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6 **IN THE COMPETITION**  
7 **APPEAL**  
8 **TRIBUNAL**  
9

Case No: 1732/5/7/25

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

13 Wednesday 25<sup>th</sup> June 2025

14  
15 Before:

16  
17 Andrew Lenon KC  
18 Robert Herga  
19 Greg Olsen  
20 (Sitting as a Tribunal in England and Wales)  
21

22  
23 BETWEEN:

24  
25 **Eurospares (Continental Parts) Limited**

**Claimant**

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32 **Porsche Cars Great Britain Limited &**  
33 **Porsche Retail Group Limited**

**Respondents**

34  
35  
36 **A P P E A R A N C E S**  
37

38  
39 Anneli Howard KC and Khatija Hafesji on behalf of Eurospares (Continental Parts) Limited  
40 (Instructed by Geradin Partners)

41  
42 Sarah Abram KC, Conor McCarthy and Hannah Bernstein on behalf of Porsche (Instructed  
43 by CMS Cameron McKenna Nabarro Olswang LLP)

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(10.30 am)

Housekeeping

THE CHAIR: Good morning. I'm going to start with the customary warning to those joining us via live stream. An official recording is being made and an authorised transcript will be produced but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as contempt of court. Thank you.

MS HOWARD: Good morning. Just in terms of introductions, I'm here on behalf of the applicant, Eurospares, ably assisted by Ms Hafesji, and appearing on behalf of the respondent we have Ms Abram KC, Conor McCarthy and Ms Bernstein.

You should have seven sets of bundles, and I apologise, some of them have been updated overnight so I'm working from the electronic versions, and I'll try -- I may not give you tab numbers, but I'll give you electronic page numbers. I just want to make sure that's going to work for everybody, if any of you are working from hard copy?

THE CHAIR: I think we're all working from the electronic bundles.

MS HOWARD: So, there is an updated skeleton bundle. No difference in substance, it's just been cross-referenced to the authorities bundle. That's bundle A, then we have pleadings in bundle B with a copy of the draft order, witness statements from the parties and reply witness statements in bundle C, correspondence in bundle D, contemporaneous docs in bundle E, and then the authorities bundles in soft copy.

To give you a route map of how I'm intending to approach things, I've had a discussion with my learned friend this morning. We're hoping to try and, if we can, get through things today. We thought it might be sensible for me to open on all the points, running through the injunction test and including fast track, and then allow Ms Abram to follow.

Would that be convenient for the panel?

1 THE CHAIR: Yes. Yes, I think our provisional view, our preliminary view is that if the  
2 Tribunal decides that this is not a suitable case for the fast track procedure, then the  
3 Tribunal would require the claimant to give a cross-undertaking in damages. That's  
4 not to say that if we decide that it's a fast track case, we will not require  
5 a cross-undertaking in damages, but just to make the other point that if it's not  
6 fast-tracked, then we will require a cross-undertaking in damages. That's our  
7 provisional view, and I understand that your case is that that's not necessarily the  
8 correct position as a matter of law, but just so that you know where we stand at the  
9 moment.

10

11 Submissions by MS HOWARD

12 MS HOWARD: That's very helpful. Thank you.

13 In terms of a route map of where I was intending to take your Lordship and the panel  
14 members, first of all, I wanted to just give some preliminary comments as an overview.

15 There are pervasive themes that apply both for Chapter I and Chapter II, serious issue,  
16 but they also feed into the adequacy of damages and the balance of convenience. So

17 I just wanted to have a preliminary overview section just to get some things out about  
18 Eurospares' business model and the role of independent resellers in the market.

19 Then I was going to deal briefly with -- I don't think we need to spend much time on  
20 serious issue to be tried because that's not contested between the parties, but  
21 obviously then going into adequacy of damages, firstly for Eurospares and then for  
22 Porsche and then the balance of convenience, fast track, and I'll fold in within the fast  
23 track the cross-undertaking issue and budgeting issues. So, that was my route map.

24 By way of introduction, this is an application for an interim injunction arising out of  
25 Porsche's refusal to supply the applicant, Eurospares, with genuine new Porsche  
26 spare parts. That is despite long standing commercial arrangements for over six years

1 and the evidence for that is in Mr Derrick's first statement at paragraph 15. Now, it's  
2 important in this case that Eurospares was supplied directly by the second Defendant,  
3 PRG, through the Porsche Centre in Reading. They had a very close relationship and  
4 Mr Derrick's evidence is that the Porsche staff visited his premises on multiple  
5 occasions. That's paragraph 15 that I just referred you to.

6 Porsche, in its witness statement, has referred to these supplies as a leak, as some  
7 kind of unauthorised or unmonitored supply. We say that that description is revealing  
8 because it shows that Porsche's intention is to hermetically seal up all supplies of  
9 genuine Porsche products within the Porsche sales organisation, and to lock out sales  
10 by independent third parties, resellers in this case. Yet these supplies have been  
11 made consistently for over six years, not by third parties, but by Porsche itself.

12 So, I want to put a very firm marker down at the outset that this case is not about grey  
13 supplies; it's not about unauthorised supplies by one of the 42 distributors, which  
14 Porsche had no knowledge of; this is Porsche's own longstanding supplies that are  
15 just suddenly being switched off. That decision is unilateral. It's entirely within the  
16 control of Porsche and there's no other external factors that we can see that are  
17 beyond its control.

18 I think it's important that I start just at the outset by taking you to the clause of the  
19 dealer agreement, which is at bundle E, page 22. The clause is clause 2.15.

20 THE CHAIR: Sorry, can you give me the bundle reference again?

21 MS HOWARD: So it's core bundle E and page 22. The actual agreement starts at  
22 page 20. I think this is just a pro forma agreement. It's an example because it's not  
23 signed by anybody, but it's the pro forma terms. And --

24 MS ABRAM: I should just mention -- sorry, I don't want to interrupt -- that this  
25 document is confidential. I'm sure Ms Howard's got that well in mind.

26 MS HOWARD: Am I allowed to -- well, I'll ask the Tribunal to read to it. Does that

1 confidentiality apply to the whole blanket document, because it doesn't seem to be  
2 redacted or marked up in my version?

3 MS ABRAM: So the parties have had a discussion in correspondence about certain  
4 clauses that my client wanted to refer to and we've engaged with that. I don't believe  
5 we've been asked about any other clauses.

6 MS HOWARD: Okay. I don't want to read anything out loud and betray confidence.  
7 Can I just ask whether clause 2.15 itself is confidential?

8 MS ABRAM: We haven't been asked to consider lifting the confidentiality claim over  
9 that.

10 MS HOWARD: Okay. We'll just read it. But you'll see that the opening part of  
11 clause 2.15 -- I mean, some of this is reproduced in the skeleton arguments and in the  
12 witness evidence -- but without reading it, I'm going to obviously say that  
13 clause 2.15(a) and (b), that contains what we've referred to as the "reseller ban" that  
14 precludes sales of Porsche parts to entities that don't have repair facilities.

15 What I wanted to draw your Lordship's attention to is the tail of this provision at the  
16 bottom of page 22, which goes over the page into paragraph 23. I obviously can't read  
17 that aloud.

18 THE CHAIR: Yes.

19 MS HOWARD: We say that tail is very curious. I can't give direct submissions on it,  
20 but it refers to a jurisdiction and I can't understand why the same criteria wouldn't apply  
21 or couldn't apply in the United Kingdom. Let me put it at that. I will come back  
22 obliquely to refer to that clause later, so I'm going to call that "the tail" of clause 2.15,  
23 obviously without revealing its contents, but I will try to make submissions about that  
24 later at an appropriate juncture.

25 We suggest that that tail shows that the concerns that Porsche has in imposing an  
26 absolute ban on resellers does not mean that that outright ban is necessary or

1 proportionate.

2 So the key difference between the parties, which is ultimately a matter for trial, is  
3 whether the instructions that Porsche has given to the second Defendant and other  
4 authorised distributors to cease supplies to independent resellers like Eurospares is  
5 a breach of competition law and we've alleged that it's both a breach of Chapter I and  
6 Chapter II; or, on the Defendant's case, is this a legitimate use of its selective  
7 distribution system to preserve its brand, prevent counterfeit products, and ensure  
8 safety concerns?

9 Just to be clear, we do not take any issue with the entitlement of Porsche to have  
10 a selective distribution system in itself. It's a recognised means of distribution.  
11 However, it's not absolute, and it's only allowed to set the criteria for membership of  
12 its selective distribution within the constraints recognised by competition law, the Metro  
13 criteria. So it can't impose criteria which we say are not objective, which are  
14 discriminatory, which are applied in an inconsistent manner, or which operate as an  
15 outright ban which effectively foreclose and exclude competitors or independent  
16 parties from membership of the distribution system.

17 I want to turn briefly now to just some key points about Eurospares' business model.  
18 You may have picked some of these up from the witness evidence but I just wanted  
19 to give you a run through so you have it in one place.

20 Eurospares is an independent reseller of luxury vehicle spare parts. The key features  
21 of its business model is that as an independent reseller, it acts as an intermediary in  
22 the supply chain. It sells spare parts, but it does not sell the vehicles themselves and  
23 it does not carry out repair and maintenance services.

24 Now, it only sells genuine branded spare parts and we refer to these as "captive parts".  
25 You'll see in the CMA guidance there are references to captive parts or OEM parts.  
26 These are parts which are produced by the manufacturer and supplied by the

1 manufacturer, and they're only available from that manufacturer or its dealership  
2 network.

3 The uncontested evidence is that the first Defendant is the exclusive importer of  
4 genuine Porsche parts from the EU into the UK, and then they are distributed through  
5 PRG, the second Defendant, and the distribution network. So Eurospares can only  
6 get those genuine parts from Porsche or its authorised dealers. In that way, we say  
7 they are necessary or essential inputs to its business and effectively it is dependent  
8 on Porsche for the supply of those products.

9 So, as essential or necessary inputs, those genuine parts really form the crux of  
10 Eurospares' business model. So, all of its established clientele, its reputation, its  
11 internet rankings, its market kind of USP is all based on the supply of genuine parts,  
12 not what my learned friend in their skeleton has referred to as OES parts or generic  
13 parts. I'm not sure whether your Lordships are familiar with the distinction of how OEM  
14 parts, OES parts, and generics work. Is it worth me just trying to explain those  
15 distinctions, or are you happy with them?

16 THE CHAIR: Well, if you can give us a brief summary, that would be helpful.

17 MS HOWARD: So, not wanting to give evidence and obviously this will be a matter  
18 for economic evidence in due course, but basically the manufacturer will produce OEM  
19 parts. But in the modern business and supply chains, it's often easier for  
20 manufacturers to outsource the actual manufacture to original equipment suppliers,  
21 OES. Often, the manufacturer will give the OES the tooling, the manufacturing  
22 equipment and the models and the equipment and the IPR for them to go away and  
23 manufacture the parts. So, those parts which are produced in the OES's premises  
24 can either be branded with the manufacturer's branding and logo and sold as OEM  
25 parts, or they can be sold as OES parts, so they're unbranded or they may have the  
26 OES's brand on them, but they won't have the Porsche logo stamp and they won't

1 have the Porsche numbers on, the T numbers, that show that they're genuine Porsche  
2 parts.

3 The other type of parts are generic parts. Those are manufactured by total third  
4 parties. They're unbranded; they're generics.

5 But the claimant's evidence is that its customers being Porsche owners and  
6 independent repairers want to install genuine Porsche-branded parts. That's the only  
7 parts that it sells. The customers want the branded parts in the vehicles because they  
8 don't want to damage the resale value of their vehicle and there are concerns with  
9 supplying other types, particularly generics, because there's a complicated verification  
10 exercise that makes it impossible for them to check reams of unbranded parts, and  
11 would compromise their rapid delivery and rapid customer service.

12 So, we say, and this will be a matter for trial, that the captive genuine Porsche parts  
13 are distinguishable from other brands of manufacturers, but also captive parts are  
14 distinguishable from OES parts and generic parts.

15 Now, Mr Derrick's evidence is that, having gone through recent orders, nearly  
16 90 per cent of the parts that he tends to order from Porsche are only available from  
17 Porsche. That's at paragraph 33 of Mr Derrick's first statement; bundle reference is  
18 C/12. He says that only 20 per cent of parts in theory could be substitutable, but those  
19 are really simple parts, like sensors. They are not parts like complex or model-specific  
20 parts.

21 That's also backed up by the supporting evidence of Mr Chopra as well. At  
22 paragraphs 17 to 18, he says that out of 400,000 Porsche parts, there's a very limited  
23 scope of 2000 that might be available unbranded; that's less than 0.5 per cent. Both  
24 independent resellers tend to work as a one-stop shop. They will not just sell one  
25 brand of products, they will sell multiple luxury manufacturers' products, and they have  
26 to have a rapid turnover because they have independent professional repairers who

1 want these products. They come in and in their basket, they will put multiple brands  
2 of products, but they need them quickly and they need them in high volumes. So it's  
3 really important that they are able to source these products quickly and provide  
4 a reliable service.

5 Mr Derrick's evidence is that he simply hasn't been able -- he's made enquiries during  
6 this transition period -- to get OES parts because Porsche owns the tooling and doesn't  
7 authorise the production of those parts using its equipment. That's in his second  
8 statement at paragraph 9. He's made attempts to try and source alternative parts,  
9 whether that's from OESs or overseas from other European states and it's all been in  
10 vain; that's in his second statement, paragraph 7. He also sets out the concerns that  
11 he has with generic parts at paragraphs 35 to 39 of his first statement. So there is  
12 a real problem here in trying to find alternative sources of supply and Eurospares' case  
13 is it is dependent on Porsche for these captive genuine parts.

14 The other two aspects of the business model is that Eurospares' business is  
15 predominantly online. So, as a reseller it doesn't sell vehicles, so it doesn't need a car  
16 showroom; it doesn't carry out repair and maintenance services, so it doesn't need  
17 a repair workshop. It simply is acting as a reseller and by definition doesn't provide  
18 these extended services and doesn't need to have those facilities.

19 And the other aspect: it is selling to the very same customers as Porsche and its  
20 authorised dealership. So its customers are, in some cases, Porsche dealers  
21 themselves, who can't get supplies from Germany and come to Eurospares to get  
22 them, but also independent repairers and end users, who are Porsche vehicle owners  
23 and classic car hobbyists, who like to do their own repairs.

24 So standing back, Porsche's conduct in this case is not just a limitation on  
25 Eurospares's business; it is a total exclusion of its access to captive Porsche parts,  
26 and the conduct eliminates effective competition in the market by foreclosing a direct

1 competitor from the UK aftermarket.

2 So it's a very extreme measure, being a blanket ban, and the evidence is that it's not  
3 just Eurospares that's being affected because of alleged conduct -- or not alleged  
4 conduct -- that Eurospares hasn't done, there have been no allegations against  
5 Eurospares specifically, about the quality of its service. But there's evidence that other  
6 long standing resellers have been excluded as well. So, another reseller, Design 911,  
7 has been excluded as well, despite 20 years of supply, and despite that company  
8 being a recognised service partner of Porsche. And it might be worth just taking you  
9 to the evidence of Mr Chopra at paragraph 16. That's at bundle C, page 76 -- sorry,  
10 paragraph 13 at the bottom of page 75. There he talks about having more than  
11 20 years' worth of trading in Porsche parts; he's not aware of any problems arising  
12 with installation, safety or authenticity, and, you know, they would have expected them  
13 to raise them.

14 At paragraph 14, he says that "Porsche has recognised Design 911 as part of [its]  
15 Trade Parts Programme since about 2010" so that's 15 years, and it awarded  
16 Design 911 with a framed certificate and a membership number under the scheme.  
17 That membership number is at bundle C1 at tab 6, at page 21. (Pause)

18 There is a certificate which recognises Design 911 as a validated member of  
19 Porsche's Trade Parts Programme. And we say that Porsche's professed concerns  
20 for its selective distribution system and the quality of service, installation problems and  
21 counterfeit goods, do not stack up when there have been these long-standing supply  
22 arrangements, without any concerns being raised or any incidents. They make  
23 allegations of counterfeit concerns, but there's nothing linking Eurospares to the risks  
24 of selling counterfeit products, nor should there be, because Eurospares only sells  
25 genuine captive parts.

26 There's no evident reason why resellers pose safety risks, when they're selling to the

1 very same customers as Porsche's own dealers -- so the independent repairers and  
2 end consumers -- and it's not clear why the requirement of a repair workshop and  
3 specialist repair and maintenance staff would minimise the apparent safety risks when  
4 installation is being carried out by those customers, not the dealers, but being carried  
5 out by independent repairers and vehicle owners.

6 So our submission, that this is actually nothing to do with those concerns, or if they  
7 are valid concerns, the measure, the outright ban, is not necessary or proportionate,  
8 and we suspect that this has more to do with ensuring pricing points, Porsche's market  
9 share in the UK, and its desire to arrogate sales of captive parts to its authorised dealer  
10 network. So, this is a race to capture the captive parts, keep them within the Porsche  
11 sales organisation, and stop independent third parties being able to sell those parts.

12 There are important consequences from that conduct, not just for the individual  
13 competitors who have been excluded from the market, but also on the structure of  
14 dynamic competition in aftermarkets in the UK. There is a public interest here, that  
15 consumers ultimately benefit from the efficiencies of dynamic and effective  
16 competition, that they are guaranteed effective choice of supply and can take full  
17 advantage of price competition, in terms of lower prices or better and more innovative  
18 quality of service.

19 And so just standing back, we say that this interim injunction is an important part of  
20 the Tribunal's toolkit, to meet its own obligations to ensure that effective competition  
21 is not distorted in markets, and also to ensure access to justice and effective relief.

22 Now, before I move on, I would like to make some further remarks on why independent  
23 resellers are so important in aftermarkets, because both the Commission and the CMA  
24 have recognised that aftermarkets for spare parts, like in this case, have special  
25 characteristics, and they recognise the role of independent distributors in providing  
26 effective competitive constraints to manufacturers and their dealerships. Because

1 independent resellers are not just an alternative source of supply for spare parts in  
2 their own right, they also act as a conduit through the supply chain. So if independent  
3 resellers can get access to parts at the high level of the supply chain, that tap can  
4 cascade down to the independent repairers, who will also get increased access to  
5 Porsche parts, and through them, end consumers will get increased choice of supply  
6 and price competition.

7 So, the role of independent operators, like Eurospares, does provide an important  
8 competitive constraint to manufacturers and their dealerships. Now, that is supported  
9 by the evidence as well, and obviously that is probably why Porsche doesn't like it,  
10 and wants to contain the alternative supply. But it's because of those very special  
11 characteristics of aftermarkets that there is a special regulatory regime for motor  
12 vehicles. So yes, we have the Vertical Block Exemption regulation that many  
13 practitioners are familiar with, but overlaying on top of that, there is also the specific  
14 Motor Vehicle Block Exemption regulations. There is one in the EU, which was  
15 updated in 2023, and since Brexit, there has also been a UK specific motor vehicle  
16 block exemption, which we've called the MV Block Exemption Order, and the  
17 accompanying CMA guidelines.

18 There are important key differences between the EU regime and the post-Brexit  
19 UK Motor Vehicle Block Exemption Order, because in particular, the UK  
20 Motor Vehicle Block Exemption Order protects not just the position of independent  
21 repairers, but also it explicitly protects the role of independent resellers like  
22 Eurospares, who sell spare parts without carrying on repair services. I think it might  
23 be helpful at this point just to take your lordships to the CMA guidelines, just to make  
24 this point good, because it is a key feature of the UK regime, which differs from the  
25 regime in Germany, or in other EU member states.

26 THE CHAIR: Yes. I mean, we mustn't lose sight of the fact that we're concerned at

1 this hearing with adequacy of damages and balance of convenience, but a serious  
2 issue to be tried has been conceded, so we don't need to go into too much detail.

3 MS HOWARD: No, that's right.

4 Well, frankly, it does go to adequacy damages, because Porsche contends that the  
5 damages of their selective distribution system will not just apply in the UK, but this is  
6 a broader policy across the whole of the EU, and that this will undermine their selective  
7 distribution in other EU states, and we're showing that because the  
8 Motor Vehicle Block Exemption Order is UK specific, this protection is required by UK  
9 law, but it need not necessarily apply throughout Europe. It does go to the adequacy  
10 of damages and the balance of convenience.

11 So if I can just take you to the CMA -- it's in the authorities bundle -- and it's tab 41  
12 and it starts at page 1289. I think it's in the other materials section. And you'll see  
13 from the first page that this was issued on 5 June 2023, so that's after the end of the  
14 Brexit implementation period, and this reflects the CMA's post-Brexit competition  
15 policy. That differs, we say, from the EU regime.

16 So, the first provision I'd like to take you to is paragraph 2.5, that's on 1295. I'm just  
17 going to flick through this quickly to show you the key provisions. So page 1295. I'm  
18 not going to read it out, but just to say, it doesn't just protect the immediate interests  
19 of individual competitors, but also the structure of the market and competition.

20 3.3, over the page on 1299, mentions the different framework that applies for differing  
21 conditions of competition in aftermarket, whereas vehicles are governed by the  
22 ordinary rules of the Vertical Block Exemption, spare parts, this is at 3.5, have  
23 a "specific block exemption", and so manufacturers have to meet not just the  
24 requirements of the block exemption order, but on top, they have to also make sure  
25 that there are no hardcore restrictions, contrary to the Motor Vehicle Block Exemption  
26 regulation.

1 Now in paragraph 3.6, on page 1300, it recognises in the second sentence that  
2 competition for distribution of spare parts is inherently less intense than sale of new  
3 vehicles because of the brand-specific nature of aftermarkets.  
4 Then towards the bottom of that paragraph, it talks about the impact on consumers,  
5 because it recognises that there's been an upward trend in pricing for repair services,  
6 spare parts, and just reading from the last four lines:  
7 "... make up a large [part] of the cost of the average repair ... and a [very high]  
8 proportion of total consumer expenditure ..."  
9 So it's a significant slice of the average consumer budget.  
10 Now, paragraph 4.2, over the page at page 1301, sets out the CMA's competition  
11 policy. This key paragraph is important, because their key objective is to protect  
12 access by suppliers of aftermarket goods, and make sure that there is effective access  
13 to spare parts in the aftermarkets, and that means that competing brands of spare  
14 parts can be made available to both independent and authorised repairers, as well as  
15 to both independent and authorised distributors. And we say that that paragraph is  
16 important because there is a two-pronged policy.  
17 First, the CMA is keen to protect market access and competition between authorised  
18 dealers and independents.  
19 Secondly, its sphere of protection extends not just to independent repairers, but also  
20 to independent distributors, and those are precisely the class that we're looking at  
21 here: independent resellers who do not carry out repair and maintenance services.  
22 You can see that in the definition of an independent distributor in footnote 19 at the  
23 bottom of the page. So this is someone that only sells spare parts and is not part of  
24 the authorised distribution network.  
25 And we say that that policy is reflected in the scope of the hard core restriction in the  
26 UK Motor Vehicle Block Exemption Order -- that's article 5(2)(a), which we've referred

1 to -- and it's that hardcore restriction applies not just to direct restrictions that stop  
2 access to captive parts, but also indirect restrictions in isolation or combination with  
3 other factors. So you have to look at the whole market context. The CMA recognises,  
4 in its guidance -- I'm looking at 4.5 over the page to 4.6, and in particular, footnote 22  
5 over the page -- it recognises there that restriction on sales to independent resellers  
6 may have a knock-on indirect restrictive effect on sales to independent repairers, and  
7 that may be contrary to article 5(2)(a).

8 At the end of paragraph 4.6, on page 1302, it says that:

9 "If a supplier of motor vehicles and an authorised distributor (ie a member of  
10 the selective distribution system) agree that parts may not be supplied to independent  
11 repairers, [that will] foreclose repairers from the [market] and [be a] breach [of] the  
12 Chapter I prohibition."

13 And in footnote 22 at the bottom of the page, the CMA goes on to note that:

14 "... an agreement [agreeing that] (captive) parts may not be supplied to independent  
15 distributors (notably independent wholesalers) may amount to an indirect restriction  
16 on access to those parts by independent repairers."

17 So that's a knock-on through the supply chain, that it will actually foreclose, not just  
18 turn the tap off for the independent wholesale resellers, but will also stop the tap in the  
19 cascade for the independent repairers lower down the supply chain. We say that that  
20 is exactly what's happening here, and there will be negative effects for competition in  
21 the market and consumer detriment. It will cause the market share of independent  
22 operators to decline, consumers will suffer harm in form of reduced choice and higher  
23 prices, and the efficiencies that are proclaimed for intra-brand competition by having  
24 this selective distribution system will not outweigh those negative wider effects.

25 I'm going to stop there. I may come back to some further points in reply about the role  
26 of selective distribution systems. But our key point is that Porsche is entitled to have

1 a selective distribution system, but it can't set its criteria in a way that automatically  
2 forecloses independent resellers and discriminates against them.

3 We say that this outright ban, and the requirement to have a repair premise facility and  
4 staff, is equivalent to the custom fit obligation in Ping. It's a physical store requirement,  
5 which is recognised in the CMA guidelines as a form of ban on online sales. It prevents  
6 online operators from having access to customers outside their immediate locality, and  
7 will therefore result in diminution of price competition.

8 I'm quoting from the Court of Appeal in the Ping judgment there. So we say that there  
9 is a serious issue on that point as well.

10 So moving now to the injunction application, I'm taking that, your Lordship, they're  
11 familiar with the American Cyanamid tests, as it's been applied in Sports Direct.  
12 I wasn't going to travail through the legal principles, I'll just pick them up as I go  
13 through.

14 So I was going to move straight to inadequacy of damages for the Claimant and then  
15 proceed to analyse the Defendants' professed damages and loss before turning to the  
16 balance of convenience.

17 So the evidence is set out, which I've taken you to in some detail, that Eurospares is  
18 dependent on Porsche for supplies of these captive parts and without the interim  
19 injunction, it will not be able to make these sales, and it will lose a substantial  
20 proportion of its customers.

21 Let's stand back: assume that interim relief is not granted and the case proceeds to  
22 trial, even if it's allocated to the fast track, it's likely to take six months and judgment  
23 presumably would take three months thereafter. What position is Eurospares going  
24 to be in if the injunction is refused and it has to fight through and ultimately win at trial?

25 Now, the Defendant suggests repeatedly that Eurospares needs to show that it's  
26 dependent on Porsche. This is repeated so often; it's become a form of mantra. We

1 didn't really understand what the reference to "dependency" meant in that sense.  
2 We're not talking about essential facilities here. We're saying this is a necessary input  
3 to the business in the same way as, you know, they cannot sell these captive parts  
4 unless they get them from Porsche. So we submit it's clear that the Claimant is  
5 dependent on Porsche for these supplies.  
6 It's tried for eight months to try and source alternative Porsche parts and even OES  
7 parts. All its efforts have been in vain and that's set out very clearly in the witness  
8 evidence of Mr Derrick that I mentioned earlier. I can take you to that witness  
9 evidence, but I think you've probably got it.

10 THE CHAIR: We've read it.

11 MS HOWARD: You've read it. Thank you. I'm grateful.

12 So we only need to show that Eurospares is going to suffer irreparable and  
13 unquantifiable harm. We don't need to persuade you that absent interim relief,  
14 Eurospares is facing an existential risk. It will have been completely excluded from  
15 access to captive Porsche parts. D1 has the monopoly over their import from  
16 Germany, and the second Defendant and all the other service centres have been  
17 forbidden from making supplies.

18 So the uptake is basically that Eurospares' customers will have to go elsewhere and  
19 they will not be able to get parts from Eurospares or any other independent resellers,  
20 and so they have to go to the Porsche authorised dealers instead.

21 Eurospares' competitive position on the market will be irretrievably damaged. We're  
22 talking about a substantial period of time, nine months to a year, and markets move  
23 on. The damage here is that where Eurospares' competitive position in the market will  
24 decline, the benefit, the loss, will be transferred immediately to Porsche and its own  
25 authorised dealers. So they benefit from a commensurate improvement in their  
26 market position by excluding the direct competitors in the market. Those competitive

1 dynamics between Porsche and its authorised dealers and independent resellers will  
2 be seriously and substantially affected.

3 The Court of Appeal in Sports Direct has recognised the difficulties of quantifying  
4 a loss of trade and loss of customers. How is Eurospares going to quantify that loss  
5 and damage at trial? Because there is a high risk that those customers may never  
6 come back to Eurospares after judgment. It will have lost its market share; it will have  
7 lost its reputation and competitive position.

8 At the moment, the Porsche parts of the business for Eurospares is a growing,  
9 expanding part of its business. It had projected that business to improve and to have  
10 significant growth, and it won't be easily compensated for that lost economic growth.  
11 It will not be -- if you think of its growth trajectory, it would have been like this and it's  
12 declining like this, it's going to be very difficult to recapture that lost growth and be  
13 restored to the position it would have been in if business had been allowed to continue  
14 as usual.

15 These difficulties are well known. You know, if you look at the Google Shopping  
16 damages case, how do you plot where an SME that's basically been deprived of  
17 oxygen would have been if it had been allowed to grow? How can you speculate what  
18 its competitive position in the market would have been like in prevailing market  
19 conditions? You know, would new customers in the cost-of-living crisis be more  
20 cost-conscious and would have preferred to have bought from independent resellers  
21 to save costs? How would Eurospares have competed with other independent  
22 resellers, other independent repairers, as well as authorised dealers in markets?  
23 Because markets are fluid. It's like a river: you never step in the same water twice.  
24 Those competitive dynamics are very difficult to predict and model.

25 As we all know, economic analysis in these types of competition cases is expensive  
26 and often acts as a deterrent to SMEs bringing damages claims in the first place. We

1 can predict that economic modelling is going to cost in excess of £1 million on top of  
2 legal fees, and that will readily eat into Eurospares' profits and its ability to survive.  
3 Your Lordship, I assume you're aware of the profit figures that are set out in the  
4 audited accounts. They're also set out in my learned friend's skeleton. Their annual  
5 profit in 2024, I think, is cited at £2 million and it has been between £3 million and  
6 £3.5 million. So the costs of this injunction application alone has been close to  
7 £400,000. That's just Eurospares' costs, let alone the adverse cost risk.  
8 The competition claims are incredibly expensive and even lifting the transition period  
9 and allowing the refusal to supply to continue is going to make this whole exercise so  
10 much more complicated, difficult to quantify and have considerable costs of economic  
11 analysis and arguments that wouldn't be necessary if the status quo could just be  
12 maintained.  
13 You're pausing and looking at me quizzically. I just wanted to ...  
14 THE CHAIR: No, I hear what you say, but I suppose at the back of my mind I still have  
15 this problem with the cross-undertaking, frankly. I mean, we're going to have to come  
16 to that.  
17 MS HOWARD: I'm open to that, yes. Can I just --  
18 THE CHAIR: Because that, at the moment it does seem to me a potentially major  
19 obstacle in your client's way.  
20 MS HOWARD: I am going to address you. I'd just like to make one more point on  
21 inadequacy damages, and then I'll move straight (overspeaking).  
22 THE CHAIR: Yes. I mean, I have no difficulty in understanding what you say about  
23 the potential for unquantifiable damage if an injunction is refused.  
24 MS HOWARD: Yes. Thank you. I'm grateful.  
25 I'll take the next point quite quickly, because I just want to make a point that this doesn't  
26 just apply to Porsche parts. Because of the Applicant's business model, it acts as

1 a one-stop shop. So the independent repairers, because they're professional  
2 repairers, they want to come and place their orders for a range of competing  
3 manufacturer brands like Lamborghini, like Maserati, and put all of their higher  
4 volumes in one basket and to buy them in one stop without having to go to multiple  
5 dealers or multiple sources.

6 That means that if Porsche, which is obviously a heavily recognised brand, if  
7 Eurospares is not allowed to sell them and is not allowed to advertise them on its  
8 website, then it's going to stop a core part of its customer base from accessing those  
9 parts in the most efficient manner.

10 So Eurospares anticipates that 30 per cent of its inventory and a significant proportion  
11 of its spare parts business will be affected. That's really important in the context of it  
12 being an online business, because it means it will affect its internet rankings. If there's  
13 less internet traffic clicking on its website, then its Google rankings will be affected and  
14 that will have a negative cycle for its rankings, which will then lead to further website  
15 drops and a downwards spiral, loss of visibility, loss of web traffic and loss of future  
16 sales of other branded products. Once those rankings are lost, it goes without saying  
17 it takes a long time to rebuild a reasonable prominence in the market and that's not  
18 quantifiable.

19 So taking that shortly, we say that it would be very difficult to recover even if -- if there  
20 was no injunctive relief, it would be very difficult for Eurospares to recover in 9 to  
21 12 months' time, even if there were a permanent injunction at the end of the day,  
22 because the loss of clientele, lost market share, lost internet rankings will take a long  
23 time.

24 THE CHAIR: I mean, you say 9 to 12 months. Obviously, that would depend on what  
25 directions were given for --

26 MS HOWARD: That's being optimistic of being on the fast track. That's assuming that

1 | there was either the fast track allocation or an expedited trial. So it's six months plus  
2 | three months for judgment is what I'm allowing, that's why I'm saying nine months.  
3 | My learned friend estimates it's going to be 12 months to bring the case to trial. You  
4 | know, we know that the CAT is battling with capacity constraints and dealing with  
5 | cases as well.

6 | THE CHAIR: I mean, I don't see any reason in principle why the case couldn't be  
7 | brought on for a full trial within six months.

8 | MS HOWARD: You don't see (overspeaking).

9 | THE CHAIR: No, I don't see any practical difficulty with that.

10 | MS HOWARD: I don't see any. I mean, we've set out in the evidence of Mr Smith and  
11 | in our skeleton why we think this should be manageable within six months.

12 | THE CHAIR: Yes, which would mean, in terms of where you are in your argument,  
13 | that the period of potential damage would be reduced; it wouldn't be as long as  
14 | nine months or a year, we'd be looking at six months.

15 | MS HOWARD: (Overspeaking) but the problem is that if Eurospares can't offer  
16 | a one-stop shop and it doesn't have products, because part of its business  
17 | model -- and we try to show you examples of the part diagrams -- it doesn't just sell  
18 | the core component that needs to go in, it also sells all the ancillary products: the  
19 | screws, the bolts, the brackets that fit it. So it provides advice on how to install the  
20 | products, so there's knock-on follow-on sales for other products, but also for repairers,  
21 | in particular, a wide range of products.

22 | If Eurospares can't actually provide a reliable service across all of the full range of  
23 | products, then its reliability and its reputation and customer loyalty will be affected.  
24 | You may say, "Oh, well, it's only going to be six months and then we're going to have  
25 | judgment; it's only a short period", but customer loyalty and reliability is crucial in these  
26 | markets.

1 You know, my learned friend, if they lose a trial, they may then seek an appeal, and  
2 there may be an ongoing situation where there's still cessations of supplies going on  
3 into the distant future. There's no guarantee, even if trial is heard within six months,  
4 that it's going to resolve the situation.

5 THE CHAIR: Yes.

6 MS HOWARD: So, I mean, my learned friend is making this point in their skeleton,  
7 but we say this ignores the one-stop shop argument and the importance of customer  
8 loyalty. It talks about temporary cessation in supplies, but normally that's just for one  
9 product, and it will be a hiatus of a couple of weeks until, you know, they can get the  
10 supplies from Porsche.

11 We're not talking about sustained disruption to all ranges of Porsche products for an  
12 extended period of supply. It ignores the high volume, rapid turnaround standards that  
13 these professional repairers expect. They want to service these vehicles for  
14 consumers, you know, this week or next week, they don't want to be waiting for months  
15 with the uncertainty of not knowing whether they're going to have the supplies. It's  
16 particularly having the "full spectrum of products", as Mr Chopra calls it, with the rapid  
17 turnaround.

18 That's essential for these online businesses. You know, markets and customers,  
19 they're fickle: if they haven't got guaranteed supplies then they will go elsewhere.  
20 That's not quantifiable.

21 In Sports Direct, that's exactly the type of damage that the CAT and the  
22 Court of Appeal recognised that it is not quantifiable and cannot be recoverable at  
23 a later date.

24 Let's now turn to the adequacy of damages for the Defendant, because we say at the  
25 beginning that it is important to recognise that this change of policy has been brought  
26 about by Porsche's own conduct; its unilateral conduct. The parties have proceeded

1 on the basis of long standing supply arrangements for years without incident.  
2 So, to some extent, whether the tap is turned on or turned off for supplies is within  
3 Porsche's own gift. It is perfectly able, as it has done during the transition period, and  
4 in fact in its more recent offer, to mitigate its losses and to a large extent, this harm  
5 that it professes is self-inflicted.  
6 Now, we have repeatedly asked Porsche, for the purposes of providing  
7 a cross-undertaking in damages, what it expects its likely losses to be. We've made  
8 it clear -- now, my learned friend says that we're refusing to give a cross-undertaking  
9 in damages. That's not true: we're refusing to give an unlimited cross-undertaking in  
10 damages and we've made repeated requests in correspondence for a ballpark  
11 estimate of what the anticipated damages might be. And the Defendant has not come  
12 back to those requests; they've simply said their loss is unquantifiable.  
13 We say that this is a very different situation to that in Sports Direct where there were  
14 third parties involved. Here, this is Porsche who's been making the supplies. PRG to  
15 Eurospares, not any third-party external factor beyond its control. We say that the  
16 notion that Porsche was somehow harming its business by supplying Eurospares and  
17 other independent resellers all this time is simply not credible, because the Defendants  
18 will continue to generate turnover and profits from the sales of those spare parts to  
19 Eurospares.  
20 So, if the interim injunction is granted and supplies continue, the first Defendant will  
21 still sell the volume of products. It makes no difference to the first Defendant whether  
22 those products are sold by its authorised dealers or whether they're sold by  
23 Eurospares and other independent resellers. The difference will be to the authorised  
24 dealers, because they will say, "Well, we might have sold more; if we've got sales  
25 targets to meet, we can't meet them because the independent resellers are creaming  
26 off our sales".

1 So, let's look at the various heads of loss that Porsche professes to have. The first  
2 one, they say, is the damage to the investments and the deterrence for dealers to  
3 make future investments. That's dealt with in their skeleton at paragraph 15 and in  
4 the evidence of Mr Mannell at paragraph 5.1.

5 Now, essentially, this is investments that the Porsche Centres and service centres  
6 make to provide a high-end customer service, this Destination Porsche badging of  
7 their premises. But it's clear that customers don't go mainly to these places to shop  
8 for spare parts; they go primarily to shop for their luxury sports car and to have that  
9 car serviced. So, although the servicing and repair may involve a spare part, it's  
10 fanciful to suggest that the dealer investments are really directed at the spare parts  
11 rather than the vehicles themselves.

12 And it's fanciful to suggest that if an online business like Eurospares who doesn't  
13 compete in selling vehicles and doesn't compete in servicing and repairing vehicles is  
14 able somehow to make sales without the same investment that dealers will be less  
15 likely to invest in their vehicle showrooms, because one would suspect that most of  
16 their turnover and profits is made from the sales of luxury sports cars with the high  
17 price tag to match, rather than some random spare part components and ancillary  
18 screws and brackets.

19 We say that it's also fanciful to suggest that dealers will somehow be placed at  
20 a competitive disadvantage. They get their prices from Porsche, the dealers, at  
21 a preferential rate than Eurospares does. The details are set out in Mr Derrick's  
22 statement. They're confidential, but you will see that there is a price differential where  
23 Eurospares has to pay a percentage markup on the price from the dealers so that they  
24 make some margin on those sales when they sell them on to independent resellers.  
25 But the dealers get the products at a lower percentage discount and so they have an  
26 advantage there.

1 The second head of damage is the professed damage to commercial relationships  
2 and the risk of litigation. The argument seems to be that if the interim relief was  
3 granted, that would result in authorised dealers bringing breach of contract claims  
4 because Porsche continued to supply Eurospares. We find this submission curious  
5 because that's never been raised before when PRG has been supplying Eurospares  
6 for over six years and was willing to continue it for the transitional period. No claims  
7 seem to have been brought.

8 In reality, this looks like a kind of shoehorn of trying to fit this case within the facts of  
9 the Sports Direct case where there were third-party exclusivity arrangements for  
10 distribution. I'm not going to take your Lordships to it, but in that case,  
11 Newcastle United had an exclusive distribution agreement with JD Sports, so if it was  
12 required to supply Sports Direct, that would breach the exclusivity arrangement that it  
13 had in place and JD Sports could claim breach of contract. But here, the supplies  
14 aren't by a third party; they're by PRG, the second Defendant, itself.

15 In any event, the dealership agreement in this case does not provide for any  
16 exclusivity. It might be worth just taking your Lordships back to the copy of the  
17 dealership agreement in bundle E. The relevant clause is 2.8 which I think is on  
18 page 20. I'm conscious that this is confidential, so I'm not going to read that out.  
19 There's two paragraphs here, 2.8. And the important here is that -- it's very difficult to  
20 make submissions -- that doesn't involve the dealers; there's no exclusive distribution  
21 arrangement there for the dealers.

22 My learned friend Ms Hafesji reminds me just to go upwards to page 15, where the  
23 definition of Porsche Sales Organisation is. That refers to anyone who's authorised  
24 within the selected distribution agreement. So, there's no exclusivity there.

25 Then the next paragraph is paragraph 15, which is on page -- sorry, that's the definition  
26 there.

1 So, that provision of clause 2.8 is a very broad and flexible provision and appears to  
2 have been drafted to allow for new members and new suppliers to be added and  
3 removed at will. So there doesn't seem to be any provision here that would amount to  
4 a breach of contract.

5 Indeed, we say that if authorised dealers are making complaints to Porsche about  
6 being undercut by independent resellers or not being able to meet their sales targets  
7 or asking Porsche to do something about it, whereupon Porsche has acted by refusing  
8 supplies, then that has a whiff of replica kits about it; it has a whiff of a hub-and-spokes  
9 concerted practice or an indirect form of RPM, which itself would be a self-standing  
10 object infringement of the Chapter I prohibition.

11 The third head of professed loss is that Porsche says that Eurospares would damage  
12 its commercial strategy, because those sales to Eurospares are an unmonitored part  
13 of the supply chain. Well, firstly, we say this is, as I've said before, not a grey market.  
14 Eurospares is only selling the genuine Porsche-branded parts that originate from  
15 Porsche itself. Secondly, there's no reason to assume that Eurospares is unmonitored  
16 because there are a range of alternative checks and controls in place or ones that  
17 could be implemented by Porsche that would be eminently more suitable and  
18 proportionate to addressing its concerns than a complete ban.

19 The issues there are set out in Mr Derrick's statement where he explains that he has  
20 controls over tracking products, that he has an ERP mechanism that he can track and  
21 trace if there's any troublesome parts that need replacement; he has detailed on his  
22 website explaining how to fit parts; he's willing to undergo training or to have  
23 appropriate guidelines or restrictions as part of any checks and controls imposed by  
24 Porsche. We say that those alternative means of checking and control, which are set  
25 out in his second witness statement at paragraphs 21 to 31. He says he's happy to  
26 have monitoring, training, audits, reasonable contractual restrictions. He also refers

1 at paragraph 24 to other AMS authorisation measures that other OEMs have imposed  
2 where they have to give a prior authorisation before they release certain parts for  
3 resale because they have a concern about safety and proper installation. So, there  
4 are a range of other mechanisms that can be used to track correct parts and trace  
5 parts that have been sold that have that are much more proportionate than a complete  
6 reseller ban.

7 Porsche and Eurospares have had a long-standing, fruitful, mutually beneficial  
8 relationship. Porsche knows what parts it's selling to Eurospares; Eurospares can  
9 track them through its ERP system. So we suggest that these concerns about  
10 damages to commercial strategy are unfounded and can be easily mitigated. The  
11 next --

12 THE CHAIR: This is probably a question for Ms Abram. Might there be a risk of  
13 dealers complaining about a failure to enforce clause 2.15, the one you took us to  
14 before, the prohibition on selling parts to ...?

15 MS HOWARD: Well, that's where we say the tail comes into effect, because that  
16 provides an immediate gateway that could be used to explain why there's no breach  
17 of the agreement. We say that the criteria in that tail seem to be obviously evidentially  
18 met in this case.

19 THE CHAIR: Oh, I see. Yes.

20 MS HOWARD: That in itself is a more proportionate way than a complete ban.

21 THE CHAIR: Yes, okay. Thank you.

22 MS HOWARD: The next head is the damage to safety standards because Porsche  
23 asserts that if it continues to supply Eurospares, there'll be a risk to its safety  
24 standards. We should say those concerns seem unfounded. Firstly, because the  
25 authorised dealers are still allowed to sell to independent repairers and end users in  
26 exactly the same way as Eurospares. There don't seem to be any checks on how

1 those products are going to be used or installed and so there's no real threat to safety  
2 standards. There's an inconsistency, an illogicality here in the application of the policy  
3 which shows that really it's not necessary, let alone proportionate. It's a double  
4 standard.

5 Secondly, there's no reason why Porsche can't continue to provide technical support  
6 and advice to customers, even if they bought the part elsewhere. I mean, customers  
7 of a luxury vehicle would expect to be able to go back to Porsche irrespective of where  
8 the part has been purchased. And really, beyond the technical advice, what an  
9 authorised dealer provides is a luxury customer shopping experience about the luxury  
10 sports car rather than the safety standards.

11 I'm conscious of time. Sorry, I can't see the clock at the moment. For the transcript  
12 writer, do we need a break or are we happy to carry on?

13 THE CHAIR: Do the transcript writers -- yes, okay. Right. We'll have a break.

14 MS HOWARD: It's a convenient moment now and then --

15 THE CHAIR: It would be a convenient moment, but again, I come back to the point,  
16 subject to Ms Abrams submissions, what you say about damage to Porsche would  
17 seem to have considerable force. Therefore, it is all the more puzzling to the Tribunal  
18 that Eurospares is not prepared to give any cross-undertaking.

19 MS HOWARD: So, I mean, I'm going to turn to cross-undertaking next after the  
20 break --

21 THE CHAIR: Yes.

22 MS HOWARD: -- but our primary position is that there is no loss here if suppliers --

23 THE CHAIR: Well, if that's right, then true it is that you may say, well, the  
24 cross-undertaking is unnecessary, but by the same token, a cross-undertaking is not  
25 going to matter, ultimately. But if that is the price conventionally for obtaining an  
26 interim injunction, it's the price for obtaining an injunction which may turn out to have

1 | been wrongly granted and would leave the Respondent with no remedy.

2 | MS HOWARD: The short point is that we haven't ruled out providing  
3 | a cross-undertaking; what we've ruled out is providing an unlimited one, given that  
4 | we're dealing with Eurospares as a small enterprise against an international giant like  
5 | Porsche.

6 | THE CHAIR: Well, again, but one assumes that Porsche has put --

7 | MS HOWARD: Eurospares asked for clarifications on the kind of ballpark figure that  
8 | should be provided, and Porsche hasn't engaged.

9 | THE CHAIR: I see that, but I mean, one can assume that Porsche has put its best  
10 | case forward now in terms of what its potential damage is. It's up to Eurospares to  
11 | take a view, frankly. It may well be that the Tribunal will end up by putting Eurospares  
12 | to an election, effectively. If it wants to have an injunction, it's going to have to give  
13 | a cross-undertaking. Whilst one can see that in an ideal world it would be a capped  
14 | undertaking, there again, that's not the way the courts proceed. You'll have to take  
15 | a view.

16 | MS HOWARD: Shall I make enquiries over the short break?

17 | THE CHAIR: Yes.

18 | MS HOWARD: Okay.

19 | (11.40 am)

20 | (A short break)

21 | (11.54 am)

22 | MS HOWARD: We're very grateful for your indications on the cross-undertaking and  
23 | its role in assessing whether you need to go to the balance of convenience or not.  
24 | Where we want to start is, in most cases where there is a cross-undertaking in  
25 | damages, there is some indication of the amount of the damage that the Defendant is  
26 | likely to sustain. An example of that is the Traylen case which my learned friend has

1 cited in her skeleton. Perhaps it's just worth turning that up. It's in the authorities  
2 bundles and it's paragraph 41, page 763.

3 THE CHAIR: 763?

4 MS HOWARD: Yes, of the authorities bundle and it's paragraph 41.

5 In that case, the interim relief was refused because of the Claimant's intransigent, as  
6 it was described, refusal to provide a cross-undertaking. But you'll note at the top of  
7 that paragraph, there was a very clear indicator of the order of the harm that was going  
8 to be suffered. In that case, it was about £75,000 to £85,000. Therefore, the refusal  
9 to give a cross-undertaking was deemed to be unreasonable.

10 Here, the Claimant has made repeated requests for clarification about the extent of  
11 the loss. The Defendants say that we are refusing to provide a cross-undertaking;  
12 that's not the case. They have wanted to try and have some idea of the order of loss.  
13 If I can take you to Mr Derrick's second statement, it's at C bundle, page 71 and it's  
14 paragraph 43. There, Mr Derrick is explaining that he understands the requirement  
15 for a cross-undertaking. He understands it's not always required in fast track; there is  
16 a discretion. It sets out his concerns about giving an open-ended financial guarantee,  
17 given the fact that Eurospares is a very small undertaking with limited -- although it  
18 makes a certain degree of turnover, that's obviously turnover; its net profits are actually  
19 relatively small compared to its overall turnover and it's worried about giving an  
20 open-ended financial guarantee to an international company the size of Porsche  
21 whose turnover is several hundred billion pounds worldwide. So, you know, he sets  
22 out that, you know, they're financially sound. They are a small --

23 THE CHAIR: In a sense, the size of Porsche is irrelevant, isn't it? I mean, in deciding  
24 whether to give a cross-undertaking, it's not the size of Porsche, it has to be the risk  
25 of a claim being made under the cross-undertaking?

26 MS HOWARD: It is, but Porsche is saying this is going to harm its selective distribution

1 system, not just in the UK, but also in other jurisdictions, because it's rolling it out  
2 across the EU. So, the scale of the losses (overspeaking).

3 THE CHAIR: Yes, it's true it is, but you've got to -- that has to obviously be weighed  
4 against the evidence that you've referred me to and what has happened in the last  
5 six years. I mean --

6 MS HOWARD: That's right. In the last six -- And we say that, you know, it should be  
7 possible to quantify this harm, given that, particularly for the last eight months --

8 THE CHAIR: But why should they? Why should they have to quantify it?

9 MS HOWARD: Because there's basically a transfer of sales for what Eurospares  
10 would have been providing, which would be transferred to the dealers. Now,  
11 Eurospares estimates that its total sales are about £400,000 in a 12-month period, so  
12 for six months it would be 200,000. And so it wants to have some ballpark figure of  
13 the harm that's likely to --

14 THE CHAIR: And what do you say would follow from that? Would you say that that  
15 would then lead to the Tribunal capping the cross-undertaking? So what if they give  
16 a -- what if the estimate turns out to be wrong and it's more than they estimate?

17 MS HOWARD: Well, I think it's -- you need to overlay, and I mean, it sort of doubles  
18 a little bit with whether it's formally badged as fast track or the considerations of policy  
19 that are behind the fast track procedure, where you've got this imbalance between  
20 a very, very small Claimant and a large, powerful, heavily-resourced Defendant, there  
21 has to be some mitigation to enable access to justice and protection of Eurospares'  
22 rights.

23 THE CHAIR: That's true. But I mean, you say very, very small. That is obviously  
24 disputed. I mean, this is a company that, as I understand it, made a provisional  
25 estimate of its costs of some £2 million. It says it's got a very strong claim; it says that  
26 the evidence of risk of damage is risible from Porsche, and yet it's not prepared to give

1 any cross-undertaking. It's frankly a rather unattractive position for Eurospares to be  
2 taking.

3 MS HOWARD: I mean, there's no dispute between the parties that Eurospares  
4 qualifies as an SME within the Commission Recommendation and it's at the small end  
5 of that bracket. So, it would be prepared to give a capped undertaking, and I'm just  
6 trying to show the anxiety and its vulnerability of giving an unquantified open-ended  
7 cross-undertaking. But I have instructions that if your Lordship's not prepared to  
8 accept a capped undertaking, then it will give a cross-undertaking in damages.

9 THE CHAIR: Well, that seems to me, in the light of the authorities, frankly, a necessary  
10 concession, if you like. I've never come across a case where, absent special  
11 circumstances such as local authorities acting in the public interest and so on,  
12 a Claimant seeking an interim injunction hasn't been required to -- is in a position to  
13 give an undertaking but has refused to do so and the court has nevertheless gone  
14 ahead and granted an interim injunction.

15 MS HOWARD: But that's because perhaps in the Commercial Court or, I mean, I do  
16 a lot of procurement claims, there's very different considerations to where you've got  
17 an SME potentially going on to the fast track, because that is exactly what the fast  
18 track procedure, which is unique to the Competition Appeal Tribunal, was designed to  
19 protect smaller Claimants and facilitate their access to justice.

20 I haven't dealt with the fast track application yet. I was going to deal with that at the  
21 end. But I wanted to take your Lordship and members of the panel through the  
22 pre-legislative materials briefly to show you the very important policy considerations  
23 that went into the design of the fast track procedure. It's stunning that, you know,  
24 we've had that procedure now for several years, and yet it's never really been utilised.  
25 It's certainly never been utilised in terms of injunctions or enabling that relief from  
26 giving a cross-undertaking. I think it does have to put a real question mark over, you

1 know, is the fast track becoming a sort of fig leaf? Is it just a facade or does it really  
2 offer a genuine access to justice and the vindication of rights by smaller Claimants?

3 I mean, this Tribunal is dominated by the big CPOs and the big tech cases. You have  
4 to ask: why are there so few claims by smaller Claimants that that regime was  
5 designed to protect?

6 THE CHAIR: Yes.

7 MS HOWARD: You know, Ms Hafesji and I have done a lot of -- we've done footwear,  
8 we've done Belle Lingerie, you know, we have real life experience of the real difficulties  
9 for small Claimants in bringing these claims, where they are essentially putting their  
10 business on the line. I mean, you say, "Oh, well, this is a substantial business of  
11 £20 million and £2 million of profits", but there's a real risk that the cost of this litigation,  
12 which my clients are intending to pursue, is going to eat up those profits.

13 THE CHAIR: Yes, I get that, but as I say, speaking for myself, it seems to me that the  
14 problem for the Claimant here is likely to be legal costs rather than the potential  
15 damage under the cross-undertaking.

16 MS HOWARD: It's not just legal, it's our first cost that's the problem and the, you  
17 know, ATE insurance, the risk of applications for security for costs.

18 You know, in the field of security costs, there's one established case law that will not  
19 allow an application for security for costs if it's going to stifle the claim. We say that  
20 similar considerations apply here for the cross-undertaking; it mustn't be used as  
21 a mechanism that can stifle a claim.

22 THE CHAIR: Well, yes, I see that. Perhaps had you not dealt so effectively with  
23 Porsche's case on likely damage I --

24 MS HOWARD: (Overspeaking) and that's obviously -- but I think for all of us who live  
25 in this glorified world of commercial claims that are several hundred million pounds,  
26 hundreds of millions of pounds, it's very easy to overlook the pressures of a small --

1 THE CHAIR: No, I do see that. Yes.

2 MS HOWARD: -- (Overspeaking) putting their business on the line to bring one of  
3 these claims.

4 THE CHAIR: Yes.

5 MS HOWARD: That's why we say that a capped undertaking would be more  
6 proportionate and enable, you know, to ensure this claim can proceed without  
7 exposing the Claimant to too much risk. But if you're not with us on that primary  
8 submission, then --

9 THE CHAIR: Well, we haven't formed a definitive view, but we'll ...

10 MS HOWARD: I would like to come back to this when I make my submissions on the  
11 fast track application.

12 THE CHAIR: Sure.

13 MS HOWARD: So turning to the balance of convenience. I'm going to deal with this  
14 quite briefly. I'm conscious I've probably exhausted your bandwidth of listening to me,  
15 but I'm going to make five points.

16 Firstly, there's the strength of the case and the evidential value. It can be  
17 taken -- weighed in the balance of the wide range of factors that the Tribunal is entitled  
18 to take into account. We say here that the Claimant has a strong case, both on the  
19 law when you apply the Vertical Block Exemption Order and the CMA guidance, but  
20 also the Motor Vehicle Block Exemption special regime with the hardcore restrictions  
21 that are specific to the supply of spare parts in aftermarkets.

22 We say that, you know, we've got strong evidence here of a refusal to supply, and  
23 that's just Chapter I. We've also got strong evidence of a refusal to supply by  
24 a dominant company and cutting off a long-standing customer who is also a direct  
25 competitor. We say that that exclusionary conduct is discriminatory and, in effect,  
26 self-preferencing, because Porsche is kneecapping independent resellers in order to

1 | favour its own authorised dealers, some of whom are owned by Porsche.

2 | We say that there's no obvious objective justification, and even if there was, the total

3 | ban is not necessary or proportionate. I don't need to lecture you on the law, but we

4 | take that at face value; we say that there is a strong case on the merits.

5 | But there are three other reasons why the balance of convenience lies in Eurospares'

6 | favour.

7 | Firstly, the nature and the extent of the harm that will be suffered by Eurospares in the

8 | event that the injunction is wrongly refused, far outweighs the damage to the

9 | Defendant. We've shown through the evidence that the Claimant will suffer a range

10 | of adverse effects on its business, its reputation, its market share, internet rankings

11 | and competitive market position, which can't be quantified. The Defendants stand to

12 | continue to make money, even if the injunction is granted; they will still make money

13 | from the sales to Eurospares. So the claimed loss, as we've set out, we say, is not

14 | credible, particularly when they continue to supply for some time without incident.

15 | We say, secondly, the Tribunal should have regard to the disparity in the size and

16 | resources of the parties. That is a weighty factor, because although the Claimant is

17 | profitable, it still is an SME, whereas Porsche is a vast, global and well-resourced

18 | brand. So if there is any harm to either party -- it may be you think there's harm on

19 | both sides -- the Defendants are far more resilient to the limited and time-limited

20 | setback that they claim.

21 | So if the injunction is refused, we have a period of six to nine months where the

22 | Claimant gets nothing, cannot sell anything, and it's cut out of the market. For the

23 | Defendant, if the status quo is maintained, supplies continue, they still have profits

24 | from those sales for the next six to nine months. If they do get complaints from

25 | authorised dealers, they've got the court judgment as a justification to them to say,

26 | "We've been ordered to do this by the court, so there's no breach of contract".

1 Thirdly, there is the public interest factor, and that is that this conduct by Porsche has  
2 an impact, not just on Eurospares, but on all independent resellers in the UK. We've  
3 presented evidence to the Tribunal from Mr Chopra, who runs Design 911. There's  
4 also a mention in Mr Derrick's statement of another independent reseller who have  
5 had their supplies cut in similar fashion. By cutting out this intermediary wholesale  
6 level of the market, that will have a wider impact on structure and competition in the  
7 market. As I've explained about the cascade, there will be a cascading effect on  
8 independent repairers and through them, negative effects for consumers.  
9 So it will drive up prices for consumers and reduce their choice of supply. Those  
10 negative effects will work importantly to the Defendant's competitive advantage,  
11 favouring their dealers over their competitors and eliminating effective competition.  
12 Those issues really raise public order, ordre public considerations, where the  
13 injunction is a means for the Tribunal to intervene and exercise its own self-standing  
14 duty to ensure effective competition and effective redress. That comes out of the  
15 *Courage v Crehan* litigation, it comes out of the *Manfredi* litigation, if the EU retained  
16 jurisprudence, but the court has its own duty to ensure effective relief and effective  
17 competition.  
18 Then the last point on the balance convenience is the status quo. We say, you know,  
19 this matter is not finely balanced; there's a very strong weight in favour of granting the  
20 injunction, especially given the continued supplies over the transition period.  
21 *American Cyanamid*, says that if there is any doubt, the appropriate course is to  
22 maintain the status quo.  
23 Can I just now quickly turn to two points that my learned friend has made that should  
24 be taken into account in the balance of convenience.  
25 Firstly, she says this is kind of a mandatory injunction, but we haven't framed this as  
26 a mandatory injunction. The draft order is bundle B at tab 2, and it's on page 26. The

1 actual provisions for interim relief are in paragraph 3 on page 27.

2 So we've deliberately framed that in negative terms so that Porsche is prohibited from  
3 refusing to supply, whether that's a direct refusal or a kind of constructive refusal. So  
4 it's not really mandatory. We haven't, for example, sought that there's any admission  
5 to the selective distribution system, and all it does is simply maintain the status quo  
6 for the period of trial and judgment. So there's no real prejudice to the Defendant from  
7 maintaining that position.

8 Then the Defendant says that the enforceability of the order should be a factor taken  
9 into account in the balance of convenience, but that enforceability issues only arise  
10 where there is a mandatory order. The Sports Direct authority that my learned friend  
11 relies on really applies where there was a very strictly-termed, express mandatory  
12 obligation. I don't know whether you want me to take you to the Sports Direct  
13 judgment, but in that case, there was a mandatory order that sought -- it was  
14 a mandatory obligation to supply Sports Direct, which hadn't been supplied before.

15 THE CHAIR: Can you remind me: what was the perceived difficulty in that case about  
16 the terms of the order?

17 MS HOWARD: I think the problem was that Newcastle United had never previously  
18 supplied Sports Direct. It had got it from the third party. The third party was called  
19 Castore. C-A-S-T-O-R-E. So there had never been any pre-existing supply  
20 relationship between Newcastle United and Sports Direct.

21 But here there has been direct supply by PRG, the second Defendant, for over  
22 six years, a long standing relationship, and in some ways, this eight-month transitional  
23 period that we've had is somehow a bit of a dress rehearsal for how the interim  
24 injunction would operate. It shows you how the parties are likely to behave during that  
25 period and that this order is going to be complied with. I mean, the Defendant hasn't  
26 pointed to any problems or concerns, you know, it's supplied the goods, there's been

1 payment. There's been no issue between the parties over the terms of supply or  
2 indeed with any quality of service or problems raised by Porsche with Eurospares'  
3 service.

4 So my learned friend, Ms Khatija, it might be worth just turning up the  
5 Sports Direct -- it's actually the Tribunal's decision in Sports Direct, and it's at  
6 authorities bundle, page 945.

7 I think there were particularly unique circumstances in that case. If we look at  
8 paragraph 34(4), we can see there the Tribunal says:

9 "... this is a mandatory injunction [that is being sought and it] would require  
10 considerable court policing in circumstances where neither party would be  
11 approaching matters in a spirit of commercial give and take. [There's going to] be  
12 significant inconvenience and cost [and also] Sports Direct would not be slow in  
13 pressing its rights and ensuring [it]. [It really considers there would need to be close  
14 supervision by the Tribunal]; and that there would be a real risk of the Tribunal being  
15 sucked into the administration ... of day-to-day disputes."

16 This is because there was a toxic relationship between the parties: they simply couldn't  
17 get on and they were never going to -- you know, there was a high likelihood that the  
18 supplier arrangement was going to break down, and then the Tribunal would have to  
19 be called upon to intervene.

20 But in this case, supplies have continued without any problem for six years and indeed  
21 the last eight months without any issue. We say that there's no problem with policing  
22 here. You know, if your Lordship and the Tribunal is not happy with the wording, we're  
23 very happy to accommodate adjustments to the terms of the order, but we say --

24 THE CHAIR: I'm just looking at what's said in Porsche's skeleton about it. It says  
25 there's difficulties with uncertainty in relation to the paragraph you've just read out.

26 MS HOWARD: I think that's another shoehorning, trying to fit this case within the facts

1 of Sports Direct, where the relationship between the parties is not the same.

2 THE CHAIR: Yes.

3 MS HOWARD: You know, there's been very cordial relationships between PRG and  
4 Porsche dealers and Eurospares. In fact, Mr Derrick, in his recent -- second witness  
5 statement, even says he was contacted the other week by a Porsche dealer who  
6 couldn't get supplies and wanted to know whether they could get them from  
7 Eurospares. So it's a cordial, constructive, co-operative relationship.

8 THE CHAIR: Your expectation is that if the injunction is granted, then Porsche will  
9 continue to supply the spares.

10 MS HOWARD: Yes. We don't see why they wouldn't. We don't want to see if they're  
11 all (inaudible) -- we don't anticipate that they would delay or disrupt supplies. There's  
12 been a professional relationship for a long-standing period of time.

13 THE CHAIR: Yes.

14 MS HOWARD: And they'll be earning money. They're not doing it out of the goodness  
15 of their hearts; they will be getting the wholesale price of these products.

16 THE CHAIR: Yes. Okay.

17 All right. Well, I'll hear what Ms Abrams has got to say about that in due course.

18 MS HOWARD: Can I just make -- the second point is delay, because the Defendants  
19 accuse Eurospares of issuing this application at the last minute. They rely on the  
20 judgment in Traylen where they say that the delay was fatal to the application. I mean,  
21 that case -- I'm not going to bring it up at the moment, but that case was a kind of land  
22 case; it was about a development of a plot of land and somebody's house and whether  
23 they were selling the other lots and developments on the same piece of land.

24 But there, the claimants knew that the developer was marketing the other pieces of  
25 land and then they delayed in issuing the claim and they didn't provide -- the important  
26 point is the claimants did not give any particular reason why they had delayed in

1 | issuing the application. That's paragraph 43. I won't take you to it, but I do invite you  
2 | to read it.

3 | But that's clearly not the case here, and I think the principles that apply in ordinary  
4 | commercial litigation or property litigation do not reflect the difficulties and complexities  
5 | of bringing competition claims, especially for small claimants. That assessment of  
6 | delay has to be flexed to enable the realities that small and medium enterprises have  
7 | in issuing these claims.

8 | If I can just give you some points of what the Claimant, I think, industriously has been  
9 | doing in the last eight months in a means to try and avoid the need for litigation.

10 | Firstly, it sought to co-operate with Porsche, both directly for two months from  
11 | September, and then when that failed with its lawyers to try and resolve this dispute  
12 | amicably. That, we say, is consistent with the overriding objective in rule 4 and its  
13 | analogue especially in the new CPR 1.4(f), where the parties now are under a strict  
14 | duty to try and resort to ADR.

15 | So the Claimant has attempted, exhaustingly, to try and resolve this amicably.  
16 | Obviously I'm not going to waive privilege, but there is open correspondence on the  
17 | file showing those attempts.

18 | Secondly, it has sought to try and mitigate its losses by trying to find alternative  
19 | supplies. Those attempts have all been in vain. That's set out in the witness evidence  
20 | of Mr Derrick: Derrick 1 and Derrick 2.

21 | Thirdly, and we make no secret of this, the Claimant sought to exhaust its legal  
22 | remedies. So it did approach the CMA, and it issued a complaint to the CMA and  
23 | sought interim relief, which, as we all know, is incredibly difficult. The CMA reverted,  
24 | made enquiries, came back with questions. They took this complaint very, very  
25 | seriously, but ultimately decided that it would not allocate its limited resources to this  
26 | case. That's a very common feature in these types of cases.

1 So that policy, that intervention, by the CMA and the process with the CMA and its  
2 decision, the timing and the substance of that were beyond Eurospares' control. But  
3 it wanted to engage in that process first. We say quite properly, it wanted to try and  
4 avoid the need for litigation to find an alternative remedy. It definitely doesn't  
5 undermine the merits of this claim. We say that Eurospares should not be criticised  
6 or penalised for trying to seek a remedy through the CMA.

7 Then when that failed, it then sought to exercise its private litigation rights. But for  
8 a small SME, there are various steps taken. You don't launch -- we know that you  
9 can't just apply for an interim injunction, you've got to proceed with a claim form. So  
10 we've had to do all the work in getting the claim form up, including economic evidence,  
11 including instructing specialist counsel, trying to sort out ATE insurance, sorting out  
12 costs budgeting and arrangements.

13 Throughout this period, Eurospares has been working in a situation of information  
14 asymmetry. We've had multiple letters before action to the Defendant; it's tried to  
15 comply with its pre-action protocol duties; it's been waiting for the Defendant's  
16 response. The Defendant's still not responded to -- or in substance to all of the  
17 allegations, particularly the allegations in relation to the Chapter II prohibition. When  
18 the Defendants changed their lawyers and they moved from Linklaters to CMS,  
19 Eurospares gave them time to enable the new lawyers to get up to speed. We say  
20 that was in the spirit of co-operation and it shouldn't be penalised for doing that.

21 So we say that the Claimant has done everything it could possibly do to act reasonably,  
22 to try and reach an amicable solution. When that hope was dashed, it then has moved  
23 at speed to issue three applications, all the witness evidence, as well as prepare its  
24 full pleaded case which has been issued. So we say the requirements of fairness and  
25 access to justice, when you look at the balance of convenience in the round, taking  
26 account of all the considerations, it would be unfair and unjust to restrict the Claimant

1 to an award of damages in a year's time, and the balance of convenience lies squarely  
2 in favour of granting interim relief.

3 That ends my submissions on the interim injunction. I was then going to turn to the  
4 fast track application.

5 Now, from experience the Tribunal will be more experienced than me. The fast track  
6 proceedings are very important for an SME when they try to issue these claims, but  
7 the normal course is the Defendant will kick up a stink about how complicated and  
8 lengthy competition trials are, how unsuitable claims are for the fast track. Then the  
9 party applying for the fast track has to try and show how the case fits the guidelines.  
10 Then there's a tally-off between them as to the likely timings for the milestones to trial,  
11 with Claimants being more optimistic and Defendants being pessimistic, and the  
12 Tribunal is caught in the middle.

13 We say the starting point is that you have to look at the purpose of the fast track regime  
14 and the intention behind it and how the legislative intention was given effect in the  
15 rules, because two formalistic in approach, we say, will actually risk undermining the  
16 entire purpose of the regime.

17 It will just -- I mean, it's hardly being used. In Germany, injunctive relief is the primary  
18 remedy for competition law proceedings. Here, we hardly see them. We've seen more  
19 recently, but the fast track, which was specifically designed for injunctive relief, never  
20 seems to quite be satisfied; the requirements are never satisfied. We say there's a real  
21 risk of this regime becoming a facade with criteria imposed that can never actually be  
22 met by small claimants in these situations.

23 If I can -- if you will indulge me, I wanted to go briefly through some of the  
24 pre-legislative materials just to show you the intention behind it.

25 THE CHAIR: Yes, briefly.

26 MS HOWARD: I will try to be brief. I'm conscious of time and I think we all want to try

1 and get this heard today so that we don't have to run over.

2 THE CHAIR: Yes.

3 MS HOWARD: So if I can take you to the authorities bundle, I think it's page 20.5.

4 This is the latest authorities bundle. It's the updated one.

5 The starting point is the Consumer Rights Act, which then amended the Enterprise Act.

6 At page 20.5, there is clause 15A, which sets out the Tribunal Rules and the various  
7 factors that can be relevant to determining suitability for fast track. It's important that  
8 those are factors rather than gateway conditions.

9 Again, if you look at paragraph A(3), the rules provide that there might be an interim  
10 injunction, it's granted to a claim and there doesn't have to be a need for an  
11 undertaking in damages.

12 The purpose of this amendment is explained in the explanatory notes. The  
13 explanatory notes to this provision are at further down on page 20.7, and the key  
14 paragraph is paragraph 424.

15 I invite you to read that, but the key point is it is actually designed to enable simpler  
16 cases to be brought by SMEs and for them to be resolved more quickly and at lower  
17 cost.

18 Now, we say in competition law, all things are relative and simpler competition cases  
19 are rarely simple, especially when you compare them to other areas of civil law claims.

20 There has to be expert evidence, including economic evidence. There'll be arguments  
21 about market definition, market power, and even in simple cases, there will be some  
22 factual evidence. So the complexity of competition claims by their very outset sets  
23 them apart from other areas of civil law. But we say that that should not defeat the  
24 fast track procedure, which was designed to accommodate these very, very particular  
25 types of claim. This fast track is only available for competition law cases.

26 The government's 2013 consultation response in its white paper gives an indication of

1 the legislator's intentions and those -- if you go to page 1367, there is a line just at the  
2 top of the page, it starts, "On the 24 April 2012". That explains the legislative reforms  
3 underpinning the introduction of the fast track procedure. I'd invite you to read that.  
4 But it's very, very clear that it wants to increase growth by empowering small  
5 businesses to tackle anti-competitive behaviour that's stifling their business, and it  
6 wants to promote fairness by enabling businesses who have suffered loss to obtain  
7 redress. It notes that:  
8 "Whilst ... large businesses [can] successfully bring these claims, for the vast majority  
9 of ... small businesses justice is out of reach.  
10 "While the public competition authorities are at the heart of the regime, they have finite  
11 resources and [they simply can't take on every case]."  
12 That is even more prevalent in today's time rather than in the legislative reforms in  
13 2013. The CMA is overstretched; it doesn't have the budget or the resource to  
14 investigate every complaint and the private actions regime for small businesses, there  
15 are concerns about it being out of reach.  
16 Similarly, over the page at 4.22 that sets out the government's injection of -- that's on  
17 page 1385, just for your pen, just under the government's decision. It explains that it  
18 wants to introduce the fast track regime; it's going to have more flexibility than the  
19 model originally imposed; it's going to be principally for the benefit of SMEs; and the  
20 CAT will seek to prioritise cases involving companies who would otherwise find it more  
21 difficult to obtain access to justice.  
22 That's why we've been emphasising the disparity in the resource -- the comparative  
23 resources -- of Eurospares and Porsche, because access to justice is not just about  
24 what the Claimant can afford, it's also about the resources of the Defendant, and if  
25 there is a large disparity and a large difference in their resilience, then that can give  
26 rise to an access to justice issue.

1 Now, the costs of this litigation, the Defendant -- both parties have filed a schedule of  
2 costs just for this application alone. The Porsche's costs are £500,000 and the  
3 Claimant's costs are £380,000. But Porsche's costs are already far in excess of the  
4 Claimant's, notwithstanding the fact that the Claimant has had to do most of the  
5 running in this and substantially more work done at this stage of the proceedings.

6 So although, yes, Eurospares does have a narrow profit margin of £2 million of net  
7 profits, if Porsche continues to litigate in that way, there is going to be a risk of stifling  
8 this claim. So at paragraph 4.24, there is a presumption that any case brought by an  
9 SME will be considered for fast track, and the preceding paragraph 4.23 is really  
10 important, because that shows the legislative intention was to prioritise injunctive relief  
11 as a candidate for the fast track procedure. That must be considered at an early stage  
12 and prioritised.

13 THE CHAIR: Sorry, which page? What page is that?

14 MS HOWARD: That's just 4.23. So it starts at 1385 and goes over the page. The  
15 relevance, the injunctive relief, is at the top of the page of 1386. (Pause)

16 4.24: Any case by an SME should be considered.

17 Then at 4.25 it says that:

18 "All cases on the fast-track must be cost-capped and, if a cross-undertaking for  
19 damages has been awarded ... [then the cross-undertaking] must also be capped."

20 We say that that's consistent with ensuring equality of arms and access of justice for  
21 SMEs.

22 The next paragraph is 4.28:

23 "The Government believes that the introduction of a fast track ... reflects the ...  
24 consultation respondents [which are needed] ... [these] reforms are needed to assist  
25 SME access to justice, whilst also retaining ... flexibility in what is a complex area of  
26 law."

1 Now, those intentions were then implemented through rule 58 of the CAT's rules.  
2 That's authorities bundle at page 23. So the language there is designed to confer  
3 a broad discretion on the Tribunal, you can see that in the first paragraph. In the  
4 second paragraph, there's a focus on speedy resolution, keeping expenditure  
5 proportionate and within six months and again in subparagraph (3), the Tribunal has  
6 a broad discretion over the factors that it takes into account, and then there's the list  
7 of issues.

8 But none of those lists of considerations amount to gateway conditions. They're simply  
9 guidelines, and that's been reflected in the case law on the fast track procedure to  
10 date. But we also say that in exercising its discretion, the Tribunal needs to take  
11 account of the legislative intention, which was to ensure a fast and effective recourse  
12 for SMEs to have access to justice and vindicate their rights. If there is a rigid or  
13 formalistic or, we would say, a standard commercial approach to this that's not flexed  
14 to take account of the unique circumstances of competition law litigation, particularly  
15 the onerous burdens on SMEs, then this regime will be meaningless.

16 We say that this is a paradigm case for a claim to be allocated to the fast track. It  
17 involves a David and Goliath battle between an SME, a small -- and it's not even  
18 a medium enterprise -- a small enterprise against a large, well-resourced international  
19 group and therefore the fast track ...

20 There are means and ways that the Tribunal can exercise its case management  
21 powers to provide the flexibility for this to be accommodated in the fast track.

22 In our alternative, we've said, you can chunk this up. I know my learned friend makes  
23 a big song and dance about having a split between the Chapter I and Chapter II  
24 prohibition. We were just trying to put forward proposals, but you can allocate to the  
25 fast track in stages. So allocate the injunctive relief stage to the fast track as was  
26 intended by the legislature. You can then revisit it at a later date when we come to

1 consequential about whether you want to retain it on the fast track, whether you want  
2 to do a split liability, a split quantum trial, and it may be possible to accelerate parts of  
3 the claim, the liability part of the claim, in order to keep within that six month guideline.  
4 The fact that the duration of the trial, I mean, that's three days. What final trial on  
5 competition law is ever going to be three days? It's just simply unrealistic when you've  
6 got expert evidence on market definition and, you know, whether it's Chapter I or  
7 Chapter II.

8 We can work things around to proceed on an assumption of dominance, which has  
9 been used by the Tribunal in other cases. But still, three days is not a realistic  
10 expectation for opening arguments, factual and expert witnesses and closing  
11 arguments.

12 So in many cases the Tribunal has said, "Look, even if it's longer, if it's five days, that  
13 doesn't preclude it from being on the fast track. Even if it's seven days, it could still be  
14 on the fast track, if it's done within six months". They've even said if it's slightly over  
15 six months.

16 We say this is a paradigm case for fast, effective and most importantly, cost-effective  
17 relief that can be sorted out rapidly in a proportionate manner.

18 THE CHAIR: Yes. I mean, if the Tribunal is against Eurospares on the question of  
19 the cross-undertaking, with or without fast track procedure, then in a sense, fast track  
20 falls away, doesn't it? Because everything else is a matter for the Tribunal's case  
21 management powers and no doubt, in exercising those powers, it would have regard  
22 to the need for speed and potentially the need for keeping costs under control but that  
23 doesn't hinge on being on the fast track.

24 MS HOWARD: I wouldn't want to dissolve the fast track regime into the  
25 cross-undertaking damages. I mean, that's one feature that the cross-undertaking can  
26 be (inaudible). In the case of fast track procedure, we say that decision of capping or

1 not shouldn't be the tail that wags the dog of the fast track procedure, because there  
2 are still outstanding benefits to being on the fast track procedure even if  
3 a cross-undertaking is ordered.

4 THE CHAIR: Such as?

5 MS HOWARD: Such as cost management and having a cost capping.

6 THE CHAIR: But again, cost management can be exercised irrespective of the fast  
7 track.

8 MS HOWARD: In practice the Tribunal has been -- and this happened in  
9 Belle Lingerie, I think there's other examples -- the CAT has been very -- the Tribunal,  
10 I shouldn't be too affectionate -- the Tribunal has been very reluctant to proceed to  
11 a cost-capping order. It's preferred to take things in stages and go for cost budgeting  
12 and then to have a kind of supervision over the budgeting. But there's not been the  
13 actual definite certainty of having a cost cap. And obviously for an SME, that cost cap,  
14 similar to public interest cases, JR cases, provide certainty and of their risk and  
15 exposure in terms of adverse cost risk. And that cost cap will make it easier to get, for  
16 example, ATE insurance, if the insurer will know that there's a definite upper limit to  
17 the amount of cost that that can be ordered in the event that the claim is unsuccessful.

18 THE CHAIR: Yes.

19 MS HOWARD: There's also this presumption of getting it on with six months. I know  
20 in practice the Tribunal has been incredibly flexible and accommodating, so even  
21 where a case isn't on the fast track, it's sought to exercise its case management  
22 powers to get the claim on quickly and to find innovative ways of dealing with it.  
23 They're also aware of the very limited capacity of the Tribunal's rooms, difficulties of  
24 getting the panel together on convenient dates and then the parties' availability can  
25 have a knock-on effect that pushes the claim back so that it's not necessarily always  
26 heard within a six-month period if it's outside the fast track process.

1 So, the fast track procedure is a compendium of flexible mechanisms. It's not just all  
2 about ...

3 THE CHAIR: No, but for my own part, I see the question of limiting costs as being  
4 independent from fast track.

5 MS HOWARD: I'm grateful (inaudible) the next answer. We have obviously put in an  
6 application for cost management. Whether that's part of the fast track or outside it,  
7 there are limited arguments I can make on that at the moment. I'm just checking this  
8 with my solicitors. We've put in a cost budget; Defendants haven't at the moment. At  
9 the moment, we're seeking a direction for their costs budget --

10 THE CHAIR: Yes.

11 MS HOWARD: -- and it may be that it picked up in consequentials, but we would want  
12 to proceed for a cost cap, just a costs budgeting. But again, the Tribunal tends to take  
13 those in phases. It likes to see the budget first.

14 THE CHAIR: Yes. Okay.

15 MS HOWARD: So, I don't have anything further to add. I hope the arguments show  
16 why we want an injunction in the terms of the order sought. Unless there's anything  
17 I can assist you with?

18 THE CHAIR: No. Anything else? Thank you.

19 Submissions by MS ABRAM

20 MS ABRAM: I'll address the injunction application first and then the fast track  
21 application. But before I get into the detail, I just want to step back and give an  
22 overview on the injunction application, on the primary aspect of the applications before  
23 the Tribunal.

24 Boiled down to its barest essentials, this is just a dispute about whether Porsche  
25 should be required to supply spare parts to a distributor which it's common ground  
26 does not meet the criteria for admission to Porsche's selective distribution system. I'm

1 going to call the selective distribution system the SDS for brevity.

2 The key context in which that question arises is that since it discovered last year that  
3 Eurospares had been being supplied with spare parts, although it shouldn't have been  
4 under the terms of the dealer agreement, Porsche has gone out of its way to do  
5 everything it can to ease the transition for Eurospares. So we have responded  
6 constructively, carefully, patiently to months of pre-action correspondence. We have  
7 agreed to repeated extensions of supply for transitional periods.

8 Within two days of this application being made, after Eurospares had run the clock  
9 right down to the very end of the extended transitional period, we'd agreed a further  
10 extension of supply until the Tribunal had determined this application. In other words,  
11 my client has acted with impeccable reasonableness at every turn. To give you  
12 another example, we were the first to propose directions for the onward conduct of this  
13 claim. Eurospares proposed proper recognisable directions for the first time only in  
14 their skeleton argument.

15 So we've engaged sensibly, constructively, and understandingly towards Eurospares  
16 from the very start. There's only so much rope that Eurospares can have. There's  
17 only so much latitude that they can be allowed from my client's perspective. What my  
18 client can't agree to happen is for Eurospares to be continued to be supplied for  
19 another indefinite period -- in particular if that were with impunity, without  
20 a cross-undertaking to protect my client against the risk of loss -- in circumstances  
21 where Eurospares has brought all of these misfortunes on itself.

22 We know, and I'll take you to the pre-action correspondence, that Eurospares was  
23 aware from September last year, nine months ago, that Porsche was going to stop  
24 supply to Eurospares -- should never have been supplied to begin with. By October  
25 last year, Eurospares was threatening an urgent injunction application, the application  
26 we're here today to deal with, eight months later. By October last year, Eurospares

1 had instructed Geradin and we were getting pre-action correspondence from Geradin,  
2 their current solicitors.

3 This is not a case where an impecunious David has struggled to find his way through  
4 the competition procedural minefield faced with an unreasonable Goliath throwing  
5 rocks at him. That is not a fair way to represent the context of this application, and my  
6 client objects to it. In fact, all of the constructive engagement in this case has  
7 materially come from Porsche, but we've reached the stage where we say, "No,  
8 enough is enough. You've had almost all the time you said you needed to make  
9 alternative supply arrangements." I'll show you, Eurospares said they needed nine  
10 months. They've effectively had seven up to today; they need no more time.

11 Now, we are super happy for this claim to be the subject of expedited directions to trial  
12 and we've proposed expedited directions to trial. There's a question about how fast  
13 you can go and we can engage in that detailed discussion, but as I say, we're not  
14 opposed to that.

15 It is quite plainly not a case that meets the criteria for allocation to the fast track, but  
16 as you say, Sir, whether a case is on the fast track in terms of precisely how the  
17 directions work, is a question of degree and extent, so it's where on the spectrum the  
18 directions are set.

19 But what we see from Eurospares is what a former prime minister would have called  
20 cakeism. What Eurospares wants is the benefit of an interim injunction requiring my  
21 client, who has already shown such flexibility by agreeing to extend supply for  
22 seven months already, to carry on supplying it, while refusing to shoulder the  
23 consequences of that by remaining intransigent in relation to the cross-undertaking.

24 What I understand from Eurospares' position now, as of my learned friend's most  
25 recent submissions, is that Eurospares resists a cross-undertaking. It would rather, if  
26 it has to have a cross-undertaking, have a capped cross-undertaking. But if it really

1 has to, it will give an unlimited cross-undertaking. There again, we see a further  
2 element of cakeism, which is a theme that's going to run through this, because  
3 Ms Howard also argued that a cross-undertaking would stifle the claim. So in one  
4 breath, Eurospares says, "If we have to give a cross-undertaking, we will give it"; on  
5 the other hand, it says, "You shouldn't require cross-undertaking because it will stifle  
6 the claim".

7 Now, in my submission -- I'm going to have to take you to a few of these  
8 examples -- there are unfortunately a few instances where Eurospares' zeal to put  
9 forward their case at the highest possible level has led to some stretching of what the  
10 evidence says and some stretching of what a coherent position is. I'll come back to  
11 some examples of that.

12 One example that is really important to my clients that I should highlight upfront is that  
13 an allegation that was repeatedly made was that the purpose from Porsche's  
14 perspective of enforcing its SDS, having discovered that unauthorised distributors  
15 were gaining access to it, was to arrogate to ourselves the profits from supplies under  
16 the SDS, so to take them out of the hands of independent distributors.

17 Now, on its own terms, that's not a submission that makes any sense if you've got any  
18 understanding of the facts of the case, because most of Porsche's authorised  
19 distributors are not owned by Porsche, so it doesn't get off the starting blocks.

20 What it also does is, very unfairly to my clients, underplay or ignore, sell away for  
21 nothing, the really serious concerns we've got about counterfeit spare parts, about  
22 public safety, about ensuring that spare parts are properly installed and I'll need to  
23 come to those. There's a very clear example of concerns around counterfeiting in  
24 relation to Design 911 who is the business that Mr Chopra, the witness relied on by  
25 Eurospares, is a director of. So, these are really weighty concerns and it's not  
26 a question of seeking to arrogate profit to ourselves.

1 With that by way of introduction, I want to move on to the criteria for the interim  
2 injunction. I'll start with a serious issue to be tried. Now, you've seen that we don't  
3 contest that for the purpose of today. That is, I have to say, not at all because we  
4 accept that there's any force in the claim; there is no force in the claim. It's pure  
5 pragmatism. We just recognise, this not being our first rodeo, that vertical agreements  
6 cases are cases in which generally the Tribunal will need the benefit of expert  
7 evidence, economic evidence, in order to take a view. For example, issues like market  
8 definition and market share tend to be important in the context of verticals and we  
9 recognise pragmatically that today isn't a day when you're going to be able to reach  
10 a view on those sorts of questions.

11 But I do need to make some points on the strength of the claim, and I need to do that  
12 for a few reasons. The first is that you heard a great deal about the claim from my  
13 learned friend, and it's really important that I should pin some of those points down to  
14 the actual legal principles that regulate Chapter I claims in the context of SDSs.

15 It's also important to pin the claim down to what's actually pleaded, because the  
16 presentation of the claim this morning which you've heard was somewhat free-floating  
17 from what is actually pleaded in the claim form, which will in fact define the issues for  
18 trial, so we need to look at what the actual case is that's been pleaded.

19 Also, I'm conscious that the strength of the claim is one of the factors that's relevant  
20 to whether there's to be a cross-undertaking if the case were to be allocated to the fast  
21 track. That's one of the criteria that the Tribunal will take into account in that context.

22 Now, we say that you get nowhere near that, because this clearly just isn't a fast track  
23 case, but it's part of the test, and so I need to address it in that context.

24 So it's sensible, I think, to look at the claim form, to look at the way the case is actually  
25 pleaded. That is in bundle B, tab 3. I think I'm the only dinosaur to be using paper  
26 bundles, but I'm going to press on with those. So bundle B, tab 3, page 40, and we

1 should start at paragraph 40. I'm looking here at the Chapter I element of the  
2 claim -- I'll come to the Chapter II element of the claim as pleaded in  
3 a moment -- paragraph 40, Eurospares pleads:  
4 "Porsche's conduct in imposing the reseller ban as an explicit term in its dealer  
5 agreement contravenes the Chapter I prohibition in two ways." [as read]  
6 So (a) is the point that we recognise:  
7 "Porsche's criteria for membership of the SDS don't satisfy the criteria." [as read]  
8 I need to deal with that; I'll come to that.  
9 "(b): Porsche's selective distribution system contains hardcore restrictions and is  
10 therefore not exempt under the block exemptions." [as read]  
11 Now, we just need to put a pin in 40(b), because contrary to the opening words of  
12 paragraph 40, not meeting the terms of a block exemption is not, in fact, capable of  
13 giving rise to a breach of the Chapter I prohibition. If they're right, that we don't meet  
14 the block exemption criteria – and I don't remotely accept that -- all it does is it means  
15 that one of the safe harbours isn't available to us. So all of the material in that second  
16 limb of the claim, as it's pleaded, just can drop away for the purpose of today.  
17 But let's look at what they say about the first limb, because that is a legally  
18 recognisable basis to claim. So paragraph 44 is where that set out; that starts at  
19 page 42. So paragraph 44(a):  
20 "Porsche's selective distribution system offends the Metro criteria as follows. First,  
21 whilst it is accepted that Porsche vehicles are a luxury product, it does not follow that  
22 Porsche parts are a luxury product. They are not displayed in any particular setting."  
23 [as read]  
24 So this is an argument that the characteristics of spare parts, even Porsche spare  
25 parts, don't necessitate a selective distribution system. That is a hugely unpromising  
26 start to a Chapter I claim, because in the Commission's guidelines on vertical

1 | agreements in the motor vehicle sector, the Commission observes, without making  
2 | any objection, that SDSs are the predominant means of distribution for spare parts in  
3 | the motor vehicle section. I'm not saying it's not a claim that can be argued, and we  
4 | can have a trial about it and an argument about it, but I am saying that it gets the claim  
5 | off to a really unpromising starting point, because there it requires Eurospares to  
6 | challenge the shibboleth that everyone accepts, that selective distribution systems are  
7 | so prevalent in spare parts for motor vehicles.

8 | So, sticky start. Then we go on. 44(b):

9 | "An authorised dealer who is not an end user, or part of the Porsche Group, must be  
10 | able to demonstrate a repair requirement. [And then you see] that requirement  
11 | excludes intermediary online resellers, such as the claimant." [as read]

12 | So the point that's being made there is that, "we'll sell to repairers, but we won't sell to  
13 | pure resellers". That's factually accurate, and then you can combine that with (e) on  
14 | the following page, where it's said:

15 | "The repair requirement criteria is discriminatory and inconsistent because we do  
16 | permit sales direct to end users." [as read]

17 | So what's being said is, "it's not fair to keep resellers out of the selective distribution  
18 | system when you sell to repairers and when you sell to end users". But that  
19 | differentiation is based on a very clear set of legal principles that is very firmly  
20 | established, so I just need to show you that in the authorities bundle.

21 | If we can start with authorities bundle, tab 5, and if we start at page 29. So I hope that  
22 | page 29 will be, the definitions that form part of the vertical agreements block  
23 | exemption. What I'm doing just to set the scene is just to look at the second definition  
24 | on the page, selective distribution system, you see the start of the first full paragraph.

25 | This is the UK block exemption:

26 | "'selective distribution system' means a distribution system where the supplier

1 undertakes to sell the contract goods or services, directly or indirectly, only to  
2 distributors selected on the basis of specified criteria and where these distributors  
3 undertake not to sell such goods or services to distributors not authorised by the  
4 supplier ..."

5 So this is just to anchor us in the legal starting point, which is that the premise, the  
6 very essence, of a selective distribution system, is that it's a complete system. If  
7 you've got a lawful selective distribution system, you sell to people who are authorised  
8 as distributors under the system.

9 So there's nothing per se objectionable about the idea that, under Porsche's selective  
10 distribution system, it sells to its authorised distributors. That's how an SDS works; it's  
11 that simple. But the point that's made against me is, "well, hang on, though, why do  
12 you allow end users in and why do you allow repairers in, if you say that it's a complete  
13 system?"

14 So let's turn over the page, to page 31 of the bundle, and you look at article 8(1) at the  
15 bottom of the page. This is the general vertical block exemption:

16 "The block exemption applies to the agreement on condition that it does not contain  
17 a hardcore restriction."

18 And (2):

19 "A hardcore restriction is one or more provisions which [et cetera]."

20 Over the page to (c):

21 "Where the supplier operates a selective distribution system: (iii) the restriction of  
22 active sales or passive sales to end users by members of the selective distribution  
23 system operating at the retail level of trade ..."

24 So you've got a legislative expectation that where you've got an SDS, it's prima facie,  
25 just the authorised distributors, that get access to the products. But there's a hardcore  
26 restriction not to sell to end users. So that's one out of two of the two exceptions to

1 the Porsche system.

2 The second one is not a coincidence either. So if you go to the next tab, to the "motor  
3 vehicles block exemption", and you look at page 42 of the bundle, we look at the  
4 bottom of page 42, article 5(1):

5 "(1)The condition in this article is that the MVA agreement must not contain a hardcore  
6 restriction within the meaning of paragraph 2."

7 So we're going to set out what the hardcore restrictions are.

8 "(2) A hardcore restriction is one or more provisions which, directly or indirectly, in  
9 isolation or combination with other factors ... have as their object--

10 "(a) the restriction of sales of aftermarket goods by members of a selective distribution  
11 system to independent repairers who use or want to use those aftermarket goods for  
12 the purposes of providing repair [or] maintenance services."

13 Again, that explains why that feature of our selective distribution system is in place;  
14 it's not happenstance.

15 The point that's made against me is, "Well, there's this paragraph in the CMA's motor  
16 vehicle guidance which says, well, you might need to supply to resellers, because if  
17 you don't supply to resellers, it might foreclose independent repairers from gaining  
18 access to spare parts". So it might indirectly make it hard for independent repairers to  
19 get access to Porsche spare parts. That is a line in the CMA guidance. It's  
20 footnote 22. Ms Howard took you to it. I'm not going to take you back to it. But the  
21 question that that gives rise to, of course, in any individual situation, is whether there's  
22 foreclosure of those independent repairers, and in this jurisdiction alone, in the UK  
23 alone, there are 44 Porsche Centres and Porsche Service Centres from which  
24 independent repairers can buy products. And I've shown you why they can buy  
25 products, because that's what we're expected to achieve.

26 So again, I'm not saying that it's a claim that can't be brought; I'm not applying to strike

1 | it out. But I am saying it just faces a very unpromising set of legislative obstacles, by  
2 | way of starting point.

3 | Going back to the pleading and continuing our analysis of that, if we look now at 44(c),  
4 | it says:

5 | "In correspondence, Porsche has referred to the need to have its selective distribution  
6 | system in place to meet the brand's high standards, so that we can better ensure the  
7 | quality and authenticity of parts, including the correct and safe installation." [as read]

8 | And then the punchline is afterwards:

9 | "There's no rational link between the way in which the spare part is installed and its  
10 | inherent quality or authenticity, particularly with genuine spare parts." [as read]

11 | I can see the time; I've got two more points just on this paragraph, so I'll finish them, if  
12 | that's all right.

13 | So, "no rational link between the way a spare part's installed and inherent quality or  
14 | authenticity". So what they're saying is that installation isn't relevant to the quality of  
15 | spare parts. Now, before this claim form was filed, we put in evidence explaining in  
16 | detail the link between the way in which a spare part is installed and its quality from  
17 | a public safety perspective, and in a sense this isn't something that we should need to  
18 | put in evidence about. Cars are, as I try and explain to my teenage children, inherently  
19 | risky items that need to be looked after and driven about with care. The same applies  
20 | to spare parts. Of course, repairs to cars need to be properly done by people who  
21 | know what they're doing, in order to ensure that they don't give rise to a risk to public  
22 | safety.

23 | We explained that, since explanation seemed to need to be required. At Mannell 1,  
24 | which is in bundle C, tab 3, page 42. Just in a passage starting at 5.17 -- and it's  
25 | helpful just to look at this because it's relevant throughout my submissions -- you see  
26 | that Mr Mannell says that:

1 "... Porsche Centres/Porsche Service Centres are available to independent repairers  
2 and end customers to provide advice and guidance as to the fitting of a part."

3 Then some examples are exhibited. And then:

4 "This technical expertise is of vital importance to Porsche in ensuring a satisfactory  
5 customer journey and safe repair whichever form of distribution under the SDS has  
6 been adopted."

7 And then we explain that 5.18:

8 "At Porsche, the safety of its customers and their vehicles (as well as ... third-party  
9 passengers, road users, and third-party property [so all of us]) is considered  
10 paramount. Porsche vehicles are complex, designed for performance and are capable  
11 of reaching very high speeds. ... The consequences of improper installation could be  
12 serious."

13 None of this is surprising or should be surprising. And then Mr Mannell goes on:

14 "As I understand it, Eurospares do not offer customers anything approaching the kind  
15 of customer care and support which Porsche UK ... offers customers."

16 Skipping on:

17 "[It's] organised as a parts reseller only utilising an online shop that [ships] all over the  
18 world ... across multiple brands ... [It] has never taken training services from [Porsche  
19 Cars Great Britain]. Given this, and in light of the breadth of the products sold by  
20 Eurospares, I do not believe that Eurospares provides a service involving the  
21 engineering and technical know-how to international vehicle homologation standards  
22 that Porsche provides."

23 And then he says:

24 "An injunction, if granted, would therefore create a significantly elevated risk of  
25 genuine Porsche parts being improperly installed, either causing malfunction or giving  
26 rise to safety concerns."

1 So that explains why we say there's a link between the way that a part is installed and  
2 its quality, because of these pressing public safety concerns, and they really shouldn't  
3 have come as a surprise to Eurospares. So I say, with respect, that paragraph 44(c)  
4 is -- again, I'm not asking you to make a finding -- but it's hopeless to suggest that  
5 there's no link between those two concepts.

6 THE CHAIR: But does Porsche monitor independent repairers?

7 MS ABRAM: So, the monitoring that I'm relying on is not of independent repairers, or,  
8 of course, of consumers who buy products from us. But what we can monitor is the  
9 people that sell to them. So our authorised distributors, our Porsche Service Centre,  
10 our Porsche Centres. What we can make sure is that the consumers who buy, or the  
11 repairers that buy, from them, are able to access proper support -- after-sale  
12 support -- from the seller. We can't train every end consumer who comes to buy  
13 a spare part from the SDS, but what we can do is, if we make sure that our parts are  
14 only sold by people who we've authorised, who we know come up to the mark, we can  
15 make sure that their service standards are up to standard.

16 So, that's the side we're monitoring, and this is a misconception that really runs  
17 through everything that, if I may say so, that Eurospares says. It seems to be saying,  
18 "Well, Porsche will sell to repairers and end consumers who might not know what  
19 they're doing, so why won't it also sell to Eurospares?" Well, the reason is because  
20 it's then Eurospares that's selling to the repairer or to the end consumer, whereas if  
21 it's our Porsche Centre who's selling to the repairer or the end consumer, we can make  
22 sure that there's support available to them. If they're a further step away down the  
23 chain, we can't control what support Eurospares provides, and we strongly  
24 suspect -- which is no criticism of Eurospares at all -- that they're just not in a position  
25 to have the expertise to provide the support that our service centres can provide.

26 That's where that comes from, and in fact the question that you've asked me, Mr Chair,

1 answers the point that I was going to raise, just to mop up on (d) and (e), because that  
2 is the complaint at (d) and (e) that I haven't dealt with in paragraph 44.

3 So what's being said is that repairers and end consumers don't necessarily have  
4 expertise. I've answered that. We make sure that the person that they buy from has  
5 the expertise, so they know that there's someone that they can contact if they need  
6 the help. We can't force the help on them -- you've seen the block exemptions that  
7 show that we're expected to provide those services -- but what we can do is make sure  
8 that they've got a source available to them. We can't do that if we have to sell through  
9 a reseller.

10 So that's what I wanted to say about the Chapter I claim as pleaded, and as I'm saying,  
11 I'm not saying that there's no serious issue to be tried, but I'm saying that the actual  
12 pleaded case is extremely legally unpromising. This is not a strong case; it's a weak  
13 case. And that is the prism through which it should be viewed for the purpose of this  
14 application.

15 I think I've gone on long enough, I think.

16 THE CHAIR: How are we doing in terms of time?

17 MS ABRAM: So, I will be fine to finish by today. I'll speak to Ms Howard over the  
18 break about exactly how to divide up this afternoon, if that's acceptable.

19 THE CHAIR: Yes. All right. So, shall we say 2.05 in that case? Great.

20 (1.06 pm)

21 (The short adjournment)

22 (2.05 pm)

23 MS ABRAM: So before lunch, I'd made a handful of points in which I'd attempt to cut  
24 through every single aspect of the pleaded Chapter I claim in order to make the point  
25 that this is a weak claim.

26 The other point I want to make about Chapter I is that when analysing the strength of

1 the claim -- and I know I'm stating the obvious here -- what we need to look at is the  
2 claim that's actually pleaded, not the claim as it's been articulated this morning or  
3 indeed in the skeleton arguments for today. There have been various elements of  
4 Chapter I claims, both in written submissions and oral submissions, that are not  
5 pleaded.

6 So, for example, I won't take you to it, but in paragraph 32 of Eurospares' skeleton  
7 argument it's dedicated to an argument that the investment requirement on distributors  
8 who are authorised under our SDS is unreasonable. That does not appear in the  
9 pleaded case at all, and so it's really important just to focus on what's pleaded.

10 Similarly, this morning, Ms Howard suggested that there was a whiff of hub-and-spoke  
11 RPM. Again, there's no suggestion; there's no whiff of that even in the pleaded case.

12 So, we just need to focus on what's actually pleaded. Just finally to tie up the merits,  
13 I should just say a word on Chapter II, because one of the complaints, I think, that's  
14 made against us is that we haven't engaged sufficiently with the merits of the  
15 Chapter II claim.

16 We've put the authority in our skeleton argument. I won't take you to it, but I will just  
17 give you the reference: at authorities bundle, tab 39. The relevant page is page 1238  
18 of the bundle. There's a general court case, which I call "Watches", but is in fact called  
19 CEHR v Commission, which relates to the interaction between a selective  
20 distribution system challenge under 101 and a refusal to supply challenge under 102.

21 It was a challenge to a Commission decision not to investigate a complaint that had  
22 been made by independent watch repairers and what the court found, the  
23 General Court in that case, was that it was legitimate for the Commission to take the  
24 view that it was indicative, that it was unlikely, that there would be a breach under 102  
25 if the selective distribution system was lawful under 101.

26 So although the fact that a system is lawful under 101 isn't conclusive of the answer

1 under 102, as you'd expect, it gives a strong indication. It's paragraphs 96 and 97 of  
2 that judgment. To that extent, what I say about Chapter II is that, again, it doesn't  
3 need to detain the court much longer because it's unlikely that it's going to add  
4 anything in practical terms to the outcome of Chapter I. I'm not asking you to make  
5 a finding about it, it's just a factor to be borne in mind when we think about the strength  
6 of the claim.

7 So that's all I wanted to say about the merits. Let me move on now to the adequacy  
8 of damages. I'll start with adequacy of damages to Eurospares. Of course, that's  
9 a necessary hurdle for them to get over because if damages are an adequate remedy,  
10 there'll be no injunction.

11 There are two types of loss, and again, for your note, the relevant types of loss are  
12 pleaded in the claim form at paragraphs 65(a) and 65(b) that's B, tab 3, page 50. We  
13 won't go to it now because there's no issue between us about what these are.

14 The primary loss that's pleaded is, of course, loss of profits on foregone sales of  
15 Porsche parts. In fact, the claim form puts a number on these, so there, by definition,  
16 it's not suggested that damages are an inadequate remedy. It's common ground that  
17 they don't need an injunction to protect themselves against that loss.

18 But what they do say damages would be an inadequate remedy for is claimed loss of  
19 profits on other sales due to this one-stop shop point, the idea that they'd lose online  
20 visibility, internet rankings, market share they'd have reduced cash flow. So that's the  
21 point that I need to address on adequacy of remedy for Eurospares.

22 Now, I'm going to make two points about that.

23 The first is that Eurospares' own evidence hopelessly undermines the idea that they  
24 would suffer these losses in the time that it would take this claim to get to trial, whether  
25 that's six months or a year or somewhere in between the two.

26 I should show you what I mean by that. It's in Derrick 1, which is at C, tab 1. If we

1 pick it up at page 5. The starting point for the exposition of this evidence is that my  
2 learned friend said in her submissions this morning that Eurospares' customers were  
3 very fickle. The word "fickle" was used, but I'm afraid that is directly contrary to what  
4 Eurospares' own evidence says.

5 So if we look at page 5 and we look at paragraph 12 as a starting point, Mr Derrick  
6 says:

7 "Eurospares serves a broad and loyal customer base ... Many of our customers rely  
8 on Eurospares as a trusted alternative to the manufacturer's official dealerships ...  
9 [and then he goes on] reflected in numerous customer reviews ... [In fact, he says that  
10 he's had] emails from customers expressing frustration at being unable to purchase  
11 from Eurospares, or at having to resort to buying directly from Porsche ..."

12 Now, if you go back to paragraph 10, you can see why Mr Derrick makes this claim for  
13 loyalty:

14 "Eurospares is a 'one-stop shop' [as we heard this morning] ... A typical customer  
15 order in the automotive aftermarket does not involve a single part."

16 Then there's an example. Two lines further down:

17 "In practice repairers and end-users prefer -- and often require -- the ability to source  
18 all necessary parts (sometimes for multiple car brands) in one transaction [as opposed  
19 to from multiple suppliers]."

20 Now, of course, Porsche Service Centres by definition can't offer that advantage  
21 because they specialise in Porsches.

22 So what Mr Derrick is saying is, "Our customers are loyal because we offer them  
23 something that Porsche Service Centres can't offer".

24 Let me show you just to close off this bit of the evidence, the proportion that Porsche  
25 parts account for in Eurospares' business. That's paragraph 15 on page 6 of the  
26 bundle. The proportion is confidential, but you see the second bit of yellow highlighting

1 in the paragraph.

2 So if you assume that this evidence is correct, unlike the submission -- if you reject the  
3 submission that you heard this morning that customers are fickle, it's not at all credible  
4 that Eurospares would struggle to win back those customers if it were to win at trial. If  
5 the customers are as loyal as Mr Derrick is saying, if they positively prefer to shop at  
6 Eurospares instead of going directly to Porsche, it must logically follow that they'd be  
7 keen to go back to Eurospares to buy Porsche parts after any trial of the claim. That  
8 conclusion is especially compelling given the relatively small proportion of Porsche  
9 parts accounted for in Eurospares business.

10 So that small minority, if you take it together with the idea that customers usually shop  
11 across a number of brands when they buy from Eurospares. So what Mr Derrick is  
12 saying is, "Our customers want to keep coming back to us. Presumably they'll keep  
13 coming back to us for the big majority of parts that are not Porsche parts, they buy  
14 across multiple brands".

15 Again it's also said that somehow Eurospares would suffer a very rapid and  
16 incalculable loss of business if it were unable to supply this small minority of parts for  
17 the period before trial. I say that if you measure this point against the actual evidence  
18 from Eurospares, it just doesn't stand up.

19 The second bit of evidence that just, frankly, is hopelessly at odds with Eurospares'  
20 case on adequacy of damages is the evidence from Mr Chopra of Design 911. That  
21 is at tab 6 of the bundle, so if we pick it up on page 75.

22 Now, Mr Chopra is a director of Design 911 and just picking this up at paragraph 12,  
23 you'll see that Mr Chopra explains:

24 "Design 911 has always bought its Porsche Parts from various Porsche authorised  
25 dealers ... Our purchases increased significantly with the success of our website  
26 business from around 2000 ..."

1 Again, it's an important online business. Then he goes on:

2 "[The] onward sale [of these parts] is a significant proportion of Design 911's  
3 business ..."

4 Now, I'm not going to read out the figure even though it's not confidential, but what I'll  
5 ask you to note is that it's about twice the proportion of Porsche parts within  
6 Eurospares' business.

7 I just want to show you paragraph 13, because I'm going to have to come back to that  
8 bit of this evidence shortly. I don't want to have to come back to this witness statement.

9 This paragraph is wrong, and I'm going to have to show you why.

10 Paragraph 13:

11 "Over the course of more than 20 years of trading in Porsche Parts, I am not aware of  
12 any problems arising in connection with the installation, safety, or authenticity of the  
13 parts supplied by Design911. At no point during that period has Porsche raised any  
14 concerns with me regarding issues such as incorrect installation, safety risks, or supply  
15 of inferior quality goods."

16 I have to show you a letter that is directly counter to that evidence, Sir.

17 But if we just focus on adequacy of damages for a minute. Let's see what happened  
18 to Design 911's business after Porsche's audit, after supplies were withdrawn from  
19 Design 911. So paragraph 15 on page 76:

20 "From 4 September 2024, with no prior notice, Design911 was notified by various  
21 Porsche authorised dealers that they had been instructed by Porsche ... to cease  
22 trading with Design911 ... We were given notice by our various authorised suppliers  
23 over the course of 2-3 months that they could no longer supply Design911. Some of  
24 our suppliers honoured our back orders but would not accept new orders ... others  
25 simply ceased supply straightaway."

26 Just to anchor ourselves in the chronology, that was nine months ago. So Design911

1 have not had supplies from Porsche, but between seven and nine months there was  
2 no transitional period for Design911.

3 Let's see what effect that's had on Design911. Page 77, paragraph 20:

4 "Once it became clear that Porsche would no longer supply parts to us, we placed  
5 a notice on our website warning customers ... This led to a drop in sales ..."

6 That's the equivalent of the primary claim that Eurospares brings, which everyone  
7 agrees that damage is adequate: lost sales, lost profits.

8 Let's see what they say about the bit of the claim for which Eurospares say that  
9 damages would be an inadequate remedy. That starts at paragraph 21, bottom line  
10 of the page:

11 "... the wider implications for the business go beyond this. Design911 has built  
12 a reputation as a one-stop shop for Porsche Parts [exactly the same point] -- supplying  
13 both genuine Porsche Parts and aftermarket parts. The availability of genuine  
14 Porsche Parts is a critical component of that offering. Customers come to us because  
15 they know they can source everything they need, whether genuine or aftermarket, in  
16 one place. If we're unable to supply ... those same customers are unlikely to continue  
17 purchasing the aftermarket parts from us either."

18 So far, that is consistent with the basis for Eurospares' claim.

19 Now paragraph 22:

20 "If we are unable to restore supply [noting in brackets they haven't had supply for  
21 seven to nine months], the business will face serious operational challenges. In the  
22 short-term, we may be forced to lay off some of our 55 staff ... We will also lose  
23 customers permanently ..."

24 Then paragraph 23, last sentence:

25 "If the supply is not reinstated, the consequences for the business will be severe and  
26 potentially fatal."

1 Now, I don't accept that that evidence is right; I don't need to. But let's just put it at its  
2 highest and assume that it's right for the purpose of today.

3 What that shows is that a business that lost the supply of Porsche parts between seven  
4 and nine months ago in the ballpark amount of time that it would take this case to  
5 come to trial, for a business to which Porsche parts are twice as important by  
6 percentage of supply as they are in the case of Eurospares, what's being said is there  
7 has been a loss of sales -- damages are adequate remedy for those. But all of the  
8 non-immediate financial losses are presented in the future. If Mr --

9 THE CHAIR: Well, that's hardly surprising, isn't it? I mean, they are inherently longer  
10 term consequences.

11 MS ABRAM: If that's right, Sir -- and that may well be right -- that is really a very strong  
12 argument against this injunction, because it suggests that in the time that it would take  
13 this case to get to trial, those damages for which damages would be an inadequate  
14 remedy would not be suffered.

15 So Design 911 have been through the seven to nine months that this case might take  
16 to get to trial, and they're saying that all those sorts of damages still lie in the future.  
17 Of course, this is critical to the application because if damages are an inadequate  
18 remedy for -- not an inadequate remedy for Eurospares -- damages are an adequate  
19 remedy. It's game over. There's no injunction. You don't go any further.

20 MR HERGA: I mean, won't that be dependent to some extent on what stock either  
21 911 are holding that they can continue to have purchases from? So it's all a bit specific  
22 isn't it, as to how much stock they've actually got or how much they've been impacted?

23 MS ABRAM: I mean, what Design 911 didn't have was the benefit of a seven-month  
24 period to continue orders and presumably plan for the future. They were told that there  
25 was effectively a cut-off. They do say that some sellers continue to supply for two or  
26 three months. But Eurospares, of course, have the benefit of this extremely long

1 transitional period. So if anything, that's another point against this application.

2 Another point I'm going to make to you in the context of impecuniosity or otherwise of  
3 Eurospares is that they claim to hold £90 million worth of stock of spare parts. So if  
4 anyone's got a stock of spare parts to tide itself over pending a trial, it must be  
5 Eurospares, Sir.

6 What's said against me in this context, great reliance is placed on the Sports Direct  
7 case in which it was said that damages would be an inadequate remedy on both sides,  
8 in fact, for the potential purchaser as well as the potential supplier. But what wasn't  
9 present in Sports Direct and what you've got here is a worked example of what, if  
10 anything, would be an even stronger case where damages should be an adequate  
11 remedy and clear evidence that damages would not be an adequate remedy.

12 In my submission, this is really, really clear that the claim falls at that second critical  
13 hurdle. That's adequacy of damages to Eurospares; I need to move on now to  
14 adequacy of damages to my client, so the third limb of the legal test: what loss would  
15 we suffer if the injunction were granted and what are the implications of Eurospares'  
16 stance on a cross-undertaking?

17 Really, there are three aspects to that: what are our financial losses as a result of an  
18 injunction; what are our losses for which damages would be an inadequate remedy as  
19 a result of an injunction; and where does the cross-undertaking fit in to all of that?

20 I want to look first at the direct financial loss that we'd suffer. This goes back to the  
21 point on the dealer agreement. The bottom line, just to summarise, is that if the  
22 injunction were granted, it would expose not just Porsche Cars Great Britain, so the  
23 first respondent to this application, but also Porsche entities throughout the EEA,  
24 Switzerland and the UK, because that's the geographical scope of the SDS, to the risk  
25 of claims by authorised dealers for allowing non-authorised entity supply under the  
26 SDS. I need to show you why by reference to the dealer agreement. I'm going to

1 labour under the same difficulty as Ms Howard in terms of getting around the  
2 confidentiality, but I'll do my best.

3 So, let's start at E tab 1. Let me just explain by way of context. This is an example  
4 dealer agreement, so we've chosen the one that's between the two respondents to  
5 this application because that seemed to make sense. So, the parties are Porsche  
6 Cars Great Britain and Porsche Retail Group Limited. There are parallel agreements  
7 across the whole of the EEA, UK and Switzerland; this is just one of many.

8 The key central clause is of course 2.8, which is on page 20 of the bundle. This is the  
9 promise made by Porsche to its dealers, the relevant Porsche entity to its dealers, that  
10 sales will only be made, you see, within the territory exclusively by those who are  
11 authorised at the end of that paragraph, end of that sentence.

12 Now, it's really important that I tell you that the territory for the purpose of this  
13 agreement is defined as the EEA, UK and Switzerland. So it's a pan-European  
14 agreement and the definition of that, if you'll notice on page 16, it's common ground  
15 that this clause covers spare parts, so we don't need to worry about that.

16 Let me show you though, the definition of the Porsche Sales Organisation, which is on  
17 page 15 of the bundle. You see that about a third of the way down page 15, there's  
18 the defined term "Porsche Sales Organisation", and the word that I draw the Tribunal's  
19 attention to there is "authorised".

20 What's said against me is, well, there wouldn't be a breach of clause 2.8 if Eurospares  
21 were granted this injunction because they would then come into this term. But that's  
22 not right. There's nothing about this application that seeks to procure the authorisation  
23 of Eurospares within the meaning of that clause. The whole point of this application  
24 is everyone agrees Eurospares shouldn't be authorised under the terms of the dealer  
25 agreement because it doesn't meet the criteria. The whole purpose of the application  
26 is, "Supply us even though we're not authorised". That's the thrust of what's being

1 asked for.

2 So, the suggestion that there wouldn't be a breach of clause 2.8, in my submission, is  
3 for the birds. It is an obligation that applies across the whole of the EEA, UK and  
4 Switzerland and you can see the scope of the territory in which all authorised dealers  
5 can sell at clause 3.1, which is at page 24 of the bundle. This relates to the area of  
6 influence, but also the territory. If you look at the line, about eight lines down, that  
7 ends with the words "the dealer may", you see, "the dealer may advertise".

8 THE CHAIR: Sorry, which page is it?

9 MS ABRAM: Page 24 of the bundle, clause 3.1, about eight lines down from the top  
10 of the clause. The line ending "the", "the dealer may".

11 THE CHAIR: Oh, yes.

12 MS ABRAM: That tells you what the geographical area is in which dealer can carry  
13 out its functions. And you see the word at the end of that sentence. I've shown you  
14 the definition of that term. The implication is, of course, that the potential claim is not  
15 limited to UK dealers. So, the suggestion that somehow this dealer agreement could  
16 be segmented as between the UK and the EU on the basis that the Motor Vehicles  
17 Block Exemption provision is different in the UK and the EU, which was the submission  
18 that was made to you by my learned friend earlier, with respect, legally has got no  
19 foundation at all. The question of the scope of the claims that can be made is regulated  
20 by this agreement and this agreement only, and it's a pan-EU problem.

21 The other point that was made about this agreement related to clause 2.15 and you'll  
22 remember the tail, the reference to the tail. Just if it's useful to remind yourself of it,  
23 it's at the bottom of page 22 and the top of page 23. The suggestion was, well, sales  
24 to Eurospares is fine because that's provided for in the tail paragraph in 2.15.

25 But that's slightly wrong if you read that paragraph. If you look at the line at the very  
26 top of page 23 as to where the customers to which supplies need to be made must be

1 registered, Eurospares doesn't get past the first hurdle. Then, the obligation on the  
2 second line, the criterion on the second line as to the second word of the second line,  
3 no attempt has been made to suggest that Eurospares fulfils that criterion. So again,  
4 this point on clause 2.15 just goes nowhere, and we go back to clause 2.8, and there's  
5 a right to claim.

6 There was also a point that was made in writing in the skeleton that wasn't pressed  
7 orally that clause 5.4 of this agreement would provide us with a defence to any claim  
8 under clause 2.8. That wasn't pressed, and presumably that was because it's now  
9 recognised that it's wrong, but just to get my retaliation in first, in case it comes out in  
10 reply, the reason it's got to be wrong is clause 5.4 only applies where there's a change  
11 in the law, and it's not open to the Tribunal to change the law; that's for Parliament.

12 MR HERGA: Can I just ask you, sorry, just going back to the Porsche Sales  
13 Organisation definition. The fact that during the last six years, Porsche has supplied  
14 product to Eurospares, which it knows it's going to sell on, you're saying that doesn't  
15 mean it's authorised to sell those? Because that's what they say, isn't it?

16 MS ABRAM: It is not an authorised distributor in the meaning of that clause. I mean,  
17 the sale of those --

18 MR HERGA: But it doesn't actually refer to authorised distributors, does it? It refers  
19 to businesses which are authorised to sell.

20 MS ABRAM: No, sorry, that's fair, yes. It doesn't refer to that. But what it requires is  
21 an act of authorisation and there has never been an act of authorisation. And as the  
22 chair pointed out this morning, the supplies to Eurospares were in breach of  
23 clause 2.15 by the dealers that were supplying them. That's not to say that any blame  
24 is apportioned to them, any complaint is made, but that is the contractual position.

25 And that's why we're trying to clean this situation up. We're not trying to pull the rug  
26 out from Eurospares' feet, where they should have been able to rely on their legal

1 rights; we're enforcing legal rights that should have been in place all along. Sorry,  
2 Mr Olsen, I think --

3 MR OLSEN: I was just going to query, you said "supplied by the dealers", but it was  
4 supplied by a Porsche subsidiary. So it was the Porsche Group that was supplying?

5 MS ABRAM: As it happens, so it's Porsche Retail Group, PRG, the second  
6 Respondent, and as it happens, that is one of the distributors that is owned by  
7 Porsche. So we've got a mixture of owned and non-owned distributors and it  
8 happened to be an owned one.

9 MR OLSEN: So, it's within the same group?

10 MS ABRAM: Within the same group. The point I was making in response to Mr Herga  
11 was not trying to split hairs; it was just to say that when we talk about Porsche, we're  
12 talking about the dealer side of the relationship instead of the Porsche strictly sensu  
13 side of the relationship.

14 So, there's clearly a risk of claims under the dealer agreement and none of the  
15 arguments to the contrary address that. But those are the financial losses. There's  
16 also the losses for which damages wouldn't be an adequate remedy. I just want to  
17 say a word on them before I come back to the cross-undertaking. For those, I just  
18 want to show you our evidence, Mannell 1, which is C tab 3 and I want to pick it up at  
19 page 40.

20 Page 40, paragraph 5.7, makes the point about counterfeiting, which is really  
21 important to Porsche. Mr Mannell explains that:

22 "Porsche is concerned, at a European board level, about the proliferation of Grey  
23 Market and counterfeit products [and he explains what those are]."

24 A few lines further down:

25 "As a result of Porsche's prestigious brand image and the value of its genuine parts,  
26 Porsche has seen evidence of counterfeit goods being subject to counterfeiting

1 practices. These are matters of serious commercial concern."

2 And then 5.8, Mr Mannell explains:

3 "Porsche has established a regime that seeks to ensure that genuine Porsche parts  
4 only enter the market through the sales channels established through the SDS [and]  
5 continued supply of parts to Eurospares (or others) outside the SDS would inhibit [our]  
6 ability to monitor and audit genuine parts."

7 Now, the point that's being made there is just the obvious one that always gets into  
8 counterfeiting cases, that counterfeiting is much more likely when a supply chain isn't  
9 carefully regulated. So, if a customer, be it a repairer or a consumer or whoever, buys  
10 from a Porsche Service Centre from an authorised distributor, then they know they're  
11 getting a genuine part. We know that our authorised distributors are selling genuine  
12 parts because we've got proper control over them. So, the consumer, the repairer,  
13 whoever gets the guarantee of genuineness, can rely on that fact. If you can buy parts  
14 from any reseller, that's not the case. And we all know that from buying on online  
15 marketplaces where one's not quite sure whether one's buying the earphones that one  
16 really expects to buy or earphones that appear to bear the mark but are not really from  
17 the right place, for example.

18 Now, counterfeiting can cause serious reputational harm, of course, as a starting point,  
19 but it's also a real worry from a safety perspective. On the safety concerns, I've shown  
20 you that passage just before lunch about the safety concerns due to incorrect  
21 installation. I should also just show you what Porsche does to address those  
22 concerns, because that goes to a point that you asked me about, Sir. So, that's at 2.5  
23 on page 36. That's mainly confidential, so I'll just ask you to read that, if I may.

24 THE CHAIR: Which paragraph?

25 MS ABRAM: Oh, sorry. 2.5 at the bottom of page 36 and then on the next page.

26 (Pause)

1 This is one of the ways in which we try to address those public safety concerns. Of  
2 course, the last thing we want, both for public safety reasons but also for reputational  
3 commercial reasons, is for our cars to be made dangerous to their drivers or to the  
4 public by improperly fitted spare parts. You'll also therefore understand the real  
5 concern about opening the floodgates to supply outside the selective distribution  
6 system.

7 That's really well exemplified by the increased involvement in these proceedings of  
8 Design911, which has also expressed similar concerns. If one supplier is able to be  
9 supplied outside of the SDS with consequently at least theoretical risks of the nature  
10 identified here, then of course, it's all the more likely that others will clamour for the  
11 same.

12 Let me show you the position in relation to Design911 because this is really a serious  
13 concern for my clients. You remember I showed you a paragraph of Mr Chopra's  
14 witness statement where he said, "I'm not aware of any concern relating to the  
15 authenticity of parts supplied by Design911."

16 That witness statement was dated 17 June. Let me show you a letter at D, tab 35, so  
17 page 111 of that bundle. This is a letter dated 12 June, five days before his witness  
18 statement. It's addressed to Mr Chopra personally, you see "Attention  
19 Kuldeep Kumar Chopra". It's from Kilburn & Strode which is a firm of patent and  
20 trademark attorneys; it's written on behalf of Porsche. Paragraph 1.3:

21 "The purpose of this letter is to request that you (1) immediately stop selling and  
22 offering for sale Porsche-branded goods which have not been approved or authorised  
23 by our client, and (2) cease and/or refrain from using Porsche trademarks or designs  
24 in a way which would infringe our client's trademarks and/or designs or which would  
25 amount to passing off." [as read]

26 Now, the letter's many pages long, but I'll just pick out one example of the complaints

1 that are made by Kilburn & Strobe on behalf of Porsche, page 113, two pages further  
2 down, 3.1:

3 "Porsche became aware of your company, Design 911 Classic Cars Limited [and  
4 trading name] by the German Customs Investigation Bureau following the seizure of  
5 320 counterfeit wheel hubcaps bearing the Porsche crest device."

6 And it goes on to identify the customs notification, listing an email address, which we  
7 believe is the email address for a chief executive of the company at the company's  
8 business address. Kilburn & Strobe go on:

9 "The seized wheel hubcaps were not produced or authorised by Porsche and have  
10 been confirmed as counterfeit goods."

11 Then there are some photographs of them. So, five days before Mr Chopra put in that  
12 witness statement saying he wasn't aware of any problems with the authenticity of  
13 goods sold by Design 911, he had personally been sent a letter complaining of that  
14 very problem. If there could be a clearer example of the proper foundation for  
15 Porsche's concerns about counterfeiting of our goods, one could not imagine it. It's  
16 a really serious matter.

17 THE CHAIR: Do we have any idea how many other resellers there are in the position  
18 of the Claimant?

19 MS ABRAM: In the position of the Claimants, in the sense of taking these steps, none.  
20 No other resellers have got involved in this litigation. Ms Howard said earlier in her  
21 submissions that there was a third reseller who had expressed some interest. Beyond  
22 that, I'm unable to give precise figures. I mean, of course, part of the problem is that  
23 the audit in which we discovered the counterfeit goods led to us clamping down on the  
24 system, but one never quite knows how many counterfeit goods are out there. That's  
25 one of the reasons why damages are inadequate remedy; you just don't know what's  
26 going on.

1 As I say, I'm not making this allegation specifically against Eurospares, but I am  
2 drawing to your attention this important point in relation to Design911 and it exemplifies  
3 the reasons we've had to take this step, which we don't take lightly, as you've seen  
4 from the fact that we've given this long transitional period.

5 MR OLSEN: On that question, do you have a sense of the total number of resellers  
6 for whom supply was terminated?

7 MS ABRAM: Let me just take instructions. I'm not sure if we do. Give me a moment.

8 (Pause)

9 I think it's seven, Sir.

10 MR OLSEN: Seven. In the UK?

11 MS ABRAM: In the UK, yes.

12 MR OLSEN: Thank you.

13 MS ABRAM: So a significant number, more than a handful.

14 So, just to bring that submission on adequacy of damages to Porsche home, and to  
15 put it in the framework of the case law, a point that was made several times this  
16 morning is that we're trying to force this case into the framework of Sports Direct, and  
17 that's really not fair. This case, on inadequacy of damages to Porsche, is so much  
18 stronger than Sports Direct. I mean, in Sports Direct, it's true that damages were not  
19 an adequate remedy for Newcastle United, because it would be exposed to the risk of  
20 claims based on its new supply agreements. But Sports Direct didn't have the features  
21 of this case in relation to counterfeiting, in relation to public safety, in relation to these  
22 wider reputational concerns. So it's really not a case of us having to try and fix the  
23 case into this framework. It's a much, much stronger case against an injunction than  
24 Sports Direct had.

25 So that's damages as an adequate remedy. I need to come back to the  
26 cross-undertaking point. So, the first thing I want to address is this point about

1 a capped cross-undertaking. This wasn't an issue until this morning, and so this isn't  
2 in the authorities bundle, but I just thought it was important to anchor this point in the  
3 law. We've just found a paragraph of Gee, which sets out the principles about capped  
4 cross-undertakings. We probably don't have enough copies, for which we're sorry, but  
5 we've done the best we can, given this has only just come up. (Pause)  
6 And I really just want this for the final sentence of the first paragraph of 11-029. Just  
7 to anchor the principle:  
8 "The applicant is normally required to give an undertaking which is not subject to  
9 a financial limit." [as read]  
10 And that follows a passage of text about fortification, which talks about fortification by  
11 reference to an unlimited or a capped sum. But the undertaking itself is usually not  
12 capped.  
13 Now, the point that was made against me is that, "well, you haven't told us how much  
14 your loss will be". And so it's reasonable that we haven't accepted that there should  
15 be an undertaking. But of course it's not realistic for us to say in advance how much  
16 we think our financial or non-financial loss will be worth, particularly given this  
17 pan-Europe situation that I've identified in the dealer agreement. That's just not how  
18 these cases work. In these cases, the quid pro quo for getting an injunction is you  
19 provide an undertaking, and the respondent shouldn't be tied to its honest pre-estimate  
20 of what its damages might be, because it's just not in a position to know. And of  
21 course, that must be right, because as we all know, in these cases, it's very usual for  
22 cross-undertakings to be given not just to the Defendant, but to third parties.  
23 Now, in this case, the relevant third parties are members of the Porsche business, but  
24 you very often get cross-undertakings that are required to fully independent third  
25 parties. And of course they can't be asked in advance how much their loss will be,  
26 and that's why it's just part of the balance of responsibilities for getting an injunction.

1 You get your injunction, you take responsibility for the consequences of that.

2 Now, it was said that, in most cases, Defendants do identify the amount of damage  
3 that they expect to suffer. No authority was cited for that proposition, and we've been  
4 unable to find any support for it. You were shown Traylen, where it's true that  
5 a Defendant had identified the amount of loss that they expected to suffer, but the  
6 reason for that was that it was seeking fortification of the undertaking, and so if you're  
7 seeking fortification by means of a bank guarantee, for example, then it's very sensible  
8 to say, and this is the amount of the guarantee that we'll be needing. It's a totally  
9 different concept.

10 And so I say that there should be an undertaking, because that's what happens in  
11 these cases; that's assumed in American Cyanamid. There's authority for it, in our  
12 skeleton argument, in Sports Direct in the Tribunal. There's no reason at all for it to  
13 be capped. There's no obligation on us to say how much our damages will be, which  
14 is not a matter of being awkward, it's that we don't know. We reasonably don't know.  
15 And so that is the price of obtaining an injunction in a case like this.

16 Now, the heart of the real argument against cross-undertaking is that that is financially  
17 hard on Eurospares. And again, I think it's just useful to have a look at what the actual  
18 legal principles are around situations where the cross-undertaking may be hard to bear  
19 for the applicant for an injunction. And we can take that from Traylen, and that's in the  
20 authorities bundle, tab 24, and we can pick it up on page 763, and just picking that up  
21 four lines from the top of the page. So on paragraph 41, this is Mrs Justice Tipples:  
22 "However, it seems to me that the Claimants have simply failed to provide the court  
23 with any appropriate evidence to support a cross-undertaking in damages and their  
24 intransigence in relation to the Defendant's request for them to fortify the  
25 cross-undertaking damages would rather suggest to me that they are unable to  
26 provide a meaningful cross-undertaking in damages. That point alone, [so that's the

1 inability to provide a meaningful cross-undertaking], it seems to me, means that the  
2 balance of convenience rests very heavily in favour of the Defendant [So not granting  
3 the injunction] and that is before I turn to the issue of delay."

4 So, inability to provide a cross-undertaking means that the balance of convenience is  
5 against granting the injunction.

6 And then just so I don't need to come back to this paragraph, delay is a really  
7 significant feature of this application. So I'll just look at what Mrs Justice Tipple says  
8 about delay. Paragraph 42:

9 "I now turn to delay."

10 And then if you skip on to 43:

11 "I do not understand, and there is no evidence to help me, why the Claimants did not  
12 take any steps to obtain an injunction after ... July 2019."

13 Two lines on:

14 "They were well aware of their rights under the agreement ..."

15 Skipping again:

16 "They even got their solicitors in September to write a letter about this to the  
17 Defendant's solicitor yet they did nothing further about it. This delay of nine months  
18 until the application was sent to the court in April 2020 is, to my mind, fatal to the  
19 Claimants' application and it is certainly fatal when coupled with the lack of evidence  
20 from the Claimants in support of a cross-undertaking and damages."

21 So, on delay, I'm going to be saying that that, combined with the position on  
22 a cross-undertaking, eerily similar to the facts of this case, Sir. But that's a treat for  
23 when we get on to the balance of convenience.

24 Just on the cross-undertaking, the expectation is that the cross-undertaking will be  
25 provided. If it's not provided, that's a problem for the applicant. There are exceptional  
26 circumstances in which the court may decide that it will not require

1 a cross-undertaking, because the claimant is impecunious. Again, we've put the  
2 references in our skeleton, but it's 11-024 of Gee. They include circumstances where,  
3 for example, the reason why the applicant is impecunious is because of the  
4 Defendant's own fraud. So it doesn't lie well in the Defendant's mouth to demand a  
5 cross-undertaking, when it's the Defendant's own fault that the Claimant can't afford  
6 to give one. That's as far as one can imagine from this case in which, actually,  
7 Eurospares have had the benefit of custom from Porsche for the last six years when  
8 they shouldn't have done. So, those sorts of situations just don't apply here.  
9 Eurospares can't sensibly be described as impecunious by any standard explanation  
10 of that term. Again, I regret to point this out, but my learned friend said in her  
11 submissions that Eurospares was an SME and in fact a small enterprise -- that's  
12 actually not right. We've given the reference at footnote 45 to our skeleton. It's  
13 a medium enterprise, within the terms of the relevant legislation. It's a company with  
14 a turnover of tens of millions of pounds a year, with profit of millions of pounds a year,  
15 and sometimes it's hard to notice what's not there. But what you don't have is you  
16 don't have any evidence about cash reserves. You don't have any evidence about  
17 borrowing or indebtedness. You don't have much of the evidence that Eurospares  
18 would have been expected to put forward if it was giving a proper case of  
19 impecuniosity. And this is where my point that I made in response to a question from  
20 Mr Herga earlier is relevant: the £90 million of stock of spare parts, that is not  
21 consistent with a business that's impecunious. There's no reason at all why  
22 Eurospares shouldn't be able to provide this undertaking, just doesn't want to.  
23 So, that's what I say about cross-undertaking, as a matter of principle. I need to tie  
24 that up to the fast track aspect. I'll come on to the fast track, and the criteria for that,  
25 after dealing with the injunction. But, you'll be unsurprised to hear that my submission  
26 is that it's totally clear that the case isn't a fast track case. What I want to say here is

1 that it's really important that the fast track shouldn't be used to circumvent the need  
2 for a cross-undertaking. There is no indication anywhere that the fast track  
3 procedure -- the case can be shoehorned into the fast track procedure -- in order to  
4 avoid the need for a cross-undertaking to be given.

5 There are two separate analyses there. There is: should there be a cross-undertaking,  
6 yes or no? Is it a fast track case? If it is a fast track case, does that change our view  
7 about whether there should be a cross-undertaking? And approaching the matter in  
8 a conflated way would, in my submission, be an error of law. And because allocation  
9 to the fast track isn't a get out of jail free card, what you've got is a test in the guide,  
10 it's paragraph [5.147] -- I won't take you to it -- a factor that will be taken into account  
11 when you're deciding whether a fast track case should still have a cross-undertaking.

12 Three factors: strength of the Claimant's case, I've made submissions on this issue.  
13 As I say, I'm not contesting serious issue to be tried, but I hope that I have, with those  
14 points I made at the start, demolished any suggestion that this is a strong case. It's  
15 sought to cut through every single element of the actually pleaded case, one at a time.  
16 Second factor to be taken into account is what loss the respondent will suffer, and  
17 there I've taken you to the financial and the non-financial loss. It's really significant in  
18 this case.

19 And then the third point is the financial resources available to the Claimant, and as  
20 I say, we do not accept that Eurospares is remotely impecunious by any normal  
21 measure of that concept.

22 So that's the cross-undertaking. I should go on to the balance of convenience before  
23 I address the fast track. I want to highlight four factors on the balance of convenience,  
24 and then I just want to deal with the points that are relied on against me by Eurospares.

25 So, the first point on balance of convenience is that the cumulative effect of all of the  
26 extensions we've given Eurospares has virtually given Eurospares the full amount of

1 transitional period that it was asking for. We've almost given it everything it wanted.  
2 And let me show you that. So I'll just give you the chronology to situate it. Supplies  
3 were restored on 28 November 2024, so the transitional period was due to end on  
4 27 May 2025, six months. This application was made a week before that, 20 May. As  
5 I said in opening, we agreed within two days to extend the supplies until the  
6 determination of the application, so super constructive immediate response from  
7 Porsche. And so the effect is that, so far, subject to any additional time for the Tribunal  
8 to write its judgment on this application, Eurospares have already benefited from about  
9 seven months of additional supply.

10 Now, if you measure that against what they asked for, which is at D, tab 15. If you go  
11 to page 47, this is a letter from Geradin, so Eurospares' solicitors, dated 10 December  
12 last year. So at this point we'd agreed to a three-month extension for a transitional  
13 period and they were asking for more. If you pick up on page 47 at paragraph 8,  
14 Geradin say:

15 "We refer to paragraph 2.3 of an earlier letter where you state, 'should more time to  
16 transition be required, your client may approach Porsche for a discussion on this topic,  
17 but any extension must be for a brief transitional period only'. To that end, Eurospares  
18 proposes a nine-month transitional period ..." [as read]

19 Then the explanation:

20 "The proposed three-month period is not enough time for Eurospares if it were to make  
21 alternative supply arrangements." [as read]

22 Then they go on to explain:

23 "Eurospares has no pre-existing relationships with any of the alternative suppliers [that  
24 we'd helpfully listed for them in an early letter]. Those alternative suppliers of spare  
25 parts for Porsche vehicles are only a small proportion of parts in comparison to the  
26 genuine parts on offer and, in any event, these alternatives are not in line with our

1 client's business model. Eurospares specialises in the sale of genuine spare parts.  
2 Consequently, Eurospares would face a burdensome and time-consuming process in  
3 trying to restore the supply that it otherwise relied on Porsche for that could not  
4 conceivably be achieved within the three-month time frame. Our client emphasises  
5 that it's committed to reaching a resolution quickly. There's no interest in delaying  
6 negotiations, the uncertainty our client faces from not resolving this matter is not good  
7 for its business. We believe that a period of nine months is more reasonable." [as  
8 read]  
9 So in December last year, they were saying nine months of additional supplies would  
10 be reasonable. We responded by saying, "Okay, six months", and of course we've  
11 then extended it again since. So the practical upshot -- sorry, Sir.  
12 THE CHAIR: No, no. Carry on.  
13 MS ABRAM: The practical upshot is that because of these repeated extensions,  
14 they've had almost the full amount of time that they were asking for as recently in  
15 December next year. There's no reason at all, now, to give them more.  
16 Now, what I know will be said against me on that is, "Well, look, Eurospares has been  
17 trying to find alternative supplies, without success. As it turns out, it's been more  
18 difficult than we could have expected". In fact, the evidence shows it's scarcely tried  
19 at all to find alternative supplies.  
20 I'm conscious that when Ms Howard mentioned this point, you indicated that you'd  
21 read the passage of Mr Derrick's evidence on this, so what I want to do instead is show  
22 you the underlying documents that really show how hard Eurospares has tried, or, in  
23 my respectful submission, has not tried.  
24 So that's again in this bundle. It's D, tab 42. There are three documents to show you.  
25 In tab 42, if you start by going to the back of the tab, it's an email chain. So you go to  
26 Bundle D page 133.

1 You see that this is an email from Mr Derrick to Bosch, which was one of the spare  
2 parts suppliers that we had suggested:

3 "Dear Bosch team,  
4 "We are an automotive spare parts specialist interested in purchasing Bosch products.  
5 "[Then he says] Can you provide some information into how we may go about this?"  
6 [as read]

7 So that's an initial query to a general email contact detail. The response on the  
8 previous page, from Bosch service centre:

9 "Thank you for your email,  
10 "Please note Bosch do not supply parts directly to the end customers. They are  
11 available from our distributors [and then there's a list of distributors]." [as read]

12 Mr Derrick does go back, he says, at the top of the page:  
13 "We're a spare parts specialist looking to become a Bosch distributor".

14 The previous page, page 131:  
15 "Bosch, isn't opening further sale accounts at this time. We have the distribution we  
16 require." [as read]

17 Then Mr Derrick says, final email, 20 January by now:  
18 "I have been in contact with FPS, [which is one of the four distributors that were  
19 mentioned by Bosch] and are waiting for their response [and sends a further inquiry  
20 about how he could get Porsche parts]." [as read]

21 Now, Mr Derrick hasn't said whether FPS have ever replied to his inquiry. He hasn't  
22 provided details of that inquiry to FPS. He hasn't shown us evidence of any other  
23 enquiries to any of the other distributors. He hasn't suggested that he chased for  
24 a response to this email, that he phoned up or chased again by email, bearing in mind  
25 that Bosch were clearly responding to him. This seems to be a dead end after this  
26 very short exchange of emails, further investigation unclear.

1 Next document is at page 134, tab 43. This is a month later. Mr Derrick sends another  
2 email to Alliance Automotive. He says:  
3 "I look after the development for a company called Eurospares [and lists a number of  
4 brands, including Porsche] ... [He says he] specialises in genuine spare parts but  
5 looking to expand. Can someone contact me to discuss supply options, please?" [as  
6 read]  
7 Mr Derrick says that Alliance Automotive didn't respond to this email. There's no  
8 suggestion that he chased it, there's no suggestion that he phoned, no suggestion that  
9 he followed up in any way. So he sent this email a month after sending the first email.  
10 Nothing further.  
11 Then we've got the final document, tab 44, page 135. So this is to Brembo. Now, note  
12 the date of this document. This is June this year; this is a couple of weeks ago. It's  
13 after this application had been issued. So Mr Derrick had sent his two emails in  
14 January and February, he's waited another four months, he's thought, "Right, I'll send  
15 another email".  
16 So he's obviously had a meeting with Brembo, and says:  
17 "Hi Anthony,  
18 "It was great to meet you yesterday and have a chat." [as read]  
19 Then a couple of paragraphs further on:  
20 "As we discussed, Brembo is an OE supplier for a lot of brands interested in securing  
21 these parts directly." [as read]  
22 So there's an inquiry. Again, Mr Derrick says he didn't get any response to this from  
23 Brembo. He clearly had a meeting with someone from Brembo, but again, there's no  
24 evidence that he phoned up, that he emailed again, that he tried any other way of  
25 getting in touch.  
26 That, Tribunal, is the sum total of the evidence that Eurospares has tried to find

1 alternative sources of supply in the UK: three desultory email exchanges, one in the  
2 last few weeks since the application was issued, with no obvious attempt to chase  
3 them or follow them up.

4 Now, there are two other emails where enquiries are made to EU distributors, but  
5 unsurprisingly, they both say, "Look, we don't ship to the UK". This is all there is in  
6 the UK.

7 So it lies very ill in Eurospares' mouth to suggest that they've made any kind of real,  
8 recognisable efforts to find alternative sources of supply, given that it amounts to three  
9 emails over seven months.

10 That's the first factor on balance of convenience.

11 The second is the delay in making the application, which I signalled upfront in my  
12 submissions. So I showed you Traylen, in which the nine-month delay in seeking an  
13 injunction, combined with the refusal to give a cross-undertaking, were fatal to the  
14 application. The facts here are just remarkably similar, subject to Eurospares'  
15 concession that they will, if they have to, give a cross-undertaking. But just as  
16 a timeline, I've told you that we notified Eurospares that it would no longer be able to  
17 purchase Porsche spare parts nine months ago in September 2024. Let me show you  
18 what happened after that.

19 So if you look at D, tab 7, at page 13. This is an email from Mr Derrick to my client,  
20 Mr Moloney. It's a substantive email dealing with the issues relating to refusal to  
21 supply. Page 13, the third paragraph up from the bottom of the page. Do you see on  
22 the third line of that paragraph, "these avenues"?

23 So page 13, three paragraphs up from the bottom of the page, there's a paragraph  
24 starting, "We hereby formally request", and on the third line of that paragraph:

25 "These avenues which Eurospares is threatening, may include seeking an urgent  
26 injunction in the UK courts on behalf of ourselves and others." [as read]

1 That is an email dated 24 October 2024, so it's eight months before we stand here  
2 today. By the end of that same month, Eurospares had instructed Geradin and  
3 Geradin was threatening litigation.

4 So if you turn to tab 11 and look at page 30, this is the culmination of an  
5 11-page pre-action letter that Geradin sent to my client at the end of October last year.

6 You see at paragraph 36:

7 "if Porsche does not reinstate supply, we intend to consider:

8 "(b) commencing proceedings against Porsche, seeking a mandatory injunction,  
9 reinstating supply and damages [and so on]." [as read]

10 Now, the correspondence continues. There is nothing in the correspondence that  
11 suggests that Porsche agreed that Europa's complaint had any merit whatsoever. So  
12 what you will find if you flick through bundle D is a careful and detailed exchange of  
13 pre-action correspondence, in which we've responded to a wide range -- no  
14 criticism -- of points made by Geradin on behalf of Eurospares and patiently engaging  
15 with them.

16 There are examples of our detailed responses at tab 12 of the bundle, tab 14 and  
17 tab 16 of the bundle and that spans the following months. But at the latest, by January  
18 this year, it had become totally clear that the correspondence was at a stalemate.  
19 I can show you that in a Geradin letter dated 30 January this year, which is at D,  
20 tab 17, and we can look at page 58.

21 So bottom of page 58, paragraph 28:

22 "Please bear in mind that your client's threats to discontinue supplies after May 2025  
23 and cut off aftermarket access is existential for our client. It is an issue that will not  
24 simply go away. In the absence of prompt and constructive engagement with our  
25 concerns, Eurospares will have no alternative but to press ahead with informing the  
26 relevant competition authorities, media channels and commencing fast track litigation

1 | for damages and injunctive relief." [as read]

2 | So in January this year, they were threatening fast track litigation five months ago, as  
3 | of this date. But no application was made for another four months until May this year,  
4 | and not until a week before the transitional period was due to expire. Well, Eurospares  
5 | say the delay was due to three things.

6 | They say it was due to Mr Derrick's attempts to find alternative sources of supply. Sir,  
7 | if he'd made all those attempts in one sitting, they wouldn't have detained him for more  
8 | than an hour, those three emails. So that's not a credible explanation for the delay.

9 | The second factor is that we changed our solicitors in April 2025, which is factually  
10 | true, but the logic escapes me because by April 2025 the correspondence had been  
11 | ongoing for six months. It was totally clear that the parties were at loggerheads with  
12 | each other. In any reasonable world where Eurospares wanted to maintain continuous  
13 | supply, they would have made their application months before that. It wouldn't have  
14 | come to April 2025.

15 | Then finally it said, "Well, a complaint was made to the CMA and we're waiting for the  
16 | CMA to decide."

17 | But you've got no evidence before you of when that complaint was made, how long it  
18 | took to get going, what delay it caused at what point in the timeline or why it caused  
19 | that delay. So none of those explanations are at all cogent, Sir.

20 | Now, we're never going to know what lay behind the delay in making the application,  
21 | it's the reality, but just looking at it objectively, the upshot of Eurospares' conduct is  
22 | that they have run the clock down for six months while we, in good faith, continue to  
23 | supply them for almost the whole transitional period they said they wanted, only to ask  
24 | at the last minute for an injunction forcing further supply while refusing to shoulder the  
25 | consequences of doing so in the form of a cross-undertaking.

26 | The cynical interpretation would be that they're seeking to get all the benefit of yet

1 another lengthy tranche of continued supply without paying any of the price of that.  
2 So that's the second factor we rely on, on balance of convenience.

3 The third factor I rely on is the right to determine your own distribution system. This  
4 was recognised in Sports Direct v Newcastle United. You won't be surprised to hear  
5 that it's a point that really has resonance for my client because it has carefully set  
6 up -- you've seen the dealer agreement -- a very carefully designed selective  
7 distribution system that applies across the whole of Europe, really thought about it.  
8 You've seen that the exceptions for end users and for repairers are not simply plucked  
9 out of thin air.

10 All it's trying to do is put in place, and ensure are enforced, the arrangements that it's  
11 thought very carefully about. That should have been, frankly, enforced many years  
12 ago. That's the factor that both the Competition Appeal Tribunal and the  
13 Court of Appeal recognised as having significant force in Newcastle United; the right  
14 to determine your own distribution arrangements and to do so in a way that was  
15 appropriate for your business. My client should have the latitude to do that.

16 What it certainly shouldn't have held against it is the fact that, super reasonably, when  
17 approached by a counterparty that says, "Look, we need a bit of time to get over not  
18 having supply of Porsche parts", it said, "Okay, we'll give you a little bit of time, then  
19 we'll give you a little bit more and then we'll give you a little bit more still". It's, in my  
20 submission, extremely unattractive for Eurospares to complain of the latitude that it's  
21 been given by my client, but that's very much the effect of this application and you'll  
22 see in that context why it's come to a point where we just can't accept to give any more  
23 latitude to Eurospares, to give them any more rope.

24 So that's the third factor on balance of convenience.

25 The fourth factor is the fact that any injunction would really give rise to a need for  
26 supervision, which is a matter of real concern to Eurospares. It was suggested that

1 the need for supervision is somehow tied up with the fact that an injunction is  
2 a mandatory injunction and compared to prohibitory. The distinction between  
3 mandatory and prohibitory is pretty arid anyway, in the context of a refusal to supply.  
4 In my submission, the two things are independent. It may well be that in cases where  
5 you're ordering someone to do something, there's more likely to be a need for constant  
6 supervision, but if there is a need in any particular case, it's capable of being relevant  
7 to the balance of convenience. So you just assess whether that applies here: whether  
8 it obtains or whether it doesn't. And it does obtain here.

9 In a sense, you could tell that from my learned friend's submissions, because in the  
10 course of Ms Howard's submissions, she made various points about more  
11 proportionate ways in which she said that Porsche could achieve its commercial end  
12 and its counterfeiting ends and safety ends. So there were references to taking  
13 training, being willing to take whatever training was on offer, or being willing to submit  
14 to checks of the supply chain and so on.

15 You see, the more of that sort of detail that gets layered on in the context of an  
16 injunction, the more likely it is that disputes are going to arise, the more likely it is that  
17 there's going to be a need for supervision.

18 But you can just see it on the basis of -- on the face of the draft order. So if you look  
19 at the draft injunction, which is at bundle B, tab 2, page 27. If we just look at  
20 paragraph 3, so opening words:

21 "Until the determination of this claim or further order, the respondents are prohibited  
22 from ..." [as read]

23 If you skip on to (c):

24 "Altering the commercial terms on which Porsche parts have been previously supplied  
25 to the applicant in such a way that unreasonably restricts or delays the applicants to  
26 such parts, imposes any new or additional conditions that are not fair, reasonable and

1 non-discriminatory, or make such supplies more difficult." [as read]

2 You can well see the fertile ground that that sets up for debate. So, for example, what  
3 if prices rise? Is there going to be a debate about whether a rise in prices is something  
4 that can be imposed, consistent with that order?

5 The same point applies to (d):

6 "Disrupting, delaying or otherwise interfering with the applicant's order for Porsche  
7 parts in an unreasonable manner." [as read]

8 You can imagine if we had a supply chain issue and parts were delayed and perhaps  
9 Eurospares' order was affected more than other orders for some reason. You don't  
10 want to see us all back in the Tribunal having a scrap about whether or not we've  
11 breached the terms of the injunction.

12 MR HERGA: It's more issues for if it was a permanent injunction; they are rather less  
13 of issues, aren't they, on an interim injunction?

14 MS ABRAM: Well, it's true that the number of issues that could arise are logically  
15 fewer because the amount of time would be less. But it doesn't follow that there's no  
16 risk.

17 The point that I thought you might make, Sir, which I think is a point that could be made  
18 against me on this is: well, just remove (c) and (d), for example. Deal with that problem  
19 by removing (c) and (d), and that's one thing that one could do to get around that.

20 But I'd suggest that there is a kind of irreducible core of supervision, an issue that is  
21 likely to arise.

22 I can just show you another example, another dimension of that, in bundle D,  
23 at tab 28.1, page 95.1. This is a letter from Porsche to Mr Derrick at Eurospares, and  
24 it's the letter that reflects our agreement to continue supply now, pending the Tribunal's  
25 decision. So I just ask the Tribunal to run your eye over that letter. It's very short.

26 THE CHAIR: Sorry. Starting which page?

1 MS ABRAM: It's tab 28.1, page 95.1. It's just a one-page letter. (Pause)

2 So you see that it's an agreement effectively for Porsche Retail Group specifically to  
3 continue supplying Eurospares, subject to an expectation, final paragraph, that the  
4 volume and frequency of orders by Eurospares won't increase.

5 Now, the reason that we needed those protections, those details, is that we couldn't  
6 accept the possibility that supplies to Eurospares might become a funnel through  
7 which supplies might be made to other resellers outside the context of the selective  
8 distribution system.

9 So what we needed to be able to do was to channel the supplies through one Porsche  
10 entity, so we know how much is being sold, and so that we can monitor whether the  
11 sales are approximately of the same volume and approximately of the same  
12 frequency.

13 But you can just see -- and this is 27 May, it's less than a month ago -- the fertile  
14 territory for that to give rise to debates about whether Eurospares are keeping their  
15 supplies of similar volume and similar frequency. I suppose the point that Mr Herga  
16 made to me a little while ago about the prospect of building up your stocks to protect  
17 yourself from a future interruption in supply is a really good illustration of how that kind  
18 of point might arise.

19 So we say that if an order were to be made, it would suffer from the deficiency of  
20 requiring continuous supervision.

21 THE CHAIR: Would you be seeking any terms such as included in their letter?

22 MS ABRAM: If the order were to be made, yes, we would seek terms to that effect.  
23 So we'd seek a term that supplies were to be funnelled in that way through a specific  
24 Porsche entity and that there wouldn't be an increase in volume or frequency.

25 Absolutely. I think the funnelling is not objectionable; I don't think Eurospares  
26 particularly care where they get their parts from; the volume and frequency, I don't

1 know. But certainly we could end up back here arguing about that.

2 Just to finish up on balance of convenience, really the points that were made today on  
3 balance of convenience by my learned friend boiled down to what she called ordre  
4 public, so the Tribunal's role in ensuring access to justice. There have previously been  
5 arguments about consumer benefit and delivery and prices and so on, but they weren't  
6 pressed orally so I assume that they're not being relied on.

7 The argument that was made is that the Tribunal was here to secure access to justice  
8 for litigants big and small and that it's important for you to interpret your powers in  
9 a way that secures access to justice and that some small litigants, when they seek  
10 injunctions, will really need to have the latitude of the Tribunal in getting those  
11 injunctions, including without a cross-undertaking.

12 The point that I'd make to the Tribunal about that is that, with the greatest respect,  
13 you're not a superhero, you're not Batman roving around trying to seek out problems  
14 that you can find solutions to; you're here to apply the law. And the legal test as to the  
15 availability of an injunction applies in the Tribunal in just the same way as it applies in  
16 any other court and Sports Direct is a really good example of that. And so the appeal  
17 to policy, the appeal to access to justice or to ordre public doesn't take Eurospares  
18 any further than any of its actual arguments. So, that aspect of balance of convenience  
19 need not detain us.

20 That's what I wanted to say about the injunction. I need to cover the fast track; I won't  
21 be super long on that. I think it probably is a good moment to have a break, Sir.

22 THE CHAIR: Five minutes.

23 (3.19 pm)

24 (A short break)

25 (3.27 pm)

26 MS ABRAM: To the fast track. Sir, just so you know, I spoke to Ms Howard over the

1 lunch break and we've agreed that I'll sit down at the latest by 4.00, but I may well be  
2 able to sit down a bit earlier, and we're happy that that gives everyone enough time to  
3 do what they need to do. Everyone's happy.

4 So, on the fast track, the starting point is that, as I said at the outset, we're not at all  
5 opposed to the idea of a speedy trial of this claim. It was us that proposed directions  
6 enabling speedy trial of the claim first. There's a question about how speedy it can be  
7 given the weight of the issues, and I'll show you some of that in the context of the fast  
8 track points. But in principle, we're absolutely on board with that. But that's a separate  
9 question from whether the criteria for the fast track procedure are met.

10 Just before I start on what those criteria actually are, I just want in a word to address  
11 the points that you heard from my learned friend about on the pre-legislative materials  
12 and the purpose of the fast track procedure. Without wanting to caricature, the tenor  
13 of those points was really, "Wouldn't it be nice if more cases met the criteria to fit into  
14 the fast track procedure? Wouldn't that be useful for small to medium enterprises?"

15 At one point, my learned friend said that the rules were unrealistic. Yet they are the  
16 rules and the job of the Tribunal is to apply the rules and not to apply the rules that it  
17 might have liked to be there or that might have been desirable if the aim had been  
18 something different.

19 So, of course, I don't accept that the rules in paragraph 53 are a straitjacket on the  
20 points that you can take into account, but nonetheless, they show the sort of  
21 considerations that are relevant to the fast track.

22 In particular on length of trial, there is really quite a lot of authority on what lengths of  
23 trials are appropriate for fast track cases and what are not. And it avails Eurospares  
24 little to say, "Well, those periods are just too short for most competition cases"; they  
25 are the periods that are set down in the rules and provided for by the case law, so they  
26 must be applied.

1 Which, as I say, is not to say that there can't be other directions that provide for  
2 a degree of expedition. Of course, our particular sensitivity about the fast track, aside  
3 from our concern to make sure that this case is litigated properly because it's so  
4 important to my client -- you'll have seen our contractual arrangements depend on  
5 it -- but part of our concern is the way that the fast track is used to seek to avoid the  
6 need for the cross-undertaking and that is something that must not be allowed and  
7 that isn't allowable under the rules.

8 I just want to say, before I dive into the criteria, one word about the suggestion that  
9 was in the skeleton argument of Eurospares that wasn't pressed orally that it might be  
10 possible to allocate this case to the fast track procedure for today, and then  
11 immediately take it out of the fast track procedure. It's, if you don't mind me saying  
12 so, something of a hokey cokey of track allocation about it. That is not what the rules  
13 provide for. The point of allocation under the rules, whole essence of it is that it has  
14 prospective effect. The whole point of it is that it's designed to deal with cases that  
15 need to be brought to trial, can be brought to trial, in a particular amount of time. It  
16 would be completely meaningless and would completely subvert the intention of the  
17 rule if you could put a case into the fast track to achieve an end in relation to  
18 a particular hearing when everyone knows that it's to be taken out of the fast track  
19 immediately. That's not what the provision is there for. It wasn't pressed orally so  
20 I won't go into it further, but I just wanted to step on that suggestion before I went any  
21 further.

22 I think it might just be useful, before we apply the criteria under the rules, to anchor  
23 ourselves in what the guide says. Authorities bundle tab 4, page 26.1 is the relevant  
24 bit of the guide. This is the guidance that the Tribunal is actually required to apply. So  
25 page 26.1, top of the page, 5.146:

26 "Given that competition cases generally tend to be heavy, complex, and often involve

1 consideration of novel issues, it is unlikely that the Tribunal will designate a case as  
2 suitable for the FTP unless it is a clear-cut candidate for such an approach. Generally,  
3 such a case is likely to be to arise or be linked to a scenario where injunctive relief is  
4 being sought ..."

5 Just to pause there, what's not being said is that every case involving an injunction is  
6 a fast track case. They say generally, the cases that are fast track cases will involve  
7 an injunction.

8 "... Or, in the case of a claim for damages, where all the parties are clearly committed  
9 to a tightly constrained and exceptionally focused approach to the litigation."

10 I need to come back to that point in relation to the scope and nature of the damages  
11 claim in this case. But that provides really helpful illumination to the points made by  
12 my learned friend in relation to the purpose of the fast track procedure, so you need  
13 clear cut candidates for the fast track procedure in order to apply that.

14 Then, if we just think about what the criteria are -- it might just be useful just to have  
15 the criteria actually in front of us while we do that, so that's authorities bundle tab 3,  
16 page 23 and the criteria are in rule 58(3). My learned friend didn't actually engage  
17 with these criteria at all in her submissions, so you haven't actually heard any  
18 submissions on whether the criteria for the fast track are actually met. But let's look  
19 at them together.

20 So, 58(3), starting with (a):

21 "Whether one or more of the parties is an individual or [SME]."

22 As I say, we accept that Eurospares is an SME, very much at the higher end of that  
23 range provided for in 58(3)(a), but that's not enough by itself.

24 "(b) whether the time estimate for the main substantive hearing is three days or less."

25 Now, it is common ground in this case that the time estimate for the trial is materially  
26 in excess of three days, which is the usual guideline maximum length for the fast track

1 procedure. We say we think it's a seven-to-eight-day case; Eurospares say they think  
2 it's a five-to-seven-day case. So we're pretty much agreed it's approximately  
3 a seven-day case -- approximately a two-week case once you've allowed for a break  
4 for preparation of written closing. I'm not taking a point to whether that should be in  
5 the time estimate, but you hear what I say about the overall weight of the case.  
6 Now, my learned friend said in certain submissions that it had been recognised by the  
7 Tribunal that seven days might be an appropriate length for the fast track procedure,  
8 but I'm afraid that's not right. I'm going to take the authorities from my learned friend's  
9 skeleton argument because they're really clearly addressed there. It's  
10 paragraph 53(b) on page 22 of Eurospares' skeleton argument.  
11 On page 22, if you just pick it up about six lines from the top of 53(b), Eurospares quite  
12 rightly records:  
13 "In *Breasley Pillows* ... the Tribunal acknowledged that 'although three days [trial  
14 length] is not an absolute limit, it should be stated emphatically that a case of such  
15 longer duration [which was two weeks in that case] is not the kind of case that would  
16 qualify for the FTP'."  
17 Then two lines further below:  
18 "In *Belle Lingerie* ..., it was said that a trial of six days would be difficult to adjust to  
19 justify as being appropriate for the [fast track procedure]."  
20 So, that's the guidance that you've got. So, seven to eight days, which is somewhere  
21 between the six days that is difficult to justify and the two weeks which is out of all  
22 scope of the fast track procedure, is the length of this case. It's just too long a case  
23 for fast track procedure; it doesn't fit.  
24 There was at one point a faint suggestion that the trial could be split between the  
25 Chapter I and the Chapter II allegations. That was never really pursued. My learned  
26 friend said today, "Well, look, we were just trying to be helpful", but in fact, it was never

1 suggested that that would bring any element of the case within the scope of the fast  
2 track procedure. It's now said that the split might reduce the length of the first trial by  
3 a day, which is not helpful in case management terms because you've then got  
4 a whole other trial that you still need to get to and it also doesn't do anything to bring  
5 the case into the fast track. So, that doesn't take us anywhere.

6 So, trial estimate is, in my submission, a reason why it's a total non-starter for the fast  
7 track in this case.

8 Second, if you look at (c), 58(3)(c), second issue is "the complexity and novelty of the  
9 issues involved". Now, previously it was said that the issues in this case weren't  
10 complex or novel, and that doesn't seem to be maintained anymore by Eurospares  
11 and we say that's right. I'll just give you three very quick examples of complexity and  
12 novelty in this case.

13 The first is the second point I made to you on the merits, which is whether spare parts  
14 for motor vehicles are suitable for selective distribution arrangements, whether they  
15 necessitate selective distribution arrangements. I said, "Look, the Commission  
16 guidelines say that the predominant form of supply for spare parts for motor vehicles,  
17 and so it's a pretty big ask for Eurospares to seek to overturn that observation in this  
18 case". So again, not trying to strike out that allegation, not suggesting they can't have  
19 a trial about it, but it's a big deal if that's what they want to challenge in this trial.

20 Second example, second reason for identifying complexity and novelty is this concern  
21 about the delta between the issues that are pleaded -- which are the issues that I took  
22 you to and to which I had clear, focused, firm, narrow answers in my submissions  
23 before lunch -- and some other issues that were raised in the skeleton and in oral  
24 submissions. Fast track is not a procedure for a case that is like pinning down an  
25 octopus. It needs to be focused, it needs to be clear.

26 The third example also goes to the criterion at 58(3)(h), which is "the nature of the

1 remedy being sought and, in respect of any claim for damages, the amount of any  
2 damages claimed". You remember I showed you in paragraph 5.146 of the guide that,  
3 in a damages claim, it would have to be clear and exceptionally focused to come within  
4 the fast track procedure.

5 Now, not only is this case not clear or exceptionally focused, but there's actually  
6 a Sempra Metals damages claim that came into the claim form in the middle of last  
7 week, so it was introduced into the case a week ago, that hadn't previously been  
8 pointed to at all by Eurospares. I'll just give you the paragraph reference: it's 65(d) of  
9 the claim form and for your notes, it's B, tab 3, page 50.

10 What's said is that we, Eurospares, would have lost profits if we weren't able to supply,  
11 Porsche parts and, as a result of that loss of profits, we wouldn't be able to invest so  
12 much in our business and so we'd suffer the consequent loss on the business. So, it's  
13 a compound loss claim.

14 Now, we all know, we do this all the time, how complicated Sempra Metals damages  
15 claims are to litigate. There is authority, of course, from the House of Lords in  
16 Sempra Metals itself that, if you're going to make one of those claims, you've got to  
17 plead it, which has been done, and you've got to evidence it. So you've got to have  
18 factual evidence about what you would have done in terms of reinvestment of profits;  
19 you've got to have expert evidence and they say accountancy evidence is completely  
20 unsurprising if you've got a Sempra Metals claim; you need to have accountancy  
21 evidence about what would have happened in a counterfactual where you would have  
22 been able to invest your profits. It's complex -- not saying it's novel in this aspect, it's  
23 complex, but it will materially add to the weight of the case and it's the opposite of the  
24 exceptionally focused damages claim that you might get under the fast track.

25 Just moving down 58(3), you see (d), "whether any additional claims have been or will  
26 be made". We don't have additional claims in accordance with rule 39, which we all

1 know is the equivalent of part 20 under the CAT rules; it's not one of those cases. But  
2 what we do have is this strange penumbral involvement of Design911 whose role is  
3 unclear and the suggestion that there's a third reseller who's also interested in some  
4 way. You can't possibly allocate a case to the fast track without knowing who the  
5 parties are, what the claims are, what the trial is going to involve and so that's another  
6 reason why the fast track is a non-starter.

7 58(3)(e), "the number of witnesses involved, (including expert witnesses, if any)". In  
8 a way, this overlaps with the time estimate for trial because one of the main drivers for  
9 the time estimate for trial is the number of witnesses at the trial. We haven't been able  
10 to engage Eurospares directly in a proper discussion of this issue. They have said  
11 that they think they need one factual witness at trial; they've relied on three factual  
12 witnesses for this application -- I accept that one of those is a solicitor. It would be  
13 very surprising if you could cover the scope of issues in this case, in a way compliant  
14 with the practice direction, that it's the equivalent of 58(3)(e) with only one factual  
15 witness. So, they've budgeted for two in their costs budget.

16 We think we'll need to rely on three or four factual witnesses. There'll need to be  
17 a witness from Porsche AG, our parent entity, about the design of the SDS and at least  
18 two witnesses from Porsche GB, the UK (inaudible) of Porsche. If you look at expert  
19 witnesses, everyone agrees you'll need economic expert evidence, inevitable in  
20 a vertical agreements case. Eurospares say they may also want accountancy expert  
21 evidence. As I say, that's not surprising if they've really got a serious Sempra Metals  
22 claim they want to they want to pursue.

23 We also say, and Eurospares haven't disagreed with this, that industry expert evidence  
24 might be helpful to the Tribunal just to help you think about, for example, what the  
25 characteristics are of spare parts for luxury vehicles and to think about whether they  
26 do necessitate a selective distribution system. You might want an independent voice

1 on that question, or independent voices. You might also want some help on  
2 substitutability of spare parts between OEM and OES suppliers, as Ms Howard set out  
3 when she set out the market context earlier.

4 So, ballpark number of witnesses: anywhere between seven and 12. Again, it's just  
5 not a fast track case.

6 Then finally on the criteria 58(3) are (f) and (g), which both go to documentary evidence  
7 and disclosure. A really curious aspect of this hearing is that not only have Eurospares  
8 not come to it with a draft order setting out the directions that they're asking the  
9 Tribunal to make for the onward conduct of the claim, which you'd expect them to do  
10 if they were serious about having a seriously expedited claim, but they haven't come  
11 to this hearing with any proposals about disclosure. Of course, those proposals could  
12 only be partial because we haven't served our defence yet, but what we could have  
13 had is a set of proposals as to the categories of disclosure that they think they should  
14 be giving and that they think we should be giving. And if you really wanted a case to  
15 come on quickly, that's what you'd be coming to the Tribunal with.

16 Actually, again, we have put in some proper evidence about what we think the  
17 categories of disclosure should be, and in their skeleton argument, Eurospares seems  
18 to agree that they are at least the categories and they might be wider. What I'm saying  
19 is that this is a case where there is going to be a real need for disclosure, you are likely  
20 to have to think about that; and where Eurospares are not putting themselves in the  
21 best stead to be moving this case forward in relation to their approach to disclosure.

22 The final thing on fast track that I just want to do, just to bring that into a really practical  
23 light, is to have a look at the proposed timings at the end of Eurospares' skeleton  
24 argument. It's on page 25 of their skeleton argument; this is where they set out their  
25 proposed directions. At paragraph 60 there's a table.

26 The first thing to say about this before I go to the table itself is that really oddly, this

1 isn't mentioned in the skeleton at all, but Geradin have asked in correspondence and  
2 have also written to the Tribunal to suggest that after this application is determined,  
3 there should be a stay of the proceedings for ADR. Now, that isn't acknowledged in  
4 the skeleton; they haven't told us how long they think the stay should be; they haven't  
5 told us what kind of ADR they've got in mind. We've asked all those questions and it's  
6 been crickets in response. We're looking forward to hearing that and super happy to  
7 talk about it, of course.

8 But the starting point when you look at this timetable is that it doesn't actually even  
9 account for all of the stages that Eurospares say should be taken to trial. Taking that  
10 as a starting point, subject to that layer of uncertainty, if you start from the back end of  
11 the timetable, so the bottom of the table, you see that they propose a trial at the end  
12 of December 2025 or January 2026, which sounds unpalatably like a Christmas  
13 present to me. It's unlikely to be that there is a trial literally at the end of December or  
14 the start of January 2026, including because of reasons of witness availability and  
15 Tribunal availability, apart from anything else.

16 Then if you just move back, just again to gauge how realistic this timetable is, if you  
17 look at the date for expert reports, that's the 31 October; the date for reply factual  
18 evidence is the 22 October. So there'd be nine days between reply factual evidence  
19 and expert evidence. That is not a way to produce useful expert evidence for the  
20 Tribunal, even if it were possible in terms of the legal teams doing it.

21 If you then go further back: the date for primary witness evidence, 10 October. That's  
22 three weeks after the suggested date for disclosure. There's no way that the parties  
23 in a case that everyone agrees is going to involve disclosure could read the disclosure  
24 and address it properly and helpfully in witness statements in that time.

25 If you move further back again, there's two weeks between the proposed CMC, which  
26 is a disclosure CMC, and the date for disclosure, but again, there's no way, if there

1 are disputes on disclosure, that they could be determined at a CMC on 5 September,  
2 and then the disclosure could be searched for -- bearing in mind that this is not  
3 disclosure that's in predestined repositories like board minutes or anything like that,  
4 disclosure that would require some looking for -- it couldn't be done in two weeks' time.  
5 But then before that at the start of the timetable, they envisage we should spend two  
6 and a half months from now talking about what the scope of disclosure should be.  
7 In my submission, for all of those reasons, this just is not a serious proposal. It smacks  
8 of kind of ticking the box but not really expecting that this timetable is going to be  
9 ordered. That's what I want to say about fast track. I submit it's totally clear that the  
10 case just doesn't fall within the fast track procedure.  
11 Just before I sit down, I just want to make one closing remark that identifies the themes  
12 that unite these two principal applications that are before the Tribunal. I made the  
13 point on the injunction application about cakeism, that Eurospares want to get the  
14 injunction without paying the price for it in the form of the cross-undertaking. We've  
15 all heard what the Tribunal's provisional view about that is.  
16 The same thing is that they complain that they urgently need to reestablish supplies,  
17 even though it was their decision to run the clock down until the last possible moment  
18 before they applied for the injunction. They've layered complexity on top of that by  
19 making the claim more complicated than it needs to be: by bringing in Design911, by  
20 adding this Sempra Metals damages claim, by putting in their skeleton argument and  
21 oral submissions today, new arguments that aren't pleaded, and again, they then come  
22 to Tribunal and they ask you to spare them from the consequences of their own  
23 decisions by saying, "Okay, you can have an injunction, don't need to  
24 cross-undertaking; okay, we agree that the rules for the fast track are stricter than it  
25 would be nice to see them so we'll put the case on the fast track even though it doesn't  
26 really meet the requirements."

1 Eurospares are totally entitled to make whatever claim they like, and we'll see what  
2 you make of it at the trial in six months or nine months' time, but they have not  
3 conducted themselves in such a way as to entitle themselves to special measures  
4 pending that trial. The fact that they are a smaller business than my client doesn't  
5 remotely mean that the usual rules don't apply. They have to bear the consequences  
6 of their own decision-making, and they are, to a very large extent, the authors of their  
7 own misfortune. They don't get an injunction, because they waited too long to ask for  
8 it, because they are reluctant to provide a cross-undertaking, because damages are  
9 an adequate remedy, and they're not entitled to use the fast track procedure, because  
10 the case doesn't remotely meet the criteria.

11 And really, it's that simple.

12 That's all I wanted to say. Unless there's anything more I can help you with.

13 THE CHAIR: Thank you very much, Ms Abram.

14 Reply submissions by MS HOWARD

15 MS HOWARD: I'm just going to pull up my notes. I'm not going to try and address  
16 every point; I'll just try to keep to the material part. (Pause)

17 I want to focus on the salient points. I'm not going to engage in tittle-tattle about  
18 pre-action process or cakeism. I'll just say the words of the former Her Majesty the  
19 Queen that "recollections differ" and we'll move on.

20 The key points, we say, that the merits of this case are not weak. The Defendants  
21 have conceded that there is a serious issue to be tried, and therefore there has  
22 a prospects of success, and we're a bit bemused by how they're now turning around  
23 and trying to attack the merits of the case, and say essentially that it's unarguable and  
24 they were entitled to apply for a strike out. We just we don't think that's consistent with  
25 their position on serious issue to be tried.

26 I wanted to make some points this morning, I was going to take you on selective

1 distribution systems and what the interplay was with motor vehicles and the Vertical  
2 Block Exemption Order, but I didn't want to weigh you down with too much law in  
3 opening. And ultimately, these are matters for trial. There is an arguable case, and  
4 you may not want to get involved with trying to weigh up those competing disputed  
5 issues of fact, disputed issues of law, at this preliminary stage.

6 My learned friend said that the first ground in our pleaded claim form, that a ground  
7 based on breach of the Metro criteria is basically unarguable, is simply wrong. There's  
8 extensive case law that, even though selected distribution systems are a recognised  
9 form of distribution, if you don't meet the Metro criteria, then those membership criteria  
10 can, in and of themselves, be a breach of the Chapter I prohibition. And the point that  
11 we're trying to make in the pleaded case, and as part of our serious issue to be tried,  
12 is that here, the membership criteria, in particular that requirement to have a repair  
13 premises and to have specialist repair staff -- we've called it the repair requirement,  
14 we've also said this is tantamount to a reseller ban -- goes beyond what's necessary  
15 and proportionate, and it does not meet the Metro criteria.

16 So although yes, selective distribution systems are seen as a recognised balance  
17 between the competing priorities of distribution efficiencies, intra-brand competition,  
18 and minimising negative effects on competition, you have to have a situation where  
19 the intra-brand competition benefits outweigh the negative effects. So, a manufacturer  
20 like the Defendant can close the ring and it can create its own club and set the  
21 membership rules for that club, but the terms of entry to that selective distribution  
22 system must be fair and transparent. They must be objective. They must be  
23 qualitative. They must be uniform. Not discriminatory, inconsistent, arbitrary or  
24 disproportionate. That's the Metro safe harbour.

25 But if the membership criteria don't meet the Metro safe harbour, then they will fall foul  
26 of Chapter I, and there's a string of cases where that's been applied. I'm not going to

1 give you all of them. Visa v MSDW, it's not in the bundle, but it was a case where Visa  
2 tried to keep a competitor, Morgan Stanley, who ran a competing card payment  
3 network, out of its card payment system, that precluded access to the acquiring market  
4 and the commission, the general court, the court of justice found that the membership  
5 rules were arbitrary, inconsistent, and therefore not necessary or proportionate, and  
6 were a breach of article 101.

7 Another example is in the bundle that's up and running. I'm not going to take you to it  
8 now, I'm just going to give you references. But authorities bundle tab 33, and if you  
9 look at paragraph 37 on page 974 and 41 on 975, it's very clear that a failure to meet  
10 the Metro criteria can be an infringement of the Chapter I prohibition. And there will  
11 obviously be a dividing line, whether that's by object or by effect.

12 Now, in this context, we need to overlay the requirements of the motor vehicle regime,  
13 and we need to keep in mind that priority of promoting competition between authorised  
14 members and independent operators that set out in the CMA guidelines. And the  
15 essence of our case, in a nutshell, is that the requirement to have physical repair  
16 premises does not meet the Metro criteria because, in effect, it's operating as a total  
17 ban. It's precluding resellers from ever becoming members of the section distribution  
18 system, and it's imposing an onerous obligation to have repair workshops, staff,  
19 ancillary equipment like hire cars, for services that a reseller is never going to provide.  
20 So in effect, it reduces the number of admissions of independent resellers down to  
21 zero, and that's not qualitative, that's a quantitative restriction.

22 And it also operates as a form of online sales ban, because it precludes an  
23 independent reseller from having an online business. And I just want to take, while  
24 I'm here, to the vertical block exemptions guidance from CMA. It's not in the bundle.

25 (Pause)

26 THE CHAIR: I'm not going to discourage you from taking us to this, Ms Howard, on

1 the basis that we are going to finish by 4.30.

2 MS HOWARD: I'm just going to take this briefly to you. So, we've just given you the  
3 extract, the relevant section starts at 8.30, and it talks about here the hardcore  
4 restrictions that are contrary to the vertical block exemption. And 8.30 refers to Ping,  
5 where the Tribunal -- and it was upheld by the Court of Appeal -- held that a ban on  
6 selling on the internet can amount to a form of geographical and customer group  
7 restriction and a restriction of competition by object. And that's because, as the  
8 Court of Appeal held, it limits the ability of the reseller to sell outside their immediate  
9 locality. The internet immediately expands the area of the catchment area, and that  
10 by artificially limiting the scope of customers, that diminishes price competition.  
11 So that's recognised here, but as we go on, and particularly we're talking about the  
12 membership criteria of being admitted to the selective distribution system,  
13 paragraph 8.38(c), which is just at the bottom of the page on page 63, talks about  
14 terminating supply of products, but also (pause)

15 Says that:

16 "Where you impose a requirement only to sell the contract goods or services in  
17 a physical space or in the physical presence of specialised personnel, [and this is  
18 picked up again in 8.39] that amounts to a hardcore restriction, because it stops online  
19 passive sales." [as read]

20 So that will account to a hardcore restriction. And similarly, 8.41(d) also talks about  
21 a requirement that it:

22 "... operates a brick and mortar shop or showroom, as a for instance, as a condition of  
23 becoming a member of the supply selective distribution system." [as read]

24 So there we're saying that the fact that, as part of the membership criteria, Porsche is  
25 imposing a requirement that there be a physical repair premises, and that these spare  
26 parts are sold with specialist staff as part of a bundled provision of spare parts with

1 a bundled repair and maintenance service, is a hardcore restriction that's contrary to  
2 the block exemption, and means it's outside the scope of the Metro criteria.

3 And lastly, we say --

4 MR OLSEN: Sorry, I'm not sure I follow the 8.41(d) example, because isn't that saying  
5 that, actually, those requirements related to online sales that benefit from the  
6 exemption?

7 MS HOWARD: So I think there's a difference: once you're inside the club and you're  
8 admitted to the selective distribution system, then it's true that the manufacturer can  
9 stop now. It used to be just they could stop active and passive sales. But if the actual  
10 criteria for getting admission to the selective distribution system means that online  
11 resellers are automatically precluded, and that applies in all instances, without looking  
12 at whether there's more proportionate ways of managing risks from online sales, that  
13 goes beyond what's necessary and proportionate.

14 MR OLSEN: I'm not sure that goes to the point you're making, but okay.

15 MS HOWARD: Well, what we're trying to say, that the absolute ban on resellers, which  
16 applies to all resellers, goes beyond what's necessary and proportionate to meet the  
17 Defendant's professed concerns about safety, about counterfeit goods, about quality  
18 of service, because it is always open to Porsche to admit resellers into its selective  
19 distribution system, and in fact they used to do, with that certificate that they granted  
20 to Design911.

21 There are other mechanisms that they could use, more suitable and proportionate  
22 means, to check criteria for safety, for fitting, and to stop counterfeit measures. And  
23 there are examples that we've given in the evidence. If I can take your Lordships to  
24 the witness statement of Mr Derrick, the second witness statement, which is at  
25 bundle c, and it's page 65. Start at paragraph 21. There he says they only sell  
26 genuine Porsche parts, which have always come directly from Porsche. So there's no

1 risk of counterfeit products here. But he also goes on to explain how the:  
2 "Eurospares website is designed to assist customers in identifying the correct parts  
3 and the related components."  
4 And he gives an example of the "exploded part diagrams" so that customers can see  
5 exactly what parts are needed, and they're given help on how to install them. And the  
6 example of that is in bundle E at page 246. So there you'll see that there's  
7 a screenshot from Eurospares' website, which sets out the parts, how they're fitted  
8 and the related parts that go with them for proper installation.  
9 So there could be criteria that Porsche may want an online reseller to have -- I should  
10 add that these diagrams are licensed from Porsche itself, because if they've got an  
11 ongoing licensing with paid royalties for Porsche's diagrams -- but Eurospares has  
12 supplemented them to explain the other related parts, and it does provide guidance  
13 on installation. So Porsche could always impose criteria for a reseller to have on their  
14 website, to explain and guide the customer on how to install them.  
15 Similarly, Mr Derrick, if we click back again to the statements bundle under  
16 paragraph 23, again at 29, he talks about having:  
17 "... a reliable and accurate system for identifying the parts ... and tracing them."  
18 That's at 23. Again at 29, he talks about their heavy investments in a "custom-built  
19 ERP system", which again traces the parts.  
20 Now, the example of that is at bundle E, page 193. So again that's from Eurospares'  
21 tracing program, ERP, so that they can track which parts have been supplied to whom,  
22 and if there's ever a problem with the part once it's been sold, they can trace it through  
23 and work out the exact part number and if there's a problem. And in this regard,  
24 Porsche says, "oh, well, we'll have a system for dealing with parts that are sold on".  
25 Well, if you buy your AirPods -- that my learned friend referred to earlier -- or your  
26 mobile phone, you may not always buy it from the manufacturer. You may buy it from

1 another reseller. You may get your phone from a mobile network operator, or you may  
2 get your AirPods from Amazon, for example. If you have a problem with that part,  
3 you're not always going to go back to Amazon to sort out any problems with installation  
4 or advice, you would go to the manufacturer. And indeed, most end consumers have  
5 direct rights in the Consumer Rights Act to go to the manufacturer to raise problems,  
6 ask for a refund or a discount, or to get guidance or a replacement part.

7 So Porsche, with its luxury brand and concerns about its prestige and reputation, is  
8 not going to turn a customer away who's been given a genuine Porsche part. It will  
9 ultimately have come through the Porsche network, even if it's been sold by somebody  
10 independent outside of that network.

11 Lastly, as an example of another proportionate measure, I'd like to take back to the  
12 statements. Mr Derrick's second statement, paragraph 24, he refers -- it is  
13 confidential, so I'm not going to give the name -- to another OEM. And their approach,  
14 where there are specific safety critical parts or parts that need specialist training in  
15 order to fit them, he mentions that that other OEM has an "ASM authorisation", which  
16 means:

17 "... an area manager authorising or signing off the release of the part and confirming  
18 that the customer is capable of fitting the part."

19 Then he, Mr Derrick, gives an indication of actually the scale of safety concerns, the  
20 total number of parts for that particular manufacturer, that Eurospares offer. You'll see  
21 that it's actually a very small proportion, less than 5 per cent you actually need that  
22 raise security concerns or fitting concerns that require ASM authorisation. So that is  
23 an example --

24 THE CHAIR: Sorry, what page is that?

25 MS HOWARD: This is on page 66. Bundle C, page 66, paragraph 24.

26 So the scale of the safety or quality concerns by another similar manufacturer are

1 relatively minor and there's an appropriate mechanism managing those risks.

2 Mr Derrick continues in paragraph 25 that, you know, "If Porsche" -- I don't think it's  
3 ever been offered training but he says that he would be "more than willing to  
4 participate" in training. Paragraph 25.

5 Then further down at 31, he also says they would be happy to take appropriate  
6 monitoring, any reasonable measures such as audits, training, verification or any  
7 restrictions that would mirror those that are in place upon the automotive dealers.

8 So that's the point that we say this is not a weak case. My learned friend tried to say  
9 that this is complicated, that it's unfocused. Actually, most of these principles are set  
10 out in established case law, whether you're looking at case law like Metro,  
11 Visa v MSDW, Up & Running, whether you're looking at Ping for online sales bans,  
12 whether you're looking at Google Shopping for discriminatory self-preferencing,  
13 there's a body of case law which everybody is familiar with. We also have the helpful  
14 guidance from the CMA on both the Vertical Block Exemption and the Motor Vehicles  
15 Block Exemption.

16 So I'm going to draw the line on that point. I want to then come back about the  
17 adequacy of damages for the Claimant. My learned friend sought to draw  
18 comparisons between Eurospares and Design 911 and the references to future tenses  
19 in the witness evidence of Mr Chopra.

20 I'd just like to say that this overlooks key differences between Eurospares' business  
21 model and that of Design 911, because Eurospares only sells genuine Porsche parts.  
22 Design 911 sells genuine parts, but it also sells some OES parts and generic parts.  
23 So it has a different clientele. Eurospares sells Porsche parts, but also a range of  
24 other competing brands. Design 911, as the name suggests, only sells Porsche parts,  
25 it doesn't sell competing brands.

26 Now, there was a question about stocks and stock provision. Obviously we don't know

1 about Design 911's stock provision, but in the terms of Eurospares, it's not been able  
2 to stockpile during the last eight months and during the extension. That is because,  
3 as my learned friend said, the volumes of the products that have been supplied have  
4 been kept to pre-existing-existing levels. So it's not been able to build up stocks.  
5 My learned friend referred to Eurospares having substantial stocks. But if we look at  
6 the witness statement -- I'm going to have to -- sorry, I haven't got a note of -- it's in,  
7 again, Mr Derrick's second statement, paragraph 38, on page 69. These figures aren't  
8 confidential and I've checked that we're able to refer to them.  
9 Now, the large figure of stocks is approximately £90 million, but that is stock across all  
10 brands. Of that, over £89.5 million relates to other OEM brands. That shows you the  
11 levels of stock that's required for Eurospares to sustain its one-stop model.  
12 By contrast, for Porsche parts, Eurospares -- according to Mr Derrick here and I've  
13 checked with him -- there are £500,000 worth of genuine Porsche parts.  
14 Now, I'm sorry for giving evidence from the bench, but I've been WhatsApping  
15 Mr Derrick who tells me that of that £500,000, approximately half of that are  
16 second-hand parts, which -- because of a range of classic cars, they're no longer make  
17 new parts for them. So they're all genuine parts, but some of them have to be kept as  
18 second-hand used parts to be used in the old classic cars. So actually the level of  
19 stock is about half that for genuine new parts. Mr Derrick estimates that those current  
20 stocks will allow Eurospares to hold for two to three months.  
21 Plus, if there is no interim injunction now, Eurospares will not be able to guarantee  
22 stocks across the full spectrum of parts, because at the moment it has -- the tap is on  
23 full and it can get all sources of stock, even if it hasn't got them in its warehouse.  
24 But if there is no interim injunction, they will start to be gaps in its inventory. It can't  
25 physically store all of the whole range; it needs to have ready access to stocks, delivery  
26 and to be able to call on them as and when it needs it. But if it hasn't got the full

1 spectrum, then it's not going to be able to access the parts and provide them when  
2 repairers need them. That's really going to cause a problem to its one-stop shop  
3 model. That's not just with Porsche parts, but it will then compromise its business  
4 model of providing, a smorgasbord of brands to its repairers across the board.

5 Sorry, I'll just take a moment. Ms Hafesji reminds me that obviously, the most popular  
6 products will go quickly, and the less popular ones are likely to want to stay in the  
7 warehouse.

8 On that point, we say there is a problem here that the existing stocks will only allow  
9 a couple of months to survive and after that there's going to be serious damage to  
10 Eurospares' business model.

11 Just in terms of the other independent resellers, there are references in the bundle.  
12 I think Design911 supplies ceased in September 2024. There is another operator,  
13 Bell & Colvill. Their suppliers were stopped in February 2025. That's at Mr Derrick's  
14 second statement, paragraph 39. It's the same page, just lower down the page that  
15 we were looking on, page 69.

16 I'm not going to make too much on cross-undertaking; I think we've explored it enough.  
17 I would just say that obviously impecuniosity is not a requirement in the fast track  
18 process. Eurospares has indicated that it's willing to provide a cross-undertaking.

19 On the balance of convenience, it is true that there was an extension that was granted  
20 during the transition period. The subsequent extension was actually granted for  
21 Porsche to have time once it instructed its new solicitor. It needed extra time to  
22 prepare its response to the injunction application, so that additional period of time was  
23 agreed in order for Porsche to have time to prepare its response.

24 My learned friend made much of the attempts to look for alternative supplies and try  
25 to dismiss this as two or three emails. But that's a very selective, we say distortive,  
26 summary of the evidence because it's clear from Mr Derrick's second statement that

1 he did make extensive attempts to try and find alternative supplies, and that's including  
2 with OES suppliers as well as with Porsche supplies.

3 If you turn to paragraph 7 of his second statement, it's on page 61, there, it's not just  
4 in relation to Bosch, but he also spoke to MAHLE about getting supplies of OES parts  
5 from them, but his evidence is that they only produced 376 products out of the total  
6 462,000 Porsche products that Eurospares requires. That equates to about  
7 0.08 per cent of the range. Bosch refused because it was not taking on new  
8 authorised distributors.

9 Similarly, Mr Derrick also tried another OES supplier, Brembo, and in fact, he says  
10 here they didn't respond. But if you go to the underlying evidence, D135, that shows  
11 you that there must have been previous communications between them. If you just  
12 bring up page 135, it refers to the fact that they also have refused to take on new  
13 accounts. So, the various opportunities -- they're trying to get allocated and authorised  
14 by the OES suppliers to distribute their products, they're facing barriers at every  
15 instant.

16 And then in the case of Bosch, they referred them to their authorised distributors. The  
17 problem is, of course, the lower the supply chain that Eurospares is forced to go  
18 to -- and this is OES products, which it doesn't want to sell, it wants genuine  
19 parts -- there will be a double marginalisation at each stage. So effectively it will face  
20 a margin squeeze where its input costs, the wholesale price it has to pay for the goods,  
21 will cover not just Porsche's margin or Brembo or Bosch's, but then their authorised  
22 distributor's margin as well. And then it means that its own profitability in order to  
23 compete with the resale price downstream will be squeezed and that's going to affect  
24 its ability to compete.

25 Mr Derrick's also made other attempts. If we go back to bundle C, second statement  
26 at paragraph 8, he reached out to the Alliance Automotive, a motor factor which sells

1 parts; they didn't reply -- and the letter, just for your reference is at D135 -- and he also  
2 talked to other OES companies at the trade fair that they have problems getting the  
3 tooling. They can't use their own tooling; they have to use Porsche's tooling and  
4 they're not allowed to use that tooling without its authorisation, and they're not allowed  
5 to set up that tooling to make OES parts. You can see this at paragraph 9 of his  
6 second statement.

7 So, Porsche has made enquiries and faced significant difficulties in getting OES parts.  
8 It can't get genuine parts and you'll have the references earlier, at paragraphs 35 to  
9 39 of his first statement, about the problems with generics. His business is not built  
10 around generic products; his customers want genuine Porsche parts for all the reasons  
11 that we explained with the problems of warranties, the problems of customers wanting  
12 the genuine parts for their vehicles, and feeling that it will either compromise the  
13 warranty or compromise the value of their vehicle.

14 I'm not going to deal with the fast track procedure, I think we've been through the fast  
15 track procedure. We have not set out directions at this stage because we thought that  
16 would be a matter for consequential directions after the judgment. We tried to set out  
17 the timetable in our skeleton to show how the trial could be accommodated within  
18 six months. It's not perfect, obviously. We haven't liaised with my learned friend. I'm  
19 sure we could come out with a practical working solution. I wasn't envisaging that  
20 August would be a holiday period; I was envisaging that there would be a process of  
21 disclosure ongoing through August through to September, but I'm sure that this trial  
22 can be accommodated with expedition to meet the six-month timetable if we want to.

23 I just wanted to clarify that we are not bringing a claim for Sempra Metals. It's not  
24 a financing losses claim. What I was trying to envisage in the pleading that my learned  
25 friend took you to is that loss of capital growth, so trying to predict where the business  
26 would have been with an expanding business with Porsche parts against decline in its

1 business, its market position and goodwill, if it does not have continuing access to  
2 parts in the interim.

3 I'm just going to check whether there's any other points. Unless you have any other  
4 questions to ask me, those are my submissions.

5 THE CHAIR: No. Can I just ask Ms Abrams to confirm that the agreement  
6 that -- I can't find it now, but there's a letter that we were shown, the agreement by the  
7 Defendant to continue to supply on the existing basis will continue pending  
8 determination of this application?

9 MS ABRAM: Yes. The agreement is that we continue to supply on that basis until the  
10 Tribunal's judgment --

11 THE CHAIR: Yes.

12 MS ABRAM: -- which I absolutely accept is the time when you hand down the  
13 judgment as opposed to a time we get it in draft or anything of that nature. So until  
14 that moment.

15 THE CHAIR: Okay. Thank you.

16 MS HOWARD: If I could just say on those terms, sorry, that is one point that  
17 Eurospares has had no problem with the terms of the ongoing order. I mean, my  
18 learned friend suggested that there might be problems and disputes down the track.  
19 It's perfectly happy to accept an order that maintains existing volumes of sales and  
20 existing terms of supply and we would be happy for that to be written into the order.

21 THE CHAIR: Okay.

22 Well, thank you very much for your submissions. The Tribunal is going to reserve its  
23 judgment, but obviously appreciates that this is an urgent matter and will endeavour  
24 to let you have our ruling as soon as possible.

25 (4.24 pm)

26 (The court adjourned)