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5 **IN THE COMPETITION**
6 **APPEAL TRIBUNAL**

Case No: 1702/5/7/25 (T)

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

12 Friday 6th February 2026

13
14 Before:

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16 Hodge Malek KC

17
18 (Sitting as a Tribunal in England and Wales)

19
20
21 BETWEEN:

22
23 **Lenzing AG and Others**

24
25 **Claimants**

26
27
28 **v**

29
30 **Westlake Vinnolit GmbH & Co. KG and Others**

31
32 **Defendants**

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

35
36 Michael Armitage and Hugh Whelan (Instructed by Stewarts) on behalf of the Claimants

37
38 Josh Holmes KC and Conor McCarthy (Instructed by Willkie Farr & Gallagher LLP) on
39 behalf of the First to Third and Fifth and Sixth Defendants

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43
44 Digital Transcription by Epiq Europe Ltd
45 Lower Ground, 46 Chancery Lane, London, WC2A 1JE
46 Tel No: 020 7404 1400
47 Email:
48 ukclient@epiqglobal.co.uk
49
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1 Friday, 6 February 2026

2 (10.30 am)

3 (Proceedings delayed)

4 (10.36 am)

5

6 Case Management Conference

7 THE CHAIR: Some of you are joining us on our website, so I must start, therefore,
8 with the customary warning: an official recording is being made and an authorised
9 transcript will be produced, but it is strictly prohibited for anyone else to make an
10 unauthorised recording, whether audio or visual, of the proceedings. Breach of that
11 provision is punishable as contempt of court.

12 Okay. Good morning.

13 MR ARMITAGE: Sir, do you need introductions?

14 THE CHAIR: You might as well do the introductions.

15 MR ARMITAGE: Yes. So I appear, as at the first CMC, with Mr Whelan for the
16 claimants.

17 THE CHAIR: Yes.

18 MR ARMITAGE: My learned friends Mr Holmes King's Counsel and Mr McCarthy
19 appear for the Westlake defendants.

20 THE CHAIR: So all regulars, so that's fine.

21 MR ARMITAGE: All regulars.

22 Just in terms of bundles, may I just check that you have six hearing bundles running
23 from A to F?

24 THE CHAIR: Probably. I'm sure I've got them all. Yes.

25 MR ARMITAGE: Good. I hope you now also have the A3 versions of the --

26 THE CHAIR: I've got those. That's what we'll go through later on today. Yes.

1 MR ARMITAGE: Then there are also, I think, two volumes of authorities. I don't need
2 to go to many of those. You'll be familiar with most of the main ones, of course.

3 THE CHAIR: I'd be surprised if we need to go through the authorities, but if we do, we
4 do. That's fine.

5 MR ARMITAGE: Of course. They are there should we need them.

6 THE CHAIR: And you brought a copy of the settlement agreement?

7 MR ARMITAGE: We have that.

8 THE CHAIR: I don't want to see the settlement figure.

9 MR ARMITAGE: Yes. Yes, we have a version that we can --

10 THE CHAIR: Because one of the issues when we come to that will be whether or not
11 I, as chairman, should look at that agreement, because I doubt there'll be anything that
12 will prejudice the trial. The only thing that could do is, of course, the figure, the
13 settlement figure, which I don't want to look at. But we'll come to that when we're
14 there.

15 MR ARMITAGE: Yes, exactly.

16 THE CHAIR: Looking at the shape of things, Willkie Farr sent in just now a proposed
17 change to the list of issues for trial.

18 MR ARMITAGE: Yes.

19 THE CHAIR: I think we should deal with that first.

20 Then there's a list of issues for the experts, because, as you know, I'm not happy to
21 just say you can call experts; I need to know exactly what they're going to be talking
22 about. Obviously, I looked at their sort of short-form report summarising what their
23 approach is.

24 Then, on disclosure, there's some big topics. One is whether I should now direct that
25 known adverse documents should be disclosed. I'm inclined to do that. Maybe
26 I missed a trick last time round, but looking at the way things have evolved, I think

1 that's going to be an appropriate order to make, which is equivalent to model A.

2 Then as part of that, I need to see where are we on non-party disclosure, because

3 there was a fundamental misunderstanding last time that we thought that the relevant

4 party was IHS and it was here in the UK. It's more complicated than it seems.

5 If you're going to go down the section 1782 route, which I think you probably should

6 do, my experience of that route is it can take a lot longer than you think it can take.

7 Particularly in the light of the correspondence from OPIS, they are saying really two

8 things. One is: well, you should try and get the stuff from the defendants first, and

9 that's what I said last time. So if you go to the court today without getting what you

10 need from the defendants on, I think it's category 5(a) and (b), you're going to be met

11 with that argument, because they'll say even the English judge said that.

12 Then the willingness of them to do the digging around will, of course, depend on: are

13 they going to be reimbursed for the cost of that exercise? Because if they're going to

14 get three and fourpence, or the equivalent in dollars and cents, they're probably not

15 going to be inclined to do much and they'll oppose it.

16 On the other hand, if they know that they're going to be looked after and that it's going

17 to be an exercise where they're going to be remunerated for doing it, they may be

18 more willing to do it.

19 But it does raise issues about the trial date, because when I look at your pleading, it's

20 IHS-centric. You know, this is a case where it's at the heart of your case that the IHS

21 index has been manipulated. If you're going to prove that, you're going to have to get

22 disclosure.

23 You may be right; you may be wrong. You've given various inferences, bringing

24 together threads of documents to say: when you put all this together, the index has

25 been manipulated. But at the end of the day, what the defendants are going to say is:

26 you're going to need to get disclosure from IHS.

1 So I think that that's a really big topic, and I must say, I'm not impressed by how long
2 it's taken to get here. I clearly envisaged that any application for non-party disclosure
3 would be in 2025. You two blame each other and I understand that; that's both of your
4 jobs to do that. But, at the end of the day, if you have an issue like this -- and it's
5 clearly been a roadblock, this issue 5 -- just write in. I would spend, you know, maybe
6 an hour and I'd come back with the answer. This way, you'll get the answer today, but
7 I could have given it to you pretty easily before, and then you could have moved on.
8 So, in future, if you have an issue on disclosure that is holding back something fairly
9 fundamental like this, just write in and I'll deal with it in the normal way.

10 Then we've obviously got the Redfern schedule to go through and then we've got the
11 timetable for trial. But, as I said, on the timetable for trial, I'm at the moment not
12 convinced that we're going to meet -- whether it's 3 or 10 May 2027. I'm sorry to say
13 that, but my experience is very mixed on section 1782. I think if it's going to be
14 opposed by OPIS in any material way, you're not going to get anything for some time.
15 Now, we may have to make a decision today, whether we bite the bullet and say,
16 actually, we should be looking for a later date, but then in which case we need to see
17 what your trial dates are and what Mr Holmes' trial dates are; or we may say: no, let's
18 see where we are in a few months' time. But I think that's where we are.

19 So let's look at the list of issues for trial. Where's the original version? Is it in bundle D?

20 MR ARMITAGE: You mean the version we were looking at CMC 1?

21 THE CHAIR: The one that was approved.

22 MR ARMITAGE: I think --

23 THE CHAIR: There's one at tab 25.

24 MR ARMITAGE: The one at tab 25 is effectively the one that was approved with the
25 only small disputed outstanding points highlighted in red. So that indicates the further
26 potential issues. I don't think there's any need to look beyond that.

1 THE CHAIR: Yes. I thought we basically had sorted it out at the last hearing.

2 MR ARMITAGE: So there's two points. I should say, actually, Mr Whelan's going to
3 address you on one of them, and that's one point in relation to which he's going to
4 speak.

5 THE CHAIR: Oh, that's brilliant.

6 MR ARMITAGE: But on issue 2, this is a point that's arisen very recently. Do you
7 have that at page C350.2?

8 THE CHAIR: Yes.

9 MR ARMITAGE: There's some proposed additional wording which we received,
10 I think, either yesterday or the day before.

11 THE CHAIR: Yes.

12 MR ARMITAGE: And we don't oppose that being added.

13 THE CHAIR: No, it reflects the pleading. So I approve that one.
14 Next one?

15 MR ARMITAGE: Yes.

16 The next one is an issue that's arisen in relation to the discussion of issue 15, and I'm
17 going to let Mr Whelan tell you about that, if I may.

18 THE CHAIR: Okay, let's hear him.

19 Thanks very much, Mr Whelan.

20 MR WHELAN: Thank you.

21 I'll just add that the list of issues also removes INEOS, which is another change
22 between them.

23 Okay, so issue 15, this was initially -- or the claimants understood that this was an
24 issue on the basis of the defendants' denial that there was joint and several liability as
25 between individual defendants.

26 THE CHAIR: Yes.

1 MR WHELAN: That's at the Defence 68(c), which is at D/3/81.

2 THE CHAIR: Yes. I'll have look at that. Yes. (Pause)

3 Yes.

4 MR WHELAN: So picking up midway through:

5 "For the avoidance of doubt, it is denied that each Westlake Defendant would be jointly

6 and severally liable ..."

7 THE CHAIR: What paragraph are you looking at?

8 MR WHELAN: I'm sorry, 68(c).

9 THE CHAIR: (c), yes.

10 MR WHELAN: "... denied that each Westlake Defendant would be jointly and severally

11 liable ... merely by reason of their membership of an undertaking ..."

12 Now, in correspondence, the defendants have confirmed that they don't maintain that

13 position and that they will amend the sentence of that defence in due course.

14 However, in the course of making that confirmation, the defendants have sought to

15 reformulate item 15 so that it no longer applies to liability as between the defendants,

16 but instead concerns the defendants' joint and several liability for all losses caused by

17 the alleged cartel.

18 Now, by the by, we note that this is somewhat surprising as a matter of law, but that's

19 not a matter for today. But the problem, we say, with that is that the defendants have

20 not pleaded that position in their Defence. The only place where this is addressed is

21 at 68(c), which now reads, or will read:

22 "As to the second sentence, it is denied that the Westlake Defendants are liable, jointly

23 and severally, or at all."

24 Then it says it's a matter for submissions in due course.

25 Now, against this, the defendants say: no; in fact, it was the claimants who haven't

26 pleaded this position, so the defendants didn't need to respond to it. We say that just

1 | can't be right.

2 | If I could ask you to turn to the Re-Amended Particulars of Claim, D/2/9.

3 | THE CHAIR: I'll be surprised if you got that wrong, but let's see.

4 | MR WHELAN: Indeed.

5 | THE CHAIR: Yes.

6 | MR WHELAN: So just racing through this.

7 | THE CHAIR: Yes.

8 | MR WHELAN: Beginning at paragraph 1:

9 | "This is a claim for damages caused by a single and continuous infringement ... for

10 | which the Defendants are jointly and severally liable."

11 | THE CHAIR: Yes.

12 | MR WHELAN: 1(c):

13 | "Each of the Defendants ... were among the entities that participated in, and/or

14 | implemented, the Cartel."

15 | THE CHAIR: Yes.

16 | MR WHELAN: 1(d), towards the bottom of the page:

17 | "As a result of the Cartel, the Claimants paid higher prices ..."

18 | Then if you could turn to paragraph 40, which is at page 21.

19 | THE CHAIR: Give me one second.

20 | MR WHELAN: Sure.

21 | THE CHAIR: Paragraph 40, yes.

22 | MR WHELAN: So the final sentence of paragraph 40:

23 | "Such collusion had the result [of increasing IHS prices] ... charged by the

24 | Westlake/Vinnolit undertaking, and the Non-Defendant Cartelists (together the

25 | 'Cartelists') ..."

26 | Then finally, page 31, paragraph 56.

1 THE CHAIR: Yes.

2 MR WHELAN: We see, as further pleaded, it is the cartelists' -- so that's defendants
3 and non-defendant cartelists -- single and continuous infringement of competition law,
4 that causes an actionable breach for which the defendants are jointly and severally
5 liable for any loss caused by that breach, i.e., the cartelist breach.

6 THE CHAIR: Yes.

7 MR WHELAN: 56(a):

8 "As a matter of UK and/or European law, such liability follows from the fact that each
9 of the Defendants is a member of an undertaking that infringed the competition rules
10 as pleaded above".

11 So that's a reference to paragraph 56, the cartelists' single and continuous
12 infringement.

13 Then finally, for good order, 56(b):

14 "Further or alternatively:

15 "i. The Claimants believe that [the defendants] participated in the Cartel [consisting of
16 the defendants and the non-defendant cartelists] and/or implemented the Cartel ..."

17 THE CHAIR: You see, as a matter of fact, there's a number of scenarios, but, you
18 know, what you've pleaded is fairly standard. I understand that. But there may be
19 a situation whereby you have a cartel, but Mr Holmes' client may have turned up a bit
20 later. They may have joined it a bit later. So we need to have some sort of mechanism
21 for them to be able to argue that point.

22 Obviously, during the period of the cartel, and if they're involved throughout the whole
23 period, what you say clearly flows. But there may be some qualifications to that.

24 MR WHELAN: We entirely agree. But our position is that if the defendants want to
25 make that argument, they need to plead it, as we have pleaded the joint --

26 THE CHAIR: I understand. But the problem with this one is -- and it's always when

1 | you've got a non-follow-on -- if it was a follow-on, it'd be really easy to know where we
2 | are and it's very easy to plead to.

3 | At the moment, it's not established who was in the cartel, for what periods and when
4 | they came in and came out -- if they did come in and come out -- or if they did come
5 | in late. That's why they probably need more flexibility than normal, because there's
6 | an unknown there.

7 | So what are we looking for? What are you asking them to do now? I can see they're
8 | going to have to amend that paragraph that you showed me at 68(c), but they say they
9 | will amend it. Shouldn't we just hear from Mr Holmes and see what he's going to do
10 | to that paragraph and then come back to you?

11 | Mr Holmes, can you just help us on that, 68(c), how you intend to amend that, so I can
12 | note that down, and be realistic. You know, there's all sorts of points you can take in
13 | these cases, but some of them are completely hopeless. Just focus on the ones that
14 | you think that you're going to win on.

15 | MR HOLMES: Well, sir, first of all, you've hit the nail on the head about our concern.
16 | There's a single and continuous infringement pleaded here.

17 | THE CHAIR: Yes, I know, but it may not be.

18 | MR HOLMES: There's the temporal period, but also, there might be -- I mean, of
19 | course, we deny that there were any infringing activities, but there might have been
20 | infringing activities of which we were not aware and of which we could not reasonably
21 | have been aware, which would therefore not fall within any single and continuous
22 | infringement, and for which we would not be jointly and severally liable.

23 | In those circumstances, the general plea at 68(c), denying liability, including joint and
24 | several liability with the other alleged cartelists is, we say, entirely proper at this stage
25 | of the process and should be reflected in the list of issues.

26 | So we say that the issue of joint and several liability does arise in circumstances where

1 we deny a single and continuous infringement. That will be potentially the subject of
2 further evidence and submissions in due course.

3 What has changed, or what isn't maintained, is any suggestion that the Westlake
4 defendants are not jointly and severally liable inter se. So the question is confined to
5 joint and several liability as respects other alleged cartelists.

6 At a stage where single and continuous infringement is clearly in issue, looking up the
7 page at paragraph 67, you see, it's currently wholly unparticularised and constitutes
8 a bare assertion. We say that the issue of joint and several liability is also in issue.

9 THE CHAIR: But can't you make your pleading a bit clearer than that you've got at
10 the moment and even on your proposal? Hopefully by the end of the day, if we have
11 a lunch break, you can come up with some proper wording on this. But I know what
12 you want to do. It's not quite reflected in the wording you've just said, nor is it reflected
13 in here, but what you want to say, if that's the case, is that if in fact there was
14 a continuous infringement and that you were party to it, you are jointly and severally
15 liable. You're not disputing that. However, you are disputing that there was one.
16 Insofar as there was one, whereby you were involved at particular times and were
17 aware of what was going on, you accept it's jointly and severally liable. Then you have
18 that final qualification you just gave me: that if, in fact, you were either not part of the
19 cartel at that time or you're unaware and couldn't reasonably be aware of certain acts
20 by the others, that you're not responsible for that.

21 So if you can sort that out by lunchtime, then we'll be fine. Okay? Thanks very much.

22 MR HOLMES: Okay, we are happy to do that.

23 THE CHAIR: So on 15, I think that we will have wording of 15, but we'll come back to
24 this if we're still going at 2.00 when we see what Mr Holmes is going to do on
25 paragraph 68(c). That is very helpful. Hopefully we've sorted out that list of issues.

26 Now, the next one to look at is the list of issues for the experts.

1 MR ARMITAGE: Yes. Have you got the updated --

2 THE CHAIR: I've got that.

3 Look, I'm satisfied that the three experts put forward can give relevant evidence which

4 is necessary for the tribunal to consider for the purposes of the just resolution of these

5 proceedings and that all three experts are suitably qualified.

6 As regards your second expert, it seems as though the other side want to leave their

7 options open until they've seen your report. They haven't proposed an expert

8 themselves; they're on the fence, they want to see where they are. So what will

9 happen is that once we get to your report and it's been served, if Mr Holmes wants to

10 have evidence in reply, he's going to have to apply on the normal terms. I'm not saying

11 he's going to get an expert, but I'm not saying he's not going to get an expert. I will

12 consider that when it comes.

13 Is that all right, Mr Holmes? We'll deal with it that way.

14 MR HOLMES: Yes, that's fine.

15 THE CHAIR: So the only issue now is: how are we going to define the issues and the

16 contested points? Which are relatively narrow and we should be able to resolve that.

17 MR ARMITAGE: Yes.

18 So assuming you're content with the black text, which is agreed --

19 THE CHAIR: Yes, no, that's fine.

20 MR ARMITAGE: I should say, we're grateful for the letter on Friday; it's been obviously

21 a helpful process to set this out in this way.

22 THE CHAIR: Yes.

23 MR ARMITAGE: There are two disagreements. One relates to the blue text in (b) and

24 (c), which is the defendants' proposal, and then our equivalent proposal, if you like, is

25 the text at (f) in red, and then there's another issue.

26 THE CHAIR: Okay. Let me just read that for a second.

1 MR ARMITAGE: Yes. (Pause)

2 THE CHAIR: Okay. When I looked at this, I didn't think they were mutually exclusive.

3 So --

4 MR ARMITAGE: No. Could I just explain, because perhaps "disagreement" is

5 perhaps putting it a bit high.

6 All we had been trying to do with (f) is to capture the fact that our expert, and indeed

7 both expert economists, are proposing to conduct various analyses which bear on the

8 question of liability or, more precisely, whether there was an unlawful cartel

9 arrangement. Obviously not trespassing on the factual question, but you'll see in the

10 methodology statements, there are various proposed analyses in relation to questions

11 of liability.

12 We had, for that reason, tried to capture the position in relatively general terms. That's

13 also partly because of the provisional nature of the methodologies. We thought that

14 binding the experts to precise forms of analysis at this stage was not desirable,

15 although obviously we fully took the Chair's point from the letter on Friday that just

16 saying "liability" would have been problematic.

17 The only issue with (b) and (c), as we saw it, was that these effectively pick up two

18 sub-aspects of the analysis that Mr Parker proposes to conduct.

19 THE CHAIR: Yes, I can see that. But one of the things that concerns me when

20 I looked at the expert evidence is that some of it's really for us. You know, you can

21 give evidence; that's fine. And you can have the factual witnesses, you can have the

22 documents. But what inferences you draw is very much for the tribunal to do, and

23 I just want to make a -- I'm going to allow both these wordings; I'm happy with both

24 wordings.

25 But I want to make it clear that when I see the expert reports at the PTR, if I think the

26 experts have gone over and gone into what our role is, as you know, I have no

1 hesitation in striking it out. You know, everyone knows how I do these things. So just
2 a warning.

3 The other warning, my normal warning, is, you know, I don't expect precise precision
4 on everything. Some of these things there's a range; I don't like extreme positions. It
5 never really benefits anyone when someone says "this claim is worth three and
6 fourpence" and the other one says "it's worth billions" and all that, and people think,
7 well, the tribunal is going to find somewhere in between. It doesn't help us.

8 The job is difficult enough as it is. Contentious expert evidence is not ideal, and the
9 experts trespassing into the ultimate issues -- obviously it's permissible in certain
10 circumstances, but it doesn't necessarily help us when we've got to look at the
11 underlying evidence and exercise our judgment, and I don't think, with due respect to
12 any of these experts, they necessarily are better qualified than we are in deciding
13 where the truth lies and what the inherent probabilities are. So if these experts are
14 thinking they're going to say, "Well, we think it's inherently credible that X, Y, and Z",
15 they're not going to get very far. Just be very focused on what you're going to do.

16 So this is approved, subject to that warning. Okay?

17 MR ARMITAGE: That's all fully understood, sir.

18 THE CHAIR: Well, I hope so. But I mean, I've seen it so many times that people think
19 they can trespass into -- you know, evidential issues and inferences are really for the
20 tribunal. I do not want the experts to deal with the inferences that you can draw. They
21 can say, "We can see X, Y and Z and these are the figures"; they can say that. But at
22 the end of the day, I don't want the experts to say, "Well, we've looked at this and we
23 don't think that you can infer that there's been price-fixing or manipulation of the index".
24 I really don't find that very helpful at all.

25 MR ARMITAGE: That is understood and, certainly from our perspective, what we'd
26 envisaged. Bearing in mind, as you say, this is a standalone case. We do think input

1 from the economists is going to be of assistance, we would hope, on liability as well
2 as quantum issues. It could be as you say. What's envisaged is the experts will look
3 at trends, will look at patterns and will present their analyses, but of course respecting
4 the proper boundaries between expert issues and factual issues.

5 THE CHAIR: On this case, we're talking about expert evidence, but it's going to all be
6 conditional upon what comes out on disclosure, whether it's from these guys or anyone
7 else and certainly what comes out from OPIS. I wouldn't expect the experts to do
8 a huge amount of work until we've got disclosure done, you know, because otherwise
9 they're going to have to do it again. What they've done so far is very useful for now,
10 but let's try and be realistic. This case isn't going to be ready for the experts to consider
11 until you've got the disclosure in.

12 MR ARMITAGE: Thank you.

13 THE CHAIR: Okay, that's on that. Yes.

14 What's the next thing?

15 Oh, yes, the next thing is, as you know, model A, known adverse documents. I can
16 explain why, but everyone agrees we're going to have known adverse documents, and
17 we can just say in the order, "Known adverse documents following equivalent of
18 model A", and you can come up with some wording.

19 Do you oppose that or not?

20 MR ARMITAGE: We sought it last time. We don't oppose it, of course.

21 THE CHAIR: No. Okay. Mr Holmes? (Pause)

22 You know where I'm coming from.

23 MR HOLMES: No, we --

24 THE CHAIR: This is a cartel case.

25 MR HOLMES: Yes.

26 THE CHAIR: Look, if, for example, you're going through your disclosure and looking

1 at one repository for a particular category of documents, and you say you're going to
2 search that for this, you come up with some text or message which clearly shows or
3 indicates there's been price-fixing, exchanging information in advance of change of
4 prices, I want that to be disclosed and I expect that to be disclosed.

5 MR HOLMES: Yes. No, that's well understood.

6 Our only concern is the one we raised last time, which is just the idea that in order to
7 determine knowledge, you've got to make -- the suggestion in the Castle Water case
8 is you might have to make quite extensive further enquiries.

9 But I think that's not what you have in mind, sir, if I understand correctly.

10 THE CHAIR: So we'll do known adverse documents in the way I've just indicated.
11 You can probably reflect it in the wording of the order. But you know exactly what I'm
12 looking for.

13 MR HOLMES: Yes. It's known within the parameters of the searches which are
14 undertaken.

15 THE CHAIR: Exactly. Yes. But if what you'll have, you'll have a team of people doing
16 disclosure and they need to be given guidance as to how they're going to do it. You're
17 probably going to need a protocol. I'm not sure if you need a Gormsen-type exercise,
18 because this may not be the same size, but please look at Gormsen, the decision
19 I gave on how disclosure should be done in major exercises. But I'm not sure if this
20 one is of the same scale as the Gormsen v Meta case, which was, as you know, vast.
21 This one is not vast, but try and follow, insofar as you can, the sort of guidance in
22 Gormsen on a practical level as to what people should be looking for.

23 MR HOLMES: Yes.

24 THE CHAIR: Okay, thanks very much. So, known adverse documents we've dealt
25 with.

26 Now the next thing is the Redfern schedule, and I think there's one big topic, which is

1 IHS and how we're going to deal with IHS. I think that fits in with is it category 5(a)
2 and (b)?

3 MR ARMITAGE: Priority disclosure, yes, and related Redfern categories.

4 THE CHAIR: Yes. If we deal with that as one issue and then we can go through the
5 rest of the Redfern schedule.

6 MR ARMITAGE: There's a handful of small priority disclosure points as well, which
7 you may have seen in the written materials.

8 THE CHAIR: Yes, we'll deal with those, obviously, that will come up. But what I want
9 to do is look at 5(a) and (b) --

10 MR ARMITAGE: Yes.

11 THE CHAIR: -- and this whole issue about IHS.
12 But before we do that, on the disclosure, when you settled with the other defendants --

13 MR ARMITAGE: Yes.

14 THE CHAIR: -- is there any mechanism whereby you are going to get some disclosure
15 from them, or is it going to have to be a non-party disclosure scenario?

16 MR ARMITAGE: You mean a mechanism within the terms of the compromise,
17 effectively?

18 THE CHAIR: Yes.

19 MR ARMITAGE: I think we corresponded on this with the tribunal at around the time
20 we were doing the amendments, I don't know if you remember that, those
21 exchanges --

22 THE CHAIR: Yes.

23 MR ARMITAGE: -- and I think we confirmed that there wasn't a mechanism of that
24 kind. So, effectively, INEOS are in the same category as any other non-party, yes.

25 THE CHAIR: Okay. Because at the moment you seem to be going down one route,
26 which is your disclosure on liability that you're seeking from other people is either from

1 Mr Holmes' client or from OPIS, and you're not seeking any disclosure from the other
2 alleged cartelists. Is that right?

3 MR ARMITAGE: Not as it stands. It's something obviously, without waiving privilege,
4 we've also thought about.

5 THE CHAIR: Yes.

6 MR ARMITAGE: There are three or, I think, four named non-defendant cartelists.

7 THE CHAIR: Yes.

8 MR ARMITAGE: From memory, Dow, Covestro, Nobian and INEOS.

9 THE CHAIR: Yes.

10 MR ARMITAGE: In terms of volume of commerce, as with the claimants, there's a big
11 variety there. INEOS is actually a very small player in terms of supply to the claimants.

12 THE CHAIR: They're a small player, yes. It doesn't make a huge difference to the
13 figures, but, you know, it doesn't matter how big their size of the cake is; if there is
14 a cartel, then they may have been privy to things and all that.

15 MR ARMITAGE: That's true. I think where we left this at the last CMC was that that
16 was a matter that would be revisited in light of the disclosure received from the
17 defendants.

18 THE CHAIR: Yes, of course. If, for example, there's a nil return and Mr Holmes'
19 clients don't have anything to indicate any cartel, then you may feel that that may guide
20 you as to what you do from there then on. On the other hand, if you can see they're
21 communicating with other members of the alleged cartel and you can see some helpful
22 stuff, you'll probably want to follow that up if you can.

23 MR ARMITAGE: Of course.

24 THE CHAIR: But again, these other cartelists, where are they all based?

25 MR ARMITAGE: So we've looked into that, I think. I don't have the details at my
26 fingertips, but I think there are possible jurisdictional issues with most of them. I think

1 INEOS may be the exception, but I think -- as I say, I don't have the full details, but
2 we'll --

3 THE CHAIR: When we have the break, we'll come back to that then, so if I can know
4 where --

5 MR ARMITAGE: Where they're domiciled.

6 THE CHAIR: -- where they are, and insofar -- then I can get an idea. If there is going
7 to be a further disclosure exercise, I'll know which country you're talking about, and
8 then I may have a view as to how long it tends to take for that particular country.

9 MR ARMITAGE: Yes.

10 THE CHAIR: So if someone could do a schedule of the other alleged cartelists and
11 where they are based for the purpose of disclosure, then that may help me when it
12 comes to later on in the day when we talk about trial date, because I can see that this
13 could go a number of different ways, depending on what disclosure you get from
14 Mr Holmes' client and all of that raises the prospect of further delay.

15 But if we're just looking to get the right result in this case, if you lose a few months or
16 whatever, then that's probably worth having than having a rush to a trial. I know it
17 sounds a long way away; you're talking about over a year. It's not that long away if
18 you've got to get documents from abroad.

19 One of the things I've been toying with is: do we scrap the trial date and say we will
20 come back once you know where you are on disclosure from outside the jurisdiction
21 and you've got a response? But we'll come back to that later on in the day.

22 Okay. Let's deal with 5(a), shall we?

23 MR ARMITAGE: 5(a) and (b).

24 THE CHAIR: Yes.

25 MR ARMITAGE: So you have those at D/20/273.

26 THE CHAIR: Right, let me get it. At the end of the order? Yes, I've got that.

1 MR ARMITAGE: Yes. Exactly. At the end of the CMC 1 order. So (a) is
2 communications between the defendants and IHS in respect of the compilation of the
3 index.
4 THE CHAIR: Yes.
5 MR ARMITAGE: And (b) is internal communications and documents prepared by the
6 defendants in connection with that process.
7 THE CHAIR: Yes.
8 MR ARMITAGE: Obviously you'll recall, sir, when we discussed non-party disclosure
9 at CMC 1, you made an order requiring us to make any application for non-party
10 disclosure from IHS as soon as reasonably practicable after receipt of those disclosure
11 categories.
12 THE CHAIR: Yes.
13 MR ARMITAGE: The logic being that that would help us to target any non-party
14 disclosure application.
15 Such disclosure would obviously reveal the kinds of information provided by the
16 defendants to IHS during the relevant period; also potentially be informative about the
17 methodology. In a sense, this added an additional priority to that priority category
18 because of this interrelationship.
19 As it transpired -- you may not have picked this up -- we have now received disclosure,
20 literally this week, under PDC 5(a).
21 THE CHAIR: Ah, good. What date did you get disclosure?
22 MR ARMITAGE: Monday, I believe.
23 THE CHAIR: Just give me a date, yes? The 2nd, yes? It was provided on the 2nd, if
24 that's Monday, yes?
25 MR ARMITAGE: Yes.
26 THE CHAIR: So what did you get on the 2nd?

1 MR ARMITAGE: So --

2 THE CHAIR: Is that listed in the -- is it here somewhere?

3 MR ARMITAGE: I don't think we have the -- let me just check.

4 MR HOLMES: There were 350 documents.

5 THE CHAIR: Thanks very much.

6 MR ARMITAGE: 350, I'm sorry, in terms of the --

7 MR HOLMES: And only one of them is before you. There's clearly been a review on

8 the other side, and they've identified one which we may come to later.

9 MR ARMITAGE: Yes, that's right. So I think I had it as 349 documents in category

10 (a) and 7 in category (b). I think I've been referring to the total.

11 THE CHAIR: Okay.

12 MR ARMITAGE: But yes, 349 and 7.

13 THE CHAIR: Yes. It's not many, is it, really?

14 MR ARMITAGE: It's not many. But there are a couple of points arising, which I'd like

15 to just briefly take you through in relation to what has been provided, emphasising, of

16 course, we haven't had very long with it. I appreciate there aren't many, but we haven't

17 had a great deal of time to look at it.

18 Now, Mr Bronfentrinker's statement for the CMC, the responsive evidence, given on

19 23 January. Having looked at that, you may have seen that he referred to -- at that

20 stage, obviously, this disclosure hadn't been provided. He indicated that there were

21 going to be about, he expected, 10 to 15 responsive documents and he said that that's

22 consistent with an indication that the defendants had provided -- in relation to PDC

23 5(a) and (b), that is -- and he said that that was consistent with the defendants'

24 explanation that they were unlikely to have very much in the way of information in

25 these categories, which is the point they'd made in correspondence.

26 THE CHAIR: Although I'm pretty experienced in doing cases to do with manipulation

1 of indices, they're all different as to how they get their information. Like in LIBOR there
2 was, you know, very little in writing when you look at how long it went on, the number
3 of banks that were involved; there wasn't a huge amount of stuff. But that's because
4 they would ring round and then you don't have any documents. Other indices, it's
5 different: they will expect a written return and there's a form that comes in.

6 I don't have any feel -- that's probably my fault; it may be somewhere in here -- as to
7 how this index actually worked. I'm not sure if they're as structured as some of the
8 other well-known indices, and we'll have to count it. But, clearly you've got two
9 methodology statement documents from OPIS and you're at an advantage to me
10 because I don't have a clear idea exactly how it worked on the ground.

11 Yes, Mr Holmes.

12 MR HOLMES: I hesitate to interrupt.

13 THE CHAIR: No, you can, it's fine.

14 MR HOLMES: There is a statement in Mr Bronfentrinker's statement based on
15 enquiries within the business -- I'm very pleased, sir, that you, drew on the example of
16 LIBOR, because the situation is similar to that which I know from -- also my experience
17 of that case was the case with LIBOR. So if you go to bundle C, just to see what
18 Mr Bronfentrinker said.

19 THE CHAIR: Yes, let's have a look at that.

20 MR HOLMES: Yes, so that's bundle C, tab 19, starting at C/311.

21 THE CHAIR: When you look at LIBOR, where the real evidence of the alleged
22 manipulation came was communications within the relevant submitters and other
23 departments with them and also with other communications with other banks. What
24 was not necessarily that helpful, was to look at exactly what was -- just on its own --
25 being submitted. And that was --

26 MR HOLMES: Yes.

1 THE CHAIR: -- you know, it's not a huge number of documents which were
2 particularly, let's say, incriminating. It was actually the other documents, but within
3 each bank and between banks, it wasn't necessarily -- the best evidence, the most
4 incriminating evidence, was not the stuff that went directly from one submitter to the
5 index.

6 MR HOLMES: Yes, yes.

7 THE CHAIR: Let's see what he says.

8 MR HOLMES: So it starts on page 311.

9 THE CHAIR: Yes.

10 MR HOLMES: You see the heading at the foot of the page, "PDCs 5(a) and (b)". If
11 you turn to page 313, you see an explanation of the process by which the defendants
12 provided information to IHS.

13 THE CHAIR: Yes.

14 MR HOLMES: The defendants explained that in correspondence --

15 THE CHAIR: Paragraph number?

16 MR HOLMES: This is in paragraph 18, just at the top of page 313. You see that the
17 defendants explained in the italicised text:

18 "... 'information was provided to IHS through an informal process, usually through
19 discussions with a representative of IHS' ... 'no formal submission of information in
20 writing ...' [exactly as with LIBOR], and that any information provided to IHS 'was very
21 generalised based on the [caustic soda] sale's team's general knowledge of the state
22 of the market at the relevant time, having regard to the types of discussions they were
23 having with customers and potential customers.'"

24 There is no repository containing documents prepared by the defendants in connection
25 with the preparation and provision of information to IHS. The search was therefore
26 performed on the custodian inboxes on the basis that:

1 "... 'whilst the Westlake Defendants do not consider there likely to be much (if anything)
2 in the way of responsive documents ... to the extent any documents were relied upon
3 by the sales and marketing team in preparing for and submitting information to IHS,
4 that will be captured in emails between them'. Conducting searches of any other
5 repositories for documents that the Defendants knew were not created ..."

6 THE CHAIR: Was there one person or one team that would be the people that would
7 be interfacing with IHS? Have you identified them?

8 MR HOLMES: As I understand it -- I'll be corrected if I'm wrong -- it was the caustic
9 soda sales and marketing team. All of those custodians from that team during the
10 relevant period were identified. You know, the documents were harvested from them.
11 Both emails and I think the internal Salesforce chatter -- is that right? So there's also
12 a messaging service that's used in-house --

13 THE CHAIR: You want to look at messaging, you want to look at their mobile phones,
14 all that needs to be done, because in my experience, quite often -- and you saw that
15 in LIBOR -- people use their own personal phones to do whatever they were going to
16 do, because they know: we're not going to do it on the main line because that's going
17 to be recorded. They'd be doing it on their personal phones. That was pretty important
18 evidence, wasn't it?

19 We'll come to this later because I know at the moment you're reluctant to do that, but
20 you are going to be ordered to do that within reason.

21 MR HOLMES: Yes.

22 THE CHAIR: And you're experienced enough to know that is where you look in a case
23 like this.

24 MR HOLMES: Yes. There are some practical difficulties that I do need to draw your
25 attention --

26 THE CHAIR: There always are; you know, Phones 4u and all that, and the judgment

1 on that is -- you know, there are practical problems; I deal with it in my book, as you
2 know. There's a few paragraphs that deal with this.

3 MR HOLMES: Yes.

4 THE CHAIR: But if we are going to get to the bottom of this case, that's the type of
5 thing that's going to have to be looked at.

6 You know, your case is it never happened, in which case that's fine.

7 MR HOLMES: Yes.

8 THE CHAIR: But that's probably even more important why you've got to dig deep and
9 see that.

10 MR HOLMES: Yes.

11 THE CHAIR: Because if in fact you say, "What I've done, I've looked at all the mobile
12 phones, there's nothing there, and all that, I've looked at all these things", then it may
13 be harder for someone to draw an inference of manipulation. If, on the other hand,
14 you haven't done that exercise, it's always going to be up in the air as to, you know,
15 what may have happened.

16 MR HOLMES: Well, some of the key individuals are not employed by the firm any
17 longer.

18 THE CHAIR: And then you've got the argument about: is it the employer's data that
19 they're holding and all that sort of stuff?

20 MR HOLMES: Well, indeed, sir. So, WhatsApp, which is the particular messenger
21 service on which my learned friend places emphasis, was not an approved means of
22 communication. There was no formal -- it was just an app on people's phones.

23 THE CHAIR: If you're going to manipulate an index, quite often, what you're not going
24 to do is use an approved mode of communication. The reason why you have approved
25 modes of communication is it can all be monitored to make sure the boys aren't
26 misbehaving. So when they are misbehaving, they tend to go outside that. They'll

1 either have a discussion somewhere else, do it orally, or they may do it some other
2 way, they may use Signal, all these other apps people use.

3 MR HOLMES: Sir, I hear what you say. The searches so far, including the internal
4 messaging and the emails, have turned up nothing in relation to this.

5 THE CHAIR: Because there may be nothing. At the end of the day, I'm not saying
6 that there is a cartel. They're saying there is a cartel, based on inference. If there is
7 a cartel, I'd like to know about it. At the end of the day --

8 MR HOLMES: That's fully understood.

9 THE CHAIR: And if you are a responsible organisation, you'd probably want to know
10 about it as well, because then you'd probably say, "Okay, we don't want people
11 working for us, because they're going to be a hazard for shipping". If that's what
12 they're going to do, responsible employers will say, "We're going to report them
13 ourselves". A lot of the cartels have been broken precisely because someone senior
14 has found out something and insisted it gets reported.

15 MR HOLMES: As I say, I hear what you say, sir. There is -- just taking a step back,
16 we do say that generally, in relation to this case, there is a need for proportionality in
17 the context of a claim which is not high value in the way that Gormsen v Meta may
18 have been.

19 THE CHAIR: That's a problem. But cartels are particularly challenging when it comes
20 to disclosure. That's why normally, if you've already had an investigation by the
21 authorities, they've done all the hard work and they've grabbed the stuff and you've
22 got something to work from. This case is very frustrating because I've got no anchor
23 to work from.

24 MR HOLMES: It's really difficult, sir.

25 THE CHAIR: Difficult for everyone.

26 MR HOLMES: On a realistic quantum, this could be €15 million.

1 THE CHAIR: Yes, I know.

2 MR HOLMES: Once we're into the exercise of attempting to obtain mobile phones
3 from workforce, imaging them and searching them, with all of the objections that that's
4 likely to give rise to in Germany, we could very easily find ourselves spending the
5 realistic value of the claim.

6 THE CHAIR: It's very difficult to know what to do, but you'll probably identify who the
7 key individuals are and you will want to focus on those in particular and see what there
8 is.

9 MR HOLMES: Well, let me take instructions. We're going to return to this as a specific
10 topic.

11 THE CHAIR: We will. We've got the rest of the day, don't worry.

12 MR HOLMES: There is just one correction that I know those behind me are anxious
13 should be made. I think Mr Armitage suggested that, at the time of this statement, it
14 was thought that we would be disclosing only 10 to 15 documents. That's not quite
15 right. What we --

16 THE CHAIR: Responsive.

17 MR HOLMES: Documents -- well --

18 THE CHAIR: Does it matter? This is --

19 MR HOLMES: 350 documents.

20 THE CHAIR: It doesn't matter.

21 MR HOLMES: We always knew it was going to be much higher; it's just a number of
22 documents were administrative in nature.

23 THE CHAIR: It doesn't matter.

24 MR HOLMES: But they were responsive to the category, which is why they were
25 disclosed, but --

26 THE CHAIR: Mr Holmes, does it matter?

1 MR HOLMES: Well, it matters to my client, and so I am passing it along.

2 THE CHAIR: I'm not critical of your client at all. If I've got any criticism, you'll hear it,
3 and then you have a right to hear it. If the other side says things, it doesn't really make
4 any difference to me. If it's something I've got to resolve then you have a right to reply
5 to it.

6 When I read this, I didn't think it was of any significance at all in determining the issues
7 today, but I know you want to preserve your position and say, you know, it's not really
8 justifiable to say that we've done something wrong. But so far as I'm concerned,
9 unless and until I say something that's critical, don't worry about it.

10 MR HOLMES: I'm grateful, sir.

11 Just one further point, if I may, in relation to methodology for the indices. Because,
12 with respect, we do agree with you, sir, that for IHS, we are not going to hold granular
13 information about the methodology of the index for that.

14 THE CHAIR: No, I'd be surprised if you did, to be honest.

15 MR HOLMES: One has to look to the index.

16 So we do agree, with respect, that it will be necessary to pursue third-party avenues.
17 We've given what we have been able to find in response to priority categories 5(a) and
18 5(b). It's a search for a needle in a haystack in relation to the methodology and the
19 appropriate course is, we respectfully agree, to pursue third-party disclosure with the
20 implications that has for the timetable.

21 THE CHAIR: Okay, but -- don't sit down yet.

22 What I don't want to happen is Mr Armitage's people go to New York or wherever
23 they're going to go and make their section 1782, and they're met with the argument,
24 "Well, you should have got this from the defendants". So if you're saying "we don't
25 have these documents", it's much easier to get the order in America.

26 MR HOLMES: We've given disclosure after a search of over 45,000 documents.

1 THE CHAIR: Yes.

2 MR HOLMES: 40,000 documents, having collected 4 million for keyword review, and
3 we have not found anything indicative of the IHS methodology.

4 Now, against that backdrop, there should already be sufficient comfort, in my
5 submission, that the source for documents about IHS' methodology will need to be the
6 current owners of the IHS assets, namely OPIS.

7 THE CHAIR: Right. Okay.

8 MR ARMITAGE: Can I make two really quick points. We've heard everything that's
9 been said.

10 There are two issues in relation to the disclosure that's been given. So it's said there
11 are only 349 documents in relation to these categories. I don't know if you've picked
12 up, sir, there is another repository of 700,000 documents described in
13 Mr Bronfentrinker's statement.

14 THE CHAIR: Let's have a look. Paragraph?

15 MR ARMITAGE: I don't want to misquote him, given the intervention just now.
16 Paragraph 18, C/19/313.

17 THE CHAIR: I've got that open, yes.

18 MR ARMITAGE: Yes, you've got that open.

19 Can you see towards the end of the paragraph:

20 "By way of example, the folders on the Defendants' European file server in which the
21 Westlake caustic soda team saved any documents relating to caustic soda contains
22 approximately 700,000 documents alone. Searching those folders for documents that
23 the Defendants already know not to exist is clearly disproportionate."

24 We simply make the point -- we've been writing to them about this; there's an ongoing
25 line of correspondence -- that if there is a repository of documents in which, as
26 Mr Bronfentrinker says, the Westlake caustic soda team saved any documents relating

1 to caustic soda, and if, as we're also told, this process with IHS was an informal
2 process, it took place through discussions, no formal submission, we don't see how it
3 can be said with certainty that that repository is not something that should be searched
4 for in relation to this important category of documents, because if members of the
5 relevant team made notes of their conversations with IHS and so on and so
6 forth -- we're not talking here about communications with IHS --

7 THE CHAIR: These folders are all -- is this all held electronically?

8 MR ARMITAGE: I believe so, and I think this repository has been searched or is going
9 to be searched in relation to other categories of disclosure. It's just in relation to this
10 one.

11 THE CHAIR: And people have to appreciate that the cost of doing these searches is
12 a lot less than it would have been even ten years ago, if you get the right search terms.
13 I'm often not really fazed when I hear the number, because I know that you can do
14 a very large number of documents and review them efficiently if you follow the right
15 process. Whether it's a TAR review, whichever way you do it, it can be done, because
16 the solution to this is technology itself.

17 MR ARMITAGE: Indeed. So where we've left this in the correspondence -- as I say,
18 there are letters flying around very recently, and this is no criticism of the other side
19 on this point, but it's arisen since the responsive evidence -- we have said we are going
20 to think about targeted searches in relation to this repository in relation to this category
21 of documents and we're going to make some proposals. There had been a pragmatic
22 agreement earlier in the process that this repository wouldn't be searched in relation
23 to this category, but we reserve the right to come back on that.

24 THE CHAIR: Is what you're saying that the search of the other repositories has not
25 really turned up much?

26 MR ARMITAGE: Sorry, to be clear, we're not in a position to say that. We've actually

1 | looked at it as far as we can, as you'd expect, and there's a document I'm going to
2 | show you in a moment. There are some -- let me put it like this -- interesting
3 | documents in there. So it's not a nil return by any means.

4 | But, yes, all we're saying is there appears to be another relevant repository already
5 | being searched in relation to other categories, which, as I say, is described as the
6 | repository --

7 | THE CHAIR: You're saying this repository has been searched for other categories,
8 | but not for this category?

9 | MR ARMITAGE: No. That's on the basis of what the business has apparently said
10 | about the likelihood of documents being saved in that repository. We just say, absent
11 | the searches -- which, as you say, could be done proportionately, in a targeted
12 | way -- we're not in a position to say that there's a nil return. That's all we're saying.

13 | May I just show you one document that has arisen, and this goes to the question of
14 | the phone messenger apps. I know we're going to come back to that in the context of
15 | the Redferns.

16 | Could I just show you correspondence bundle E --

17 | THE CHAIR: Yes.

18 | MR ARMITAGE: -- tab 91, page 220.

19 | So this is very recent. This is a letter from Stewarts --

20 | THE CHAIR: I haven't read this.

21 | MR ARMITAGE: You saw this?

22 | THE CHAIR: I haven't seen it.

23 | MR ARMITAGE: Oh, I'm so sorry.

24 | So this covers a number of points, most of which we may not need to get into, but it
25 | deals with PDC 5(a) and (b).

26 | THE CHAIR: Yes.

1 MR ARMITAGE: In fact, just so you have it, if you look at the top of E/222, this is the
2 reference I just made to the 700,000 documents where we say we are considering this
3 further and will revert separately in relation to further requested searches of the
4 European file server.

5 So it may be that's something we could potentially do in short order after today, but as
6 you'll see, what we're proposing is that that file server is searched for documents
7 responsive to these important categories.

8 THE CHAIR: Well, it's an important category. The question is: how likely is it that it's
9 going to produce anything? If there's a reasonable prospect that it's going to produce
10 potentially important documents, then I'll order it. But is there a way of making it, either
11 through a sampling process or agreed keywords or something, less burdensome?
12 Because I think if it's a sort of open-ended search, it's not going to be particularly
13 helpful.

14 If the parties can agree what they say is a proportionate search of this repository, then
15 I'm more likely to be inclined. Mr Holmes has heard what I've said. But this dispute
16 hasn't crystallised yet for me to give a ruling on. All I'm saying is --

17 MR HOLMES: It's not business for today, sir.

18 THE CHAIR: It's not, but I can help you by saying that one option you may be wanting
19 to explore is not an all or nothing, but somewhere whereby targeted searches are
20 done, whether it's on a global basis or on a sample basis, and you see where it goes.
21 But it all depends on how widely you define things, because then you get too many
22 hits.

23 MR HOLMES: I know you have the point that we have already reviewed 40,000
24 documents, and while there's talk of interesting documents, that's really not -- it doesn't
25 cut it.

26 THE CHAIR: Yes.

1 MR HOLMES: They need to bring forward those interesting documents and refer to
2 them specifically. All that we have before us today is this one email which I can
3 address you on in due course. It doesn't show use of WhatsApp by anyone employed
4 by us. It really doesn't show WhatsApp being used by anyone employed by us.
5 But laying that to one side, the cost for us would not be the electronic component of
6 the search of the 700,000. The difficulty would be that vaguely formulated search
7 terms are likely to throw up, given the nature of the case, many, many returns.

8 THE CHAIR: Exactly.

9 MR HOLMES: It's the manual -- I mean, I'm teaching you to suck eggs, sir, but the
10 costs will be phenomenal.

11 THE CHAIR: That's why if you've got the terms, and the way you're going to do it
12 properly, you're not going to get 100,000 hits. If you're going to get 100,000 hits, you're
13 doing something wrong, okay? That's the thing.

14 MR HOLMES: We will hear any constructive proposals from the other side.

15 THE CHAIR: Okay.

16 MR HOLMES: It's quite difficult to target searches because of the rather nebulous
17 nature of the case that we are facing. That does need to be borne in mind.
18 It may well be -- I know that, sir, you've kindly offered before now to make yourself
19 available in relation to any matters that cannot be resolved.

20 THE CHAIR: Exactly.

21 MR HOLMES: Given the concerns on our side about the costs being incurred, this
22 may well be something that we do need to trouble you with and it may well need to be
23 ordered with consequences in costs so that the consequences in costs can be
24 understood down the line on the basis --

25 THE CHAIR: At the end of the day, if you're right and this case doesn't add up to a row
26 of beans -- that's what your case is.

1 MR HOLMES: Yes.

2 THE CHAIR: I'm not saying you're right; I'm not saying you're wrong. But if you're
3 right, the more disclosure there is, the bigger the bill is at the end of the day. One of
4 the things I'll probably want at the end of today is what I ordered in Gormsen: when
5 you've done your disclosure, you give us a report on what the costs are, how much
6 you've incurred; you make sure that you've got a proper system of logging in hours so
7 everyone knows how much they spent on disclosure --

8 MR HOLMES: Yes.

9 THE CHAIR: -- and then the report will say what the practical problems are that have
10 occurred.

11 MR HOLMES: Yes.

12 THE CHAIR: You know, in case we forget, we're going to make sure we come back
13 to that later, but I do want a Gormsen-type cost report at the end of this exercise.

14 MR HOLMES: Yes. We agree that would be useful in order to keep tabs on it.

15 THE CHAIR: Because at the end of the day, you know, when people ask for too much
16 disclosure, it can bite them back later because this case is not going to be a cheap
17 case.

18 MR HOLMES: No.

19 THE CHAIR: Whichever way you look at it, it's not going to be a cheap case. But
20 fortunately Lenzing is a big, substantial undertaking, and if they're ordered to pay a bill,
21 I think that that will be paid.

22 MR HOLMES: You have the point though, sir, that they've yet to give any priority
23 disclosure themselves.

24 THE CHAIR: Yes.

25 MR HOLMES: On section 1782, if I could return to that for a moment --

26 THE CHAIR: Of course you can.

1 MR HOLMES: -- we do see a looming problem with the timetable. We are not keen
2 to have this case lingering endlessly and incurring substantial costs for our client,
3 recoverable though they may be in due course from Lenzing. They should get on with
4 their applications. We are not a good source of detailed and granular information
5 about methodology. That's already clear from the emails. There would be no reason
6 for our workforce to conceal our understandings of the methodology in emails, and
7 that's turned up nothing.

8 THE CHAIR: I know. But if you look at the correspondence from the Americans and
9 you look at what I said last time, the expectation was they wouldn't go for disclosure
10 against third parties until they'd gone through this process.

11 MR HOLMES: That's well understood. But we've --

12 THE CHAIR: Now we've done it, my concern is different, which is that, given that it's
13 in America, it's going to possibly take a lot longer than if it was here. Given that was
14 unknown last time when we fixed the trial date, if I'd known that, and I'd known that
15 OPIS were likely to object, I probably wouldn't have given you even May 2027. I would
16 have said: I'm not going to fix a trial date; let's wait until we've got the answer from the
17 section 1782 application and then we can fix a trial date.

18 But what I think is coming out of this is my advice to the parties, insofar as you're
19 willing to listen to it, is: don't spend any money for a while on the experts, because
20 whatever work they do now isn't going to help you, because they may have to rewrite
21 the book once we've got -- if we do have it, from America. Let's get the disclosure
22 stage finished.

23 MR HOLMES: Yes.

24 THE CHAIR: They will probably, once we've finished disclosure, have to consider: are
25 they going to amend their plea to give further particulars, because one of the things
26 you say is, "You haven't particularised enough". They say, "We can't until we get

1 disclosure". I understand that as well. But once we've got disclosure, then they're
2 going to have to have a very cold look at the pleadings and say, "Is our case simply
3 based on manipulation or alleged manipulation of the IHS index, or is it something
4 wider, or is it something narrower?" Whatever it is.

5 MR HOLMES: Yes.

6 THE CHAIR: But they can't do that until I think the disclosure exercise is finished.

7 MR HOLMES: We agree, sir, but they need to get on with it in relation to section 1782.

8 THE CHAIR: I agree with that. I think that I've made that clear. They do need to get
9 on with it. But we are where we are, and this is an unexpected, let's say, spanner in
10 what we thought we had at CMC 1. Now we've got that, we've got to react to whatever
11 the situation is and not just go on blindly as to what we do.

12 Given that this is, I think, a fairly fundamental change since CMC 1, we're going to
13 have to revisit what we're doing. At the end of the day, we're going to go through all
14 the directions again and see where we are, because I can't see how this case is going
15 to really progress until this disclosure exercise has been done.

16 Yes.

17 MR ARMITAGE: Can I make three very quick points?

18 Obviously, we have heard, and are now thinking very hard about, what you said about
19 the trial date. I've been handed a note to say we're not wedded to the trial date next
20 year, so of course that's something we need to discuss and we see that.

21 Just three very short points, and I want to finish the point I was just going to, which is
22 on the WhatsApp point.

23 THE CHAIR: The WhatsApp point, yes.

24 MR ARMITAGE: So, first, just two points arising out of what Mr Holmes said.

25 I made a reference to "interesting documents". I wasn't proposing to make
26 submissions about liability at this CMC. The only reason I said that was to respond to

1 the assertion from the other side of the courtroom that there are no interesting
2 documents, so it's not for today.

3 THE CHAIR: Yes, I agree.

4 MR ARMITAGE: The second point is just something slightly perplexing about what
5 Mr Holmes said a number of times, which is that they haven't found any documents
6 relating to the IHS methodology. But that's a disputed Redfern category. They haven't
7 searched for such documents within their own disclosure. So we'll obviously come
8 back to that in relation to the Redferns, but I don't see how it can be said they haven't
9 found such documents.

10 THE CHAIR: What I want, before you go for section 1782, is that you conclude
11 whatever you need to conclude on IHS with the defendants.

12 MR ARMITAGE: Exactly. Exactly.

13 THE CHAIR: Okay? Once you've got to a landing on that, go to America. I do not
14 want you to go to America until we've got a landing, because I can see it'd be a game
15 of snakes and ladders: you'd go to America and they're going to say, "You've got to
16 get this from the defendants".

17 So whatever you need from the defendants that otherwise IHS should have, make
18 sure you've asked for it and they've come back and said, "Yes, we've got it" or "No,
19 we don't have it", then you can go to America. If you haven't completed that and you
20 go to America now, you're going to have a problem.

21 MR ARMITAGE: Exactly.

22 I should say -- I think I referred to it in my skeleton -- this process was followed in
23 a case in which I was involved before the president, the Qualcomm case. So I've had
24 some experience of this process and I completely agree that's the key consideration,
25 which is why we've been so keen to exhaust the process with the defendants --

26 THE CHAIR: Of course, you have to.

1 MR ARMITAGE: -- because that's clearly a precondition for any of this.

2 OPIS has repeated --

3 THE CHAIR: On this one, OPIS have actually written to you saying you've got to get
4 it from the defendants first.

5 MR ARMITAGE: Repeatedly, yes. Exactly, exactly.

6 So the only other point, just in terms of exhausting the process --

7 THE CHAIR: Can I just read this paragraph 7.

8 MR ARMITAGE: This is on the WhatsApp. (Pause)

9 THE CHAIR: Okay.

10 MR ARMITAGE: You have the document actually behind --

11 THE CHAIR: I don't need to see it.

12 MR ARMITAGE: You don't need to see it.

13 So we're not waving this document around as some sort of smoking gun on liability or
14 anything of that nature. All this document indicates, we say, is that there appears to
15 have been communication between Westlake ... Well, between Westlake and IHS.
16 Sorry, I'm confused.

17 So the document refers to a message being sent on WhatsApp by an associate
18 director of IHS to I think it's a named custodian, actually, for Westlake.

19 THE CHAIR: Yes, it is.

20 MR ARMITAGE: We rely on it for two reasons. One is that we say it indicates that
21 phone messenger apps may be a relevant repository in relation to the IHS-related
22 disclosure. Secondly, we're going to come to WhatsApp later. So, for obvious
23 reasons, we wanted to draw this document to your attention. That's as far as that
24 goes.

25 MR HOLMES: Sir, I'm sure you have this point, but this was an unsolicited WhatsApp
26 sent by an IHS employee. You see that from his email at the bottom of the page.

1 THE CHAIR: I see it's on there.

2 MR HOLMES: He basically tried to phone, didn't reach the Westlake employee in
3 question, and then decided to try sending a WhatsApp instead. Now --

4 THE CHAIR: Yes, but look, I'd be astounded if WhatsApp was not used by anyone
5 because lots of people use WhatsApp. Even if you don't normally use WhatsApp, you
6 may end up getting a WhatsApp message from someone who's never WhatsApped
7 you before.

8 MR HOLMES: But the interesting thing is that the response came by email from
9 Mr Fox rather than by WhatsApp, which suggests that he obeyed the company rule --

10 THE CHAIR: He may have done. What --

11 MR HOLMES: -- against using WhatsApp communications. So this is, we say, a mark
12 of desperation, this email.

13 THE CHAIR: There's no desperation in this. You're experienced in cartel cases; so
14 am I and probably Mr Armitage as well. The non-authorized modes of communication
15 are often the most interesting ones in these cases. The purpose that you have
16 authorized modes of communication -- there may be an instruction to only answer by
17 email -- is precisely to make sure your employees don't misbehave. If they have
18 misbehaved, then they've misbehaved and we're going to get to the bottom of it. If
19 they haven't misbehaved, then that's fine for you.

20 Anyway, let's carry on.

21 Armitage.

22 MR ARMITAGE: So, I don't know if this is a point -- so obviously we're going to come
23 back to the WhatsApp messages --

24 THE CHAIR: We are.

25 MR ARMITAGE: -- in relation to some of the other Redfern categories. In light of this,
26 we are also keen to ensure that any searches in relation to the IHS materials are

1 the -- 5(a) and 5(b) --

2 THE CHAIR: You can sort the IHS materials out.

3 MR ARMITAGE: Yes. So it may be that, insofar as we're writing further in relation to
4 the 700,000 documents, we pick this point up in that context as well -- in other words,
5 the use of WhatsApp for communications between Westlake and IHS -- rather than
6 seeking a direction.

7 THE CHAIR: It's my view that the parties should try and agree, in relation to this
8 repository of 700,000, a way forward which is not ridiculously expensive and is
9 targeted and proportionate and gives a relatively -- what I don't want is far too many
10 hits which are totally irrelevant. It's all a question of design. I don't know how far
11 they're using TAR or what system they're using. As you know, they can learn by the
12 responses and human reviews, and you can look at it once and it comes up with
13 100,000, and you can look at a certain number and then you can say, "Well, look, learn
14 from this; these are the important ones". But it all depends on people's own
15 experience.

16 Technology can really cut back the costs of these exercises, and the good thing about
17 TAR is that the system can learn from the searches itself to reduce the amount that
18 actually has to be looked at by a human being.

19 But I don't know what system they're using and how advanced their use of these
20 processes are. But there are ways of doing this that aren't going to cost you an arm
21 and a leg.

22 MR ARMITAGE: Would you be content then, sir, to leave 5(a) and 5(b) with us
23 essentially to write a further letter to our counterparts?

24 THE CHAIR: Yes. You should get together --

25 MR ARMITAGE: Yes.

26 THE CHAIR: -- and you know, maybe the solicitors should meet or something just to

1 resolve these things, because sometimes if you talk through the issues, you come up
2 with it because -- you know, if there are practical issues, you just sit down and work it
3 out. That's what most people try and do.

4 It may be that writing these letters isn't going to help. It may be that having a partner
5 plus one technical guy on each side is the best way to get to the bottom of it, because
6 the technical guys will know what could be done and what's practical; partners will
7 have, you know, the overall view of the litigation.

8 But I do want this 700,000 to be searched in some way on this issue, because it's an
9 important issue.

10 MR ARMITAGE: Yes.

11 THE CHAIR: I'm frightened that if it's not done, when you try and go to America, you're
12 going to get some sort of response that you haven't pushed it far enough.

13 MR ARMITAGE: We do agree, respectfully, and we do share Mr Holmes' expectation.
14 This is a matter we may need to return to you, sir, on if we cannot reach an agreement
15 on these points, as much as we --

16 THE CHAIR: I do encourage you to try and reach --

17 MR ARMITAGE: We'll try. Of course we will. We will.

18 THE CHAIR: -- because the best cases, the ones that work well, are where you've
19 got one solicitor on either side who are responsible for disclosure -- not necessarily
20 the partner; they're probably a bit higher up the tree -- but who've got the ability to talk
21 on a technical level about what the practical problems are. When you both see where
22 we are, the technical guy will probably come up with something that will work. That's
23 not going to cost ...

24 Okay, so that deals with 5(a) and 5(b).

25 MR ARMITAGE: There's an issue, a very small issue --

26 THE CHAIR: We'll have a break now --

1 MR ARMITAGE: Oh, yes, of course.

2 THE CHAIR: -- and then we'll come back to the other things.

3 MR ARMITAGE: Yes.

4 (11.52 am)

5 (A short break)

6 (12.07 pm)

7 THE CHAIR: Okay. So we're still on the priority categories.

8 MR ARMITAGE: Yes, so I think there's obviously the trial timing issue, which I infer

9 we're going to come back to later.

10 THE CHAIR: Yes, the trial timing issue. It may well be that what we'll do is we'll leave

11 in the date for now, but when we get to the longstop date, the end date for disclosure,

12 we'll then make a decision on where we are.

13 MR ARMITAGE: Yes, okay.

14 So there's a few more discrete points on priority disclosure. Priority disclosure

15 category 3 is the first one of those.

16 THE CHAIR: Okay, yes.

17 MR ARMITAGE: So we've got the CMC 1 order, D/20/273.

18 THE CHAIR: Yes.

19 MR ARMITAGE: This is a category which applies to both parties.

20 THE CHAIR: Yes.

21 MR ARMITAGE: There's still a point in dispute. It's a short linguistic point which turns

22 on the meaning of the words, "negotiating documents". We say -- sorry, you can see

23 from the wording of the order this relates to some allegations in the particulars about

24 the defendants and other suppliers requiring pricing to be determined by reference to

25 the IHS index, rejecting proposals for caps, floors and discounts, and then a related

26 issue that arises from the Defence about whether the claimants repeatedly requested

1 the defendants to move away from the IHS index. So it's that sort of contextual point.

2 THE CHAIR: Yes.

3 MR ARMITAGE: The point of dispute is the defendants say that this category should
4 be limited to emails, and we say it should also cover internal documents, for example,
5 from the European file server that we've discussed, where we know from
6 Mr Bronfentrinker's statement that documents relating to caustic soda were saved.
7 The defendants say that this category should be understood as being limited to
8 documents and emails exchanged in negotiations between the claimants and the
9 Westlake defendants, and that they therefore shouldn't be required to search internal
10 documents. As I understand it, they say this because, in their submission, the relevant
11 allegations are based on inferences, and inferences, they say, can't be drawn by
12 definition from internal documents that the claimants haven't seen.
13 We don't understand that. We say that internal documents, as well as emails, are
14 plainly capable of shedding light on what may have happened in these negotiations.
15 You may have a negotiation on the telephone, you may have a note of it, or so on and
16 so forth.
17 So it's a very short point: we just say that this category isn't limited in the way
18 defendants say it is and we'd invite you to give an indication. (Pause)

19 THE CHAIR: Yes, Mr Holmes.

20 MR HOLMES: Sir, this is a category of priority disclosure directed at three specific
21 allegations, all of which concern positions alleged to be taken by the defendants in
22 negotiation with the claimants.
23 So, first of all, at (a) the allegation that we ultimately required pricing to be determined
24 by price indices produced by IHS; at (b) that we rejected proposals for price caps,
25 floors and discounts; and (c) that Lenzing requested that we should move away from
26 the IHS index. Those are all positions in the course of negotiations.

1 So the category is squarely aimed at the negotiations and the exchanges in the course
2 of them.

3 We say that a wider trawl of internal documents is not required to give this priority
4 disclosure category and would obviously increase the scale and complexity of priority
5 searches. Where the intention was to capture internal as well as external documents,
6 that was expressly provided for in the priority disclosure categories, and one sees that
7 at PDC 5, where a distinction is drawn at (a) between the communications between
8 the defendants and IHS and at (b) internal communications.

9 THE CHAIR: Mr Holmes, when you look at it, it could be a timing issue or a more
10 fundamental issue. If what you're saying is a timing issue, which is, for the purpose of
11 priority, we're going to do what you said, which is the actual communications between
12 each party, but you are going to give the internal documents to them later as part of
13 your disclosure, then I'm absolutely relaxed with it.

14 If you're going to say, "I'm not going to give the internal documents", then there's
15 a problem, because clearly when you have negotiations, you'll have your own internal
16 documents reporting back on those negotiations, and there'll be positions being taken.
17 So which one are we?

18 MR HOLMES: Sir, I think this is largely a phoney war. At the start of this disclosure
19 process, we have agreed to disclose any practices or policies to link caustic soda
20 prices to indices under category 10, and that category will address the pleaded
21 allegation that Westlake insisted on IHS and resisted a move to other indices. That
22 addresses, we say adequately, 3(a) and 3(c).

23 As regards 3(b), refusal to agree price caps, floors or discounts, we say that the best
24 place to look for such a generic approach in the course of commercial negotiations is
25 the exchanges between the parties. Attempting to find policy documents on these
26 matters would require a huge and expensive trawl for a category that is so diffuse that

1 the claimants have not even attempted to formulate it in their Redfern categories.

2 MR ARMITAGE: So, sir, we would be equally relaxed about -- as long as we get the
3 documents, whether they're categorised as priority or otherwise is not an issue.

4 The limitation, though, to what I think my learned friend described as practices or
5 policies we would be concerned about, because, plainly, you may have a relevant
6 document going to these pleaded allegations that doesn't fall into that category.

7 But provided that the order was framed in a way that ensured that it didn't omit
8 documents because they weren't formal policies or practices, we would be content for
9 this to be treated as a freestanding disclosure category. It's not currently covered in
10 the Redferns because of this dispute.

11 THE CHAIR: I know, but it's clearly an important category, and you want internal
12 documents.

13 MR ARMITAGE: Exactly.

14 THE CHAIR: Yes.

15

16 Ruling

17 THE CHAIR: At the last CMC, disclosure was considered and it was decided that five
18 categories of documents would be prioritised as set out in the annex to the order that
19 was made on 17 May 2025.

20 There is a dispute as to the extent of the search that should be made, either at all or
21 at this stage, in relation to category 3. Category 3 provides:

22 "The Claimants and the Defendants (insofar as the allegations referred to below relate
23 to them) shall give disclosure of negotiating documents concerning:

24 "(a) The Claimants' allegation at Amended Particulars of Claim paragraph 33 that the
25 Westlake Defendants, the II Defendants and other suppliers of caustic soda 'ultimately
26 require pricing to be determined by caustic soda price indices produced by IHS Markit

1 Limited';

2 "(b) The Claimants' allegation at Amended Particulars of Claim paragraph 41(f) that
3 the Westlake Defendants, the II Defendants and the other suppliers of caustic soda
4 rejected proposals of price caps, floors and discounts; and

5 "(c) the Claimants' allegation at Reply to Westlake Defence paragraph 9(b)(i) and
6 Reply to II Defence paragraph 7(a)(i) that the Claimants repeatedly requested the
7 Defendants to move away from the IHS Index."

8 The dispute between the parties is whether or not, at this stage or at all, this should
9 be confined to documents effectively passing between the parties, ie the actual
10 negotiating documents, or should it be wider and include internal documents, including
11 policies and practices, as well as internal comments on negotiating where they should
12 go.

13 The tribunal takes the view at this stage the proportionate approach is to look at the
14 documents exchanged for paragraph 3, but when it comes to substantive disclosure,
15 the tribunal does expect the wider exercise to be undertaken that is proportionate and
16 reasonable and necessary for the fair resolution of these proceedings. Internal
17 documents are clearly going to be relevant on this and the tribunal is satisfied they are
18 likely to exist. }

19 That's where we are on that. So, anything else that we need to do on this annex?

20 MR ARMITAGE: There's a further issue. It applies to this priority disclosure category
21 and also to some of the Redfern schedule categories.

22 THE CHAIR: Yes. But just remember on this, this applies to both of you, you know.

23 MR ARMITAGE: Yes.

24 THE CHAIR: Okay.

25 MR ARMITAGE: Yes. So this is about the use of Argus as a search term.

26 THE CHAIR: Yes.

1 MR ARMITAGE: You'll have picked up from the pleadings, I'm sure, sir, that there is
2 a pleaded issue in relation to an alternative index called the Argus.

3 THE CHAIR: Yes, the Argus index, which tends to have a lower prices. You would
4 have thought that one of the things you'd want to be seeing is whether or not the
5 alleged cartelists are giving different prices --

6 MR ARMITAGE: Yes.

7 THE CHAIR: -- and information to Argus as to IHS, and so I would expect to see the
8 communications to Argus as well as to IHS precisely for that reason. Whether we do
9 it for the whole period or not is a slightly different question.

10 MR ARMITAGE: Yes. So that's a question about the material scope of some of the
11 Redfern categories, which we'll --

12 THE CHAIR: We'll come to that later.

13 MR ARMITAGE: This is in relation to priority disclosure category 3.

14 THE CHAIR: Yes.

15 MR ARMITAGE: It's again quite a narrow point. Can I just show you something from
16 the Defence, which explains why we say that these categories should be searched
17 using the word "Argus" as a search term.

18 THE CHAIR: Okay.

19 MR ARMITAGE: Defence paragraph 24, which is at D/3, page 61, particularly at
20 subparagraph (c). You can see there's an averral from the defendants that:
21 "It was not until the contract negotiations in relation to the 2021 supply contract that
22 the Claimants sought to change the price adjustment mechanism to the base rate to
23 be based on the Argus Index."
24 We join issue with that in the Reply, which is at the next tab, if you could turn, please,
25 to tab 6, page 101.
26 Can you see at the top of the page, (i):

1 "It is denied ..."

2 I don't know why in fact it says "if alleged", because it is alleged.

3 "It is denied ... that it was not until the contract negotiations in relation to the 2021

4 supply contract that the Claimants first sought to move away from the use of a ...

5 formula based on the IHS Index ... to a price ... based on the Argus Index ..."

6 So there's a disputed factual issue. The priority disclosure categories that we were

7 just looking at, 3(a) to (c), bear on that issue because they are about the negotiations

8 in relation to whether the IHS index --

9 THE CHAIR: Yes.

10 MR ARMITAGE: We say, in those circumstances, not using Argus as a search term

11 when you're looking for these documents would be a very strange position and we

12 would invite --

13 THE CHAIR: It's part of the same thing.

14 MR ARMITAGE: Yes.

15 THE CHAIR: It's negotiating -- well, part of the negotiation is: what index do we use?

16 MR ARMITAGE: Yes. There's a dispute over when the claimants first started saying,

17 "Hang on a minute, please, can we move to the Argus index because there are these

18 differences", and insofar as searches are going to be carried out for these categories,

19 in line with the ruling that's just been made, we just say that "Argus" should be added

20 as a search term. It's said on the other side that that won't throw up any additional

21 documents, but how can that possibly be known a priori, as it were? So we would

22 invite you to indicate that "Argus" would be an appropriate search term.

23 MR HOLMES: Sir, I think I can cut through this. Our concern isn't that this will throw

24 up no documents; our concern is that if it's used as a single search term, rather than

25 in combination with other items, it will potentially throw up a large number of

26 documents. Provided it's understood --

1 THE CHAIR: You have to be sensible about this.

2 MR HOLMES: Yes.

3 THE CHAIR: You just have to be sensible. I think it's clear that documents referring
4 to Argus are potentially relevant in this category.

5 MR HOLMES: Yes.

6 THE CHAIR: And they're going to be disclosed. But using Argus on its own as a
7 category may not be that helpful, but I think certainly Argus should be a search term
8 when you're looking at this category.

9 MR HOLMES: Well, on the basis that it can be combined with other appropriate search
10 terms to narrow down to proportionate bounds, then I think that's fine.

11 THE CHAIR: Okay.

12

13 Ruling

14 THE CHAIR: In relation to priority disclosure category 3, there is an issue between
15 the parties as to whether or not the search should include documents relating to Argus,
16 which is an alternative index, and there is a dispute between the parties, the extent to
17 which the claimants sought to move away from the IHS index to the Argus index and
18 exactly when that happened. The dispute is evident from the pleadings at
19 paragraph 24(e) of the Defence and paragraph 9(b)(i) of the Reply.

20 In the circumstances, the tribunal is satisfied that documents relating to those issues
21 clearly should be disclosed, but that the proportionate way of searching is to combine
22 "Argus" with other search terms to locate the relevant documents. {}

23 Okay, done that one. Next one.

24 MR ARMITAGE: Thank you. So the next one relates to priority disclosure categories
25 5(c) and (d), but it's actually effectively a freestanding request which arises from the
26 letter from my client's proposed accounting expert.

1 Essentially, what is sought is that the priority disclosure that has already been ordered
2 at the first CMC in relation to profitability, so it's management and audited accounts at
3 (c) and then internal documents, minutes, papers discussing profitability, should be
4 given for the -- sorry, this order is confined to the relevant period and we say this
5 should be extended to before and after the relevant period and indeed to the broad
6 temporal scope --

7 THE CHAIR: What, so you can see the trends and everything?

8 MR ARMITAGE: Yes. So the proposed analysis -- and I should say, we're going to
9 come on to the broad temporal scope point, which will require a decision as to the
10 precise parameters of the before and after. So we would seek disclosure within these
11 categories for whatever that period is determined to be.

12 THE CHAIR: All right, that seems sensible. We just need to come back to it once
13 we've done --

14 MR ARMITAGE: Yes.

15 THE CHAIR: -- when we get to that part of the exercise.

16 MR HOLMES: I fully agreed on the temporal period; that's for later.

17 THE CHAIR: Yes.

18 MR HOLMES: In relation to whether these are sensible categories for extension
19 before July 2017, this is considered by the experts here. Ms Lim says that she would
20 prefer a longer period for these materials, but we say that, you know, a preference for
21 documentary or qualitative documents is one thing; the question of whether it's
22 reasonably necessary is another.

23 Our economic expert, Mr David Parker, identifies reasons for scepticism about these
24 specific ways of addressing the question of profitability in circumstances where there's
25 going to be disaggregated sales and costs data, so data showing for caustic soda what
26 the costs were and what the prices were across the long period, whatever's ordered.

1 So the question is whether you need the qualitative documents as well in
2 circumstances where again -- I mean, we're trying to keep this within proportionate
3 bounds -- looking for committee papers and/or minutes, discussing profitability over
4 a period of eight years.

5 THE CHAIR: So what's your proposal? Because, look, when you're looking at (c),
6 I've got no doubt that the extended period makes sense and it's not a huge burden.
7 But then you say the more detailed data -- yes, you say the more detailed data is going
8 to be broken down in the other documents you're going to give anyway. That's going
9 to be really important because you're looking specifically at caustic soda.

10 MR HOLMES: Yes. The data is just the best source.

11 THE CHAIR: Yes, that is the best source for that, but I do think for (c) --

12 MR HOLMES: (c) is fine. So (c) within the broad temporal period such as is ordered
13 in due course, but (d) we say should be left out for now.

14 THE CHAIR: Yes, I agree. Left out for now.

15 MR HOLMES: Thank you.

16 THE CHAIR: But you'll be giving disclosure of (d), but it's a question of the temporal
17 scope, isn't it?

18 MR ARMITAGE: Sorry, sir. Category (d) I understand from Mr Bronfentrinker's
19 statement is -- well, it is to be provided because it's in --

20 THE CHAIR: Yes, yes.

21 MR ARMITAGE: It just is one of the categories that hasn't yet been provided, but yes.

22 THE CHAIR: Okay, that's fine. So have we now dealt with that?

23 MR ARMITAGE: I'm going to turn around, but I think we've dealt with the priority
24 disclosure points now.

25 THE CHAIR: Okay. So what's the next point you want to go through?

26 MR ARMITAGE: Well, we're in your hands, of course. The natural next point could

1 | be to make a start on the Redferns.

2 | THE CHAIR: We could, yes. That's all right.

3 | MR ARMITAGE: There are obviously quite a few points, so we'll have to move swiftly.

4 | THE CHAIR: Have you made any progress?

5 | MR ARMITAGE: There is some limited progress; perhaps not as much as you may

6 | have hoped, but there are some categories that we can at least go through. Well, at

7 | least one.

8 | THE CHAIR: Okay. So on your one, just identify first which categories are still in issue

9 | that you need a ruling on.

10 | MR ARMITAGE: Okay. Well, if you have the summary schedule, which is right at the

11 | front of the ring-bound A3?

12 | THE CHAIR: I've got the schedule here.

13 | MR ARMITAGE: So the page that has B91 in the bottom right.

14 | THE CHAIR: I've got that.

15 | MR ARMITAGE: Yes. So that's the cover schedule, which shows the remaining areas

16 | to be determined with the space for the tribunal's decision --

17 | THE CHAIR: You're saying I've got to determine all of these?

18 | MR ARMITAGE: Shall I quickly trot through them or shall we get -- there are a lot of

19 | categories, I'm afraid.

20 | THE CHAIR: As of this document, there's a lot of categories. Which categories in B91

21 | to B97, I think, am I going to be required to give a ruling?

22 | MR ARMITAGE: So category 1.

23 | THE CHAIR: Yes.

24 | MR ARMITAGE: Category 3.

25 | THE CHAIR: Let me just tick it and then we know where we are.

26 | MR HOLMES: Sir, B91 is our Redfern. I think B78 is the Westlake.

1 MR ARMITAGE: B91 is the claimant's requests of the defendants, which I thought
2 would be taken first.

3 MR HOLMES: Yes.

4 THE CHAIR: This is what they're asking from your clients.

5 MR ARMITAGE: What we want from them.

6 THE CHAIR: B91.

7 MR ARMITAGE: So obviously -- I'm sorry, I should have said that the broad temporal
8 scope resolves a number of these. Category 1, categories 3, 4, 5, and 6.

9 THE CHAIR: Yes.

10 MR ARMITAGE: Categories 8 to 9.

11 THE CHAIR: But a lot are just the temporal scope that's going to be --

12 MR ARMITAGE: Yes, indeed, quite a few of them will be resolved by the temporal
13 scope point. And some of them, the only other point is the point about Argus as
14 a search term --

15 THE CHAIR: Yes.

16 MR ARMITAGE: -- where we'd invite you to --

17 THE CHAIR: It looks, it's not quite as bad as it looks.

18 MR ARMITAGE: It's not quite as bad as it looks but I'm afraid there are quite a few
19 points --

20 THE CHAIR: It can't be as bad as Gormsen, can it?

21 MR ARMITAGE: I'm not familiar with that case, but I can well imagine. I mean, I think
22 the reality is, as we go through --

23 THE CHAIR: Okay, if we just start going through it because once we've made a ruling
24 on temporal scope, we'll probably be okay.

25 MR ARMITAGE: Would it make sense to start with that point?

26 THE CHAIR: Yes. Try to finish temporal scope before lunch and then that may resolve

1 the others.

2 MR ARMITAGE: Yes.

3 As you know sir, the relevant period in this case, or what we call in the Particulars of
4 Claim the cartel period, is July 2017 to February 2021. That's our best current
5 estimate based on the inferences we've drawn of the duration of the unlawful conduct.

6 THE CHAIR: It's July ...?

7 MR ARMITAGE: July 2017 to February 2021, and that's at paragraph 1(b) of the Re-
8 Amended Particulars. So it's just over three and a half years.

9 It's common ground that in relation to a number of disclosure categories, primarily,
10 although not invariably, categories that are going to be used by the experts in their
11 quantum analyses, it's common ground that disclosure of documents should extend to
12 before and after the relevant period, enabling them to run their regressions in the usual
13 way.

14 THE CHAIR: Yes.

15 MR ARMITAGE: That's what we mean by the broad temporal period. And it's common
16 ground that the after period should run until 29 February 2024, so three years after the
17 end of the relevant period.

18 THE CHAIR: So that is the run-off period, yes?

19 MR ARMITAGE: Well, that's an important point, so we'll come to that. We'll come to
20 that because we say that's relevant to the question of how long the before period
21 should be. So the dispute is only about the length of the before period, and we say it
22 should run from 1 January 2014 -- so effectively the same length of the relevant period
23 beforehand, so about 3.5 years -- and the defendants say it should run from
24 1 January 2016, so about 18 months.

25 According to my notes, a resolution to this issue will completely resolve, if this puts
26 your mind slightly at rest, sir, a number of Redfern categories where this is the only

1 point of dispute.

2 THE CHAIR: Yes, I can see that. Yes, it's an important point.

3 MR ARMITAGE: It's got quite a large number --

4 THE CHAIR: So you've agreed the end period?

5 MR ARMITAGE: We've agreed the end period.

6 THE CHAIR: And that you've agreed at least 18 months.

7 MR ARMITAGE: Indeed. So it's a fairly narrow point. Our position is based on input

8 from our proposed --

9 THE CHAIR: And do we have any evidence, in pounds, shillings and pence terms, as

10 to what's the difference between having the before period January 2016 and

11 January 2014?

12 MR ARMITAGE: No, sir, so --

13 THE CHAIR: Do we not have that?

14 MR ARMITAGE: Costs and proportionality are very much the nature of the objection

15 from the other side, but there isn't any evidence, as far as I know, on the pounds,

16 shillings and pence terms.

17 THE CHAIR: I think I've made it clear in other rulings that if you are going to take

18 objection on costs, I expect to have something at least in ballpark cost estimate of

19 what the difference is.

20 MR ARMITAGE: Yes. Certainly where you have already agreement that there should

21 be a relatively substantial period. So as you say, the debate is over extending that by

22 18 months.

23 THE CHAIR: That's what the debate is, yes.

24 MR ARMITAGE: So we say it's reasonable, and it may be we can take this quite

25 shortly. That's informed by input from our expert economist, Dr Bagci, and you have

26 her letter, which deals with this, and then a number of specific --

1 THE CHAIR: Let's look at the letter then.

2 MR ARMITAGE: C/4/48.

3 THE CHAIR: Yes. Paragraph -- oh, yes. I've seen this, yes.

4 MR ARMITAGE: So these were written with the tribunal's new practice direction in
5 mind, which refers to the sense of having these sorts of letters at these sorts of
6 disclosure CMCs.

7 You'll see at paragraph 5, she makes the point that it's important to have a sufficient
8 number of observations in the clean period, in other words the period unaffected by
9 the anti-competitive conduct, to ensure that it's comparable with the period affected by
10 the alleged conduct.

11 THE CHAIR: Yes.

12 MR ARMITAGE: Then at 6, she sets out her reasoning, and she identifies a number
13 of factors which are, in my submission, quite familiar.

14 Just to pick two of them out, which I'd like to particularly emphasise. Really, the issue
15 here is the defendants rely on the fact that it's common ground that there will be
16 3.5 years of after data, which they say would allow you to do a during and after
17 analysis. We say there are concerns over that, and the first concern is this is a case
18 in which, firstly, it's uncertain what the temporal scope of the cartel was. That's
19 something that needs to be considered and refined following disclosure, we anticipate.

20 But it's obviously well recognised that, where you do have a cartel overcharge, the
21 impact of that overcharge may linger on, and that's the run-off point.

22 Depending on the precise end date of the cartel -- which we don't currently know;
23 we've given our best estimates -- that could cause issues with the suitability of data
24 from the after period, if the after period data is actually polluted by the cartel
25 overcharge.

26 That's why we say that the before period is more important than it might be in another

1 case. Where, for example, you have a Commission decision establishing the precise
2 duration of the cartel, nobody's going to argue about that. You can then say: well,
3 look, we know the cartel ended on this date; let's allow a one-year run-off period and
4 then let's take data from after that. We just don't have that here.

5 Then the other point in relation to the after period is it's anticipated at subparagraph (e)
6 of Dr Bagci's paragraph 6, which is the point about the potential structural break in the
7 data -- so if there's some major shock during the before period which renders it -- if
8 you have a narrow period, it's harder to take account of that in your regression
9 analysis.

10 THE CHAIR: That's true, but the point the other side will say is we've got no evidence
11 that there is one.

12 MR ARMITAGE: No, that's true, but the point we rely on, though, is that there is reason
13 to think there may be an event of that nature in the after period because, as you'll
14 recall from the last CMC, you requested that diagram showing --

15 THE CHAIR: I did, yes.

16 MR ARMITAGE: And what you saw is a big spike in prices in the after period.

17 THE CHAIR: Correct.

18 MR ARMITAGE: There's some evidence from Ms Forster, my solicitor. A point has
19 been taken about it being inappropriate for that evidence to be given in reply, but it
20 was a direct response to something said by Mr Parker on the side of the defendants.
21 Because Mr Parker recognises in his letter that if you do have a structural event of this
22 nature -- he doesn't refer to that particular event -- that can cause difficulties with the
23 cleanness, if you like, of the data.

24 THE CHAIR: Of course, we all understand that. What they're saying is that, as of
25 now, there's no reason to believe that there is a structural break, but a lot depends on
26 how much have people actually looked, and I'm not clear about that.

1 MR ARMITAGE: No, and Dr Bagci's position is you need to examine the data in order
2 to see that.

3 THE CHAIR: Yes, of course you do.

4 MR ARMITAGE: So all we're really saying on this is that we're seeking a fairly limited
5 extension to the before period, as compared with what the defendants are agreeable
6 to providing. There are reasons to think -- and I put it no higher than that -- that using
7 data from the after period may be -- there may be difficulties.

8 The worst thing in the world, in my submission, would be to come back later, when the
9 experts have looked at the data, with a shorter before period, and they realise that the
10 data's unusable and they'd need longer; or for this matter to sit over until trial and we
11 find the defendants taking points about the comparability of the before data having
12 said that it should be limited in this way.

13 So we're really seeking quite a limited expansion to the before period, for 18 months.
14 There's no evidence on additional costs associated with that, and we have a clear
15 basis, we say, in Dr Bagci's letter.

16 So we would respectfully ask that that be ordered and that would, as I say, then resolve
17 quite a large number of categories in the defendants' Redfern schedule and some in
18 the claimants' as well.

19 THE CHAIR: Let's hear what Mr Holmes has got to say.

20 Mr Holmes, there are three possibilities. One is we go for your period, the other is we
21 go for Mr Armitage's period, or the other is we go for another period which I select
22 that's somewhere between the two. Those are the three possibilities we need to talk
23 about.

24 MR HOLMES: Yes, sir, I'm grateful for that indication. I mean, our concern is
25 disclosure is proving more difficult than we'd anticipated. The costs are substantial
26 and they will be increased. It's true that it's hard to quantify those, but there's no doubt

1 that, across a broad swathe of categories, searching further back in time is difficult
2 and extensions to that are more difficult.

3 THE CHAIR: I was thinking -- look, it's very difficult to come up with anything that ...
4 you know, at the moment, I would just go for 27 months, which is sort of between you,
5 and let's just move on. Because there's an element of unknowns. He may be right,
6 and I don't want to have a situation further down the line that we've got to do this
7 exercise again. So at the moment, I'm inclined to 27 months. If you want to argue
8 against that, we can deal with that. But I don't want to be in a situation that he's posited
9 and then we have to do the exercise again at huge cost.

10 MR HOLMES: Would you give me one moment to take instructions on that?

11 THE CHAIR: I would, of course. (Pause)

12 MR HOLMES: I'm grateful, sir.

13 Can I flag up one immediate point, which is that there are a whole range of questions
14 that are before you. I'm sure you'll have well in mind that one needs to consider them
15 in the round when considering the costs implications, and while the claimants keep
16 saying that each point might not add significant cost, the combination of requests that
17 they are making will carry very significant costs.

18 The problem is that a large volume of requests will lead to a large volume of irrelevant
19 hits which need to be considered, because this is qualitative as well as just data.

20 THE CHAIR: I understand that.

21 MR HOLMES: Let me just -- on the specific question you asked, those were my
22 immediate responses. I just want to get a sense of ... (Pause)

23 So, sir, we do remain concerned, I'm afraid, that this compromise -- it's obvious if that
24 is where you're going, we would prefer that to the longer period.

25 THE CHAIR: Yes.

26 MR HOLMES: But our concern is, looking at the expert evidence, we say that it doesn't

1 support --

2 THE CHAIR: Let's look at your expert evidence. Let's do that now.

3 MR HOLMES: Of course. Just briefly, if you still have it open on C48, I just would
4 observe -- this is Dr Bagci's evidence. She's somewhat caveated -- she says that
5 a clean period in January 2014 is preferable, and she then gives reasons. So she
6 doesn't go so far as to say it's necessary.

7 THE CHAIR: Yes. I know that, yes.

8 MR HOLMES: That's then addressed by Mr Parker. That's at tab 11, starting at 147.
9 You see at 2.1.4 he was asked to comment on this dispute --

10 THE CHAIR: Yes.

11 MR HOLMES: -- in other words, the additional two years sought, and he's been asked
12 to consider whether it's necessary for the analysis. His view is that the temporal scope
13 is longer than necessary, and he makes several points.
14 So, first of all, clean data pre and post is ideal:
15 "However, depending on the elapsed time since the beginning of the alleged cartel, it
16 may be that before-data are not available and a during-after analysis is undertaken."
17 And there is material to be provided both pre and post, a substantial period of time.
18 At 2.1.6, he says that:
19 "... it would be sufficient to provide disclosure of data and documents responsive to
20 the categories set out above from 1 July 2016 onwards, as this would provide a full
21 year before the beginning of the alleged cartel".
22 In fact, it's 18 months. 1 January 2016 is the offer, so it's slightly more than what is
23 suggested by that sentence.
24 So he says a year would be sufficient, back to July 2016; he says January 2016,
25 18 months, is quite sufficient. He points out that a one-year clean period would include
26 a complete cycle of any variation due to annual reporting cycles and, in his view,

1 a one-year clean period pre-dating the period is sufficient to conduct
2 a comparator-based approach.

3 So his evidence is that whatever might be preferable, this is sufficient. On that basis,
4 we do recommend the shorter --

5 THE CHAIR: A one-year clean period, my gut feeling is it just feels too short.

6 MR HOLMES: But we've offered 18 months; one year is his minimum.

7 THE CHAIR: You're offering 18 months. Yes.

8 MR HOLMES: The question is what's really needed, we say.

9 THE CHAIR: I just don't want a problem further down the line. You understand where
10 I'm coming from?

11 MR HOLMES: Yes, sir.

12 I mean, just to throw another point into the mix, you've drawn attention to the fact that
13 this is going to be a somewhat drawn-out process because of the need for third-party
14 disclosure.

15 THE CHAIR: I know.

16 MR HOLMES: It may be that this could be done in a staged way. While there's been
17 some sort of mention --

18 THE CHAIR: I'd rather a two-year, 24-month clean period. Let's just go with that. So
19 it's going to be a two-year clean period.

20 MR HOLMES: I'm grateful.

21 MR ARMITAGE: Yes, I'll gently push -- we would respectfully --

22 THE CHAIR: There's a limit to how much time I can spend on any one issue. I have
23 a whole load of things to deal with. It's rough and ready.

24 I would ideally want to see a two-year clean period. It could have been a bit longer.
25 You may be right at the end of the day. I hope you're not right. But if there's a problem,
26 we're going to have to come back to it anyway. But for now, it's a two-year clean

1 period.

2 All right. Next one. That probably helps you on some of the Redfern schedule.

3 MR ARMITAGE: It does. We then dive into the individual categories in the claimants'
4 Redfern schedule.

5 You said at the outset you probably didn't need to be taken to any authorities. Can
6 I just give you one reference. It's an authority you'll be extremely familiar with because
7 it's the Ryder authority on the general approach to disclosure.

8 THE CHAIR: Yes.

9 MR ARMITAGE: The only reference of which I wanted to remind you -- as I say, you
10 may not need it -- is the point you and your colleagues on the tribunal made at
11 paragraph 35(3) of that judgment about the potential relevance of train of enquiry
12 disclosure in cartel infringement cases.

13 The reason I just mention that is because a repeated refrain in relation to our request
14 in these categories is that we're on a fishing expedition. We don't accept that
15 characterisation in relation to the requests, but we do say, when looking at some of
16 these requests, it is important to bear in mind the information asymmetry we find
17 ourselves in. I know the Chair will have that in mind. I just wanted to refer to the fact
18 that there is a --

19 THE CHAIR: Yes. This case is stronger than that because that's a follow-on case.
20 When you look at the cases, cartels are exactly one of the areas where there's a lot of
21 rulings saying this is the prime example of when you have Peruvian Guano still. It
22 doesn't mean Peruvian Guano applies to all the categories of documents, but you have
23 to look at each category and say to yourself: what's necessary for the fair disposal of
24 the proceedings, given the nature of the claim?

25 But, you know, what Mr Holmes is saying is the reason why -- his case is there's no
26 cartel at all and that if you start off with that premise, anything you ask for is going to

1 be fishing. As a tribunal, we can't start off from that premise; what we've got to do is
2 to look at the pleadings, the issues between the parties, and then we go from there
3 without any presumption one way or another that it's a good case or a bad case. We
4 just have to say: well, this is a cartel case; there are likely to be, if it is a cartel case,
5 communications in all sorts of different ways, and there's so many ways that cartels
6 operate in this type of case.

7 I will bear in mind what was said in Ryder, and I agree that that will apply. In going
8 through this Redfern schedule process, I will apply the principles that we set out in
9 Gormsen at paragraphs 18 to 27 and paragraph 50, with the addition of paragraph 33
10 from the Ryder decision. I don't need to set it all out now. But those are the
11 parameters for today.

12 Yes.

13 MR ARMITAGE: I'm very grateful for that. I think paragraph 35 is the key --

14 THE CHAIR: 35. Yes, I remember it.

15 MR ARMITAGE: Yes, thank you.

16 So if you have the Redfern schedule to hand, so the claimants' Redfern schedule,
17 beginning at B91.

18 THE CHAIR: Yes.

19 MR ARMITAGE: If one looks at category 1, and if you could just read that please, sir.

20 THE CHAIR: Yes.

21 MR ARMITAGE: Insofar as this relates to IHS, this is an extension, effectively, of the
22 priority disclosure categories already discussed. Then there's also included in this the
23 Argus index. So the temporal scope of this is in line with the broad temporal scope,
24 although this is a slightly different form of enquiry, because the reason we want this
25 material is that we would wish to compare the submissions made by the defendants
26 to IHS with the submissions made to Argus -- a different index in relation to which

1 | there's no allegation of manipulation, which displayed very different trends -- and also
2 | with evidence of the defendants' actual contract pricing. The reason, respectfully, is
3 | obvious: if there are material differences in the submissions made to the two indices
4 | or the submissions made to Argus --

5 | THE CHAIR: What's actually in issue in this?

6 | MR ARMITAGE: What's in issue is whether Argus should be included in this at all.

7 | THE CHAIR: Okay, but if Argus is pleaded by both sides --

8 | MR ARMITAGE: Yes.

9 | THE CHAIR: -- as an alternative index, it's going to be really important to see what
10 | they're saying to Argus as well as IHS. When I looked at this before, I was on your
11 | side. It's probably better to hear from Mr Holmes first to see where we are, but we're
12 | changing the temporal scope, obviously.

13 | Mr Holmes, where are you on this? Because I do think Argus is relevant for the
14 | reasons we discussed even earlier, but again it's a question of what do you put along
15 | with Argus as part of the search? I agree with you that just simply having "Argus" as
16 | a search term is going to give you too many hits.

17 | MR HOLMES: Well, sir, we hear what you say about train of inquiry; we have that in
18 | mind. But we also have a pleaded case that identifies a particular mechanism and
19 | based on price changes, which is focused on the manipulation of the IHS index.

20 | THE CHAIR: Yes.

21 | MR HOLMES: There's no allegation, obviously, of manipulation in relation to Argus.
22 | What's said instead is that it would be helpful to compare submissions made to IHS
23 | and to Argus.

24 | THE CHAIR: There's got to be a reason why there's the discrepancy between the two
25 | indices. You know, your clients, from what I can see from the pleadings, are pushing
26 | for, "Let's use IHS as our base ", and they were suggesting at some stage -- we can't

1 get to the bottom of when -- that you should be looking at Argus. No doubt both parties
2 have the different interests. Your interest is to start off with indices as the base and,
3 obviously subject to discounts and all that, you start off with a base of IHS because
4 that's higher, and obviously it's in their interest to start off with a base that is lower.
5 But understanding why the two indices are different, I can't get to the bottom of it with
6 the little information I've got.

7 One possibility is that the alleged cartel is giving different pricing information to
8 different organisations. But there's another explanation, that the approach of the two
9 organisations was fundamentally different --

10 MR HOLMES: Yes.

11 THE CHAIR: -- and that the Argus was actually looking at different things and different
12 sources and so they would come, let's say, to a higher figure.

13 MR HOLMES: Yes.

14 THE CHAIR: There are a number of explanations, but I do think that it is going to be
15 relevant to look at Argus, but not to the same level as IHS, because clearly this case
16 is about IHS.

17 MR HOLMES: I think this takes us right back to the issue that you raised with
18 third-party disclosure. Because to know whether there's a fundamental difference
19 between the indices, one needs to know the methodology. On methodology, the
20 authoritative source of methodology will be the indices themselves. There has been
21 no contact made by my learned friend's client yet with Argus, as we understand it,
22 certainly nothing that's been disclosed to us, in order to try to identify what the
23 methodology is. Instead --

24 THE CHAIR: But that's the point. The point is, point 1, the explanation may be the
25 same people are giving different information to different indices. Clearly, if that's
26 happening, we need to know. On the other hand, point 2 is that it may simply be a

1 different methodology, and so that will help you.

2 MR HOLMES: Yes. And so --

3 THE CHAIR: So we're leading to a position whereby you say, well, it's for them to
4 prove their case. If they don't look at the methodology of Argus and they want to rely
5 on that, then there's an evidential gap and you haven't tried to get the information.

6 MR HOLMES: Yes. I mean, the short and simple point is, before sending us off on
7 a massive trawl, increasing our costs and causing significant burden for us -- 40,000
8 reviewed in relation to IHS, 40,000 documents, 14 reviewers -- before sending us off
9 on that, one might at least find out whether there's any information about Argus'
10 methodology to see whether there's any basis for supposing that the differences
11 between IHS and Argus can be explained in the way that they allege, purely
12 inferentially. And unless one has information from both Argus and IHS about
13 methodology, one cannot work out, simply from having information about the
14 submissions, whether there is an explanation other than the one that's being posited.

15 THE CHAIR: On the IHS methodology, you weren't able to assist.

16 MR HOLMES: No, and it seems --

17 THE CHAIR: So, on Argus methodology, it's most likely that you're not going to be
18 able to assist.

19 MR HOLMES: After a massive trawl, yes. And combine that --

20 THE CHAIR: Where are Argus? Are they in London?

21 MR HOLMES: Yes, they are sir, they are in London.

22 Second point: the search that we have done for submissions to IHS has revealed
23 nothing. I think, one document of written communication, of submission of actual
24 information submitted by us to IHS.

25 To do the same exercise with Argus to get another nil return, another 40,000
26 searches -- at a certain point, the tribunal just has to stand back and ask: are we going

1 down the right track here or is this increasing cost on the defendants in relation to
2 a speculative claim where other stones, much easier stones, have not been turned by
3 the claimants?

4 It's very easy to push it on to us, but, really, we say that's not the right approach in
5 principle. Given the results of the searches in relation to IHS, sending us off on a wild
6 goose chase in relation to Argus seems, we say, really not well-founded, not
7 reasonable and not proportionate. (Pause)

8 THE CHAIR: Yes, okay.

9 I think the problem with Argus is that, to get you to go and do the same exercise at this
10 stage without knowing what their methodology is is disproportionate. On the other
11 hand, if it is the first scenario, it doesn't exclude the second scenario. It can be both
12 scenarios.

13 So if we look at scenario 1, which is you're giving different data to different people and
14 it may be that Argus has a different approach that you sometimes see where there's
15 a form, you fill out the form and you're giving precise information and that's all in
16 writing; I don't know, that may explain why there's a difference. I don't know.

17 But is there a sample we can do for a relatively confined period where you do your
18 sample and say, "Okay, I'm going to look at it for this particular year", they can choose
19 which year you want, and then you'll do it for that year? I think that's probably the way
20 forward.

21 I know your solicitor doesn't like it, but that's what I think is the proportionate way
22 forward.

23 MR HOLMES: I'm very grateful for that suggestion. I'm conscious of the time.

24 THE CHAIR: Yes.

25 MR HOLMES: Would it be -- rather than -- I appreciate it's a bit unacceptable to leave
26 this over the adjournment, but --

1 THE CHAIR: I can understand. What's coming out of this is that at some stage it's
2 going to help the tribunal to know what the methodology of Argus is. Okay? Clearly
3 that's a piece of information. If they want to go and get it, they can get it. If they don't
4 want to get it then they don't get it, and then there'll be an evidential vacuum.
5 If they try and get it and they don't get it, then that's fine, I'm not going to draw an
6 adverse inference. But if they don't try at all, then I may say, well, that's your choice
7 and there's always a risk of scenario 2.
8 On scenario 1, which doesn't exclude scenario 2, I do think it's worth doing something
9 at this stage, but for a limited period of time. That's what I'm indicating.

10 MR HOLMES: That's very helpful.

11 THE CHAIR: You should try and be flexible.

12 MR HOLMES: Yes.

13 THE CHAIR: I know the natural reaction is always to push back and say nothing, but
14 I'm trying to be reasonable for both sides. I fully appreciate this has costs involved,
15 but both sides are going to think about -- you've got to think about using a sample, and
16 these guys are going to have to think about what are we going to do with Argus,
17 because the chairman who's going to be determining this case at the end of the day
18 thinks it is helpful to know the methodology of Argus.

19 MR HOLMES: I'll take that back and perhaps --

20 THE CHAIR: Take it back. We'll come back to this. You've got other things to do as
21 well, because you have to look at that pleading and you're going to have to come back
22 with some wording.

23 MR HOLMES: Yes, we'll do that.

24 THE CHAIR: And they've got work to do because they've got to give me a schedule
25 of the location of all the other alleged cartelists.

26 MR HOLMES: But just to make sure I've understood, the suggestion would be that in

1 relation to Argus submissions, we might take a confined period by agreement with the
2 other side --

3 THE CHAIR: Correct.

4 MR HOLMES: -- and search within that to see whether we have anything better on
5 that side. And also perhaps something like model C disclosure in relation to
6 methodology: we make reasonable enquiries, we can give witness evidence about
7 how Argus was handled, perhaps. Something along those lines.

8 THE CHAIR: I'm sure you'll be able to come up with a compromise, but I think you
9 both know what we're looking for.

10 MR HOLMES: Yes, that's very helpful. So we'll take that offline.

11 THE CHAIR: Okay. What's going to be next after this?

12 MR ARMITAGE: Then we're on to -- well, sorry, there's just one point I might just
13 make before lunch, which is my learned friend said again that they had only found one
14 document based on the searches they'd done so far in relation to the IHS
15 methodology, but that's the next category, and as I understand it, there haven't been
16 searches for that category, so --

17 MR HOLMES: I can scotch this very quickly now.

18 It was very clear and has been well understood that the priority disclosure categories
19 were ordered partly with a view to getting an understanding of the methodology. That
20 was our understanding and that was the basis on which, for example, internal,
21 communications were searched. So it's not correct to say the searches done so far
22 haven't been directed at the methodology.

23 MR ARMITAGE: Okay. We'll discuss that over lunch. That may be the next category.
24 If not, we'll be on to 4 and 5, which --

25 THE CHAIR: What normally happens with Redfern schedules is that the parties can
26 see what the direction is and they can carry on talking, so when you come back at

1 2.00, you'll be able to say, "Well, we've resolved these ones now and we're just going
2 to be concentrating on the remaining ones". Okay?
3 That's it for now.
4 (1.03 pm)
5 (The short adjournment)
6 (2.08 pm)
7 THE CHAIR: Mr Holmes.
8 MR HOLMES: So, sir, there were two pieces of homework. We've come up with some
9 amendments.
10 THE CHAIR: Okay.
11 MR HOLMES: Let's look at it. Do you want to hear them or do you want us to see if
12 we can just hammer them out with the other side and raise any problems later?
13 THE CHAIR: This is on the pleading?
14 MR HOLMES: This is just on the joint and several liability point. It's just --
15 THE CHAIR: We do want it resolved before I leave today. That's something.
16 MR HOLMES: Yes. So shall I very briefly tell you what we propose to say?
17 THE CHAIR: Yes, and then Armitage can deal with it on his feet, I'm sure. Okay.
18 MR HOLMES: Okay. Very good. This is paragraph 68 of the pleading.
19 THE CHAIR: Yes.
20 MR HOLMES: And what we were proposing to do was in (c). Yes. So we're deleting
21 in (b) the "for the avoidance of doubt" text at the end. It is denied -- was that already
22 gone? Yes. So do you see the final sentence of 68(b) would go --
23 THE CHAIR: (c).
24 MR HOLMES: Sorry I think the numbering may have gone wrong. Let me just check.
25 Can I just have the document here?
26 THE CHAIR: I'm just working from D/81.

1 MR HOLMES: Sorry. Yes. (Pause)

2 THE CHAIR: We'll deal with this after the next break --

3 MR HOLMES: Very good. So then the second piece --

4 THE CHAIR: -- and then try and get it agreed with --

5 MR HOLMES: Yes, we'll do that. It may be during the next little break --

6 THE CHAIR: Yes, exactly.

7 MR HOLMES: -- we can deal with it.

8 So the second thing was the proposal for addressing Argus. What our proposal is - is,

9 first of all, in relation to Argus methodology, we propose model C disclosure; that's to

10 say we'll make reasonable enquiries to see what methodology documents we might

11 hold and we'll provide them.

12 THE CHAIR: Yes.

13 MR HOLMES: We'll also provide a statement supported by a statement of truth as to

14 the process that was used for making submissions to Argus. There's obviously

15 information in Mr Bronfentrinker's statement, on instruction, about how submissions

16 were made to IHS.

17 THE CHAIR: I know, but that's not from -- ideally, I don't like these statements coming

18 from the lawyer. I'd like it to come from someone on the client side.

19 MR HOLMES: Very good. So it could either be a statement -- an information --

20 THE CHAIR: An information statement? Why don't we have an information statement

21 on both IHS and Argus to cover it?

22 MR HOLMES: Yes, fine.

23 THE CHAIR: And then that way you've got someone pinned down on that.

24 MR HOLMES: That's not a problem. It will basically be the same type of information

25 as was provided in this --

26 THE CHAIR: Yes, that's all right.

1 MR HOLMES: Then the third thing was for submissions, we have one document.
2 Now, this is the document, we say, in which was --

3 THE CHAIR: Is this the email that refers to some WhatsApp call --

4 MR HOLMES: No, no, no, no, it's not that. You've got that already, I know, sir. All
5 this is - is that one example that we have from our searches of information being
6 provided in writing to IHS for the purposes of compiling the IHS index. This is the
7 original language because it was -- sorry -- because it was to IHS, which is
8 English-speaking.

9 You can see some questions were posed, dates from April 2020, some questions were
10 posed and then answers in red were given and that was sent across to the individual
11 from IHS. You see some specific questions have been raised about how COVID-19
12 affects things, how production has been impacted. Then at 6:
13 "Have you gone out to market with an increase for quarter 2? If so, how big in euros
14 per dry metric tonne?"

15 Then some information is provided. Then similarly at 8, in relation to spot transactions,
16 some further information.

17 So this is a specific basis on which a comparison could be made with submissions
18 made to Argus contemporaneously or in the same area. So our proposal would be to
19 search to see whether there are Argus submissions within, say, three months on either
20 side of that and disclose those on the basis that if you're going to be comparing to see
21 if there's a difference between the submissions, this would allow that.

22 THE CHAIR: I'd rather have six months either side.

23 MR HOLMES: Six months either side. I'm grateful.

24 THE CHAIR: Yes. Mr Armitage?

25 MR ARMITAGE: We had been going to say one year, but six months --

26 THE CHAIR: It will be six months either side, so it will be one year.

1 MR ARMITAGE: Yes.

2 THE CHAIR: Yes. Yes, that's fine. Yes, can I hand that back so I don't have it hanging
3 around. I thought some of that information is quite sensitive anyway.

4 Yes, don't forget to give me that information I need about the location of all the other
5 people in the market.

6 MR ARMITAGE: We've either done it or we're about to finish it.

7 THE CHAIR: Okay. So we'll look at that at the next break. Get it printed out so at the
8 next break we can talk about that and we can talk about the pleading after the next
9 break.

10 MR ARMITAGE: Yes.

11 THE CHAIR: Okay. All right. So what have we managed to dispose of?

12 MR ARMITAGE: I'm afraid there are still quite a few points on the Redferns. Okay.
13 I'll try to --

14 THE CHAIR: Remember, Mr Holmes has got his turn as well. We don't want him to
15 have a squeeze.

16 MR ARMITAGE: No, I know. There are rather fewer categories --

17 THE CHAIR: Oh, he doesn't have many categories, but he still has his right to have
18 his own share.

19 MR HOLMES: We've got less. I think ours will be quite a bit quicker. But, I'm grateful
20 that you've got that in mind.

21 THE CHAIR: You never know until we get there. (Pause)

22 MR ARMITAGE: Okay. So for category 1.

23 MR HOLMES: So there is one remaining temporal point which hasn't been canvassed
24 yet. You had the point that for the economists there was a debate about the length of
25 the broad temporal period.

26 THE CHAIR: Yes, we've got that.

1 MR HOLMES: And there was agreement that it goes back. There's also a dispute in
2 relation to some liability categories. I think on my note, it's categories 1, 4 and 5.
3 You've seen the allegation of infringement --

4 THE CHAIR: I have, yes.

5 MR HOLMES: -- based on unexplained pricing trends, July 2017 to February 2021.
6 What the claimants say is that they want liability documents, documents targeting
7 liability, going all the way back to the start of the broad temporal period which has now
8 been settled. We say that doesn't follow from the expert methodology question and
9 we say that there's no justification for going further back than the alleged relevant
10 period or, if it goes any somewhat further back, nothing like as far back as
11 January 2014. This is particularly costly and difficult because, again, it's documentary
12 searches.

13 THE CHAIR: Let's see what Armitage says on that and then you can come back in
14 the normal way.

15 MR ARMITAGE: I think, sir, I'm instructed on the liability categories -- I think it's 1 and
16 possibly some of the others -- we would be content with the relevant period approach.
17 At least for now. Obviously, if anything arises from the disclosure, we can --

18 MR HOLMES: I'm grateful. That solves the problem.

19 MR ARMITAGE: Thank you. Yes. Thank you.

20 THE CHAIR: And there's always liberty to apply on that.

21 MR ARMITAGE: Yes, with liberty to apply.

22 THE CHAIR: What tends to happen is you start the disclosure exercise and then you
23 start finding other things and other trends come out, and then you're going to have to
24 go back again. But for now, that's fine.

25 MR ARMITAGE: Okay. So that resolves a couple of the points.
26 Just very briefly on category 3, so B92. Obviously.

1 THE CHAIR: So 2 we forget, yes, because that's all agreed.

2 MR ARMITAGE: That's all agreed. Argus methodology documents we've dealt with.

3 THE CHAIR: Yes, we have.

4 MR ARMITAGE: Yes. But then there's a question of IHS methodology documents,
5 and I confess I've slightly lost track of where we've got to on the temporal scope there.
6 Obviously we are interested in any differences between what was going to IHS before,
7 during and after the relevant period. That's not such a liability issue in the same sense.

8 THE CHAIR: Yes.

9 MR ARMITAGE: It's a sort of comparator issue. And it's also important to remember
10 this is a category to which the 700,000 documents point applies.

11 MR HOLMES: Sir, I don't know if I can cut through this. We've offered model C in
12 relation to Argus methodology. It seems sensible the same approach is taken. You've
13 already indicated that the statement should cover how submissions are made to IHS.

14 MR ARMITAGE: Yes. That solves that.

15 THE CHAIR: That solves that. Yes, next one.

16 MR ARMITAGE: So next, we come on to categories four and five which are
17 conveniently taken together. These, if you'll cast an eye over them, are really critical
18 liability documents because they cover communications between --

19 THE CHAIR: Oh, this is absolutely critical in any --

20 MR ARMITAGE: And there's no dispute about the wording of these categories. I think
21 this is a category to which the point about temporal scope that Mr Holmes has just
22 made applies. In other words, although the schedule indicates that there's a dispute,
23 it's now agreed that this in the first instance will be confined to the relevant period.

24 THE CHAIR: Yes, we dealt with that. Yes.

25 MR ARMITAGE: The only issue is about the phone messenger apps.

26 THE CHAIR: Yes.

1 MR HOLMES: I thought we'd dealt with this. We're going to come forward with
2 proposals based on what we can ascertain about what phones are actually obtainable.

3 THE CHAIR: Exactly.

4 MR ARMITAGE: Oh, I see.

5 THE CHAIR: And you'll bear in mind all the relevant principles on this.

6 MR HOLMES: Yes.

7 THE CHAIR: You've got the Phones 4U first instance, Court of Appeal. You've got
8 what I say in my book at 597, 598.

9 MR HOLMES: Yes.

10 THE CHAIR: Bear all that in mind and then you'll probably come up with the right
11 answer, but I think you know what we're looking for.

12 MR HOLMES: Yes.

13 THE CHAIR: And any phones any of the key employees had at the relevant time
14 ideally should be looked at one way or another, but I know what the practical problems
15 can be and you're just going to have to, insofar as you can, work through them.

16 MR HOLMES: Agreed.

17 THE CHAIR: It takes time.

18 MR HOLMES: We'll do our best. But we're grateful for those indications. It's not
19 something we can really hammer out today.

20 THE CHAIR: No, I know. These things take time. As long as we all understand and
21 it's on the transcript what's required.

22 MR ARMITAGE: I'm grateful.

23 The next is category 6, B93. Another important liability category. If you have a look
24 at that, please.

25 THE CHAIR: I don't know because I think -- obviously if there are any, if there's
26 anything ... are they worried about incrimination? Mr Holmes, what's your concern

1 about this?

2 MR HOLMES: We are concerned that the category is pretty vaguely drafted and it will
3 catch issues of competition law which bear no relationship to this case, so vertical
4 supply agreements, for example.

5 THE CHAIR: I'm not interested in that.

6 MR HOLMES: No.

7 THE CHAIR: It's anything to do with the pricing which is the one that I think you should
8 be giving disclosure of.

9 MR HOLMES: Yes. I mean, subject, of course, to the fact that these
10 documents -- I mean, this is up to February 2024; there may be a lot of privileged
11 material. So this will be a difficult category --

12 MR ARMITAGE: Sorry. I think this would fall within the discussion on relevant period.

13 MR HOLMES: Ah, it would be confined to the relevant --

14 MR ARMITAGE: I think that one is in the same category.

15 THE CHAIR: Yes, I think it's okay in this category. Obviously, if anyone's going to -- if
16 you're going to raise traditional LPP, English LPP, then you'll do it in the normal way.
17 If you want to rely on any foreign law, you know there's a lot of authority on what you
18 can do and what you can't do. But generally, whatever the theory is, what tends to
19 come out comes out, as you know, because my experience of these foreign law
20 objections is they sound worse than they are in actual practice and the risk of actual
21 incrimination steps being taken is pretty minimal.

22 Okay, so I think we've dealt with category 6. What's the next one? We've got
23 category 8.

24 MR ARMITAGE: This started life as something that was discussed at CMC 1 about
25 price announcement letters. You may not remember --

26 THE CHAIR: They say they don't have them, but --

1 MR ARMITAGE: Yes, they --

2 THE CHAIR: -- what you ... (Pause)

3 Yes.

4 MR ARMITAGE: Well, can I just show you one document which I hope -- we sent this

5 to counsel on the other side this morning. It's just one --

6 THE CHAIR: It depends on what you call them, but it's pretty common --

7 MR ARMITAGE: Yes.

8 THE CHAIR: -- we get letters out.

9 MR ARMITAGE: Yes. This is the one we emailed this morning.

10 THE CHAIR: Yes. Okay.

11 MR ARMITAGE: Yes. So this comes out of the priority disclosure 5(b) and 5(a), and

12 this is a communication with IHS again. It's just the email at the bottom. Can you just

13 see the reference to formal price announcement regarding negotiations for Q4

14 contracts? Just if you could read that.

15 THE CHAIR: I don't know what happens in this industry, but quite often you get a table

16 or whatever that's sent from the manufacturer saying, "This is our guide price for the

17 next quarter" or whatever, and then there's a discussion as to what this particular client

18 is going to be charged. They'll use that as a starting point, and the customer will say,

19 "No, I want a discount, I'm getting a lot of volume". But it's always used as the sort of

20 starting point, the basis for discussion. I want to see those documents.

21 MR ARMITAGE: It's that sort of document, exactly.

22 THE CHAIR: We want to see that.

23 MR ARMITAGE: We've really tried to formulate it to avoid catching any routine

24 communication on any pricing. Exactly. So the reference here suggests there may

25 have been formal price announcements regarding Q4, that seems to be the thrust of

26 what's said, so it's documents of that kind, exactly.

1 MR HOLMES: Sir, if I could --

2 THE CHAIR: You may say there are none, but --

3 MR HOLMES: With great respect, how is this relevant? They're getting the prices
4 and sales in a data set, yes?

5 THE CHAIR: Yes, yes.

6 MR HOLMES: So they'll have that information. They're getting any communications
7 between us and the other alleged infringers. How will any non-public communications
8 over a period of up to ten years with customers which are only at best a starting point
9 for negotiations shed light on anything?

10 THE CHAIR: I've had experience with cartels when it's exactly done in that way. I can
11 give you examples if you want, but I don't think this is a misguided approach. I think
12 that what you may find is you've got five cartelists, okay? They will say amongst
13 themselves, "What are you thinking about? Incremental increase for the next quarter",
14 and then you'll find that they'll all be sending out roughly the same information, they
15 may spread it out over a different period of time, and then you'll see a clear pattern
16 that there is a cartel operating. I do think this is a type of document we'd want to see.

17 MR HOLMES: But wouldn't the relevant document be any evidence of consultation,
18 any document showing contacts of the kind you described? Wouldn't that be a more
19 sensible point?

20 THE CHAIR: It could be, but I don't -- the problem with this case is that what one
21 would want to see, okay, is not just -- let's say you have a system where you say, "This
22 is our sort of intended incremental price increase over the next quarter", okay? We
23 want to see if you do that and you want to see if the others do that, okay, at the same
24 time, roughly in the same amount. That's a pretty good indication there's a cartel
25 operating, even if you can't find any documents between them, because the whole
26 idea is they do these things in secrecy.

1 What is unusual about this case, Mr Holmes, is that they're only asking you for that
2 type of document.

3 MR HOLMES: Yes.

4 THE CHAIR: What one would normally want to see is what everyone else is sending
5 out, because if all I have is you saying there's an incremental price increase for the
6 next quarter of, let's say, \$1 or €1, okay, that in itself may not tell me very much. On
7 the other hand, if I look at other caustic soda producers and that they send out "we've
8 decided that we're going to increase it by €1 for the next quarter", then you'll say "even
9 if I can't find any communications between the two, it's likely that there is a cartel
10 operating if they're the same amount, coming out roughly the same time". So this is
11 a very unusual way of doing it.

12 You know, my own view is what these guys should be doing, if they want to prove their
13 case, is trying to get documents not just from you, but from other people, so you can
14 do that analysis.

15 MR HOLMES: Yes, I think you have already, sir, the sense of frustration on our side
16 at being at the sharp end of enquiries that, on their own, won't elicit anything of utility
17 because of the way that this is being prosecuted by the other side.

18 THE CHAIR: Well, "prosecuted" is the wrong word.

19 MR HOLMES: Well, conducted.

20 THE CHAIR: Yes.

21 MR ARMITAGE: Just very quickly, I don't agree that absent -- I heard what you say,
22 of course, about how in a normal CMA investigation, you would have the broad data
23 from the market and of course you could then look for parallels. Obviously, what we're
24 interested in here is putting an evidential picture together from a range of sources.

25 So let's say one had disclosure pursuant to one of the agreed categories which
26 showed there was a meeting between suppliers on date X, then we also see shortly

1 following that a price announcement letter. That link could be extremely informative.

2 THE CHAIR: Of course. Look, I'm inclined to order price announcement letters.

3 MR ARMITAGE: Yes.

4 THE CHAIR: What I'm saying is that it would be far better if you were looking for other

5 price announcement letters with other alleged members of the cartel, because if Mr

6 Holmes is right and you don't have any pattern, can't prove any pattern with other

7 alleged cartelists, that weakens your case. On the other hand, if you have examples

8 of price increase letters or whatever, incremental increase letters, and they have

9 parallels, you could have a pretty well improved case.

10 But I do think that I would like to see price announcement letters, and I don't think it's

11 a huge burden to do it.

12 MR HOLMES: So as I understand it, it's confined now to the relevant period,

13 Mr Armitage says. We say that that (overspeaking) --

14 THE CHAIR: Yes, the relevant period, yes, (overspeaking) --

15 MR ARMITAGE: Relevant, yes.

16 THE CHAIR: Yes.

17 MR HOLMES: You also have the point, sir, that my understanding is there are no

18 such price announcements.

19 THE CHAIR: I understand that.

20 MR HOLMES: So there may be a nil return.

21 THE CHAIR: Your case is there's going to be a nil return.

22 MR HOLMES: Yes.

23 THE CHAIR: But it can take more than one form. You can have an official document

24 which goes to all the customers, and it just goes out a standard thing, but you may

25 have an email to individual customers saying, "The incremental increase for the next

26 quarter is X". You've just got to look for both. Okay.

1 MR ARMITAGE: So on that understanding, then, the wording, I take it, is
2 unproblematic; it's just it's confined to the relevant period.

3 THE CHAIR: It's confined to the relevant period and takes into account what I said.

4 MR ARMITAGE: Of course, of course.

5 THE CHAIR: I'm not inclined, unless someone really wants it, to give a written ruling
6 on this because there's so many bitty little things.

7 MR ARMITAGE: No.

8 THE CHAIR: We don't need a ruling. Also, this is not a class action. If it was a class
9 action, I generally will give everything in writing. Members of the group, those who are
10 represented, have a right to see what's going on and what's been decided. But I'm
11 dealing with firms like Willkie Farr and Stewarts. I don't think they need that.

12 MR HOLMES: Sir, our proposal would be just to append the Redfern or refer to it in
13 the order.

14 THE CHAIR: That's perfect. That's absolutely fine. Yes.

15 MR ARMITAGE: Okay, so the next category is category 9.

16 THE CHAIR: Yes.

17 MR ARMITAGE: So this is documents evidencing contractual arrangements
18 underlying the relevant supplies of caustic soda that were effectively used for the
19 purposes of reporting to the indices and/or where they were linked to the relevant
20 indices.

21 I think the point of dispute here really is that this covers contractual arrangements with
22 purchasers other than the claimants.

23 We would like the broader set of contractual arrangements for a number of reasons.
24 They're explained by Dr Bagci at paragraphs 11 to 13 of her letter, but just to
25 summarise -- I'm conscious that there's a lot to get through -- we think this will help
26 establish the existence of links between the defendants' actual supply prices and the

1 | prices they reported. It will also be informative in relation to the incentives that the
2 | defendants may have had to manipulate the IHS index. Obviously, if a large proportion
3 | of their contracts across the market were --

4 | THE CHAIR: So your concern is that they have contractual arrangements at
5 | a particular price, and that when they do whatever their reporting, they don't reflect
6 | that and they reflect a higher price. That clearly would be manipulation of the index, if
7 | that's what they're doing.

8 | MR ARMITAGE: Exactly. There's two possible -- very broadly -- ways: one way of
9 | manipulation would be, as you say, submitting something that is different to your actual
10 | contract pricing. Obviously, the other way is by colluding directly on pricing and then
11 | your actual prices are submitted, but they're inflated. So there are two different ways.

12 | THE CHAIR: So you may want to get the price of the index up in order to get the
13 | benefit of higher pricing.

14 | MR ARMITAGE: Yes, exactly.

15 | THE CHAIR: Yes. There are two ways of doing it.

16 | MR ARMITAGE: Exactly. So we're looking for contracts with not just the claimants
17 | but other purchasers in order to enable a more fulsome assessment of those issues.
18 | That's the short point.

19 | MR HOLMES: Sir, our only concern here is proportionality. In relation to establishing
20 | a link between actual supply prices and the index, we are disclosing data about
21 | transactional data. So that's in relation to individual sales volumes and prices already,
22 | and that data set is a better way to test against the index.

23 | As regards incentives, our largest customer was Lenzing. So Lenzing knows what
24 | was in its contract. It knows the link to IHS. That gives them information about their
25 | incentives.

26 | THE CHAIR: Can you give me an indication as to how many customers we're talking

1 about in the relevant period?

2 MR HOLMES: I can't give you the numbers -- how many? (Pause)

3 So we think it's a large number because part of the supply methodology is through

4 distributors, and there are spot contracts as well as -- so it could be a significant task;

5 that's the concern.

6 Given that we are providing the data, and we are happy also to confirm, in broad terms,

7 the proportion of contracts that contain an IHS pricing mechanism, we would ask you

8 to consider whether it's really necessary --

9 THE CHAIR: So you're willing to -- you've got the data that's readily available that tells

10 you the proportion of contracts that have IHS as a --

11 MR HOLMES: No, no, that's not what I said. I said that we would be prepared to

12 establish that with the client.

13 THE CHAIR: Okay. So you're willing to do it. So the records are there in order to do

14 that exercise?

15 MR HOLMES: They will be able to -- I think by looking at a few large customers, it will

16 be easy to get to a figure that is relevant for the purposes of incentives. There's no

17 real dispute that, on the one hand, customers will have had an incentive to push the

18 index down with the submissions they made, and that we will have had an incentive

19 to push it up, to the extent that there are price adjustment clauses by reference to IHS.

20 So that incentive exists; that's not really in dispute.

21 THE CHAIR: Well, where I am --

22 MR HOLMES: Yes.

23 THE CHAIR: -- is that I don't think it's necessary for the fair disposal of these

24 proceedings to have it for all customers, because you can have a vast number of

25 customers. So really the question is: how am I going to narrow this down, and what

26 figure, by size? Is it going to be -- how are you going to come up with saying the

1 largest X number, and how are you going to get to that? But I'm not keen --

2 MR HOLMES: Again, it would be a sample. It would be a share of the market, just in
3 order to allow them to understand exactly how much of it is covered by IHS clauses.

4 MR ARMITAGE: Could I just show you one entry from the -- so we can see that some
5 form of sampling may be sensible in relation to this category. Can I just show you
6 B137, which is an agreed category in the defendants' Redfern schedule, and it's
7 effectively the equivalent category going the other way. We've agreed -- I'm sorry,
8 B137.

9 THE CHAIR: I've got B137.

10 MR ARMITAGE: We've agreed that we'll supply rates between the claimants and our
11 top ten customers. So that sort of approach --

12 THE CHAIR: Yes.

13 MR ARMITAGE: -- we could see maybe a way through this.

14 Just on the data that they've agreed to provide -- it may be, in light of this resolution of
15 this issue, we don't need to come back to it -- the problem with that is that the apparent
16 data fields that they're able to provide are deficient in some respects, which is why we
17 need the contracts. But I think if we got, say, the top ten, that may circumvent that
18 issue. Top ten European customers other than Lenzing. That could be the --

19 MR HOLMES: Well, Lenzing is the largest -- top ten with Lenzing, which we're giving
20 anyway.

21 MR ARMITAGE: Yes. Okay.

22 MR HOLMES: To cut through this, we're happy with top ten for the relevant period.

23 THE CHAIR: Just one thing: the relevant period does run across a number of years,
24 okay? It may be that you'll have someone who is in the top ten in one year, who's not
25 in the top ten the next year. I think what I'd want is, in respect of relevant years, the
26 top ten for each relevant year, so that that way you won't miss someone out that could

1 | be significant. It may be it's going to have the same top ten, but if someone is in the
2 | top ten for one year but not the other years, just add them in. So you may have -- you
3 | understand what I'm trying to --

4 | MR HOLMES: I do, and I think that, as I understand it, that's the category also for
5 | Lenzing in the categories that we've just been shown.

6 | THE CHAIR: He's not listening. Sorry.

7 | Mr Holmes said something to you, Mr Armitage.

8 | MR ARMITAGE: Oh, I'm so sorry.

9 | THE CHAIR: See what he wanted.

10 | MR HOLMES: No, no, I'm so sorry. We have to -- and I hope you won't find it
11 | disrespectful that we take instructions. It's a complex matter, we don't want to --

12 | THE CHAIR: It's not. I just want to get to the end of it.

13 | MR HOLMES: Yes, of course.

14 | THE CHAIR: Just say the point you wanted to --

15 | MR HOLMES: Yes. So simply that the top ten for each year --

16 | MR ARMITAGE: Yes. Oh, yes, sorry.

17 | MR HOLMES: -- I think that is the category, but I just wanted confirmation.

18 | THE CHAIR: Okay. So we've done 9.

19 | Okay, next one.

20 | MR ARMITAGE: Yes. Okay.

21 | 10 I think is resolved because the only issue is Argus as a search term.
22 | 11. I think in light now of what we've seen in -- so there was a dispute about the scope
23 | of the agreement. So if you look at what's agreed here by the defendants in the second
24 | or the third column, they had imposed a limitation in relation to this category. I think
25 | in light of what's been said in Mr Bronfentrinker's statement -- and, sorry, I haven't had
26 | a chance to convey this to my learned friend yet -- it's now agreed, and this is

1 a quotation from Mr Bronfentrinker, that they'll disclose all decision-making or policy
2 documents that address the defendant's reasoning on decisions regarding the export
3 of caustic soda outside the EEA/UK. This relates to the pleaded allegation that caustic
4 soda was being exported out of Europe (overspeaking) --

5 THE CHAIR: Yes, no, that's appropriate.

6 MR ARMITAGE: So I think, in light of that clarification --

7 THE CHAIR: Yes, I'm happy with that.

8 MR ARMITAGE: -- this category is agreed.

9 Category 12: this is documents relating to the so-called mercury phaseout.

10 THE CHAIR: Yes.

11 MR ARMITAGE: This is now agreed. We've indicated, subject to liberty to apply, that
12 we're happy with the proposed temporal scope.

13 THE CHAIR: Okay.

14 MR ARMITAGE: So that one I don't need to trouble you with.

15 Category 13 -- and I hope we can take the remaining categories relatively
16 quickly -- this is at B94, documents and data on the defendants' total production
17 capacity, supply capacity and so on.

18 There's an agreement that they'll provide capacity data but not capacity-related
19 documents. Obviously, data will be relevant to the regression analyses that the expert
20 economists propose to conduct, given that capacity is a potentially important driver of
21 prices.

22 Can I just show you, Dr Bagci at C/4/52, has explained why she would find it of
23 assistance also to have capacity-related documents.

24 Yes, so C52, paragraphs 14 to 16.

25 THE CHAIR: Yes.

26 MR ARMITAGE: Just to add to that, there's a very important -- it isn't just relevant to

1 the expert analysis because there's a very important pleaded issue in relation to
2 capacity, because you'll have seen in the pleadings that we say -- one of the indicators
3 we rely on, we say there was no supply and demand related reason for these sharp
4 price increases. Westlake pleads back to that. It's paragraph 41 of the Defence, (a)
5 to (c). But essentially, they deny that there was generally sufficient production capacity
6 to meet demand.

7 There's a reference to not being able to increase caustic soda production if there was
8 no equivalent increase in demand for chlorine, because, of course, caustic soda is
9 a by-product of chlorine. There's some specific allegations about demand in Europe
10 being greater than domestic supply in particular years, and that actual operating
11 capacity of plants was constrained.

12 The short point is that these are all matters on which capacity-related documents and
13 not just data are likely to be informative in light of the pleaded issues.

14 THE CHAIR: Okay.

15 MR HOLMES: So it's a really short point, sir: we're giving the data on the defendants'
16 total production capacity, supply capacity and the operational rates of plants. That will
17 give them the information they need to understand capacity and to test the pleaded
18 case on the available capacity. The request is for qualitative documents. They
19 obviously carry much higher search and review costs. The keywords are likely to
20 trigger a large volume of the 4 million that have been collected. If the underlying issue
21 is simply whether there's adequate supply of caustic soda to meet demand, the first
22 and obvious starting place is the data.

23 Mr Parker's evidence is that documents will be less helpful than data, and that's
24 particularly the case given Westlake's --

25 THE CHAIR: Mr Parker, which paragraph?

26 MR HOLMES: Very good question.

1 It's tab 11 of bundle C, page 153, 3.3.2:

2 "Given that any data disclosed will be accompanied by an explanation of the data, I
3 do not consider that documents relating to Westlake's production capacity, supply
4 capacity, operational rates ..."

5 THE CHAIR: But isn't this something you can do with an information statement?

6 MR HOLMES: An information statement accompanying the --

7 THE CHAIR: Yes.

8 MR HOLMES: Let me take instructions.

9 There is an explanatory statement that will accompany the data. So that should, we
10 think, be adequate.

11

12 Ruling

13 THE CHAIR: In relation to category 13, this relates to documents and data on the
14 defendants' total production capacity, supply capacity, operational rates of plants in
15 the EEA/UK, prospective caustic soda, and the defendants' monthly output of caustic
16 soda.

17 The dispute between the parties is whether or not this should not only include data,
18 but it should also include the underlying documents as well.

19 Qualitative disclosure is always more expensive and harder to do. Given that there is
20 quite a long relevant period, it's far better, at least in the first instance, to have an
21 information statement dealing with this, which will accompany the data, and if that
22 information statement is not adequate, then we can come back and deal with it and
23 revisit it.

24 So that's 13.

25 MR ARMITAGE: I'm grateful.

26 14 is documents and data prepared by the defendants on the position across the

1 market as a whole in relation to market, production, profitability and sales. You will
2 have seen there is a pleaded issue. It's again one of the indicators, if you like, that we
3 set out at paragraph 41 with the various indicators. One of them relates to market
4 shares and profitability of the alleged cartelists during the relevant period.

5 There's no dispute about whether materials of this kind are relevant as far as I can
6 see. The defendants' position is that this is unnecessary because you can get this
7 information from third-party sources. It's a short point: we would respectfully submit
8 that the defendants' own internal and unvarnished view on factors like profitability and
9 market shares across the market may well be more informative than reviews of
10 third-party analysts. That's the short point on this category.

11 MR HOLMES: So we're a bit-part player in this market.

12 THE CHAIR: Yes.

13 MR HOLMES: 5 per cent share with limited visibility of where everyone else is. This
14 isn't about our profits; we're providing that information. It's about our estimate of other
15 people's profits and shares.

16 Mr Parker, in his evidence, has made enquiries, and he confirms that market-wide
17 data and market shares across time are readily available from providers like
18 S&P Global. That's going to be a better source than Westlake's own limited and partial
19 perspective of the market.

20 Indeed, Lenzing itself --

21 THE CHAIR: Can you show me that in tab 11?

22 MR HOLMES: Yes, of course, C154. I'm sorry, I'm going perhaps too fast, but you
23 see, 3.4.2:

24 "I understand that Westlake has agreed to disclose sales and cost data ... which can
25 be used to calculate Westlake's production, profits and sales. In relation to
26 market-wide data on revenues, volumes and profits of caustic soda sales in the

1 EEA/UK, I am aware that these are publicly available from third-party sources.
2 I consider it would be preferable to rely on these third-party market-wide data for the
3 purpose of estimating market shares, instead of Westlake's internal estimates ... This
4 is because, third party data providers ... whose business model is to compile and
5 publish market-wide data, will likely have more granular, accurate and reliable data
6 regarding market-wide production, sales and profits than Westlake ..."

7 So we say, you know, rather than picking over, you know, a large volume of documents
8 to try and find snippets about this, they should just go straight to the authoritative
9 sources that are available. Indeed, they presumably drew on such sources in pleading
10 their case on stable market shares and profits.

11 THE CHAIR: All right, I've got that, sit down.

12

13 Ruling

14 So, look, what I'm going to order on category 14: category 14 is documents and data
15 prepared by the defendants on total EEA/UK caustic soda market production,
16 profitability and sales, including the defendants' share of production and sales. As
17 I understand it, the defendants' share of the market is relatively small, and at least in
18 the first instance, I consider that, as set out in Mr Parker's report at paragraph 3.4.2,
19 the port of call, at least, is to look at the third-party data providers, do that research,
20 see what comes out of that. If there is a further issue and the claimants want to pursue
21 it, they can deal with that on the next occasion.

22 So I'm not refusing it; I'm saying: do the basic work that Mr Parker has suggested and
23 we'll go from there.

24 MR ARMITAGE: I'm grateful.

25 So the next category is the Ethylene decision, the Commission decision.

26 THE CHAIR: Yes.

1 MR ARMITAGE: I don't know the extent to which you've picked this up from the
2 papers, but this is a Commission settlement decision in relation to a cartel in relation
3 to a product called Ethylene. That's what you might call an adjacent product.

4 THE CHAIR: Is it from the same alleged cartelists?

5 MR HOLMES: No, it's not.

6 THE CHAIR: It's not?

7 MR HOLMES: It's an entirely different cast of cartelists. The defendants are parties,
8 but they're the only common ground.

9 MR ARMITAGE: Yes, sorry. Yes, yes. I think four of the five defendants were party
10 to the cartel, yes.

11 MR HOLMES: But the cast is otherwise entirely different and the time period is
12 different, 2011 to 2016. We were the whistleblower.

13 MR ARMITAGE: That's true. So just a few short points --

14 THE CHAIR: Let me look at it.

15 MR ARMITAGE: The decision is at authorities --

16 THE CHAIR: Which number are we on at the moment?

17 MR ARMITAGE: I'm sorry, it's 19 in the schedule.

18 THE CHAIR: Let's go to number 19.

19 MR ARMITAGE: Obviously, we have the public version of the decision. We're not
20 seeking the file documents or anything.

21 THE CHAIR: You've got the non-confidential version.

22 MR ARMITAGE: We've got the published version available from the Commission
23 website. There's lots of redactions to footnotes and it's a Henry Kissinger situation,
24 unknown unknowns. All we say is it's the same defendants. The temporal scope of
25 the cartel is different. In other words, it ends very shortly before the start of the cartel
26 that we --

1 MR HOLMES: With us whistleblowing.

2 MR ARMITAGE: Sorry? Apparently with Mr Holmes' clients whistleblowing.

3 THE CHAIR: Your client was the whistleblower?

4 MR HOLMES: Yes. Zero fines in consequence.

5 THE CHAIR: But the thing is that what it may show is alleged means as to how you've

6 been operating a cartel and messaging and stuff.

7 MR ARMITAGE: Exactly, it's potentially a --

8 MR HOLMES: A totally different market, totally different period. You know, sir, from

9 other cases, what's involved in getting a -- where you've got non-parties. This is

10 a confidential decision. It's the subject of litigation in other countries. There's

11 a different cast of people. No one else involved in this is involved in this case. We'd

12 have to go to their lawyers, each of them, and give them an opportunity to object. If

13 they object, we'd have to deal with that and the correspondence in relation to a totally

14 different product market.

15 THE CHAIR: There are three possibilities. Possibility 1: I order an unredacted

16 version. Possibility 2: I make no order at all. Possibility 3: we look at any paragraphs

17 that specifically relate to your client. I don't know how big an exercise that would be.

18 MR ARMITAGE: It's a settlement decision. As you'll know, they are shorter than --

19 THE CHAIR: So not very long.

20 MR ARMITAGE: And it's really the footnotes. There are lots of footnotes, for example,

21 x, y and z. Just to be clear, it's not the case that this is a totally different product

22 market. I mean, the pleaded case is that Ethylene is a key raw material in the chlor-

23 alkali industry and that, I think, is not in dispute. So it's not a totally different product

24 market in the sense it's completely unconnected.

25 Yes, I think we -- let me just turn around, sir. (Pause)

26 We'd be happy with, I think, the third of your suggestions. In other words, given that

1 | it's a different cast of characters, references only to the defendants.

2 | THE CHAIR: And if there are references to other people?

3 | MR ARMITAGE: I can see that may raise practical difficulties, but really we're
4 | interested in what it says about the defendants. As you say, it's the possibility that it
5 | reveals modes of communication, relevant individuals and so on. That's the point.

6 | THE CHAIR: I don't like it.

7 | MR HOLMES: Well, it's just a totally different product for an earlier period. If anything,
8 | it casts doubt on their allegations because after we cleaned the cupboard out, we're
9 | supposed to have embarked on a whole new exercise in relation to a different product
10 | market with different people. It's inherently implausible.

11 | THE CHAIR: The problem is, it's pretty peripheral. What I'm going to do is I'm not
12 | going to make any order on this. If it comes back later, then it comes back later. But
13 | at the moment -- you know, we're at 2.50 and we've got Mr Holmes' stuff. So just no
14 | order. It's not refused; it's not accepted. Next time around you can try and open it,
15 | but if you do try and open it, only ask for any communication, any passages, that deal
16 | with them alone.

17 | MR ARMITAGE: Okay. Thank you.

18 | So there's two more categories in the claimants' schedule. First is category 20.

19 | THE CHAIR: Yes.

20 | MR ARMITAGE: So this comes back to having the discussion about the contracts in
21 | relation to category 9. Mr Holmes referred to the fact that they'd agreed to give us
22 | data, but there's just a -- sorry, I'm going to just turn round and see if I can cut through
23 | some of this.

24 | THE CHAIR: Yes. (Pause)

25 | MR ARMITAGE: Sorry, that's helpful.

26 | So, given where we landed on the contracts, we won't push for the additional data

1 categories at this stage in relation to the EEA/UK. So they've agreed to give us some
2 data categories from their SAP systems. We would ask, though, that we be provided
3 with the equivalent data categories for the outside EEA/UK sales, in other words, those
4 that are readily available in the same sense as the ones for the within EEA/UK sales.
5 The reason for that is simply that, as we see, there's a pleaded issue in relation to
6 export pricing being lower than --

7 THE CHAIR: I saw that.

8 MR ARMITAGE: So it's simply so that we have that data and our expert can look at
9 it, limited to the categories that they say are readily available.

10 THE CHAIR: Mr Holmes.

11 MR HOLMES: So, Westlake has agreed to provide sufficient materials to address the
12 pleaded allegation, which is whether Westlake and others sought to constrain prices
13 in the EEA and UK by exporting outside those areas, providing Lenzing with
14 transaction-level data in the EEA and the UK from SAP, data on Westlake's
15 aggregated monthly sales data outside the EEA and UK, and decision-making and
16 policy documents on whether to export caustic soda from the EEA and UK.

17 Mr Parker confirms this is sufficient to analyse the relevant issue. That's at C/11/155
18 at paragraph 3.5.

19 You see at 3.5.2:

20 "... unclear why it would be necessary to disclose data on sales made outside the
21 EEA/UK at the transaction level. To assess the claim that Westlake exported ... what
22 is required is an assessment of evidence on ..."

23 With various categories then identified.

24 So, we say, no good justification for requiring Westlake to compile and disclose
25 transaction-level data all around the world.

26 MR ARMITAGE: I think the short point, really, is there's a pleaded issue as to the

1 comparison between EEA and UK prices and export pricing. As it stands, absent this
2 disclosure, we won't have the data necessary to scrutinise that. We'll have the
3 qualitative data, that's true. So we would maintain this application for those limited
4 readily available categories.

5 THE CHAIR: Yes. I'll order it subject to "limited readily available". I do not want
6 Westlake to go to town and spend an absolute fortune on this. Okay? So it's going to
7 be "limited and readily available", and a "reasonable and proportionate search". Okay.
8 That's that one.

9 MR ARMITAGE: With thanks for your patience, there's one final category on the
10 schedule, which is 22 --

11 THE CHAIR: Yes.

12 MR ARMITAGE: -- which is on page B97. This is effectively demand forecasts
13 prepared by the defendants in relation to both caustic soda and then the related
14 product, chlorine. I mentioned earlier the pleaded issue about the relationship
15 between demand for the two products. I'll just very quickly show you, the justification
16 for this category is given at C/4/54 by Dr Bagci, so can I just show you that.
17 Paragraphs 22 to 23, bottom of page 54.

18 It's relevant both to the overcharge assessment and also to the assessment of those
19 issues about the relationship between the two products in terms of demand.

20 THE CHAIR: Yes.

21 MR HOLMES: So what Dr Bagci wants is data on demand. We say that the request
22 for forecasts from us is not the best source. It's an analogue of an earlier request
23 you've seen. If you look at Mr Parker's report, C156, he explains that he's aware of
24 publicly available demand forecasts from third-party sources such as S&P Global, and
25 that would provide a sufficient source, and he doesn't consider it necessary for
26 disclosure to be given of this category.

1 THE CHAIR: Yes.

2

3 Ruling

4 THE CHAIR: In relation to category 22, data prepared by the defendants forecasting
5 demand during the relevant period for the defendants of caustic soda, PVC chlorine
6 and/or market wide demand for caustic soda, PVC chlorine in the EEA/UK, the
7 claimants say it is relevant for the reasons set out in the Dr Bagci report under category
8 22, paragraphs 22 and 23.

9 I do not regard this as absolutely central, but I do see it is relevant, if there are readily
10 available forecasts which are found by a reasonable and proportionate search, they
11 should be produced, but I do not expect Westlake to go over the top and spend a huge
12 amount of money on this.

13 At the end of the day, whoever is going to be in charge of disclosure on your side just
14 has to be reasonable and see where things are. Sometimes you start the process and
15 you can see this is getting nowhere. Then you leave it and you just say this is nowhere.
16 As long as you have a record of why you decide not to go any further, because you
17 have looked to a certain extent and you have found there is nothing there and nothing
18 helpful, that is fine.

19 Okay, so that's that.

20 Mr Holmes, on the settlement agreement --

21 MR HOLMES: There is the defendants' Redfern as well.

22 THE CHAIR: I know, we'll come to that. But one of your requests is to have a copy of
23 the settlement agreement. There's this issue about whether it's mentioned in the
24 pleadings. We can have that debate, but I don't think it's -- in my view, I don't think it's
25 mentioned in that sense. But it doesn't stop me deciding that you should have it. What
26 I was proposing to do is for me to look at it. I know why you say it might be relevant.

1 MR HOLMES: Yes.

2 THE CHAIR: If I look at it and I think that it might be relevant, I will order disclosure of
3 a redacted version of that.

4 So what I suggest we do is have our break now, I will read the paragraphs of your
5 skeleton argument -- just show me where it is in your skeleton -- that say why you say
6 you want it to be reviewed, because quite clearly you've got an arguable case for
7 relevance. I accept that. If you're right, then it should be disclosed; if you're not right,
8 then it's not going to be disclosed. If you're happy with that --

9 MR HOLMES: Entirely happy with that. Yes. No, we thought you might say that.

10 So, just one point. I'm sure you have this well in mind from our submissions. We say
11 that it's potentially relevant in two ways. One is in relation to lacunae in the evidence.
12 If there's anything that stops documents being provided --

13 THE CHAIR: I want to see that myself.

14 MR HOLMES: Yes, of course, because they're going to invite you to draw inferences
15 at trial on the basis, potentially, of lacunae.

16 THE CHAIR: I have that.

17 MR HOLMES: You've got all of that.

18 The second point was only that we say the quantum is also potentially relevant to the
19 extent that there is a reduction provided in relation to the umbrella overcharge for
20 which account should be given. But I know you have our submissions on that; I've just
21 been asked to make sure that's on your mind.

22 THE CHAIR: Yes. I think a lot depends on what the settlement figure is and what it's
23 for, because what you tend to have as a problem is that even if you do have a figure,
24 you don't know what it's been allocated for. I've had some cases where they allocate
25 recoveries to specific heads, in which case it's easy. Other cases they haven't, in
26 which case at the end of the day, there's authorities, the Scania case, on the extent to

1 | which you can do that exercise yourself.

2 | MR HOLMES: Yes, indeed.

3 | You have our points well in mind, so we're very glad to leave it to deal with it as you

4 | suggest.

5 | THE CHAIR: So your skeleton, which paragraph do I want to look at?

6 | MR HOLMES: It commences on --

7 | THE CHAIR: It's paragraph 43 onwards?

8 | MR HOLMES: It is, exactly.

9 | THE CHAIR: Yes.

10 | MR HOLMES: The law you'll be well familiar with; it's really --

11 | THE CHAIR: I won't worry about that.

12 | MR HOLMES: -- paragraph 43 onwards.

13 | THE CHAIR: Okay, I'll take that with me. Can I have a copy of the agreement?

14 | Unless -- Mr Armitage, you accept I can look at it? I've got jurisdiction?

15 | MR ARMITAGE: Yes, you've got jurisdiction. It's quite difficult to say anything about

16 | it in open court, for obvious reasons. It defeats the point of the application.

17 | THE CHAIR: If I'm minded to order anything to be disclosed, I'll give you notice --

18 | MR ARMITAGE: No, of course.

19 | THE CHAIR: -- and then you can make the submissions at that stage.

20 | MR ARMITAGE: It's only in case, because you'll see we've sought to -- we have

21 | complied, we consider, with your suggestion in terms of redacting the settlement sum.

22 | But as you'll see, the redactions have been done in a particular way, and if you need

23 | some assistance with how that's been done, I'd obviously like to give assistance --

24 | THE CHAIR: Yes, of course.

25 | MR ARMITAGE: But that would be difficult, certainly, with the full cast on the other

26 | side. But please just let us know if you have any queries about that. But that's the

1 document.

2 THE CHAIR: I will.

3 Once we've done this, then we've got your Redfern schedule to deal with.

4 MR HOLMES: Yes.

5 THE CHAIR: And then we're going to have to talk about all the other directions.

6 MR HOLMES: Yes.

7 THE CHAIR: But at the moment, my inclination is probably to leave the trial date in
8 there but not necessarily make any orders as to precise timetable beyond disclosure.

9 MR HOLMES: Yes.

10 THE CHAIR: Because it may be, once we've done disclosure, we're going to have to
11 have a proper rethink about things and how far things are coming in, are there going
12 to be amendments and stuff, and I'm keen to do this case in a cost-effective manner.
13 I do not want the experts really to start doing all their substantive work --

14 MR HOLMES: We've heard that and it seems sensible.

15 THE CHAIR: -- and that may have an impact on where we go from here.

16 MR HOLMES: Yes. Understood.

17 THE CHAIR: Thank you.

18 (3.04 pm)

19 (A short break)

20 (3.20 pm)

21 THE CHAIR: Mr Armitage, looking at the settlement agreement, there's nothing in
22 there so far as I can see -- and you'll tell me whether I've got it wrong -- that prevents
23 you, if necessary, seeking disclosure against the settling defendants.

24 So what I'm going to do is to say it's not relevant, subject to one thing. There's the
25 umbrella damages point that's been made by Mr Holmes, and so there will be liberty
26 to apply to have the settlement sum disclosed after judgment.

1 So if at the end of the day we come up with a figure, then Mr Holmes can stand up
2 and then say, "I'd like to see the settlement agreement", and then we can have that
3 debate then as to whether or not it's going to be produced and go through it.
4 So that half of the application is not dismissed, but the other half, which is the first half,
5 which is why they say it's otherwise relevant for these proceedings, that is dismissed.
6 If I can hand it back to you, that deals with the settlement agreement.
7 When it comes to the order, make sure it says that there's liberty to apply after the
8 initial judgment when it comes to quantifying damages. I'm really not keen to know
9 what the settlement figure is, because if it's high, then you'll complain and say, "That
10 prejudices us"; if it's low, they'll complain it prejudices them. I really don't want to know
11 at this stage.
12 Okay, so that deals with the settlement agreement.
13 Mr Holmes, it's down to you to take me through your Redfern schedule, isn't it?
14 MR HOLMES: Yes. Quick preliminary point.
15 THE CHAIR: Yes.
16 MR HOLMES: Known adverse documents within the categories, we assume that your
17 order in relation to that applies mutually.
18 THE CHAIR: Mutually, definitely. I want both sides to disclose known adverse
19 documents, which includes not only documents that they know at the moment, but
20 documents that they may come across as they go through the disclosure process. So
21 if someone is working on disclosure and sees a document which is clearly damaging,
22 he's got to report it to the team leader, and then the team leader will decide whether
23 it's a known adverse document.
24 MR HOLMES: I'm grateful.
25 MR ARMITAGE: I'm sorry to rise. Just conscious you haven't discussed the deadline
26 for the KADs evidence. Would that just be --

1 THE CHAIR: Sorry, say that again?

2 MR ARMITAGE: I'm sorry. I'm conscious of the time. We haven't discussed timings
3 for the KADs disclosure.

4 MR HOLMES: It's presumably when disclosure is given though.

5 THE CHAIR: Yes, it's all at the same time.

6 MR HOLMES: Yes.

7 THE CHAIR: But what I envisage at the end of the day -- and you'll see this from
8 Gormsen -- at the end of the day, you may be giving disclosure statements now in
9 relation to what you're disclosing as you go along, but once you get to the end of the
10 process, there's going to be a global disclosure statement covering everything, and I'll
11 expect that to be not simply by the person in charge of disclosure within Stewarts or
12 Willkie Farr, but also by a relevant individual within each party. I'm not expecting every
13 entity within the Westlake Group to do it; just one person who you think is suitable for
14 doing it. A senior person.

15 MR HOLMES: Yes.

16 THE CHAIR: Thank you.

17 Okay, so we're now going to your schedule.

18 MR HOLMES: Yes. So first category, page B132.

19 THE CHAIR: Has any of this been dealt with? Has anything been agreed or is it still
20 the same one I saw the other day?

21 MR HOLMES: I think I can cut through some of the points as we go.

22 THE CHAIR: Okay, try. Yes, okay.

23 MR HOLMES: So there's actually only a handful. We've only got five disputes and
24 they all obviously go to loss, because that's information that they hold and that we
25 don't have.

26 THE CHAIR: Yes.

1 MR HOLMES: So at 3(d), you've got volume discounts in storage and transportation
2 costs, which are in issue.

3 THE CHAIR: So where's that? Sorry, what page is that?

4 MR HOLMES: So we're on page B132.

5 THE CHAIR: I've got 132, yes.

6 MR HOLMES: So the category is a request for documents and data on transport costs
7 for caustic soda. I don't think there's any dispute that these are relevant. They go to
8 Lenzing's allegation that it incurred additional transport and storage costs because of
9 having to import more caustic soda. You saw that in 61(f) of the Particulars of Claim.
10 Lenzing has agreed to disclose documents and data on its base transport costs, but it
11 resists giving any available information on volume-related discounts that were
12 obtained on those costs. But that will obviously affect the extent of real loss.

13 THE CHAIR: Yes, exactly. Okay.

14 Mr Armitage?

15 MR ARMITAGE: It's only that we've agreed to provide, under category 1, very
16 extensive data, including at 1(g) any discounts or rebates.

17 THE CHAIR: I don't mind where it falls within it. If it's going to -- I'm not particularly
18 keen on it falling in two categories, to be honest. But if you say that your category
19 1(g) -- I think they're different. They're looking at different things.

20 MR ARMITAGE: Sorry, 1(q).

21 THE CHAIR: 1(q). Yes, it must be 1(q). So let's have a look at 1(q).

22 MR HOLMES: But that just is the same -- it's the transport and storage costs all over
23 again. It doesn't specifically cover volume discounts, which is the subject --

24 THE CHAIR: Put what you need to put in (q), including discounts.

25 MR HOLMES: Fine.

26 THE CHAIR: It's got to be there somewhere but that will cover it.

1 MR ARMITAGE: They're getting the contractual documents as well, 5, 6 and 7.

2 THE CHAIR: Yes, I know.

3 MR HOLMES: As long as there's no dispute in respect of those categories

4 (overspeaking) --

5 THE CHAIR: (Overspeaking) --

6 MR HOLMES: -- being provided, that's fine.

7 THE CHAIR: Just weave it in number 1, okay?

8 MR HOLMES: I'm grateful, we'll do that.

9 THE CHAIR: Next one.

10 MR HOLMES: This is cost savings, category 4, on page 133.

11 THE CHAIR: Yes. 4(a), okay. So it's --

12 MR HOLMES: Yes. So 4(a) is agreed.

13 THE CHAIR: Yes.

14 MR HOLMES: It's 4(b) to (d) that are disputed.

15 THE CHAIR: Yes.

16 MR HOLMES: We say that the category derives from the defendants' pleaded case.

17 If we could go briefly to that, bundle D --

18 THE CHAIR: Can I just read this. (Pause)

19 Yes, okay.

20 MR HOLMES: So, if you could go, please, to bundle D, tab 3, page 84.

21 THE CHAIR: Yes.

22 MR HOLMES: Can you see at (f)(ii), it's pleaded that:

23 "... the Claimants' damages are liable to be reduced by reason of their failure to take

24 reasonable steps to mitigate ... by meeting their caustic soda requirements from

25 alternative suppliers (including those 'outside Europe' in respect of whom they claim

26 to have reasonably incurred additional transport and storage costs). The extent of any

1 offsetting and/or mitigation may be the subject of submissions and evidence following
2 disclosure."

3 Now, we say, (b), increasing purchases from a single supplier to benefit from volume
4 discounts, is squarely within the pleading. That would be an example of meeting
5 caustic soda requirements from alternative suppliers: that's to say, by concentrating
6 them on the single supplier where volume discounts are available. We don't
7 understand why disclosure should be refused in relation to that.

8 In relation to (c) and (d), these consider offsetting and mitigation more generally,
9 renegotiations with suppliers, including, of course, the alternative suppliers of caustic
10 soda considered at 4(a) and (b), and we say disclosure should also be given of
11 renegotiations at least with alternative caustic soda suppliers to see whether there was
12 a failure to mitigate as alleged or whether losses were in fact avoided.

13 MR ARMITAGE: So we've got a pleading point and a legal point, if I may.

14 The pleading point is that that's a very narrow pleading. It relates to an allegation that
15 we failed to take reasonable steps to mitigate losses by meeting our caustic soda
16 requirements from alternative suppliers. That's why we've agreed to give
17 category 4(a), which obviously --

18 THE CHAIR: 4(a), yes.

19 MR ARMITAGE: 4(b), I don't see how that is tied to the pleaded issue, because 4(b)
20 relates to increasing purchases from a single supplier in order to benefit from volume
21 discounts.

22 MR HOLMES: So shifting them from many to one.

23 MR ARMITAGE: Sorry --

24 THE CHAIR: We've had a lot of debate about to what extent are you meant to plead
25 mitigation, and is a general mitigation plea enough? I take the view it often isn't
26 enough; it depends on the circumstances.

1 MR ARMITAGE: So that was going to be the legal point.
2 So certainly in relation to categories (c) and (d), which are about steps taken or
3 attempts made to reduce supply costs, including by renegotiation, and then any other
4 cost saving measures -- so on their face, very broad categories -- there is not
5 a pleaded case that we took steps in relation to mitigation of this kind. There's
6 a pleaded case in relation to pass-on, which is a recognised form of mitigation, and
7 that will come up later. But (c) and (d) fall squarely within the case law to which you've
8 been referred, sir.
9 Do I need to show you -- there's a relevant authority, the Stellantis case, in the Court
10 of Appeal.
11 THE CHAIR: Is that one I did?
12 MR ARMITAGE: I think at first instance, you may have done, sir.
13 THE CHAIR: Let's see what the Court of Appeal said about it.
14 MR ARMITAGE: I think you'll be pleased with what they said. So authorities 16,
15 page 401.
16 THE CHAIR: That's not the one. Okay. I did another one where I think we had exactly
17 the same issue.
18 MR ARMITAGE: Yes, this is different.
19 THE CHAIR: It's a different one. Yes, yes.
20 MR ARMITAGE: But in relation to Stellantis proceedings.
21 If we could just go on, because I rely on it for the --
22 THE CHAIR: Yes.
23 MR ARMITAGE: -- point of law. In fact, I'll just show you what was pleaded in that
24 case, because essentially what had happened is that the pleading on mitigation was
25 struck out, and then the Court of Appeal upheld that.
26 I'll just show you what was pleaded. It's paragraph 40, page 413.

1 THE CHAIR: It's the Royal Mail case, isn't it, that they cite at paragraphs 22, 31?

2 MR ARMITAGE: Yes. Yes, in relation to the overall approach, exactly. And at 40, so
3 the pleaded case -- so just to be clear, we say in the present case, there is no pleaded
4 case, and you've seen what the pleading says: it's about failure to take steps to
5 mitigate by going to alternative suppliers. There's no pleaded case about offsetting by
6 cost savings and so on.

7 Here, you did have a pleaded case:

8 "... if any Overcharge was caused, NTN avers that the Claimants passed any
9 Overcharge through to their own customers or purchasers, or otherwise mitigated their
10 loss (including, without limitation, through reducing their other costs)."

11 Then at 41, that was elaborated significantly by some voluntary further particulars in
12 relation to how the alleged costs-related mitigation took place.

13 Then if we go on, please, to paragraph 44, there's a discussion of the Sainsbury's
14 judgment, the Interchange judgment, in the Supreme Court, which obviously
15 discussed pass-on and mitigation. That's mentioned by Mr Parker, as it happens, in
16 his methodology statement when he talks about cost savings.

17 Paragraph 46 quotes from the CAT's judgment at first instance in Interchange, which
18 refers to the four ways in which a merchant can respond to an overcharge on
19 interchange fees, and point (iii) is "can seek to reduce its costs by negotiation with its
20 many suppliers".

21 Then one of the issues in the Supreme Court was about burden of proof in relation to
22 pass-on. If one goes over to page 418, paragraph 216, and this is a paragraph that's
23 become famous in competition law circles, and this is the quotation from Sainsbury's
24 in the Supreme Court:

25 "The legal burden lies on the operators of the schemes to establish that the merchants
26 have recovered the costs incurred in the MSC in the form of pass-on, but once the

1 defendants have raised the issue of mitigation, in the form of pass-on, there is a heavy
2 evidential burden on the merchants to provide evidence ..."

3 But then we see 48, the Court of Appeal makes the point that the Supreme Court didn't
4 spell out what, in practical pleading terms, it meant to raise an issue of pass-on.

5 Then see in the third line:

6 "It did not say that it sufficed merely to plead the bare assertion that there had been
7 mitigation by off-setting and nor did it say that there was no burden on a defendant to
8 support such an averment with sufficient particularisation and evidence, such that it
9 surpassed a minimum threshold of realism and conviction."

10 Then, at the end of 49:

11 "It follows that the Court was not saying that the pleading of a bare-bones averment
12 that there was mitigation by off-setting would always pass muster."

13 I mean, in short -- I'm so sorry, I'll just show you how that ended up --

14 THE CHAIR: You say this is just a bare-bones --

15 MR ARMITAGE: Well, it's not even that; there's not even a bare-bones averment.

16 THE CHAIR: It's not even in there.

17 MR ARMITAGE: Yes, exactly. It's a very extensive potential set of categories, so we
18 would resist this quite forcefully.

19 THE CHAIR: Okay. So I really do think this is a bit of a bare-bones assertion.

20 MR HOLMES: Yes. No, no, that's understood. But on 4(b), I would like to push back,
21 if I may, by way of reply. We do say that 4(b) is covered by the pleading.

22 THE CHAIR: Let's have a look at that then. I'm more inclined -- it's (c) and (d) I was
23 concerned about.

24 MR HOLMES: The idea here is that there -- so (a) is --

25 THE CHAIR: (a) is covered. Just show me where (b) is.

26 MR HOLMES: -- higher volumes from non-cartelists.

1 THE CHAIR: I've got that.

2 MR HOLMES: Then (b) is increasing purchases from a single supplier, so in other
3 words shifting their purchases between suppliers, so that they're concentrated --

4 THE CHAIR: Yes, you go to a cheaper one and you get the higher volume discount.

5 MR HOLMES: Yes, exactly. We say that that is fairly covered by the reference to
6 meeting their caustic soda requirements.

7 MR ARMITAGE: I'm sorry. I'm instructed (b), we can live with --

8 MR HOLMES: You can live with (b)?

9 MR ARMITAGE: Yes, yes.

10 MR HOLMES: Okay. Well, then, on that basis, I think we're there.

11 THE CHAIR: Thank you. Okay.

12

13 Ruling

14 THE CHAIR: So in relation to category 4, 4(a) and 4(b) are conceded and (c) and (d)
15 are refused because there's not even a bare-bones assertion in the pleading on that
16 where mitigation is dealt with in paragraph 74(f)(ii) of the Defence.

17 Okay. Next one.

18 MR HOLMES: The next one is 14, which is on page --

19 THE CHAIR: Can I put the authorities away?

20 MR HOLMES: You can, yes.

21 So it's on page B136, and this relates to volume effects. So it concerns the claimants'
22 pleaded case that, to the extent there were losses that were passed on, they suffered
23 fewer sales and made smaller profits than they otherwise would. That's pleaded in
24 61(g) of the Particulars of Claim.

25 So the category therefore seeks evidence that the claimants made lower sales as
26 a consequence of any pass-on as alleged, and four specific subcategories are then

1 identified. You see at (d) the agreed category: any internal or external assessments
2 of price elasticity of demand.

3 THE CHAIR: Okay.

4 MR HOLMES: That's agreed. So it's (a) to (c) that are disputed, and they are basically
5 evidence that the claimants may not have been able to meet their contractual
6 requirements or that they failed to do so, that they fell short of sales or revenues
7 targets, or evidencing that claimants' customers made spot purchases which the
8 claimants could not compete for.

9 Now, Mr Parker's evidence is that he does need this material. That is at C, tab 11,
10 page 157.

11 THE CHAIR: Okay, let me read that. Okay.

12 We're coming towards the end of this, aren't we?

13 MR HOLMES: Yes, we are. We're close. We really are. The end is nigh.

14 THE CHAIR: Yes. I just want to make sure we finish. I think we will.

15 MR HOLMES: I think we'll finish comfortably in time. I'll be another ten minutes.

16 THE CHAIR: There are things to discuss, but -- yes, okay.

17 Yes, which paragraph?

18 MR HOLMES: So you see 4.1.3, this is how to estimate the reduction in sales. At (i)
19 there's elasticity of demand, the agreed category. But then at (ii), "direct evidence
20 from Lenzing as to whether it was ... unable to meet", and then those categories which
21 are mirrored exactly in the request.

22 There's no evidence, I think I'm right in saying, on the other side to say that this isn't
23 relevant material. Instead, Lenzing's skeleton says that these documents haven't
24 been ordered before in previous case law or in a Commission guidance note.

25 THE CHAIR: I wouldn't worry about that.

26 MR HOLMES: Yes. So we say that on the basis of this expert evidence, the disclosure

1 | is needed and should be searched for.

2 | THE CHAIR: Is this dealt with in anyone else's expert evidence?

3 | MR HOLMES: Not that I'm aware of. Mr Armitage will tell me if I've missed something,
4 | but I don't believe it is.

5 | THE CHAIR: Okay.
6 | Mr Armitage?

7 | MR ARMITAGE: Yes. So it is dealt with. I was going to show you a case in which
8 | the elasticity of demand approach was adopted; that's the Granville case, which you
9 | have in the authorities. But I hear what you're saying on that, sir.

10 | In relation to the expert evidence, in the methodology statement from Dr Bagci, which
11 | is at C/7/86 --

12 | THE CHAIR: Yes.

13 | MR ARMITAGE: -- can you see at paragraph 43, she explains that she ...
14 | Oh, sorry, I just wanted to show you that she had indicated that she proposed to
15 | assess this issue by reference to looking at the price elasticity of demand. So just so
16 | you have that point.

17 | THE CHAIR: You've got two different approaches.

18 | MR ARMITAGE: The only point I wanted to make. So we are concerned about
19 | proportionality in relation to a number of these requests. So can I just show you --

20 | THE CHAIR: All I'm going to do on this is a reasonable and proportionate search along
21 | the terms before, which is I don't want you to spend a huge amount of money on this.
22 | It's going to be something that's relatively modest and don't go to the nth degree.
23 | Because if this didn't happen at all, that's going to come out pretty quickly.

24 | MR ARMITAGE: Okay. We understand. On that basis, I won't push back.

25 | THE CHAIR: Yes.
26 |

1 Ruling

2 THE CHAIR: So in relation to category 14, the dispute is in relation to 14(a), (b) and
3 (c). The tribunal thinks that they are relevant for the reasons set out in Mr Parker's
4 report, paragraph 4.1.3. The tribunal appreciates there are different ways of doing
5 this, and a different way is proposed by Dr Bagci in the methodology statement, where
6 it deals with volume losses at paragraphs 41 to 44. The tribunal does not want a huge
7 amount of resources to be spent on this and this is ordered only to the extent of
8 a reasonable and proportionate search and not a great deal of money is spent dealing
9 with this.

10 Okay, so that's that one. Next one?

11 MR HOLMES: So three down, two to go.

12 The next one we can cut through, I think: it's the price-setting process. So this is
13 category 15 which relates to pass-on and the question whether, if prices were higher,
14 Lenzing passed them on to its customers.

15 THE CHAIR: Yes.

16 MR HOLMES: Various categories are sought in relation to how the claimants went
17 about pricing.

18 The claimants have suggested that, in the first instance, there should be a pricing
19 statement -- you may have seen this -- which would then allow for more targeted
20 disclosure. I think it would be accompanied, as I understand it, by relevant documents
21 that were located.

22 We were concerned about timing when there was a 29 May longstop for disclosure in
23 the diary, but given your indication on the fact that that's not now going to be ordered,
24 we're content to receive the pricing statement on 31 March, bearing in mind that there
25 will then need to be a period for disclosure of documents, albeit targeted, so that the
26 pricing statement can be tested, because, of course, it can't be conclusive.

1 THE CHAIR: (Overspeaking) the pricing statement, you're happy with it and you keep
2 it --

3 MR HOLMES: Yes.

4 THE CHAIR: -- and we'll see.

5 But I think, Mr Armitage, are you happy to deal with it on that basis, that you deal with
6 it initially by way of a pricing statement with any key documents appended, and then
7 there'd be liberty to apply? I'm not saying I'm going to order anything.

8 MR ARMITAGE: That was our suggestion, so we are happy with it. We're also
9 disclosing very extensive price and cost data.

10 THE CHAIR: Yes.

11 MR ARMITAGE: Mr Parker says that's one way in which you can assess these things.
12 So we don't see that there ought to be anything else. But, yes, we're happy with it.
13 I'm sorry, I hadn't understood you to say that the longstop date for disclosure had fallen
14 away.

15 THE CHAIR: I haven't said that. We haven't dealt with that, but --

16 MR ARMITAGE: But, yes. On this point, yes.

17 THE CHAIR: There is going to be this issue about America and --

18 MR HOLMES: Yes, third-party disclosure and all that stuff.

19 THE CHAIR: That's all coming back later.

20 MR HOLMES: Yes. Well, I would like to address you later then on the longstop,
21 because the difference between 31 March and 29 May does not allow a long time for
22 a further round of disclosure.

23 THE CHAIR: Yes. Well, we'll see where we are.

24 MR HOLMES: Yes. Very good.

25 So then the final categories are 20 and 21 on the cost of equity and debt and the
26 profitability of reinvestment. So they're concerned with the claimants' pleaded case

1 on financing losses. They begin on B139 and they carry on to B140.

2 This is the claim that the claimants, if they hadn't paid higher prices, would have had
3 more funds to reinvest in their businesses by generating further profits and/or reducing
4 cost of debt or equity.

5 There are no particulars provided yet. It's at 61(d) of the Particulars of Claim. The
6 burden is, of course -- I mean, I don't need to trouble you with Sempra Metals; you
7 know the burden is on them to prove these losses. We need documentary disclosure
8 so that the claim can be properly evaluated at trial.

9 At 20, you see that there's a request for documents concerning the cost to the
10 claimants of raising debt and equity and information regarding the cost of new debt
11 and equity each year. There are then specific subcategories of documents which are
12 becoming well familiar to those who have sought disclosure in relation to debt and
13 equity financing previously. In my submission, they're neither unreasonable nor
14 disproportionate.

15 THE CHAIR: What about we just do the same as we did on the last one, 15?

16 MR HOLMES: Yes, we're content with that.

17 THE CHAIR: Okay.

18 Well, that applies to the rest, doesn't it? Okay.

19 What are we going to do? When are you going to be in a position to take out an
20 application under section 1782, and are you going to take one out?

21 MR ARMITAGE: Well, we haven't reached a decision on that, to be clear. I think
22 where the debate has ended up this morning is it is really important that we exhaust
23 any potentially relevant IHS disclosure from the defendants --

24 THE CHAIR: I agree with that.

25 MR ARMITAGE: -- before making such an application and the agreed
26 longstop -- subject to the pass-on points where a slightly longer period I suppose may

1 be necessary, and indeed financing losses if we're having the statement first, it was
2 agreed that all relevant disclosure could be given by the end of May. I don't see that
3 that has fallen away in light of today's discussions.

4 A somewhat longer longstop date, from our perspective, would be acceptable. We
5 think it should be retained and, as I say, May was agreed. So I suppose the approach
6 we would respectfully suggest is that we, by the longstop date, whenever that may
7 be -- and we'll obviously very expeditiously pursue these points about the phone
8 messenger apps and the 700,000, because that obviously needs to be sorted out as
9 part of this. We obviously then need to, to use a colloquialism, put up or shut up in
10 relation to non-party disclosure. Once we've been through the process of getting what
11 we can from the defendants, then of course we need to do that at that stage.

12 THE CHAIR: I think in your case is - it is pretty central to get the IHS documents if you
13 can. I don't know whether there's an element of reluctance or there's a concern that
14 the order might not be granted, I don't know, but I would have thought that looking at
15 the US authorities, you'd have a pretty good chance, when you look at Intel and all
16 that, to get the documents.

17 MR ARMITAGE: No, no, it's not reluctance, per se; it's a concern about costs and
18 proportionality, of course. But we've obviously been here in court; we've heard the
19 discussion last time as well. We don't demur from the suggestion that these
20 documents may be important at trial. We don't accept that, absent these documents,
21 we won't be able to establish our case. I hope I've made that clear.

22 THE CHAIR: But it's clearly going to be harder if there's an evidential void. If the
23 evidential void is through you not taking a step which the tribunal at the end of the day
24 is persuaded is a reasonable and necessary step, then you have problems about: are
25 there going to be any inferences to be drawn?

26 You know, it's one thing if you apply and you don't get it; we all understand that and

1 that's what litigation is. If you don't apply, I'm sure Mr Holmes will stand up and say,
2 "Well, they haven't applied, there's a lacuna and it's a lacuna they've created
3 themselves".

4 MR ARMITAGE: He'd definitely say that.

5 THE CHAIR: He will. He's very forceful at the best of times.

6 MR ARMITAGE: I mean, last time, sir, you made a conditional order in which timing
7 for any non -- I mean, that was of course when we were proceeding on the mistaken
8 footing that there were no jurisdictional issues. You made a conditional order that said
9 an application would need to be made as soon as practicable following the provision
10 of 5(a) and 5(b).

11 Obviously, that would be the position here. Following the disclosure from the other
12 side on the IHS materials, we need to very, very quickly make -- I mean, we need to
13 consider that carefully. We need to target the request.

14 THE CHAIR: You've got various lines of enquiry. One is the Argus line of enquiry,
15 contacting them for methodology statements and all that sort of evidence. You're not
16 likely to get a huge amount from the defendants on that, so you're probably going to
17 have to go to them and see what they can give you. You might as well write to them
18 now saying, "This is where we are".

19 MR ARMITAGE: Yes.

20 THE CHAIR: If they do provide it, that's great. If they don't provide it, there'd be
21 a non-party disclosure application. That's what you (inaudible). The tribunal considers
22 that that material will be relevant, so that will be a factor in determining whether or not
23 that order will be made. That's the first step.

24 The second avenue is getting documents from other alleged cartelists.

25 If I can have the list of where everyone is.

26 MR ARMITAGE: Sorry, has this -- I don't know if this has been emailed, but if I hand

1 that up. (Handed)

2 THE CHAIR: Yes.

3 MR ARMITAGE: So that's obviously based on our efforts today. You'll see there are
4 some UK subsidiaries.

5 THE CHAIR: They may or may not be the ones holding the relevant documents, but --

6 MR ARMITAGE: Exactly.

7 THE CHAIR: I can see that.

8 MR ARMITAGE: We need to think about this, yes.

9 THE CHAIR: Yes.

10 MR ARMITAGE: I think I'm just saying that we need to see on the key categories -- so
11 categories 4 and 5, the documents that may allege --

12 THE CHAIR: I know, you need to get that.

13 MR ARMITAGE: That's what we need to see and then we can properly target any --

14 THE CHAIR: So what is a realistic longstop date for all the stuff that's been ordered
15 so far as between the parties?

16 MR ARMITAGE: We'd agreed May. That was the agreed position.

17 THE CHAIR: I know, but it does seem to me we're a bit behind already.

18 MR HOLMES: I think there is a lot to be done, and we do think that May is realistic for
19 the current rounds. We will continue on a rolling basis. One thing that we can say
20 immediately that we will prioritise is the statements in relation to IHS and Argus and
21 the model C disclosure in relation to IHS and Argus. We think it's highly likely that the
22 material will be limited.

23 Just to read you a snippet from one of the emails which have been disclosed. It's
24 translated from the German but it states ... (Pause)

25 It's an internal email within Westlake, and it says:

26 "IHS does not provide any insight into its pricing process. It is known that, besides us,

1 | most other producers and major distributors are contacted regularly. Customers have
2 | often reported a lack of contact. Large consumers such as Lenzing, Kelheim, Prayon
3 | and Essity have not been contacted for months." [as read]
4 | So there's just going to be a bit of a black box here.

5 | THE CHAIR: Could be. We'll see.

6 | MR HOLMES: Yes, we'll see. We'll find what we can. But once we've given our return
7 | there, in my submission, they do need to get on in relation to IHS and Argus.

8 | THE CHAIR: Okay. Let's see where we are in relation to the last order. That's at
9 | tab 20, bundle D. (Pause)

10 | MR ARMITAGE: I've just had a very quick word with those behind me. I think there
11 | is a sense that the May date may be possibly a bit tight, just to ensure that the
12 | disclosure is given. I don't know if July might be a better longstop date if that's the
13 | approach being taken. Obviously, it's a rolling --

14 | THE CHAIR: Well, let me just look.

15 | Okay, so we'll leave the trial listing. We'll put it to 10 May, so we'll put that back by
16 | a week, because you've already taken a week off. So in 14, the trial listing is 10 May.
17 | We've had the CMC.

18 | Let's look at the proposed order; let's go through that. Where do I find that? (Pause)
19 | I've got tab 2 of bundle C.

20 | MR ARMITAGE: Things have moved on a bit.

21 | THE CHAIR: Obviously that's moved -- the experts point is all changed because of
22 | what we've ordered already.

23 | MR ARMITAGE: Yes. I think we need the version with the disagreement.

24 | MR HOLMES: It's C/27.

25 | THE CHAIR: C/27, you want to work from that one?

26 | MR ARMITAGE: Yes, that's the expert order. I'm so sorry.

1 THE CHAIR: Well, I've got the claimants' draft order at --

2 MR ARMITAGE: Yes, I think things have moved on a bit.

3 MR HOLMES: It's in 21.

4 MR ARMITAGE: Yes. Yes. So C/21.

5 THE CHAIR: C, page 21?

6 MR ARMITAGE: C, tab 21, page 333. But things --

7 THE CHAIR: A lot has moved on.

8 MR ARMITAGE: A lot of peace has broken out on the case management directions.

9 I think we ended up -- only one date was still in dispute, and it was a matter of about

10 two days, which was the deadline for the amended Reply. But I'm sorry, we ought to

11 have provided an updated version of this. I don't know if we've got one, but ...

12 THE CHAIR: A lot depends on what's happening in America because --

13 MR ARMITAGE: Yes. So what was envisaged under this process was we would get

14 the disclosure by the longstop date of 29 May. We would then promptly, in the usual

15 way, in these cases, amend to reflect the documents we'd seen, maybe amendments

16 in relation to the participants, the duration, that sort of thing. But obviously, as you

17 say, that doesn't take account of the possibility of non-party disclosure taking longer.

18 MR HOLMES: Just, sorry, to canvass the -- you did mention the possibility of just

19 leaving the other directions at large. I have to say I do see the force of that as

20 a suggestion given the difficulties and uncertainties. If I understood rightly, there was

21 a suggestion from my learned friend that the longstop for the existing disclosure might

22 already be challenging given progress hasn't, I think, been made yet.

23 THE CHAIR: We'll come to that.

24 Look, the first thing is to agree the longstop date for everything that's been ordered up

25 till now. I'm inclined to give an extra four weeks or so from what we've already got.

26 So that takes us to some date in the end of June.

1 MR HOLMES: Sir, that's fine, subject to the pass-on point and the fact that we may
2 need longer given the timing of the pricing statement. There's no agreed disclosure
3 yet on pass-on at all; they've not been prepared to agree any categories.

4 THE CHAIR: Is that right?

5 MR ARMITAGE: Well, we're giving --

6 MR HOLMES: A pricing statement.

7 MR ARMITAGE: -- a large quantity of price and cost data and the pricing statement.

8 MR HOLMES: The pricing statement has to be tested by reference to documents.

9 THE CHAIR: They are meant to be giving a pricing statement.

10 MR HOLMES: Sure, but there will still need to be disclosure of documents relevant to
11 that.

12 THE CHAIR: There will be, but what disclosure is going to be ordered is going to be
13 very specific depending on what comes out of that process. We can't really address
14 that --

15 MR HOLMES: Of course. No, it will be targeted.

16 THE CHAIR: Until we've got the pricing statement, with the relevant documents -- the
17 key documents exhibited, we can't progress that any further.

18 MR HOLMES: I quite see that, sir. It's simply just to put a marker down that we may
19 need either liberty to apply or --

20 THE CHAIR: The things which are being dealt with by information statements or
21 whatever you want to call it, they are left open deliberately so targeted requests can
22 be made, and I fully understand that those targeted requests may not be resolved prior
23 to the longstop date.

24 MR HOLMES: I'm grateful.

25 THE CHAIR: I understand that. What I want is to keep a longstop date for everything
26 else, knowing that there may still be residual issues in relation to anything that's

1 the subject matter of an information statement. So we add on four weeks, and then
2 as regards everything else, amending the pleadings and stuff like that, I'm not inclined
3 to put dates on that at the moment. We leave in a trial date of 10 May, because that
4 may help or may not help in relation to America, because if you don't have a trial date,
5 then they'll say, "Well, there's no trial date, there's no hurry to do anything". So we
6 need to have a trial date in, knowing there is a risk that the trial date may need to
7 move, depending on how we go.

8 MR HOLMES: Sir, would it be worth listing provisionally a CMC before the summer?

9 THE CHAIR: I think it probably would, if we can figure out when, we can look at it.
10 Yes.

11 But also what would be helpful is if, prior to the next CMC, the parties can indicate the
12 amendments that they may wish to make to their pleadings. So, for example, if a lot
13 comes out of the disclosure, on both sides, if both sides can indicate what, in general
14 terms, amendments they'd be seeking to have so we know whether or not the case is
15 going to be narrowed or wider.

16 MR ARMITAGE: Bit of timing there, just if the CMC is before the summer and the
17 longstop date is the end of June, but obviously we can endeavour to --

18 THE CHAIR: Yes, so I'm just trying to look and see what I'm doing in July. (Pause)

19 MR HOLMES: Should we perhaps liaise with the registry?

20 THE CHAIR: Yes. I would have thought we'd want to have it at the beginning of July.

21 MR HOLMES: Okay.

22 THE CHAIR: So a date in the first week of July is to be fixed.

23 MR ARMITAGE: Yes.

24 THE CHAIR: Yes.

25 MR ARMITAGE: I mean, it would be very challenging to say anything meaningful
26 about amendments in time for that.

1 THE CHAIR: No, what I'm saying is that you -- I don't want people to wait until the end
2 of the longstop date before they start disclosing that.

3 MR ARMITAGE: No, of course.

4 THE CHAIR: Everyone understands they're going to be disclosing as they go on. But
5 what I expect to have in July is that if either party is saying, "Well, I think we're going
6 to need to amend", I need to have an indication in broad terms what those
7 amendments are likely to be, particularly if it's anything that's going to potentially affect
8 the shape of the case or disclosure.

9 So I think we need to perhaps indicate that in the order: that if either party's minded to
10 seek permission to amend, they set out in broad terms the nature of those
11 amendments without specifying the actual amendments themselves. Yes.

12 Right, so the parties are going to have to try and agree an order. This is going to be
13 a more complicated order than normal, so I'll give you seven days to try and agree an
14 order. If you can't agree an order, then send me an order with the alternative wordings.
15 I'm not keen to invite anyone to put submissions or anything, just indicate what the
16 different wordings are because I know if one wants to say something, the other will
17 want to say something and before you know it, a lot of time is wasted.

18 Okay. Thanks very much, everyone. I know a lot of work has been done to make this
19 hearing efficiently run. The bundles are excellent. It's much easier when you've got
20 advocates as experienced as you two doing it as well.

21 I won't say anything more now, but there's a lot of work to be done.

22 I'll rise. Thank you.

23 (4.03 pm)

24 (The hearing concluded)

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Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
...	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?