ask is it the same as the parents, you have to look at all the other
19 things which are unrelated and then say what percentages is it of that apply --

20 MS MOCKFORD: Sumal invites you to take a functional -- there is not any more
21 evidence I can point to. Sumal invites you to take a functional approach and to bear
22 in mind what you are seeking to do, which is attribute liability for the parent's
23 anti-competitive conduct.

24 That's the context in which I say you need to look at the relative -- you need to ask
25 yourself: what is the predominant business of this subsidiary; what is it actually doing?
26 In my submission, it was there to do farming of Scottish Atlantic salmon. It has made

1 some sales of Norwegian farmed Atlantic salmon. We don't shirk from that -- I should
2 say the 1 million figure is a figure over five years for the whole market, it is not 1 million
3 a day. It is corresponding with the 2 per cent figure here.

4 The point also is that 2 per cent is our upper threshold. That's taking a very
5 conservative view. And for the reasons Mr Frey explained we think it is going to be
6 substantially higher than that, possibly a tenth of 2 per cent, possibly 0.02 per cent.

7 THE CHAIR: We don't know that at the moment.

8 MS MOCKFORD: We don't know that at the moment because in that requires data
9 reconciliation. What we do know is we think it is will be much lower. I can't tell you
10 how much lower and I can't tell you --

11 THE CHAIR: We have to work on the basis it would be 2 per cent or less?

12 MS MOCKFORD: 2 per cent or less. We think it might be substantially less. So my
13 submission is that is a de minimis amount in the context of this company's overall
14 business.

15 THE CHAIR: Right, okay.

16 MS MOCKFORD: And that that is sufficient to take it outside the Sumal undertaking
17 test.

18 In support of that, my third point is that Scottish and Norwegian salmon are very
19 different products, and that it is wrong to lump them together in the ways that the
20 claimant seeks to do.

21 Some of the witness evidence explains that, which I want to go to, and then there are
22 also regulatory decisions of both the CMA and the Commission that make that point
23 good.

24 We can start with the witness evidence. I think the easiest place to see it -- I hope
25 I am not stealing his thunder -- but it is Mr Gallagher, D11 to 13, so Mr McCarthy's
26 client. It's in the core bundle, 33, page 376.

1 His account of it, the differences between Scottish and Norwegian farmed Atlantic
2 salmon, starting at paragraph 9 on page 376. He made several points. He said, first,
3 there are differences as regards pricing:

4 "Scottish salmon is a premium product and I can charge for more for it because of its
5 premium status ...(Reading to the words)... expect to buy Scottish salmon, but are not
6 readily able to change this."

7 He then, at paragraphs 10 and 11, talks about differences in production, so, for
8 example, stocking density, the amount of fish per cubic metres of water, diet.

9 Paragraph 12, an important point:

10 "Scottish salmon has protected status under the UK protected geographical indication
11 scheme."

12 In other words, it has an accreditation which Norwegian salmon does not.

13 Paragraph 13, he makes the further point about customer expectations, about the fact
14 that Scottish salmon is a premium offering --

15 THE CHAIR: There is an end-user --

16 MS MOCKFORD: Yes -- these are retailers. So what we are talking about at
17 paragraph 13, UK retailers will almost always use Scottish salmon in their premium
18 offering -- presumably because end customers also want it --

19 THE CHAIR: So we are concerned with whether their considered different at customer
20 level or at the claimant level?

21 MS MOCKFORD: I say it is both. But as in the same will be true -- the supermarkets
22 regard these as premium products because their customers regard Scottish salmon
23 as premium products. I don't say there is any relevant evidence to draw between the
24 two levels of customers.

25 That's the witness evidence, which explains the differences in that it exists. Then
26 when regulators have been required to look at this point in the last decade or so, that's

1 the conclusion they have also drawn, viewing them as different products.

2 I think the first page we can see there has been a 2013 version of reviewed decision
3 by the Commission, which is here in the bundle -- volume 5 I think of the hearing
4 bundle, tab 138. I am at page 2561, please.

5 What you see is happening in paragraphs 42 to 45 of this Commission decision, the
6 Commission made many of the same points that I just showed you, in the witness
7 evidence from Mr Gallagher.

8 They explain at 42 there is a strong customer preference towards Scottish salmon,
9 based on the perception that Scottish salmon is superior in quality. Paragraph 43,
10 they make the point I just made to you that it has distinct technical accreditations. And
11 customers therefore attach a point to that, and they are happy to pay
12 a premium -- paragraph 45, a price premium which is on average 10 per cent more
13 expensive than Norwegian salmon.

14 If you go on to paragraph 58 on page 2565, we see the Commissions conclusions, in
15 light of what it set out above. What it says is that it is likely that separate markets for
16 the farming and primary processing of Scottish salmon and Norwegian salmon exist.
17 It is not necessary for the Commission to conclude -- because the parties have
18 submitted remedies that eliminate serious doubts in the narrowest possible market.

19 In other words, what they have agreed to do was divest the operations of Scotland, so
20 the Commission didn't need to reach a final view. I say that completely bears out what
21 Mr Gallagher said in his witness evidence to the tribunal.

22 We then get another merger decision, which is one of the CMAs this time, in the
23 hearing bundle --

24 THE CHAIR: Is this the same as -- it is the same test applying here as we would apply
25 under Sumal?

26 MS MOCKFORD: I don't say it is identical. That's a point that the claimants make as

1 well. I don't say it is an identical test, because the Sumal test, as I have emphasised,
2 is a functional one, in the particular context where what you are trying to do is work
3 out whether that subsidiary should be liable for the anti-competitive conduct of its
4 parent.

5 I am not suggesting that there is a direct read across this, but I am saying they can
6 give you comfort that Scottish and Norwegian salmon are different --

7 THE CHAIR: We are having to decide whether this point is unarguable, not giving
8 comfort.

9 MS MOCKFORD: I say you should base that decision on the witness evidence, and
10 this corroborates the witness evidence.

11 THE CHAIR: Okay, but the witness evidence tells us what? Tells us they are not the
12 same --

13 MS MOCKFORD: That there is product differentiation. That being engaged in the
14 production of Scottish farmed Atlantic salmon is not the same thing as being engaged
15 in the production of Norwegian farmed Atlantic salmon. That's what I say the witness
16 evidence says and supported by the merger and review decisions, which I accept are
17 not looking at precisely the same thing.

18 THE CHAIR: I am just struggling as to what test we are meant to be applying to decide
19 or that it falls within Sumal.

20 MS MOCKFORD: The test that Sumal asks you to apply -- tells you to apply -- is: are
21 these two -- two entities within the corporate group engaged in the same economic
22 activity?

23 THE CHAIR: Right, but they are not asking us: are they selling the same product?

24 MS MOCKFORD: No.

25 THE CHAIR: So how do we decide whether it is the same economic activity or not?

26 MS MOCKFORD: Based on the evidence before you, which shows that there is real

1 product differentiation between the two.

2 THE CHAIR: There is some product differentiation; does it have to be absolute?

3 MS MOCKFORD: I say it's sufficient -- it was sufficient for the Commission and the
4 CMA --

5 THE CHAIR: The Commission is behind the ciphers. They are asking are they -- it
6 only uses the word "likely", it says "separate markets".

7 MS MOCKFORD: It only uses that word in this case because the partners had agreed
8 divestiture of the Scottish operation.

9 THE CHAIR: I understand. It only got as far as getting to likely, yes.

10 MS MOCKFORD: The CMA decision that we will come to goes a bit further.

11 THE CHAIR: Right. I am still -- you understand salmon, but just quite how
12 we -- bearing in mind this is a strike out, what test it is we apply to be confident -- the
13 requirement is not the same product, so I am uncertain why this isn't the same -- so
14 what indicia do we use to tell whether it is the same economic activity? What test do
15 we apply? Saying they get different food or they are stocked at different
16 densities -- I mean, red cows are stocked at different densities, so what?

17 MS MOCKFORD: My point is that if they are different products, they are certainly
18 different economic activities.

19 So I do say that there is a correlation between those two things. The regulators in
20 merger cases are taking a narrow view, but they are also taking a strict view. And the
21 view they are coming to is that these two things that I know sound similar, farmed
22 Atlantic salmon, put them into one bucket, but they are saying: no, there are real
23 product differentiations between the two. That leads us to conclude that they are in
24 different product markets.

25 THE CHAIR: Let's assume some consumers differentiate; some consumers don't
26 differentiate; some consumers differentiate some of the time; some consumers never

1 differentiate; are these even relevant questions?

2 MS MOCKFORD: Yes, they are absolutely relevant questions --

3 THE CHAIR: So we would have to be confident that a significant number of consumers
4 don't consider Norwegian salmon substitutes for Scottish salmon or vice versa?

5 MS MOCKFORD: You have to be confident in these two companies, the subsidiary
6 and the parent, are not engaged in the same economic activity to the extent that you
7 can attribute liability. I know I keep coming back to it, but what Sumal drives home is
8 that the analysis you are trying to do in this situation is a functional one for the
9 purposes of attributing liability.

10 I understand the points you are putting to me, sir, and I understand the reluctance to
11 say: well, is this at the strike out threshold? My submission is that you have evidence
12 before you that there is real product differentiation between these two types of salmon.
13 You have that evidence -- directly witness evidence --

14 THE CHAIR: Putting the evidence at your highest, there is a differentiation in the
15 marketplace for Scottish salmon and Norwegian salmon --

16 MS MOCKFORD: -- the end product, different product market. That's what the CMA
17 has concluded.

18 THE CHAIR: Well, no, it said it is slightly --

19 MS MOCKFORD: No, the Commission said slightly, the CMA said they are in
20 different --

21 THE CHAIR: We will get into the CMA next. Let's go to that.

22 MS MOCKFORD: I am conscious of the time, I have one more minute and then it is
23 half past.

24 THE CHAIR: Let's finish that case and then we'll take stock.

25 MS MOCKFORD: Hearing bundle, volume 2, tab 15, page 849, sir.

26 Paragraph 3, you can see immediately the CMA's conclusion, which does go

1 beyond -- sorry, I should say this is based on a more recent decision in 2021, and this
2 was about the divestment of my client's former Scottish operations to SFF. What the
3 CMA concludes in its summary is:

4 "It would not be appropriate to widen the product frame of reference to include ...
5 (Reading to the words)... and can only be produced in Scotland."

6 And you get more detail of all of that at paragraphs 34 to 38, on pages 854 to 855.

7 It makes the point that their view on this has changed over time. So in its 2006
8 decision, the OFT assessed the impact of the merger on the supply of farmed Atlantic
9 salmon, including both Norwegian and Scottish, because the OFT found a price
10 correlation between the two.

11 But in this case, at paragraph 35, you see the CMA's investigation found different
12 things. It found that on the demand side, the majority of customers stated that Scottish
13 salmon is priced at a premium, approximately 10 per cent more expensive than
14 Norwegian salmon --

15 THE CHAIR: But even stating that, that it is priced at a premium and putting a figure
16 on it, suggests it is part of the same economic activity. I mean, the price --

17 MS MOCKFORD: No --

18 THE CHAIR: -- the price of motor cars is not a premium to the price of salmon. They
19 are different economic activities. Once you have one lawyer in this room charging
20 more than another lawyer in this room because they are a little bit better, then that
21 sentence only makes sense in the context of both lawyers being involved in the same
22 economic activity, which would be providing legal services.

23 MS MOCKFORD: No, it doesn't mean that at all. Because the test of course -- the
24 typical product definition test is to apply a SSNIP test, which is potential significant but
25 non-transitory increase in price. And typically, that's regarded as 5 per cent.

26 THE CHAIR: But we are concerned with same economic activity, aren't we?

1 MS MOCKFORD: We are. But my point is that if they are in a different product market,
2 which these cases make clear, they are by definition engaged in different economic
3 activities because they are doing something separate.

4 THE CHAIR: You are now saying it is the same test. You already exhibited to me that
5 they were different tests.

6 MS MOCKFORD: I am saying that economic activity and product tests are different,
7 but I am saying one is informative of the other. Whether you are farming the same
8 thing is very relevant, whether you are engaged in the same economic activity. At its
9 highest, you could say all farming is the same economic activity, but I think farmers of
10 corn and farmers of salmon would say: we are not engaged in the same economic
11 activity.

12 I accept that in the process of (inaudible) salmon, we are talking about Scottish salmon
13 and Norwegian salmon, but the same principles apply.

14 THE CHAIR: I would have thought one of the relevant factors may be the extent to
15 which -- well, the way the markets are related, whether one can be a substitute for the
16 other.

17 MS MOCKFORD: Exactly.

18 THE CHAIR: Whether the pricing of the two, there is a relationship in the price of
19 Atlantic salmon and Scottish salmon.

20 MS MOCKFORD: I accept those are relevant factors.

21 THE CHAIR: Then they are relevant factors against you.

22 MS MOCKFORD: They are not, because the CMA has determined in this case that
23 those factors all point towards Scottish salmon --

24 THE CHAIR: No, they said it is 10 per cent more expensive. If they had said the cost
25 of Scottish salmon bears no resemblance to the price of Norwegian salmon, that would
26 be an argument in favour of a separate economic activity. When you say the

1 two -- I know they didn't go this far -- but when you suggest one is a lock step with the
2 other or related to them, that suggests they are, at least arguably, part of the same
3 economic activity.

4 MS MOCKFORD: I think that is a different point, whether they are in lock step or
5 whether they are -- the prices, you will always be able to say something is 10 per cent
6 or 80 per cent more expensive than something else. If both things move over their
7 own line, it doesn't show that there is any relationship between the two.

8 What they are not saying here is -- in fact they are explicitly rowing back from the OFT
9 2006 suggestion that there was a price correlation; and at 35 they are saying it was
10 priced at a premium to Norwegian salmon -- Scottish salmon was priced at a premium
11 to Norwegian salmon -- that it is differentiated due to factors including feed type,
12 nutritional value, stocking density and certification. And customers generally indicated
13 that they would not switch from one to the other, which of course is the classic test.
14 That's what the SSNIP test is getting at.

15 Generally, a five per cent difference between one product and another without
16 switching is enough to tell you that they are in different product markets.

17 I am conscious we are running over slightly so I will wrap up on this document.

18 Paragraphs 36 to 38 deal with the supply side. They make the point that Scottish
19 salmon can only be produced in Scotland, salmon farmed in Norway cannot be
20 labelled "Scottish"; the internal documents to the parties generally only discuss
21 Scottish salmon rather than Atlantic salmon, and that generally the internal documents
22 also discuss strategy in a competitive landscape with respect to the UK.

23 Therefore you get the conclusion at 39:

24 "The CMA considers that the appropriate frame of reference ...(Reading to the
25 words)... salmon in the UK."

26 So that is a conclusion on product definition.

1 I think, given the time, I ought to leave it at that.

2 THE CHAIR: Thank you very much. You still have not had to revise your time
3 estimate?

4 MS MOCKFORD: No.

5 THE CHAIR: Good.

6 We think we can start at 10 tomorrow. As I said, we have to stop at 4.

7 Are you going to send me the pleadings in Word, both versions? And I don't know if
8 I have the skeletons in Word or not.

9 MS MOCKFORD: I think from our side, we will supply them ...

10 **(4.38 pm)**

11 **(The hearing adjourned until 10.00 am,**

12 **Wednesday, 5 February 2025)**