COMPETITION APPEAL TRIBUNAL

Case No: 1440/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 23rd March 2026

Before:
The Honourable Mr Justice Richards
Anthony Neuberger
Antony Woodgate

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Clare Mary Joan Spottiswoode CBE

Class Representative

v

Nexans France S.A.S. & Others

Defendants

A P P E A R A N C E S

Robert Marven KC, Gerard Rothschild and Jamie Farmer (Instructed by Scott+Scott UK LLP) on behalf of Clare Mary Joan Spottiswoode CBE

Colin West KC (Instructed by Hausfeld & Co. LLP) on behalf of London Array Limited & Others

Paul Luckhurst (Instructed by White & Case LLP) on behalf of Nexans

Fiona Banks (Instructed by Macfarlanes LLP) on behalf of Prysmian

Michael Armitage and Daniel Carall-Green (Instructed by Addleshaw Goddard) on behalf of NKT

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Monday, 23 March 2026

(10.02 am)

Housekeeping

THE CHAIR: Just first of all, I will connect my computer and then just read out the usual warning, please, which is that some of you are joining us on live stream on our website so I start with the customary warning: an official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as contempt of court. Thank you very much. Right. Yes, Mr West.

MR WEST: Colin West KC, I am here on behalf of the London Array Claimants. Mr Marven KC, Mr Rothschild and Mr Farmer are here for the Class Representative, Ms Banks for Prysmian, Mr Luckhurst for Nexans, and Mr Armitage and Mr Carall-Green for NKT.

I'm hoping to play a cameo role today because there is only a single agenda item concerning my clients which relates to the London Array Claimants' payment on account in relation to their ROC costs. Subject to the Tribunal, the parties have agreed that this can be the first item on the running order today.

THE CHAIR: Yes.

Submissions by MR WEST

MR WEST: The London Array Claimants seek a payment on account of their ROC costs at the level of 65 per cent. The corresponding figure in pounds, based on the most recent signed schedule of costs, is in paragraph 5 of our skeleton argument, and is the sum of just under £870,000. The Tribunal has already ordered that next --

THE CHAIR: 870? Sorry.

MR WEST: Yes.

The Tribunal has already ordered Nexans to pay those costs, the ROC issue costs, and has also held that London Array was entitled to have separate legal representation and its own expert for those purposes. The Tribunal has also already held that the Class Representative should indemnify Nexans in relation to that liability, and the Tribunal has also already determined the level of the payment on account in relation to the balance of the London Array Claimants' costs, that is, their overcharge costs at 65 per cent.

My submission is a simple one, it's that the 65 per cent level the Tribunal has already ordered in relation to the balance of the costs should apply equally to the ROC costs. In my submission, there is no reason why a different level of recovery should be anticipated in relation to the ROC, as opposed to the non-ROC costs. It was, after all, the same legal team dealing with both aspects of the case, to a large extent, concurrently.

There has been no suggestion to date that the London Array Claimants' ROC costs are in any way disproportionate or unreasonable and, notably, the level of the payment on account we are seeking, in pounds and pence terms, is significantly less than what the Class Representative has already agreed by way of a payment on account of their ROC costs to both Nexans and Prysmian. The amounts are about, I think, exactly £1 million in the case of Nexans and about £1.3 million in the case of Prysmian.

THE CHAIR: That's based on a 46 per cent figure.

MR WEST: Yes, that's right. But, my point is that it can't be suggested that the costs on which our figure is based are in any way unreasonable or disproportionate, given that they are so much less than the costs of the other parties, even with

a lower payment on account.

The only basis put forward to date to suggest a different approach to the ROC costs was the issue of duplication but, as I said, the Tribunal has already rejected that.

THE CHAIR: But is that right? Because I thought what I'd said in the judgment was that, yes, you can go into your detailed assessment of costs knowing that you were entitled to be separately represented and you were entitled to your own experts. But I thought, in paragraphs 20 and 21 of the ROC judgment, I made the point that, because Ms. Spottiswoode is ultimately footing the bill under the indemnity, she could chip in to the assessment proceedings and make arguments about the reasonableness and proportionality of your costs. One of the arguments she might make is, "Yes, you were entitled to have your own expert and, yes, you were entitled to be separately represented but you should have been liaising more with the other experts and reducing the amount of duplication in the work that you were doing".

MR WEST: Well, that isn't the point she has, in fact, made (overspeaking).

THE CHAIR: Right.

MR WEST: But, in my submission, even on that basis it's not realistic to suggest that my clients are likely to recover less than 65 per cent, which is the amount I'm seeking by way of a payment on account today. For those reasons, as I say, it's not a reason against the level of payment on account that we are seeking. Of course, she can make those arguments if she wishes but, in my submission, 65 per cent remains a reasonable level of recovery.

THE CHAIR: Sorry, Mr Luckhurst wishes to say something? (Pause)

MR WEST: The Class Representative makes two points in her skeleton, if I can briefly address those. One is that she relies on an authority called *Teva* but the level of the payment on account awarded in that case was 60 per cent, which is higher than the 50 per cent she is proposing. So, it does not, in fact, support her case. She

says that that is authority for the proposition that 60 per cent is the maximum level of a payment on account but, of course, that isn't so. There are many authorities in which more than 60 per cent has been awarded including *Trucks* where 75 per cent was awarded and, indeed, this Tribunal's own ruling in relation to the non-ROC costs, where 65 per cent was awarded.

THE CHAIR: I mean, my overall -- I think I can say this, it's my decision, I think, because this is fallout from my own costs decision. So, I'm going to say "I" because I think it is me. But my task is to come up with a reasonable estimate of the amount that you could realistically recover on a detailed assessment. I can't believe that there is authority that says that figure is 60 per cent or 70 per cent or 65 per cent, because it must be a fact-specific matter in each case, mustn't it?

MR WEST: Indeed.

The only other point made by the Class Representative is that she says the appropriate level in the case of the Spottiswoode Defendants is 50 per cent although, I think, that point is now gone because they have been agreed, the payments on account in the case of the Spottiswoode Defendants with the possible exception of NKT. She says 40 per cent is the appropriate level for the Spottiswoode Defendants. It's now been agreed, I think, slightly higher than that.

THE CHAIR: 46, I think it was agreed at.

MR WEST: She says that 50 per cent is the appropriate level for the London Array Claimants because she recognises that the level of the payment on account should be higher in our case. We, of course, agree that the level of the payment on account should be higher, but the logic of her reasoning doesn't, in fact, support the level of 50 per cent and does not detract from the 65 per cent which we say is appropriate. So, for these reasons, we seek a payment on account of 65 per cent.

Before I sit down, can I just briefly say something about the judicial review?

THE CHAIR: Yes.

MR WEST: The Class Representative, somewhat faintly, suggests in her skeleton argument that there should be no payment on account unless and until Nexans and the London Array Claimants have given specific assurances that the payment on account will be repaid in the event of a successful judicial review. But, in my submission, there is no need for such assurances. If there is a successful judicial review which results in the indemnity, which this Tribunal has ordered, being permanently set aside, the Tribunal will no doubt make such orders as are necessary to give effect to that ruling including by ordering repayment if appropriate. So, there is no need, in my submission, for assurances.

We have now seen the judicial review grounds on Friday, and they do not dispute the Tribunal's jurisdiction to make the order. What they say is that the Tribunal applied the wrong legal principles in coming to its decision and, if that is correct, then, in my submission, the appropriate order -- even if that were to be upheld and permission granted and so on by the divisional court -- would be that this Tribunal should make a new decision based on what the Class Representative says are the correct legal principles.

As I say, she does not suggest that the Tribunal would not have jurisdiction in those circumstances to come to the same decision. It came based on the legal principles the Class Representative says are applicable. So, it isn't actually appropriate for anyone to be undertaking to repay anything in the event of a successful judicial review because it may not, in fact, result in any different outcome.

Indeed, by way of final point, even if the indemnity were to be finally set aside, that would not in itself make any difference to the Tribunal's order that Nexans pay the London Array Claimants' ROC costs or that they make a payment on account in that regard. So that's all I was proposing to say.

THE CHAIR: Thank you, Mr West.

Yes, Mr Marven?

MR MARVEN: Sir, yes. Can I just deal with the judicial review, with respect, point first?

Just to be clear, we've never sought any kind of assurance from the London Array Claimants. Nexans have said in correspondence, as you may have seen, "Why don't we just drop out and you pay the London Array Claimants directly because that's what it amounts to". And we've said, "No, the order is that we indemnify you". We sought an assurance from Nexans that, in the event that the judicial review succeeded, that they should repay us. We've never sought anything from the London Array Claimants. We've said to Nexans, "Whether or not your liability to pay the London Array Claimants would fall away in that situation, that's not our concern". So, we have simply sought an assurance from Nexans.

Without going into the correspondence, I think over the weekend it's been given. As to how the judicial review, if it were to succeed, would be dealt with. I mean, it would certainly be possible for the administrative court simply to substitute its own decision. A form of words can be found and, obviously, if the outcome is, if I can put it this way, a technical win but the indemnity remains by one route or another, then obviously I'm not suggesting in those circumstances we should be repaid. But, if the ultimate effect of the judicial review is that the order that you made, that we indemnify, is quashed, then obviously Nexans should repay us. I don't think, after some late correspondence, that's controversial but I would invite the Tribunal to put that in the order; it shouldn't be controversial. But to be clear, whether that alters the position as between Nexans and the London Array Claimants is a matter for them.

So, two things on the form of the order. One is the point I've just made, that I --

THE CHAIR: You say that any order for an interim payment should

respect -- I mean, I have to say, I thought, well, anyway. The order I made was for Nexans to pay and you to indemnify. So, the order should respect that. So Nexans to pay an interim payment and you to indemnify and the order to say, "If the divisional court subsequently orders that the indemnity falls away or is adjusted, Nexans --"

MR MARVEN: Should repay us.

THE CHAIR: Should repay.

MR MARVEN: I'll leave it to them what they want to say about the position. I mean, whether or not they're asserting it, it necessarily follows that they wouldn't have to pay the London Array claimants in that event is a matter for them to address the Tribunal on.

That's all I've got to say on the form of the order, but I accept that, subject to those complications, the real issue about the figure is mine, because ultimately I'm paying.

THE CHAIR: You're paying.

MR MARVEN: So, I'm going to address the Tribunal on that. To be clear, just so there's no misunderstanding, with the Defendants, we didn't suggest 50 per cent; we suggested 40 per cent. In respect of two of the Defendants -- and the Tribunal may not know about the second one -- we settled at 46 per cent.

THE CHAIR: Was that with Prysmian and NKT?

MR MARVEN: No, NKT is the one we haven't settled. With Prysmian and Nexans we settled at 46 per cent.

THE CHAIR: Right.

MR MARVEN: Our position with the London Array Claimants is that it should be 50 per cent. The reason we accept a higher figure is because this Tribunal has held that they were entitled to their own representation and own expert. But to be clear, the issues about duplication -- and we were very careful to ensure that the order said

this -- that our reserve to the cost judge is in respect of all the aligned parties.

Now, I entirely accept that in the light of your ruling, that point is unlikely to travel as far with the London Array Claimants as it might with the Defendants, but it's still there. It's not really fair to say we haven't made the point; obviously, when we made our submissions, we were making the "one set of costs between the aligned parties" points and you rejected that. But we haven't abandoned the duplication points against the London Array Claimants, and we were very careful that the order recorded that it was in respect of all the aligned parties, including them, that the point was reserved -- or the point went off to the cost judge.

I'm not saying 60 per cent is a principle of law; what *Teva* says -- I don't think we need to go to it -- is that it's a common figure. But you're right that the test is, "What's a reasonable estimate?". To be fair, it doesn't have to be a bare minimum, but it should be a conservative figure, allowing for the prospect that adjustments may be made on assessment.

As to the "Why shouldn't we get 65 per cent?" that my learned friend says. Well, firstly, it doesn't seem to me that any duplication point would arise in respect of the non-ROC costs. But secondly, as a matter of procedural fairness, that's not an issue -- I don't know how the 65 [per cent] was determined -- on which you heard any argument from us, because we weren't concerned with that. So, it would be unfair simply to read that across. It would be unfair to us not to be heard on what the right figure was. I'm sure the Tribunal will hear what I have to say. As I say, we weren't heard on the non-ROC costs.

THE CHAIR: So, you think 60 per cent is a generally kind of rule of thumb figure?

MR MARVEN: Yes, precisely. It's a rule of thumb figure. I accept that. That's what *Teva* says; it's a common figure.

THE CHAIR: Yes.

MR MARVEN: But I say it should be lower here to factor in, really, the prospect of duplication. Also, what I'm just now going to come to: with respect, the absence of visibility on the work done, and the fact that the allocation between ROC and non-ROC costs seems to be rather approximate and rough and ready.

Can I take you, then, to the revised statement of costs that's been submitted on behalf of the London Array Claimants? It's the ROC costs bundle tabs -- I'm going to go to 25 first -- 25 and 26.

THE CHAIR: When you say ROC costs, you mean ROC bundle, do you?

MR MARVEN: The ROC bundle, yes, sorry.

THE CHAIR: Yes.

MR MARVEN: So, I hope page 184.

THE CHAIR: Yes.

MR MARVEN: You have a document that's headed "Statement of Costs". In the paragraph below that heading, four lines down, just where the bold text ends, it says: "These costs have been provisionally isolated from our clients' total incurred based on:

"1. Specific time entries or costs relating to the ROC issue; or

"[2] a proportion of the overall costs commensurate to the work undertaken during the trial preparation of the ROC issue." [as read]

Then it says:

"Namely, a quarter of counsel's brief fees, or based on trial length, two-fifths for other trial costs." [as read]

That doesn't seem to me to specifically say what's being done with the non-trial costs, but presumably we're supposed to understand there's been some kind of provisional isolation.

But if one looks down this -- bearing in mind this is a fractional figure -- perhaps the

first point I should make is that these hourly rates are above overall the grade A City of London guideline rates for 2025. We've taken 2025 as a sort of average.

Just to give you what those rates are, if that's helpful, for A it's £566, B it's £385, C it's £299 and D £205. All these rates are banded, but the upper ends of A, B and C are all somewhat above the guideline rates -- sorry for B and C, they are.

So just looking at the figures -- and I appreciate you're not conducting a summary assessment, let alone a detailed assessment -- my overall point is there's very little visibility on what's being done here. There's no narrative. It's fee earners broken down by hours.

So we have £63,000 on internal communications, which seems very high.

Correspondence with and attendance upon Class Rep/Defendants, £104,000. Work done on documents, and I'll come back to that. But these figures overall just seem extremely high. If we look at page 186, that's the document time. This is of course supposed to be only on the ROC figures, 400 hours.

If one just looks back at page 185, the brief fees, which apparently is a quarter of the overall fees, £151,000, respectfully, seems high as a quarter of a fee. Those figures generally, I say, lack visibility and seem rather high. There are subsequent pages in this breakdown, but again, as you'll see from really a fairly quick perusal there's no narrative here, is exactly what's being done; it's just correspondence or internal communication, or work on documents, and so on and so forth.

So, I do say that in all the circumstances, a figure of 50 per cent, which we calculate at being about £637,000 is the appropriate figure. A rule of thumb would be 60 per cent, but there are outstanding duplication issues here, and there is a lack of visibility across the schedule.

That's the main schedule that I've just taken you to. For completeness, there's a schedule just for the last short period at tab 26 page 197. Very much follows the

same pattern. So, unless I can assist further on any of that, those are my submissions.

THE CHAIR: Thank you, Mr Marven.

Briefly, Mr West. Very briefly, we've got a lot to get through, but ...

MR WEST: Yes. Well, I'm not going to go into detail on the cost schedule, but I will just point out that none of these points were made in correspondence. If they had been, we would be in a position to answer them. Lack of visibility, lack of detail: These are all being made by Mr Marven on his feet for the first time.

Could I just mention one point about the timing of the detailed assessment that arises out of something the chair said. If you look at tab 4 of paragraph 4 of the order of the ROC bundle.

THE CHAIR: Yes.

MR WEST: This is the provision for there to be a single detailed assessment.

THE CHAIR: Yes.

MR WEST: To which I think the Chair referred. That refers to:

"The aforesaid costs being the subject of a detailed assessment." [as read]

The aforesaid costs are those in paragraph 3, which are the costs incurred by the Defendants. That is clearly not applicable to my clients who are not Defendants; we are the London Array Claimants. This is, this has some practical significance because the detailed assessment in the case of the Spottiswoode Defendants is likely to take place at the end of the Spottiswoode case, whereas the detailed assessment in the case of the London Array Claimants can take place immediately. In my submission, it is practically important that this detailed assessment is not the one in which the London Array Claimants' costs will be assessed.

THE CHAIR: Where does that leave what I said in my judgment? Because I thought that is what -- where's my ruling on ROC costs? Tab 1. 29 and 30. I thought it

was --
MR WEST: I think that's right, paragraph 29, tab 1, page 10.
THE CHAIR: Yes.
MR WEST: You do say the Class Representative will be entitled to make submissions, meaning that there should be provision for the Class Representative to appear at the detailed assessment of the London Array Claimants' costs.
THE CHAIR: Yes, well, I think that's what I had in mind.
MR WEST: But not that detailed assessment should take place at the end of the Spottiswoode case.
THE CHAIR: Okay.
MR WEST: Can I propose some wording to that effect?
THE CHAIR: Well, I mean, I think we're going to probably have to move on, because I don't want to do that on the hoof.
MR MARVEN: I wasn't expecting that. To be clear, it's not our reading of the Order because paragraph 2 refers to the indemnity. So, I took paragraph 4 of the Order to mean that everything would be together. I mean, I haven't taken instructions on this because I'm surprised by this point, but we may very well want to say that this assessment should be together. I mean, how else is duplication going to be properly looked at, apart from anything else?
THE CHAIR: Yes. Well, I think we're going to have to leave that issue for another day. If the order needs to be tweaked, the order might need to be tweaked. I don't want to do that in a room full of people.
Are you itching to say something on behalf of Nexans? Yes.
MR LUCKHURST: Very sorry. Not on payment on account; we're neutral on that, as you can see from our skeleton argument. It's just on the question of assurances.
Mr Marven accepted that sufficient assurance has been provided over the

weekend -- unwinding it if it was paid.

THE CHAIR: Yes.

MR LUCKHURST: He says something should go in the Order about that. It's unclear if that's necessary, given that sufficient assurances have been provided in correspondence. But insofar as reservations of right and repayment assurances are going to go into the order, I just draw attention to the reservation of rights at paragraph 28 of my skeleton, where we've said: if it's unwound in some form as a result of the judicial review, we reserve the right to submit to the Tribunal it may need to look at the broader costs order, in terms of: should we still be paying 100 per cent of the costs? That's all.

THE CHAIR: Yes. Okay. Well, this is what I'm going to do on the payment on account:

(10.26 am)

Judgment 1 – Payment on account of London Array's costs

THE CHAIR: The principle, everyone agrees, is that the payment on account should be a realistic and perhaps a conservative estimate of the amount that would be covered on a detailed assessment. I left this issue open in my earlier costs judgments for reasons that I explained in those judgments. When the parties were making their written submissions on percentages that should be applied when determining interim payment, they would not have known that I was going to be asking the costs judge to determine the reasonableness and proportionality of matters such as expert fees, with an eye on potential duplication.

Now, I quite accept that 60 per cent is a usual rule of thumb. London Array is asking for a higher figure than that: 65 per cent. The Class Representative is suggesting a somewhat lower figure than that, at or around 50 per cent.

Mr Marven KC took me to London Array's costs schedule. He pointed to what he said were the high rates and submitted that there was "little visibility" on what the money was spent on.

In my judgment this is a case where the payment on account should be slightly lower than the usual rule of thumb. As I explained in my written ruling on costs London Array was, in my judgment, entitled to be separately represented at the ROC trial, and was entitled to have its own expert at that ROC trial. However, as Mr Marven KC says, there is still a residual issue of duplication that will need to be addressed by the costs judge. That issue would not arise in a normal case to which the 60 per cent rule of thumb applies.

In my judgment, that means that in this case, the appropriate rate is a 55 per cent rate, a discount from the usual rule of thumb reflecting that uncertainty.

Mr Marven KC's points on the asserted high rates and the absence of "visibility" on where costs have been incurred do not seem to me to have much effect on the payment on account. Those points would arise on a detailed assessment on the standard basis in the usual way and are in my judgment "priced in" to the 60 per cent "rule of thumb" rate. In the circumstances of this case, I consider that 55 per cent is the right rate to apply when determining the payment on account.

It was suggested that I should do something in the order to reflect the possibility that the indemnity that the Class Representative gives to Nexans might be set aside or varied following a proposed judicial review. It seems to me that in this case it is not appropriate to say anything in the order. If the indemnity is set aside or varied, the Administrative Court will no doubt make such order as it sees fit to make at that stage, in the light of whatever ruling it makes on the judicial review. We are dealing here with creditworthy entities. No suggestion has been made that there is any lack of creditworthiness that preclude Nexans repaying any sums that need to be repaid

should the Administrative Court so order. It seems to me that any consequences that arise from the judicial review are best dealt with at that stage, rather than in an order that I make now.

(10.29 am)

MR WEST: May I be released?

THE CHAIR: Sorry, say again?

MR WEST: May I be released?

THE CHAIR: Of course you may, yes.

MR WEST: Thank you.

THE CHAIR: Right, so what is next on the agenda?

MR CARALL-GREEN: Sir, I think it's interim payments in respect of the ROC trial.

ROC trial interim payments

THE CHAIR: Interim payments in respect of the ROC trial? Interim -- sorry, this is what I call wider ROC costs?

MR CARALL-GREEN: No, sir, this is just a question -- you've made a cost order.

THE CHAIR: For London Array, yes.

MR CARALL-GREEN: London Array is now out of the picture.

THE CHAIR: Yes.

Submissions by MR CARALL-GREEN

MR CARALL-GREEN: You made a cost order to the effect that the Class Representative is to pay the cost of the Defendants of the ROC trial. There's a separate question of the so-called wider ROC cost that we'll come to, but we're just talking here about the trial itself and the order that has already been made to the effect that the defendant should get their costs.

THE CHAIR: Yes.

MR CARALL-GREEN: And the question is: what payment on account should be made in respect of those costs?

THE CHAIR: No, I thought that had been agreed at 46 per cent.

MR CARALL-GREEN: That has been agreed as between the Class Representative and Prysmian and Nexans, but not as between the Class Representative and NKT.

THE CHAIR: Oh, right. Okay, NKT. Right, okay. Yes.

MR CARALL-GREEN: Right. So sir, the missing piece of the puzzle, in your Ruling on costs, was that you said that you were unable to make a decision on the question of payment on account, because you considered that you had not had submissions on what was the appropriate percentage to be applied in circumstances where there was a question about duplication.

THE CHAIR: Yes.

MR CARALL-GREEN: Now, NKT's position is set out in our skeleton argument, but I'll give you the three headline points:

First: the mechanism, or the legal machinery, by which a cost charge may reduce costs to be awarded by reason of duplication is the familiar mechanism of unreasonableness and proportionality. I've given an authority for that, but I expect that's uncontroversial.

Point number two: NKT, for its part, did not incur any substantial amount of costs which are allegedly duplicated. So, the point I'm making here is that NKT's position is different from the position of the other Defendants when it comes to the argument about duplication. And sir, to illustrate that, if I could take you to page 109 of the ROC bundle. (Pause)

THE CHAIR: Yes.

MR CARALL-GREEN: These are the Class Representative's cost submissions

about what is allegedly duplicated. And we see those in the three subparagraphs of paragraph 45.

THE CHAIR: Yes.

MR CARALL-GREEN: Now, subparagraph 1, there's some criticism of solicitor costs, but as the submissions make clear, NKT's solicitor costs are about a third of Prysmian's and about a fifth of Nexans'.

The second item of duplication is supposedly duplication of experts, but the Tribunal will recall that NKT did not call an expert witness, and it has claimed costs but for advice, which are in single digit percentages of the other Defendants' costs, on the question of experts.

And then the third item of alleged duplication is multiplication of counsel. The Tribunal will recall that it was just me at the trial. So, unless it's being suggested that NKT should not have been represented at all, then there's no duplication here.

And so, the overall result, sir, is that NKT's costs were £594,342.33, and I give that figure in full, because I have to point out that the figure in our skeleton is slightly mis-stated by approximately £1,100.

Now that figure compares with £2.9 million for Prysmian and £2.2 million for Nexans, and that can be seen earlier in this same document at page 100. I don't propose to turn it up, because that's not in dispute.

So that's the second point, sir, that NKT's position is very materially different from the position of the other Defendants, both as to the approach taken to duplication of work and therefore to the overall result of what the costs actually are.

And so that takes me to point number 3, which is in my submission, there's no reason to expect that reasonableness and proportionality will reduce the recoverable costs by anything more than the normal amount.

Now, the parties are only apart by a small margin; as the Tribunal pointed out, the

Class Representative has said 40 per cent. We've said 65 per cent. The Tribunal has observed just now in relation to the London Array application, that 60 per cent is a rule of thumb. We are proposing a very modest improvement on 60 per cent, on account of the fact that NKT took strenuous efforts to avoid duplication and in light of its very modest costs in the overall context.

The 40 per cent sir, or 40 odd per cent, is what the other Defendants are getting. NKT did something quite different, by saving a lot of costs, saving a lot of its own expenses. If that results in no difference in treatment vis-à-vis the other Defendants, then we say that that would be rather unjust. The other Defendants are now getting over £1 million in payments on account, and we are asking only for something in the region of £386,000, so much more modest.

THE CHAIR: Thank you very much.

Yes, Mr Marven.

Submissions by MR MARVEN

MR MARVEN: We do say we've moved to be clear -- and this is in correspondence -- from 40 per cent to 46 per cent to reflect what seems to have been accepted by the other Defendants as a going rate. There is -- and I think I can tell you this because it's open correspondence -- although to be fair they reserved their position, they did suggest in correspondence they will settle for 55 per cent, and we said "no", but that's open correspondence.

But anyway, sir, they've now gone back up to 65 per cent. I do say that 46 per cent is an appropriate rate taking into account the duplication points. Somewhat paradoxically, they support their application for payment on account by underlining all the things they didn't do, which is a counterintuitive way to support an application for costs. But although I accept that they didn't have an expert and they only had one counsel at trial, as we can see from their statement of costs, there was a lot of

work being done in the background and that does give rise to potential duplication issues.

And also -- and I'm sorry, you've heard me use this phrase once before in a previous submission -- there is also, again, a lack of visibility as to how these costs have been spent. And can I just show you that their cost statement that is at page 170, it's tab 21 of the ROC bundle, pages 170 to 172. (Pause)

And you of course have in mind, sir, that we're talking about the costs of the ROC issues trial. So, for example, under part one:

"Working in connection with the joint CMC, including work associated with formulating ROC issues to be tried as a preliminary." [as read] On the face of it, that's too broad.

Then there's work in respect of disclosure at (ii). If we go over the page, (v) about a third of the way down:

"Work in connection with ongoing strategy from a period following May 2024 through to preliminary issues trial, and other work such as relating to Confidentiality Ring Orders, case management and planning." [as read]

A lot of that, I would suggest, is outside the scope of the costs award.

And then over on page 172, (iii) under "counsel's fees", with respect to "a bit high".

And there -- sorry, I should say going back up to (i) on page 172 under "counsel's fees":

"Fees in connection with the joint CMC, including work associated with formulating ROC issues to be tried as a preliminary issue." [as read]

So, it does seem some of this is too broad. There's relatively --

THE CHAIR: Why is it broad? Just explain that a bit more.

MR MARVEN: Well, the order that you've given -- the order that you've made -- is for the costs of the ROC issues trial.

THE CHAIR: And this is --

MR MARVEN: That would seem to be sort of general management of the proceedings, at least in part.

THE CHAIR: Thank you.

MR MARVEN: So, we do say that bearing and --

THE CHAIR: But how much is affected by this? How much is -- I mean, I see £14,000 on that.

MR MARVEN: Yes, but that's right. It's not the larger sum but it's -- given we have so little visibility about how these costs are calculated, again, you just have hours and rates; there's no real narrative as to what's being done. I do say it suggests that the net has been drawn too wide generally.

THE CHAIR: Yes.

MR MARVEN: As to the things NKT says in its skeleton argument they didn't do: that, in a sense -- in an immediate sense -- that points to a lower figure, but it doesn't answer the point, in my submission, that there are a significant number of fee earners -- and you can see that from page 170 -- working behind the scenes. And that is one of the areas where I anticipate on assessment, we will be saying that the reductions fall to be made, in respect of duplication, because resources could have been pooled and so on and so forth.

So I say that the points they make about not having their own evidence and only having one counsel at trial don't really point to a higher figure than the appropriate figure for the other Defendants, and we started at 40 per cent, but we settled at 46 per cent with the other Defendants, and we say that's the appropriate figure here as well.

THE CHAIR: Okay. Thank you very much.

Very briefly.

Reply submissions by MR CARALL-GREEN

MR CARALL-GREEN: Yes, one point, sir. It's just the core problem with my learned friend's submission is the notion that 46 per cent is a going rate. If it's an axiom of fairness, that relevantly alike cases should be treated alike, it's also axiomatic that relevantly unalike cases should not necessarily be treated the same. So, if 46 per cent is what the other Defendants got on 2.2 or 2.9 million, it certainly doesn't follow that it's the same thing that we should get on a fifth or less of that figure.

(10.41 am)

Judgment 2 - Payment on account of NKT's costs

THE CHAIR: I am going to order a payment on account, in NKT's case, by applying a rate of 60 per cent. I do so, again, recognising that is the rule of thumb that is frequently applied. It does seem to me that NKT are less at risk of the arguments on duplication than London Array were. That suggests a point of difference with London Array's 55 per cent. I do acknowledge Mr Marven KC's point that there is some suggestion that the costs schedule has captured costs that are not ROC trial costs. However, the sums involved there are relatively low and the kind of matter that, in my judgment, would be picked up on a standard basis assessment anyway. This point does not suggest that any sort of additional override is needed to the adjust a 60 per cent "rule of thumb". In connection with NKT, the "rule of thumb" rate of 60 per cent appears to me to produce a realistic and conservative estimate of likely costs recovery and so I am going to order the payment on account by reference to a 60 per cent rate.

(10.42 am)

Right.

MS BANKS: I think that brings us to the wider ROC costs which are very much bound up with the proposed amendments that the Class Representative proposes to make.

THE CHAIR: Yes.

MS BANKS: So, I was going to start by taking you to those amendments --

THE CHAIR: I mean I was wondering if maybe -- conscious that there's a lot on the agenda today and wider ROC costs have been dealt with quite fully in the skeletons. I wasn't necessarily going to say I'll take it all from skeletons, but I wonder if we could come back to it at the end. I know that's not the order that the parties suggested but I think that might be the most productive use of time.

MS BANKS: Well, the actual points on the amendments are relatively brief --

THE CHAIR: The points on amendments are brief, yes.

MS BANKS: -- but the submissions on the wider ROC costs are more wide ranging, and (overspeaking) rather deal with --

THE CHAIR: Yes. That's what I was worried about.

MS BANKS: Well, what I don't really want to happen, sir, is for this to just get left and (overspeaking).

THE CHAIR: No, nor do I. But equally, I do want to make sure that I'm using the time as productively here for the case management of the proceedings going forward. Could we move on to other case management matters and come back to this? Unless you think that means that we won't be able to deal with the case management issues fairly.

MS BANKS: No, I'm in your hands.

THE CHAIR: Well, would you mind if we come back to it? (Pause)

MR ARMITAGE: Sorry, sir, there is another -- it's Michael Armitage for the NKT Defendants. There is a short point on cost budgeting --

THE CHAIR: Yes.

MR ARMITAGE: -- which I think I can take extremely briefly.

Cost budgeting

Submissions by MR ARMITAGE

MR ARMITAGE: So, it's the Defendants' proposal that the Class Representative should file an updated costs budget. The Class Representative has indicated that it doesn't object, in principle, to doing this. So, I think the question is over whether the Tribunal would find this of assistance. If you need any assistance with that determination I can, of course, make more detailed submissions but in the event that the Tribunal already has the view that an updated budget would be useful, I think we can move directly to the practicalities of that.

THE CHAIR: It's not controversial that the Class Representative should update the budget. It would seem to me to be a good discipline now that quite a lot has happened since the original budget was filed.

MR ROTHSCHILD: Certainly, sir, if the Tribunal wants an updated costs budget we should, of course, be happy to provide one but it should be in conjunction, pursuant to the recent CAT's decisions with costs budgets for the Defendants.

I don't know if the Tribunal is familiar with the recent observations of the President in the other case that my client is Class Representative in, the *Spottiswoode v Airwave* case.

THE CHAIR: I'm not familiar with it.

MR ROTHSCHILD: But maybe an appropriate time to --

THE CHAIR: Can I suggest we come back to this as well? Because it seems to me that one of the things we're going to be talking about later on in wider case management is the possibility of another CMC in June or July. It might be that this is

one of the topics that could sensibly be put on the agenda for that other CMC. Maybe we could come back to it as part of the discussion about what should be on the agenda for the other CMC.

MR ARMITAGE: That's the Defendants' budgeting issue.

THE CHAIR: Yes, I think so.

MR ARMITAGE: Yes. Just to foreshadow, we say that point wasn't canvassed in the skeletons. We're not necessarily opposed to the idea, but we think it hasn't been raised in an orderly way. So, we would fully support the idea of that coming back at a further CMC.

THE CHAIR: Yes, well, let's --

MR ARMITAGE: But obviously happy to discuss that later.

THE CHAIR: Let's park that and make progress on other issues first.

Case management issues

MR ROTHSCHILD: On case management issues, I propose to follow the order of my skeleton argument, which is the same order as the parties' suggested on Friday evening in response to the Tribunal's request for a proposed running order.

THE CHAIR: Yes.

Which I've now, I'm afraid, varied, but I hope you understand why.

MR ROTHSCHILD: But, under case management, the first topic is approving the list of issues. This seems uncontroversial. The parties have agreed a list of issues. It's in the core bundle, tab 8, page 4. It may not be necessary to turn it up but the parties request that the Tribunal approves it and annexes it to the case management order. Paragraph 1 of the composite draft order the parties have prepared is one of the few paragraphs in black, indicating it's common ground.

THE CHAIR: I mean, it does seem to me that the list of issues has been agreed

between the parties. I don't, looking to my left and my right, see any reason why we shouldn't approve that list of issues since the parties have done so. I think we're happy to do that.

MR ROTHSCHILD: Great.

The next topic was permission for pleading amendments.

THE CHAIR: Yes.

MR ROTHSCHILD: I'm happy to address that, although my learned friend suggested that there was an overlap with wider ROC issues. Can I address the principle?

THE CHAIR: The amendments you want to make are just to abandon, sorry -- no one likes it being suggested they're abandoning anything -- to not pursue ROO09 or ROO10; is that all the amendments or are there other ones, too?

MR ROTHSCHILD: Effectively. There are some fairly light amendments to the claim form in the supplementary bundle from page 5 onwards. They principally reflect the outcome of the ROC issue trial. They do also do some minor tidying up. They may not actually be necessary amendments. In my submission, it's not actually essential to amend a claim form after a preliminary issue trial. The reason -- and it's perhaps quite important to explain -- why these amendments have been made: the Defendants asked for them, rather oddly. In the supplementary bundle -- it might be appropriate to turn it up, page 910A -- there's a letter dated 4 November 2025.

THE CHAIR: Sorry, would you give me that page reference again?

MR ROTHSCHILD: 910A.

THE CHAIR: In the supplementary bundle?

MR ROTHSCHILD: That's right.

THE CHAIR: Yes.

MR ROTHSCHILD: On 4 November, Macfarlanes, solicitors for the Prysmian

Defendants, wrote to Scott+Scott, my instructing solicitors, referring to the ROC issue judgement and Tribunals. See the third paragraph:

"In light of the findings of the judgment, aspects of the Class Representative's case are unsustainable. Please confirm the Class Representative will promptly take steps to provide proposed amendments." [as read]

We therefore drafted some amendments which removed the 2009 and 2010 ROC claims.

THE CHAIR: Right.

MR ROTHSCHILD: But that simply reflects the result of the ROC issue trial. So, for tidiness, there are draft amended pleadings. The Defendants have -the draft Amended Claim Form. The Defendants have drafted Defences in response and we have drafted replies to those Defences.

THE CHAIR: I mean, let me suggest this because we've got a lot that we need to make progress on today. It seems to me that the amendments are minor. There's a legitimate debate to be had about what costs consequences should flow from the amendments and whether that feeds into the debate about wider ROC costs. But it doesn't seem to me that there would be any sense in refusing permission to make the amendments. Is anyone asking the Tribunal to refuse permission to make amendments? Or is the debate simply about what costs consequences should flow from the amendments that are proposed?

MS BANKS: The debate is just about costs consequences.

THE CHAIR: Okay.

MS BANKS: But can I just make the point, sir, that the reason why this amendment is important is because of the amount that it lops off the overall claim. So, at paragraph 89, the underlying cost figures (inaudible) quantum assessment was --

THE CHAIR: You make it 41 per cent. Don't you think it takes off 41 per cent of

their claim?

MS BANKS: Something like that.

THE CHAIR: Yes. I appreciate it's a significant amendment and I appreciate that it might have cost consequences, but it does seem to me that the right order is to permit the amendment on the usual terms that the Defendants can have permission to amend consequentially.

MS BANKS: Which we have done.

THE CHAIR: Which you've done. Okay. Well, should we just allow all of those amendments then? Right.

MR ROTHSCHILD: In regard to my learned friend's point, there is a revised claim value estimate from the Class Representative's experts that the damages are in the range, now, of £173 million to £498 million.

THE CHAIR: Right. So, what was it prior to ...?

MR ROTHSCHILD: It's supplementary bundle, page 43. It's within the Amended Claim Form. I haven't memorised the figures.

THE CHAIR: Don't worry (overspeaking).

MR ROTHSCHILD: But I now have them in front of me. The figures, of course, depend on disclosure and many different assumptions but, if the Tribunal has page 43 of the supplementary bundle, paragraph 89, the Tribunal can see from the colour text how the figures have evolved.

THE CHAIR: Right, okay. Okay. Thank you very much. Well, why don't we just give permission, then, for the various amendments to be made, both on the Class Representative's side and the Defendants' side? We will, I promise, come back to the cost consequences of that.

Disclosure

Submissions by MR ROTHSCHILD

MR ROTHSCHILD: The next topic is disclosure applications by the Class Representative against the Defendants. The first (inaudible) so-called off-the-shelf disclosure.

THE CHAIR: Yes.

MR ROTHSCHILD: This is agreed. The Tribunal has made a consent Order on 10 March. It's in the core bundle at page 11. This is documentary disclosure and disclosure statements previously provided by the Defendants in Direct Purchaser Proceedings. So, proceedings by London Array, Vattenfall, National Grid and Scottish Power in respect of direct purchases of high voltage power cables.

The Defendants are due to provide such disclosure within 21 days of that order. It has not yet been received; it's due by 31 March. Once the Class Representative and her expert have had an opportunity to study this so-called off-the-shelf disclosure -- "off-the-shelf" in the sense that it's somewhere already on the Defendants' list of virtual shelves -- the scope of the further disclosure required in the present case will obviously be clearer to the Class Representative. But there are some further disclosure applications that can be progressed meanwhile. If I may, I'd like to turn to those.

The next heading, then, is "Disclosure reports and electronic disclosure questionnaires" from those Direct Purchaser Proceedings.

THE CHAIR: Yes.

MR ROTHSCHILD: So the Class Representative seeks an order that the Defendants disclose those. These would allow her and her experts to better understand two things.

So firstly, in the universe of potentially relevant documents that the Defendants have available in relation to the power cables cartel and its impact in Great Britain, from

which the Class Representative might make further disclosure requests.
THE CHAIR: Because there was some suggestion in the Defendants' response that this was really directed at material that might exist prior to the infringement period. Do you not position it --
MR ROTHSCHILD: It's not solely directed to that.
THE CHAIR: Right, okay.
MR ROTHSCHILD: We may seek to make further disclosure requests in relation to pre-1999 data, but these reports will tell us the whole universe of potentially relevant documents. We, of course, were not involved in the Direct Purchaser Proceedings (inaudible).
The second thing that these documents would allow is an understanding of the context in which the off-the-shelf disclosure, due by 31 March, was identified; the pool of documents from which it was selected.
The Defendants resist the application on an unusual basis. I mean, they say that to the extent that disclosure reports and EDQs were prepared, they're now old and/or high level and/or superseded. Well, we maintain that they're likely to be relevant and helpful, at least in understanding the context in which the off-the-shelf disclosure was identified; they were the reports and EDQs that preceded that off-the-shelf disclosure being compiled. And also, they should be easy for the Defendants to produce: they exist, they should be on their shelves.
So we say the Defendants' resistance to disclosing these materials, together with the off-the-shelf disclosure, is somewhat surprising. But if the Defendants are concerned that they might give a misleading impression to the Class Representative, because documents have since been lost or storage systems have changed, and that all these reports and EDQs are outdated, then we would respectfully seek a direction that the Defendants additionally provide fresh, current disclosure reports

and EDQs, so as to help inform the Class Representative's future disclosure requests of the Defendants in these proceedings, and therefore fulfilling the first purpose for which we make this application; namely, to identify the universe of potentially relevant documents that are in the Defendants' hands.

That is my application. Maybe the Tribunal would wish to hear --

THE CHAIR: Yes. Well, it's such a discrete point, why don't we hear from the Defendants on that?

Submissions by MS BANKS

MS BANKS: So, we do resist this. In the Class Representative's application, it was put on the basis of being needed to ascertain the extent of information available in respect of the pre-infringement period. We explained in correspondence that, actually, these documents won't assist with that, because although there was some infringement disclosure in the National Grid and Scottish Power proceedings, that arose at a later stage -- at the third CMC -- following a specific disclosure application.

THE CHAIR: Can you show me where it was positioned as a pre-infringement period?

MS BANKS: Yes, it is the core bundle at tab 14, page 27, paragraph 5.8.

THE CHAIR: Page 14? Tab 20 --

MS BANKS: Sorry, tab 14. Page 27, and it's paragraph 5.8. (Pause)

THE CHAIR: Right, so it is there. In that paragraph, you say, "positioned as a pre-infringement period point".

MS BANKS: Yes, and as I've just outlined, we explained that actually these EDQs and disclosure reports wouldn't assist in that aim that's outlined at 5.8.

We do have concerns now about the broader basis in which this is put; this idea that the Class Representative wants to ascertain the universe of potentially relevant documents that are out there. Because we do say that is approaching disclosure

from the wrong way round.

The Class Representative needs to justify, by reference to the sizable amount of disclosure she will be given, why further disclosure should be necessary and proportionate. Just to give some context to this, the Prysmian disclosure alone is estimated to be around 22,000 documents and 12 gigabytes of data. That's explained in Mr Day's witness evidence.

THE CHAIR: Is that just the off-the-shelf material?

MS BANKS: Just the off-the-shelf. And of course, we've got NKT's and Nexans' off-the-shelf disclosure as well.

We say, in circumstances where the Class Representative hasn't even looked at that off-the-shelf disclosure, but she's already looking for reasons to cast her net more widely, that's the wrong approach. We also say that's very much reflective of the Class Representative's approach to disclosure to date. She made, initially, some very broad, wide-ranging requests, now abandoned, for disclosure of a 37 year period, including by reference to the US and Canada, supplies made in those regions, without reference at all to the off-the-shelf disclosure, and what had been given in prior proceedings.

So we do resist this, and we resist it on that principled basis; it's the wrong way round. The Class Representative should be looking first at what she's going to get in this off-the-shelf disclosure.

THE CHAIR: Right, okay. Thank you very much.

Submissions by MR ARMITAGE

MR ARMITAGE: May I just say very quick word about the NKT position? Because we were also parties to the National Grid and Scottish Power proceedings. You've got some evidence -- we may not need to turn it up -- from Ms Haigh at paragraph 11(a), and that's at core bundle, page 198. Ms Haigh explains that, in

addition to the disclosure reports that we produced in those proceedings, we produced disclosure statements at the time of the disclosure that was given. Those are going to be provided to the Class Representative under the agreed off-the-shelf disclosure order. So, they're going to be getting those.

They're also going to be getting some explanatory material produced by the NKT Defendants' expert in relation to some of the disclosure that was given. So, it's not the case that the Defendants are going to be supplying nothing in relation to explanatory material on the disclosure that was given.

We say, for that additional reason, otherwise, we fully support the position of Ms Banks for Prysmian. This request isn't necessary and isn't going to assist.

THE CHAIR: Yes, thank you very much.

MR LUCKHURST: Just to correct one line. Mr Rothschild said that the off-the-shelf disclosure has not yet been received; we actually provided all of our London Array disclosure on Friday, I'm instructed, and that included a disclosure report detailing how that was assembled. So, we're not dragging our feet. Where it's possible to provide stuff in advance of the order, we've done so.

THE CHAIR: Thank you very much.

Yes, Mr Rothschild.

Submissions by MR ROTHSCHILD

MR ROTHSCHILD: I hadn't been aware that disclosure did come on Friday, if just the London Array. Still at least 22,000 documents, apparently.

But as to my learned friend, Ms Banks' point on the scope of the application, Ms Banks took you to the application at page 27, but that, of course, refers to the supporting witness statement. It's important to see that for the scope of the application.

So, page 27 of the core bundle, Ms Banks referred to --- took you to paragraph 5.8,

which begins:

"As explained further in JHC1 at paragraph 23 ..."

It's necessary to go to JHC1 -- that's Mr Hain-Cole, my instructing solicitors' witness statement -- at paragraph 23 to see the breadth of the application.

THE CHAIR: (Overspeaking).

MR ROTHSCHILD: That's on page 48, paragraph 23. I invite the Tribunal to read that. In particular:

"As explained in Scott+Scott's letter of 24 February, this is considered likely to be illustrative of the Defendants' ability to provide further categories of disclosure in due course, and the kinds of material available e.g. [so, for example] the availability of data for the pre-Cartel period, and is particularly important where the Defendants are seeking to place particular reliance on the off-the-shelf disclosure in these proceedings." [as read]

So, the breadth of the application should have been apparent. In any event, we're talking here only about a few pages. Disclosure reports and EDQs are very short documents. There's no suggestion that it would be disproportionate or burdensome for the Defendants to provide them. Instead, my learned friends seem to be saying, "Well, they may not be relevant, or the Class Representative should look at the off-the-shelf disclosure first".

Well, in my submission, the Class Representative should be allowed to see the disclosure report, see the EDQs, and then take a view on whether to make an application. The Tribunal may subsequently decide that any application is disproportionate, but my learned friends are seeking to prevent the Class Representative from even making a further disclosure application.

So, I maintain my application.

THE CHAIR: Thank you very much. Well, I think we won't give a ruling on this one

now. Why don't we give a compendious ruling on lots of matters relating to disclosure later on, either orally or in the reserved judgment.

Perhaps we can then move on to the next topic.

Disclosure of experts reports

Submissions by MR ROTHSCHILD

MR ROTHSCHILD: I believe the next topic is Defendants' expert reports and witness statements in the Direct Purchaser Proceedings.

THE CHAIR: Yes.

MR ROTHSCHILD: The Class Representative seeks disclosure first of the experts' reports served by the Defendants in the Direct Purchaser Proceedings. Now, these cases covered, as I've indicated, very similar subject matter and issues to the present case, although, of course this case is wider in ambit.

THE CHAIR: And just to be absolutely clear, the request is for the Defendants to serve their own expert reports, you're not seeking --

MR ROTHSCHILD: Only the Defendants.

THE CHAIR: Yes, okay.

MR ROTHSCHILD: In respect of the experts' reports, these should help the Class Representative's expert witness in marshalling what we've been told today. There's going to be a significant volume of data and information from the Direct Purchaser Proceedings, we say, in a time-effective manner. They can be equated, perhaps, to specialist academic papers on the very subjects in issue, namely the effect of the cartel on purchases of high voltage cables in Great Britain.

There are expert reports on that very subject, which is one of the key subjects of this case for trial. So, access to those expert reports is likely to assist in reaching the right answer in this case more efficiently.

THE CHAIR: And what are you interested in in those reports? Because obviously, experience on the London Array proceedings gives at least two of us a clear insight on what they might look like. Are you interested in the methodology that is applied in those reports? So, for example, the kind of before/after comparison that may or may not have been produced. Or are you interested in the actual data in those reports, the way specific overcharges were said to be calculated in relation to specific supplies of cables?

MR ROTHSCHILD: Well, it's the Class Representative's expert who's interested in them, so perhaps it would be appropriate to look at the Class Representative expert's, Mr Druce's, letter, where he says why he would find them useful.

THE CHAIR: Yes.

MR ROTHSCHILD: In answer to your question, in the core bundle at page 36, paragraphs 19 and 20; two paragraphs where he sets out why he would find them useful.

MR NEUBERGER: Can you give me the tab reference?

MR ROTHSCHILD: Yes, it's tab 15.

MR NEUBERGER: Thank you very much.

THE CHAIR: Page 36. Yes, this is the bit I remember reading.

"It will maximise the efficiency of the current Proceedings for the experts to have access to reports outlining the methods that have been used to estimate overcharge and results." And then "…review of the factual witness statements may provide me with further insights." [as read]

So, it's methods. So, the fact that a particular supply of cables that was relevant in the DPP proceedings was considered to have – quite, on one expert's methodology -- resulted in a particular level of overcharge. It's not that that's interesting; it's the method used to estimate the overcharge that's interesting.

MR ROTHSCHILD: Yes, that is what is said here. Did Mr Cruton have your question before him?

THE CHAIR: No.

MR ROTHSCHILD: Of course there may be other material in there too, it's not entirely clear until we see it. But what analysis the experts did ...

THE CHAIR: But you see, the reason I asked the question is obviously we are going to be hearing in a bit one of the objections is that the expert reports themselves might refer to information that has been disclosed and is subject to some restriction on disclosure. So that's an objection based on the information in the reports, and I suppose the reason I ask the question is to canvas with you whether a potential way through that objection might be for any disclosure to show you methods, but not information that might be considered critical or sensitive or having been disclosed by other parties.

MR ROTHSCHILD: We don't have to slow down the process to trial. It may be appropriate, therefore, to take it in stages, to see a selection first, and if then we wish to come back for more, we should be allowed the opportunity to do so.

We do, of course, hear the objections raised by the Defendants about the collateral use and the fact that third-parties' data might be affected. So, these are the Defendants' reports, but we are told that they include some material from the claimants in those proceedings.

THE CHAIR: Yes, and that's not unrealistic, is it? Because in London Array itself we saw that the expert reports -- and I'm not going to give away confidential information, but we saw that the expert reports referred to information that London Array had given on their bidding processes, for example.

MR ROTHSCHILD: As things stand, we're completely in the dark. The Defendants said they are cautious about using those materials for purposes of making

submissions today, but they're at least better placed than we are to comment on that content. (Pause)

So, we say that access to the reports would assist Mr Druce. The Defendants also say that the costs of reviewing these reports would be significant, but we say that that is surely exaggeration; the cost ought to be relatively small when compared with the costs of the Class Representative's expert conducting the analysis that led to the conclusions in those reports from scratch. But in any event, access to those reports will be like allowing the Class Representative's expert access to a good library of data; he doesn't have to use the library, and if he incurs disproportionate costs in doing so, when it comes to the assessment of costs at the end of the case, the cost judge may decide that the costs incurred were disproportionate, but it's an odd objection at the moment to say he shouldn't have access to that library of data, on the basis that he might spend too long reading it.

THE CHAIR: Yes.

MR ROTHSCHILD: Now, there's also a serious risk of inequality of arms unless these reports are disclosed. The Defendants apparently want to use one of the same experts again, Dr Davis, who acted for Nexans in the London Array proceedings. And there's also clearly commonality of lawyers instructed by the Defendants, as between the Direct Purchaser Proceedings and these Proceedings. I believe, for example, that my learned friend Ms Banks appeared with Ms Davies, instructed by Mr Day and Mr Firth of Macfarlanes, instructed for this hearing too, for the Prysmian Defendants in both the Scottish Power and the National Grid cases. Now, these lawyers and experts are not going to be able to shut these reports from their analysis out of their minds, nor would you expect them to, and unless the Class Representative's expert has access to the expert reports from the Direct Purchaser Proceedings, there could well be unfair inequality of arms as between the parties.

I'm not suggesting that those lawyers would in any way breach their professional obligations to keep information confidential, but the fact is that they have seen the methodologies in those reports and will understand the structure of the way those cases developed.

THE CHAIR: So, just to put a real world example on that, is the inequality of arms you're worried about this: if you don't have sight of these reports, you will prepare your methodology as best you can without it, and is what you're worried about is that you then send that over to the other side, and they have access to a secret cache of material that they can use to snipe away at it, which you rather wish you think you should fairly have been able to see before you prepared your report. Is that the point?

MR ROTHSCHILD: Yes.

THE CHAIR: Okay.

MR ROTHSCHILD: Directly relevant as well, because in this case we'll be dealing with the same purchases amongst others.

THE CHAIR: Yes. (Pause)

MR ROTHSCHILD: The inequality of arms. In relation to the collateral use restrictions, and the precise scope of that issue is really for the Defendants to explain as we were not involved in those proceedings. But the short response is: collateral use restrictions can be overridden by the court or the Tribunal in which the case was pending, and I believe all these proceedings were ultimately before the Competition Appeal Tribunal, even if some were started before the High Court. And so, we would ask for any restriction to be lifted. Maybe the Tribunal wishes to give the third parties who were entitled to the benefit of the collateral use restriction opportunity to object.

THE CHAIR: I mean, surely it would be precipitate to lift it today.

MR ROTHSCHILD: Well, we proposed in the composite draft order a potential way

forward; it's in paragraph 5, perhaps turn that up, whereby those parties could be formally notified and effectively the Tribunal would order now that the Defendants provide the materials on a certain future date if having been notified, the affected parties have not by then raised reasonable objection.

THE CHAIR: Sorry, where am I reading this?

MR ROTHSCHILD: There's a composite draft order to the Tribunal.

THE CHAIR: I have that with the very helpful colour coding.

MR ROTHSCHILD: It should be behind tab 6 of the skeleton argument bundle from page 82 onwards. And specifically, paragraph 5 on page 84 that I'm currently addressing. It deals both with witness statements and expert reports. And there's a proposal there in A and B.

THE CHAIR: Right, I see. So, the proposal -- I think you trailed this in your skeleton -- is that we order a long stop date by which disclosure is to be given. In the interim, the Defendants are to talk to potentially affected third parties, see if there's a problem, and if there is a problem, we sort it out as best we can.

MR ROTHSCHILD: Yes. I believe there has been -- we've already got something at the end of last week -- some correspondence between the Defendants and at least the solicitors for SP and National Grid, but they're asking for more information in summary, I understand.

But an alternative would be that the way forward that, sir, you suggested earlier, that those parts of these reports that are clearly not subject to any collateral use restrictions be disclosed first, or we get a redacted or partial version of the report. I don't have sufficient visibility of the content or structure of these reports to be able to make informed submissions on how that might be done.

THE CHAIR: And is your position that collateral use -- because I saw extracts from the CPR and the Competition Appeal Tribunal Rules in someone's skeleton -- is

governed entirely by the Competition Appeal Tribunal rules, or do you make no submission? Because I suppose you don't know --

MR ROTHSCHILD: We don't know. It would be for the Defendants, perhaps, to explain the history of those proceedings. Often the case when proceedings are transferred from the High Court to the Competition Appeal Tribunal, there's a provision in the order saying that the Tribunal's Rules will apply.

THE CHAIR: Yes. But there was a quote, wasn't there, from someone's skeleton argument that quoted one of the orders, which seemed to me --

MR ROTHSCHILD: (Overspeaking).

THE CHAIR: No, I'm sure it wouldn't have been yours. No, it wouldn't have been yours. Well, maybe we should hear from the Defendants on that; they are first. Have you said all you want to say on this topic, Mr Rothschild?

MR ROTHSCHILD: Yes, so witness statements could perhaps be dealt with separately. I've said everything I wish to say on expert reports for the moment.

Witness statements

THE CHAIR: Should we do witness statements at the same time? Let's do witness statements at the same time.

Submissions by MR ROTHSCHILD

MR ROTHSCHILD: They're related, but when we come to witness statements, so these are witness statements served by the Defendants in the Direct Purchaser Proceedings. When we come to witness statements, the Defendants are more accommodating. I mean, they say, and I quote, Ms Banks's skeleton argument at paragraph 15:

"In respect of the Defendants' witness statements in the Direct Purchaser Proceedings, the Defendants accept that there will likely be efficiencies to be gained,

especially for the experts, from the use of their statements from the prior proceedings where those proceedings concerned multiple supplies in issue in these proceedings." [as read]

And there is a similar statement in Mr Day's witness statement. And Nexans's skeleton argument adds that Nexans is content to provide confidential versions of its witness statements from the London Array proceedings.

So the part of the Class Representative's application concerning witness statements appears not to be opposed by the Defendants, subject, I think, to two points.

So, the first is that the Defendants seemingly do not consent to providing witness statements from two sets of proceedings, namely the Greater Gabbard and Vattenfall proceedings. Now, they clarified this point only in correspondence, a letter of the 19 March.

THE CHAIR: Greater Gabbard and say the other one?

MR ROTHSCHILD: Vattenfall. (Pause)

We don't really understand the distinction being drawn; I can take the Tribunal perhaps to the letter. But they say that the benefit of the witness statements from those two cases would likely be more marginal. They seem to be admitting that they would all be potentially relevant, but it seems to the Class Representative, it should not really be for the Defendants to select degrees of relevance. They all to us seem potentially relevant cases.

The second objection that the Defendants raise is the one previously addressed, regarding collateral use. They say they need to be satisfied they're not infringing any restriction on collateral use of information provided to them by other parties to the Direct Purchaser Proceedings. And again, we don't have visibility of the extent of the collateral use problem. But it does seem odd, or at least exaggerated, because the witness statements being requested are the Defendants' own witness statements,

and so it would be surprising if they drew substantially on materials that have been provided to the Defendants by other parties. The Defendants can waive their own collateral use benefit.

In any event, it seems to be common ground that these are relevant materials, and that is the basis for the application.

THE CHAIR: Thank you, Mr Rothschild.

Submissions by MS BANKS

MS BANKS: Sir, in my submission, the application for expert statements from our proceedings fails for a number of reasons before we even get to the collateral use issue. I wanted to address that first before coming on to that.

First of all, we say that the Class Representative is not in a position to say that these expert statements are necessary. At most, it is said in my learned friend's skeleton that the reports are expected to assist in marshalling a significant volume of data and information in a time-effective manner. We say that "expected to assist" is not good enough when the Class Representative's expert hasn't even looked at that data. As the Defendants pointed out in their evidence, Mr Druce will have the benefit of the expert notes which were prepared in those proceedings by the experts to assist in analysing the data.

THE CHAIR: For all of the DPP's or just some?

MS BANKS: Can I take you to Mr Day's evidence? That's at tab 24 of the core bundle, paragraph 46. He makes the first point in paragraph 46 that the data set that's available in these proceedings substantially exceeds that which has been available in the prior proceedings. Then he goes on to explain that the way the data -- this is the fifth line up from the end of the paragraph:

"Further, the way the data is to be marshalled depends on the views of the expert. As explained above, the experts in these proceedings will already have the benefit of

the explanatory notes prepared by Prysmian's experts." [as read]

THE CHAIR: By Prysmian's experts. But it's only one less set of experts, isn't it?

MS BANKS: Yes, but it's in relation to the Prysmian data that was disclosed. Prysmian is more than willing to engage constructively in any reasonable and proportionate questions the Class Representative may have in respect of the data set. So, we say it's not necessary.

But second, we say that this is a recipe for the disproportionate incurring of costs and the overcomplication of the expert evidence in these proceedings. The Tribunal has seen that Mr Druce says in terms that he wants to look at the methodology that was used. We say that the idea that the experts in this case should be looking to interrogate what was done before by different experts, by reference to a different, far smaller, data set which was never the subject to trial, is a recipe for huge wasted costs. We say that is the antithesis of the efforts that the Tribunal has been making, reflected in the recent Practice Direction to make expert evidence manageable.

As Mr Day explains in his evidence, if we could go to the paragraph 45, just back one page from where we were on page 310. The volume of expert evidence is significant. In that final sentence of that paragraph, he says:

"There are 11 expert reports arising out of these proceedings, excluding reports purely on tax issues, each running to hundreds of pages." [as read]

Sir, just to your point about trying to isolate the methodology, it's very difficult to see how that could be done because, obviously, the choice of methodology is informed by the data. We say that, rather than shadowboxing absent experts, the experts in this case need to be focused on formulating their own views by reference to this new, wider data set.

Now, my learned friend said that the costs ought to be relatively small when compared with the costs of his expert doing an exercise ab initio. We don't accept

that submission because it assumes that the experts in this case will find the prior analyses helpful. It may well be that Mr Druce reviews what's gone before and decides to do something completely different. We say that that would just lead to a whole tranche of wasted costs and, if you were to do that, it wouldn't be surprising given that the data set is different.

Also, the expert evidence isn't a library of published studies. It's untested expert evidence that never went to trial. My learned friend's expert has the library. The library is the library of data that we've given him in the off-the-shelf disclosure.

My learned friend also says that if his expert chooses to engage in a disproportionate exercise, she won't be able to recover her costs. But we say it's not just about the Class Representative's costs. This is going to lead to the increase of costs for all the parties. In any event, we say that submission is totally at odds with the close case and costs management control that is to be exercised by this Tribunal, in respect of collective proceedings, to ensure that they do proceed on a proportionate basis.

We say that the final nail in the coffin is the failure by the Class Representative to address why the collateral use of these expert reports should be permitted, which is an exceptional course. We were very surprised that wasn't anticipated by the Class Representative, given the need for expert views to be grounded in the facts of the case and it's, therefore, unsurprising, we say, that our expert evidence made extensive reference to the documents of other parties. That was explained by Mr Day in paragraph 48 of his statement at page 311 of the core bundle. This issue has just been ignored in my learned friend's skeleton and it's been ignored largely today. It was only at 10.00 pm on Friday that we received a mock-up of our consolidated draft order which had paragraph 5, which at least belatedly recognised the issue in respect of experts. The difficulty with what is proposed in paragraph 5 is that we could only do the review and liaison exercise, which is contemplated at 5(a),

if the Tribunal and the High Court were willing to lift the collateral use restriction for that purpose.

THE CHAIR: Right. You're going to have to say that again. I'm not sure I'm following that.

MS BANKS: I will develop.

THE CHAIR: Yes.

MS BANKS: So, I want to take the Tribunal to the case law because the case law makes clear that "use" is a very broad term. On the basis of that case law, we don't even consider that we're at liberty to actually review the evidence and statements of others. Even our own witness statements are covered by the collateral use provisions in the CPR. I will develop this, sir.

THE CHAIR: Right, okay.

MS BANKS: But, just in a nutshell, the problem with what is being proposed is that: (a), we say we would need permission and then, more broadly, we say it's not simply for the affected parties to assert collateral use restrictions. They exist as duties owed to the court and the Tribunal. Regardless of whether they are specifically asserted, absent consent, it is for the Tribunal and the High Court to determine whether exceptional circumstances exist to justify lifting these restrictions -- and I'll come on to the case law -- and therefore, disclosure could only be permitted under paragraph 5(b) if the Tribunal and the High Court were willing to lift that restriction. We say that, certainly, we're nowhere near that when it comes to expert reports for the reasons I've given.

So, I just wanted to address you on the collateral use restrictions. I've set out in my skeleton at paragraphs 20 to 23 -- that should be tab 4 of the skeleton bundle at page 64 -- the rules on collateral use, both under the Civil Procedure Rules but also under the Tribunal Rules. To explain why I've done that, it's because all of the

proceedings in which the Prysmian Defendants were involved started in the High Court and were then transferred. The National Grid and Scottish Power proceedings, they were transferred after disclosure and the exchange of witness evidence and for the others the transfer was before those stages. But the relevant transfer orders all contain the same provision that I've set out at paragraph 17.

THE CHAIR: Yes. It did rather seem to me, just reading that snippet entirely in isolation:

"The proceedings were and shall continue to be regarded as having been commenced in this court." [as read]

So, it's a statement about where the proceedings were commenced. The next sentence says that:

"Any further statements of case or amendments are to be dealt with in accordance with CPR and not the Competition Appeal Rules." [as read]

If we now get on to questions about whether collateral use should be permitted, I confess to finding myself thinking that the snippet that you quoted -- sorry, "snippet" is not pejorative. The extract you quoted doesn't reserve that to the CPR, sort of rather suggests that it's a CAT rules point. Do you disagree with that analysis?

MS BANKS: Well, we're proceeding on the conservative basis that both sets of rules apply. The reason we do that, in particular in relation to the National Grid and Scottish Power proceedings, was the transfer happened after the disclosure and the exchange of witness statements took place in the High Court.

THE CHAIR: Does it matter? Does it matter which rules apply? I mean, there did seem to me to be daylight between the rules.

MS BANKS: Sorry, you did.

THE CHAIR: The CAT Rules seemed different from CPR.

MS BANKS: They are different, but I think the underlying public policy reasons for

the rules being there are the same. I will come on to this.
THE CHAIR: Right, okay.
MS BANKS: But certainly, we wouldn't want to proceed without it being absolutely clear through a ruling from this Tribunal that you didn't consider we were within this order, because we don't want to find ourselves in breach of the position of the CPR.
THE CHAIR: Sorry, but the reason I'm labouring here is, if you need permission under CPR and it's not just the CAT Rules that are in issue, this Tribunal can't give it to you.
MS BANKS: Exactly right.
THE CHAIR: Right.
MS BANKS: This isn't my application.
THE CHAIR: Right.
MS BANKS: This is my response to the Class Representative's application that hasn't considered any of these issues, despite us flagging them in good time.
So, just coming to the principles, then. CPR 31.22, which I set out at paragraph 20 of my skeleton, applies to disclosed documents, absent the three scenarios listed in (a) to (c). The documents are only to be used for the purpose of the proceedings in which they've been disclosed, and "used" here has given a very wide meaning.
If we could turn, please, to the authorities bundle at tab 13, page 192. We should have the case of *Lakatamia Shipping v Morimoto*. Then, at page 199.
THE CHAIR: Sorry, let me --
MS BANKS: Sorry.
THE CHAIR: There's an authority bundle, is there? I haven't got that in PDF.
MS BANKS: Yes, there is. (Pause)
THE CHAIR: Right, okay. Don't worry, I'll look on this one. Right, yes. Authorities bundle for CMC and what page?

MS BANKS: So, I'm on page 199.
THE CHAIR: Right.
MS BANKS: The authority starts on page 192 and tab 13.
I would be grateful if the Tribunal could just read paragraphs 53 through to 59.
(Pause)
THE CHAIR: Yes.
MS BANKS: The Tribunal will see, from the conclusions of paragraph 59, that the courts envisage a two-stage process. So, where collateral use is raised at a review stage, the appropriate course is to seek permission and then, if you're going to do anything further with the documents, you need to seek permission again.
Then turning back to CPR 32.12, which I set out at paragraph 21 of my skeleton. This is engaged in respect to witness statements:
"... a witness statement may be used only for the purpose of the proceedings in which it is served."
Notably, that clause is not restricted, or it's not narrowed to a party to whom a witness statement has been provided, as per 31.22. So, it extends to all witness statements, even a party's own witnesses.
THE CHAIR: So, I mean, I found myself wondering this when I read your skeleton. Is your position that a party's own witness can say, "I gave this witness statement, you may not use it". This is something that can be enforced by a witness?
MS BANKS: (Inaudible)Yes, because the rights of the witness are engaged. We can see that from the exception at 32.12(2)(a) and we'll come on to the case law but there is case law that explains that 32.12 is about the protection of the witness as well as the party. Although the court can give consent for the collateral use restriction to be released or modified, the relevant test sets a high bar.
I'd be grateful if we could turn back to the authorities bundle and tab 12. Starting at

page 117 is the case of *ACL Netherlands*. If we could pick it up at 176, starting at paragraph 23. At paragraphs 23 and 24, the court sets out the policy context.

(Pause)

That then explains the importance of the rules, which is explained at paragraph 26.

(Pause)

Then paragraph 27 reiterates the breadth of the prohibition(?), which I've just shown the Tribunal in *Lakatamia*. Then the relevant test is set out at paragraph 30.

(Pause)

THE CHAIR: This makes it clear, does it, that a witness can insist -- that 32.12 gives something enforceable by the witness itself rather than the party?

MS BANKS: What it says, sir, about witnesses is covered at paragraph 31. It doesn't specifically deal with the point about the witness of the party's name.

THE CHAIR: Right.

MS BANKS: Then the Tribunal will see the (inaudible) court, through those principles together at paragraph 32. We have a reiteration at 33 of the high bar that needs to be satisfied to obtain permission for collateral use.

Now, neither of the provisions that I've taken the Tribunal to in the CPR expressly concern expert evidence. However, the courts have not been willing to permit collateral use indirectly through the use of expert reports which draw heavily on information disclosed by others. We've given an example, I'm not sure we need to turn it up, but footnote 7 on page 63 of our skeleton argument. That's the case of *Sayers & Others v Smithkline Beecham*, where the court effectively applied the same test as set down in 31.22 and 32.12, where there was this issue of heavy reliance in the reports on the underlying documents disclosed by others.

So that's the position under the CPR. The Tribunal only has one rule on collateral use and that's Rule 102. I've set that out at paragraph 23 of my skeleton. That only

permits a party to whom a document has been provided in the course of proceedings (audio error) by the Tribunal, by another party, may use that document only for the purpose of the proceedings. We say that in principle that's broad enough to encompass, for example, expert reports provided by another party.

THE CHAIR: But it wouldn't -- it does seem to me there's daylight, potentially, between Rule 102 and the CPR.

MS BANKS: Potentially.

THE CHAIR: Because Rule 102 doesn't obviously apply to witness statements -- your own witness statements -- at all, because your own witness statement is a not a document that has been provided to you in the course of proceedings.

MS BANKS: That's true. That's true, sir. It would be surprising if there was significant (inaudible), given the public policy concerns that we just looked at.

THE CHAIR: Yes.

MS BANKS: But be that as it may, at paragraph 23 of my skeleton, I set out subparagraph 2. That applies in respect of confidentiality ring documents. And then subparagraph 3 applies to those disclosed into confidentiality rings.

THE CHAIR: Well, perhaps I could suggest this: I'm conscious we've had a good long run since 10 am, and I'm sure the transcribers -- although we can't see them -- are under the cosh a bit. So why don't we have a break there, please, and let's come back at 11.55 am and resume discussion on this issue.

(11.42 am)

(A short break)

(11.54 am)

THE CHAIR: Yes.

MS BANKS: Sir, stepping back from the provisions, this is the Class

Representative's application. So, what is being proposed in paragraph 5 of the draft order, if we could just turn back to that, is that absent of third-party objection, disclosure should be given of these reports. We say that therefore Ms Spottiswoode has to satisfy the Tribunal that there are cogent and persuasive reasons as to why the expert report should be permitted to be used in these Proceedings.

We say she hasn't engaged with the relevant test, and we say her reasons for seeking disclosure of the expert reports simply don't cut it.

The collateral use issue is also why there is no inequality of arms, as my learned friend suggests. Our legal teams and experts are not free to use the prior expert reports, and again, that's simply ignored by the Class Representative. We can't delve into a secret box of documents, and certainly the Grid reports were served around five years ago. I personally have no recollection of detailed methodological points. There is no inequality of arms here.

Finally, on expert reports --

THE CHAIR: You might not be able to use them, but you'll be aware of them, won't you? I mean, I understand the point that you couldn't reach into the box and deploy them, and sort of say, "Here, look at this". But you have more knowledge on these issues than the Class Representative does. You can't unlearn what you've learned from the process in the DPP.

MS BANKS: I accept that I have a degree of knowledge of the factual context of the market, but when we're talking about detailed modelling choices, I don't accept that I have any particular knowledge, especially that's going to assist in this case, because of course, this is a far wider data set.

THE CHAIR: Yes, but isn't it right that when we're talking about collateral use, the collateral use we should have in mind is the extent to which the expert reports refer to documents that you've been disclosed by your counterparties?

MS BANKS: Yes, but it means that our team are not free to just review these expert reports.

THE CHAIR: That I understand.

MS BANKS: Because they're so heavily reliant on --

THE CHAIR: I understand that point. But when we're talking about the inequality of arms point, is there a danger of letting the collateral use tail wag the dog? Because much of these expert reports will not be concerned at all with matters that rely on material disclosed by your litigation opponents in the DPP; much of it will be ordinary expert analysis of a data set and applying a methodology. Now, you're absolutely free to draw on your knowledge of that material as much as you want, and collateral use doesn't restrict it.

MS BANKS: But it would be very difficult for the legal team to refresh their views of a particular report if that report is making -- how are we to go about ensuring that we're restricting our review to the very passages that don't reference the underlying documents of others? How can we actually go about doing that? We certainly haven't taken the view that we are at liberty to just take these and read them, because of this collateral use issue.

THE CHAIR: But you are, aren't you? You're at liberty to take them and reread them.

MS BANKS: But for example, if one of the experts made extensive reference to the purchasing practices of National Grid and Scottish Power, if there was a chunk of the evidence that addressed that, we shouldn't be looking at that at all. But how are we to know until we look at the --

THE CHAIR: No, I see that. But it does seem to me that there is something in the -- I mean, that's not a complete answer to the inequality of arms point, because --

MS BANKS: The answer says the distinction between primary facts and expertise.

THE CHAIR: Right.

MS BANKS: We are suggesting that we can see some efficiencies in the witness statements going across and I'll address you on that.

THE CHAIR: Right.

MS BANKS: And that will lead to efficiencies, but you don't need the expert report to get at that information.

It is also now clear that Scottish Power and National Grid object and do not consent to the collateral use of their information, in Prysmian's expert evidence, on a blanket basis. This is addressed in two BCLP letters, which are in materially the same terms for both National Grid and Scottish Power. You can turn up the Scottish Power one at supplementary bundle H, [tab] 68.6, page 974L. (Pause)

Sir, given that this is relevant both to the issue of expert reports and witness evidence, I would just invite the Tribunal to read this letter.

THE CHAIR: We're on page 946L?

MS BANKS: 974.

THE CHAIR: 974.

MS BANKS: And it's tab 68.6.

THE CHAIR: Right. (Pause)

Right, well, it's quite a long letter, but it's clear they're not prepared to give a blanket consent.

MS BANKS: They're not prepared to give a blanket consent; they want a process of engagement. That is going to take both time and costs. The Tribunal has seen at paragraph 8 that they consider, as per the documents, they should be shielded from the costs of engaging with a non-party disclosure request. We say those costs should be met by the Class Representative.

We do say that the sort of process that's been envisaged here is going to be

significant because of the fact that the reports will be riddled with the data and documents of others. And it's not just -- my instructing solicitors have reminded me -- that some of the data came from the Claimants too. It's not just the fact that it's our data only the experts were using to formulate their views.

Just to complete the picture in relation to the National Grid and Scottish Power, we had a further letter this morning. I'd just be grateful if I could hand up. (Handed) It's in materially the same terms for both National Grid and Scottish Power.

THE CHAIR: Thank you.

MS BANKS: If I could just flag at paragraph 4, they raised the potential issue of needing to seek consent from National Grid's factual witnesses and Scottish Power's factual witnesses. We'll come back to the witness evidence in a moment.

We say we shouldn't be put to the cost and time of having to do this exercise, because the whole process of disclosing expert reports and prior proceedings by reference to a data set is just going to lead to a huge spiralling of costs and fees that we just say isn't justified.

Mr Armitage had a specific point for NKT on expert reports. I was just going to sit down for a moment.

THE CHAIR: Yes.

Disclosure of expert reports (continued)

Submissions by MR ARMITAGE

MR ARMITAGE: Ms Banks said that the Class Representative would be getting explanatory statements from the experts --- Prysmian experts in the National Grid and Scottish Power proceedings. You, sir, made the point that that would only, obviously, cover Prysmian's data, and I just wanted to make sure the point hadn't been lost. I did say it earlier, but it might have been -- NKT is also going

to be providing explanatory statements from its own experts. You have that at Ms Haigh's witness statement, paragraph 11, subparagraph b, page 199 of the core bundle.

If the essential thrust of the expert report disclosure application is all about helping Mr Druce to marshal and understand the data in the off-the-shelf disclosure, we say those documents from both NKT and Prysmian ought to assist with that in a proportionate way.

I should say, NKT is only going to be disclosing around 900 documents in relation to the off-the-shelf disclosure; it's a much smaller pool, reflecting, essentially, the fact it's a smaller number of NKT projects that are in issue. So, I just wanted to ensure the Tribunal had those points in [mind?].

THE CHAIR: Sorry, the DPP, the Defendants to those are NKT, Prysmian and Nexans as well? No, it's only NKT and Prysmian, is it?

MR ARMITAGE: Of the Defendants in the room.

THE CHAIR: Yes. So shortly put, the Class Representative has the benefit of all experts' explanatory statements. Thank you.

MR ARMITAGE: I think Mr Luckhurst also had a point.

THE CHAIR: Yes.

Submissions by MR LUCKHURST

MR LUCKHURST: Sir, I endorse what Ms Banks has said on behalf of the Defendants. I'd like to briefly pick up on a couple of points made by Mr Rothschild in oral submissions.

First, the suggestion that the expert reports from other proceedings should be equated with specialist academic papers. They're not peer-reviewed papers. There's a real concern that if one starts regarding them as such, we end up at trial with all of these expert reports from other proceedings in the bundles and

submissions being made to the effect of, "Well, Dr X made point Y, Dr A made point B", and everyone will have to read and digest those materials.

I've never read the expert reports from this long list of other proceedings, and it will take me a lot of time and cost to do that, and no doubt the same for others. You're going to hear from me and Mr Rothschild in due course at this CMC about the need to control the scope of expert material at trial, and having lots of additional reports in the bundle is contrary to that, in my submission.

Next, the inequality of arms point. Three short points in response. First, we're talking about a margin comparison analysis, with or without regression. It's not a novel area of economic analysis.

Second, the Class Representative's expert should be proposing a method ex-ante, and one can see that from the recent Practice Direction on expert evidence. If I could ask you just to look in the authorities bundle, tab 5, page 79. (Pause)

Paragraph 18 of the Practice Direction:

"Econometric and other analytical techniques, particularly tests and criteria used to decide between alternative models that are identified in advance of any data being analysed are likely to be given more weight by the Tribunal, and techniques selected only once their effect on the outcome can be observed." [as read]

It's dealing there with a data mining concern and fitting your method to the data. In my submission, the point is a broader one. One should, as a matter of principle -- and on an ex-ante basis -- be identifying a preferred methodological approach. And indeed, Mr Druce has already done so to support the CPR application, at least to some extent and on a preliminary basis.

And my third point is that the Tribunal can at any stage direct methodological discussion between experts if it considers that appropriate. That's in the same Practice Direction, paragraph 21, which is just over the page, page 80 of the

authorities bundle.

And then finally, one point of detail. Mr Rothschild says that the Class Representative is in the dark as to the contents of these reports, but they actually have the non-confidential versions of the London Array proceedings reports already, because there was a public trial, so they were entitled to request those under the Guide at paragraph 9.66. Those are the only expert reports that Nexans has filed in any proceedings.

So, they have those documents already, shorn of the collateral use problems that we've been discussing, because they don't have the confidential material shown, and the methodology can be seen from those documents. But the methodological issues are those familiar, in my submission, to any competition economist: should you have an individual-to-group or a group-to-group analysis? Should one test for statistical significance and how. And you will recall -- at least two members of the Tribunal will recall -- those debates we had at trial.

I think that's the only supplemental points.

THE CHAIR: Thank you.

Yes, Mr Rothschild.

Reply submissions by MR ROTHSCHILD

MR ROTHSCHILD: The main reason why my learned friends seem to be distinguishing between witness statements of fact and expert reports is to be costs, but it won't cost the Defendants any more to provide these expert reports; they already have them. It would be the cost of the Class Representative in reading them, and my submission is the Class Representative to decide how much time to spend reading those reports.

The subsidiary reason given seems to be that there needs to be fresh analysis for this case. Well, we are not saying that these expert reports from previous

proceedings -- witness statements in previous proceedings -- will be admissible evidence in the present case. But we are seeking their disclosure as a means of speeding up the pre-trial process, economy proportionality. That's fully consistent with the governing principle. And also, to redress the potential inequality of arms between the parties. Well, my learned Ms Banks says that she may have forgotten the detail of them, but Mr Davis, the expert Nexans propose to call, wrote one of the (inaudible) and the methodology and the systems (inaudible) to mind when reading back into this case.

The Chairman used the expression "collateral use tail wagging the dog", and I'd like to echo that. We're seeking material of the Defendants here and it's only incidentally that -- so we're told -- it happens to refer to material of other parties and therefore raises the collateral use issue. But collateral uses is not an absolute bar, and the authorities that the Tribunal has been taken to -- for example, the *ACL Netherlands* case at 33 -- explain that if the Tribunal court is to consider whether to lift the collateral (inaudible), it's a case of balancing competing public interests. Here, this material we're seeking disclosure of is, in my submission, highly relevant, because it's from closely aligned proceedings: very similar facts, very similar circumstances. We are seeking not specifically the material of third parties, we're seeking material produced by or on behalf of the Defendants here today, who, in order to understand the workings of a cartel, which can't be denied they participated in.

There is an information imbalance representative and providing these materials will assist with equality of arms at trial and the balancing of the public interest is in favour of closure or lifting the collateral use restrictions.

THE CHAIR: And what do you say to the point that really what we're going to be doing here, admittedly on a large scale with a much larger data set than in London Array, is some sort of before and after comparison, some sort of individual-

to-group or group-to-group analysis, with or without some sort of regressions. It was suggested that these are the techniques, the methods, that Mr Druce referred to really are quite -- really ought to be familiar and there won't be any surprises in the material that you're shown. What do you say to that?

MR ROTHSCHILD: We anticipate that the materials will help us to understand the nature of the data, and that will help within the analysis. We don't know for sure. If these materials are -- as the Defendants claim -- not relevant, we'll soon work that out. Significant cost will not be incurred.

THE CHAIR: Thank you very much.

MR ROTHSCHILD: I'm going to make one further point, if I may, in relation to the way forward. If in fact this is governed by the High Court rules, then the way forward in my submission, is for the Tribunal to give a ruling explaining the balancing of the public interest, which can, if necessary, then be taken before a High Court master on an application.

THE CHAIR: But how can we give that ruling? I mean because the balancing of the public interest ruling that you invite us to do, presumably part of that has to have regard to the interests of the parties who disclose the material in the first place. How can we give that?

MR ROTHSCHILD: (inaudible) necessary to involve both parties, but Ms Banks took you to the letter from BCLP, the lawyers for National Grid and Scottish Power, at 974L of the supplementary bundle. And 974M, paragraph 10 of that letter, says: "We are content to engage constructively with the Class Representative's request. In order to do so, we require proper particulars of the documents requested as an explanation as to why it's necessary." [as read]

And paragraph 14 on page 974N, again says:

"Scottish Power is willing to engage constructively." [as read]

THE CHAIR: Yes.

MR ROTHSCHILD: These third parties appear willing to engage in the process. They just need more information about what these witness statements are and what they cover. That isn't information that the Class Representative can currently give; it's in the Defendants' possession. We don't even have a list of the names of the witnesses, the structure of their witness statements, the headings. If we had that, it might make it easier to explain our position. I'm not suggesting that the Tribunal should make order without any regard (inaudible)to third parties, but I've suggested in paragraph 5 of the composite draft order a process whereby the Tribunal make an order subject to (inaudible)consent from third parties, or alternatively it may be that the Tribunal would wish to hear from those third parties in another hearing.

THE CHAIR: Yes.

MR ROTHSCHILD: But if the difficulty is that this is subject to the jurisdiction of the High Court, then of course the Tribunal can't sit as if it were the High Court, but the Tribunal could, or in my submission should, give some indication that will facilitate the task of the High Court master, should the matter come up.

THE CHAIR: Right, thank you very much. I think that's expert report disclosure of expert reports and witness statements from the DPP. I don't think there's anything more on that topic. Or is there something more?

MS BANKS: Sorry, (inaudible) on the witness statements.

THE CHAIR: Right.

MS BANKS: I just sat down to allow Mr Armitage --

THE CHAIR: Oh, I see, sorry. You right -- okay.

MS BANKS: May I come to that now?

THE CHAIR: Yes, of course you may. Yes.

Witness statements (continued)

Submissions by MS BANKS (continued)

MS BANKS: So in respect of witness statements, Prysmian considers that in principle it is likely that there would be some efficiencies to be gained, especially for the experts from the use of the statements served on both sides in the prior proceedings, which concern multiple suppliers -- sorry, multiple suppliers, that's National Grid, Scottish Power and SSE.

Greater Gabbard concerned only one supplier in the UK, and in Vattenfall -- that concerned two UK wind farms -- the majority of the supplies were outside the UK, and that's covered in Mr Day's second statement, which is in the core bundle at tab 24, page 314 at paragraph 58.2. (Pause)

Now, although the Class Representative is only asking for the Defendants' witness statements, we say that efficiencies are only likely to be gained in this litigation if both sides' evidence is disclosed, because only then will there be a complete view of the evidence, and many of the Prysmian witness statements were responsive. So, for example, the Class Representative may consider, having reviewed the evidence of both sides, that she is able to agree a detailed statement of facts ahead of the provision of witness statements in the proceedings, which might cut down on the witness evidence required and enable the experts to get up the curve more quickly. But we don't anticipate that the Class Representative would be willing to do that without having seen the Claimant's witness evidence, too.

However, we made clear in our skeleton that our position on this is subject to the collateral use restrictions being overcome and the Class Representative has maintained today that our concern is exaggerated and we say that is an entirely unfair criticism. The Tribunal need only consider the letters from National Grid and Scottish Power that I just took you to, to realise that this is a very real issue. And

those letters confirm the position in respect of the National Grid and Scottish Power proceedings that Mr Day explained in his evidence, namely that Prysmian's witness evidence referred to documents disclosed by other parties to the proceedings. And as Mr Day explains at paragraph 48 of his statement, if we could just go to that, tab 24 of the core bundle. At page 311, he explains that many of the statements were produced prior to Practice Direction 02/2021, and he also explains in that paragraph that many of the witness statements were responsive and to the best of his recollection, they will have addressed and/or summarised content of the other party's witnesses.

And we also provided further explanation, which is in a letter at supplemental bundle, tab 68.5, page 974J. (Pause)

And I just invite the Tribunal to read paragraph 3.3 at the end of that page. (Pause)

THE CHAIR: Right.

MS BANKS: And in light of the collateral use restrictions, the scope of the review has been very limited, and we explain that at paragraph 3.2. And additionally, I just invite the Tribunal to read paragraph 3.4. (Pause)

THE CHAIR: Right.

MS BANKS: So, whether the Tribunal is minded to direct that the Defendants engage with relevant parties, five points, we say, would need to be resolved.

Firstly, what statements are in scope? Paragraph 5 of the consolidated order just refers to the direct purchaser proceedings, which is undefined. We assume that that's intended to be a reference to all. As I made clear previously, Prysmian only considers it likely that efficiencies will be gained if both the C and the Defendants' witness statements are disclosed and we can only really see the efficiencies in those proceedings which involve multiple suppliers.

Further, disclosure should only extend to witness statements addressing matters

relevant to this litigation. The Tribunal will recall, in the Scottish Power letter I referred you to, that there is evidence, for example, in respect of Scottish Power's costs of financing which is obviously irrelevant to the current proceedings. So, we say paragraph 5 is too broad. It should be limited to witness statements to the extent relevant to the list of issues, but also only those filed in National Grid, Scottish Power and SSE. But we do say it should extend to both sides: Claimants and (inaudible).

THE CHAIR: Why Scottish Power only and SSE? Because those are the...?

MS BANKS: Both Scottish Power and SSE were the ones that involve multiple (inaudible) in the UK.

THE CHAIR: Right.

MS BANKS: Greater Gabbard and the Vattenfall proceedings didn't have anywhere near the same number and most of the Vattenfall suppliers were outside the EU.

The second issue that arises is who needs to be contacted. Paragraph 5 of the draft order just references affected parties and we say the Defendants should not be obliged to contact the witnesses of the Claimants because they don't have the means to do so.

There is also the question of whether this whole process should extend to the defendants in prior proceedings, who are not Defendants in these Proceedings. That's ABB. We say there's no justification that's been provided as to why ABB's information should be included in any of this. So, the order would need to be limited to the notification of the Claimants to ascertain whether the Claimants and their witnesses take issue with the disclosure of the witness statements and reference documents in these proceedings but excluding any ABB information.

Thirdly, there would need to be a lifting of the collateral use prohibition. We would need permission from the Tribunal and the High Court effectively disapplying the

collateral use restriction for the particular purpose of engaging and then, subsequently, to disclose the documents in the event of no objection being raised. That's the two-stage process that was referenced in *Lakatamia*. Indeed, that's confirmed by Scottish Power and National Grid's position that I took you to in the letters from the BCLP. Certainly, it does appear that at least National Grid and Scottish Power are content to engage on that process.

But, as to the timing of this, we also resist 30 March. 7 days is obviously too short given the volume of material involved, and there is the added complication that we anticipate that at least some of this material will be subject to the constraints of the confidentiality rings in those prior proceedings. So, we'll need to get further individuals added in order to carry out this process. Prysmian would ask for a minimum of 3 weeks from the day after permission is given by the High Court and/or the Tribunal, whichever is later, assuming that the exercise just relates to those Grid, Scottish Power and SSE statements. To the extent it's wider, we need more time.

Finally, there's going to be a cost to all of this. We say that the Class Representative should bear all the third-party costs. It's the Class Representative that is seeking disclosure. We will be incurring costs in administering this process.

Unless the Tribunal has any questions?

MR WOODGATE: Could I just ask for you to enlarge on the point that the Chairman just asked you about. The distinction about the Greater Gabbard and the Vattenfall ones, I think, is the point that there's efficiency in having both sides' witness statements when there's multiple suppliers, but not when there isn't. Could you just address that? Why is that distinction important?

MS BANKS: It just goes to the extent that can be gleaned, we anticipate, from the information. Because, in National Grid and Scottish Power, I can take you to today's

evidence on them, there were multiple suppliers across the UK for a protracted period of time.

MR WOODGATE: So, to do with disentangling the events that happened and the material. I'm just thinking it was a custom allocation by territory cartel according to the European commission. It's the multiple suppliers of cables, is that what you're suggesting is important?

MS BANKS: So Mr Day explains in his evidence that, in National Grid and Scottish Power, there were 75 supplies made by National Grid and 52 supplies were made by Scottish Power. Paragraph 16 of his evidence, page 303 of the core bundle. Then, at paragraph 18, he references Mr Druce's noting that SSE included 21 projects in its claim. So we can see that if the parties are in a position to review that volume of information, going to that volume of supplies, then there is a very real chance that we could, for example, agree a statement of facts in relation to underground cable suppliers because these were the main transmission operators or DNOs --- distribution network operators --- in Scottish Power. So we can see how that may lead to something of real use.

When you're talking about the one supplier or two suppliers, and also in that you've got the added issue that most of the suppliers were outside the UK, we just can't see that it's going to make a real difference to what has to be determined in the (inaudible).

MR WOODGATE: Thank you, that's helpful.

THE CHAIR: Mr Rothschild, we probably ought to give you a further right of reply on the witness statement side of things.

Reply submissions of MR ROTHSCHILD

MR ROTHSCHILD: We do not fully understand the distinction being drawn between the Greater Gabbard and Vattenfall proceedings on one hand and the other

proceedings. Greater Gabbard and Vattenfall involves supplies within the scope of the current collective proceedings. (Inaudible) Ms Banks says they didn't involve very many suppliers, but they did involve suppliers within the scope of the current collective proceedings.

Regarding costs, well, costs should be a determination at the end of the case.

Regarding the time period that the Defendants say they need, they need longer than a week. We understand that.

Regarding the need to apply for the permission of the High Court, the first step is surely to ask the affected parties if they would consent. National Grid and Scottish Power, from their letters, passages that I just identified, say that they will take a constructive approach. It may not prove to be necessary. The points that Ms Banks has raised are a few practical points, mostly of drafting. It seems that the principle is agreed, that the witness statements are potentially relevant, and I maintain my application for disclosure (inaudible) subject to any questions the Tribunal may have.

THE CHAIR: Thank you.

Do we have anything else on that? No. Okay.

Right, the next topic. Would you mind if we went slightly out of order and do the one expert or two expert issue -- one issue or multiple expert issue first.

Multiple experts

Submissions by MR ROTHSCHILD

MR ROTHSCHILD: Sir, I think you may have seen, the Class Representative seeks an order that the Defendants' permission to rely on economic expert evidence at trial to be confined to a single joint expert. By contrast, the Defendants suggests that they would require three or perhaps more experts. If you would go to, next, skeleton

argument at paragraph 12, that's skeleton bundle, page 27, tab 2. There's a table showing what the Defendants appear to be asking for. The precise number of experts remains unclear to me because, well, firstly, the Defendants, you'll see there, seek to divide up most of the economic issues as between two experts, Dr Davis and Dr Moselle. In my submission, two similarly competent expert economists. There can be no good explanation as to why one of them could not do the whole job.

But, in addition, in the first line of that table, they say that each of the three Defendant groups should be able to adduce their own expert evidence on overcharge and value of commerce with experts:

"... potentially focusing in particular on the sales of the Defendants' group instructing them." [as read]

I mean, this comment fails to recognise that experts have an overriding duty to the Tribunal and that experts should have access to all relevant materials in the case. I mean, they're not the advocates for that particular client case. There is, in my submission, no obvious need for Defendant-specific analysis of overcharge or value of profits. But, even if it were necessary to produce Defendant-specific analysis, that could be done by a single expert with separate chapters in that expert's report dealing with each discrete topic.

I mean, there are no contribution claims between the Defendants for the Tribunal to determine at this trial. Each Defendant, of course, has its own factual evidence but it doesn't follow that each Defendant needs to instruct its own expert witness at the trial.

Now, this is particularly troubling request by the Defendants, because the Tribunal has itself described the problem of multiplication of expert evidence in the ROC judgment. It is paragraph 87 of that judgment in authorities bundle tab 18, page 328. Paragraph 87, this Tribunal pointed out that the case that was advanced by each of

the aligned parties at the ROC issue trial was essentially the same. It was, in the Tribunal's view, unnecessary for three experts to be called by the aligned parties, all of whom gave clear and cogent evidence, rather than one jointly-appointed expert. There's a risk, a serious risk, that the Defendants might do the same again.

THE CHAIR: But I think you say it's even more acute in this case because, I mean, the ROC issue trial, it might be said that a lot of the expert evidence the Tribunal received wasn't really expert evidence at all, it might be said. Whereas here, in this case, the concern is it would be expert evidence and I think you raise the spectre of the experts being at cross purposes and the point that Lord Justice Birss raised in his case.

MR ROTHSCHILD: Yes. I mean, the potential here for the Tribunal to assess multiple different methodologies. So the Class Representative intends to pool one expert, Mr Druce, but he may face three methodologies on the other side, effectively four competing methodologies for the experts' meeting and the Tribunal to assess. It will multiply work for the Class Representative and for the Tribunal.

We set out some relevant principles in our skeleton argument, paragraphs 37 to 39. Perhaps I can show them to the Tribunal in the authorities bundle. I'll quite quickly go through them. At tab 4, I'm sure you're very familiar, page 74, the Tribunal's "Governing Principles". We point out the Governing Principle, to deal with cases justly and at proportionate costs involves, so far as practical, 4.2(a):

"ensuring that the parties are on an equal footing;

"(b) saving expense; [and obviously,]

"(c) dealing with the case in ways which are proportionate ..."

Going to tab 3, page 72, the CAT Guide to Proceedings elaborates, in relation to "Expert Evidence" at paragraph 7.65, that:

"... the Tribunal will take into account the principles and procedures envisaged by

Part 35 of the CPR, notably that expert evidence should be restricted to that which is reasonably required to resolve the proceedings."

Then, of course, there is the recent Practice Direction, which is behind tab 5 on expert evidence, which makes clear at paragraph 6, lest there were any doubt -- it's on page 76 -- that:

"Where it appears that the interests of two or more parties are aligned on particular issues, the Tribunal may require those parties to instruct a joint expert rather than individual experts."

As to how that power should be exercised, the key authority is (inaudible) judgment in the *Stellantis* case. That's at tab 15, starting at page 218 and given that (inaudible) relevance and (inaudible) it's a judgment of the Court of Appeal, I propose to take the Tribunal through the key paragraphs in a little more detail.

So this case, as one can see from the headnote, "Concerned Claimants".

THE CHAIR: Was there an electronic reference I could use, perhaps?

MR ROTHSCHILD: Authorities bundle, page 218.

THE CHAIR: 218. Oh, yes, okay. Thank you.

MR ROTHSCHILD: One can see from the headnote there that the claimant brought a claim for the Tribunal under section 47(a), companies from two different groups seeking over €734 million in damages. It's a large (inaudible). The Competition Appeal Tribunal refused the applications for (inaudible) to call their own expert and directed that expert evidence should be given by a single joint expert shared between the two groups of defendants, and the defendants appealed. Summary: the Court of Appeal affirmed the decision of the Tribunal.

Going into the judgment of Lord Justice Birss , starting on page 220, paragraph 1 explains it's a cartel case, paragraph 2, that the claimant were companies in the Stellantis group, part of that group. Going over the page, that the first to fifth

defendants are of one group and the sixth to tenth are members of another. The Commission, paragraph 3, had found fault in the cartel. Paragraph 9, second sentence:

"The claimants relied on expert economic evidence to show the existence and extent of an overcharge." [as read]

Paragraph 10:

"At the CMC in March 2023, the Tribunal raised the possibility of directing the defendants to call a single joint expert in the field of competition economics. The Tribunal's view was that it was highly unsatisfactory that the claimants or the Tribunal would have to consider what would then have been three different economic models from what were then three distinct groups of defendants." [as read]

With similar potential retention problems we've just discussed this case. Jumping on in the judgment to paragraph 22 at the foot of page 223:

"The defendants' case has two aspects." [as read]

Going over to top of page 224,the defendants' appeal said "the Tribunal erred in trying to identify relevant conflicts." And that "…if such a conflict exists it follows that separate experts must be permitted as a matter of principle…. When asked by Lord Justice Arnold if the defendants' case was, in effect, the existence of the conflict was a 'trump card'." [as read]

Counsel in that case agreed that was the submission. Later we see the appeal said it was not a trump card. Then going on, if I may, to the principles that the Court of Appeal looked at. Authorities from page 225, paragraph 29 and 30, the Court of Appeal looked at Rule 4, the CAT Governing Principles, which I just took you to. Paragraph 33 to the CAT Guide, again, the passage that I took you to. And then paragraph 34. Lord Justice Birss says:

"It is clear that the CAT approaches issues arising in this case on the same basis as

the CPR, with the same three features: the duty to restrict expert evidence; secondly, recognition that experts have an overriding duty; and thirdly, a power to direct evidence from a joint expert." [as read]

So as to what the Court of Appeal actually decided, the key paragraphs are 47 through to 50, that's page 228. Paragraph 47:

“Pulling this together,” Lord Justice Birss said: “a direction for a single joint expert is governed by two primary dimensions. One is the overriding objective, which is the same in all material respects as the governing principles in the CAT. These are simply that the court or Tribunal will seek to ensure the case is dealt with justly and at proportionate costs, in other words, to restrict expert evidence,in other words, to limit it to that which is reasonably required to resolve the proceedings in issue." [as read]

Now, as to the value of the case. The Defendants’ closing arguments today, the Court of Appeal said that that isn't really a relevant consideration in that, as said here at paragraph 48:

"Many but not all of the statements of actionable joint experts are made in the context of low-value cases." [as read]

Lord Justice Birss says:

"There's no doubt that this approach has a particular value in such cases, when proportionality is important. Nevertheless, the principles are the same irrespective of the value at stake." [as read]

Then, as to conflict of interest, another point that's raised by the Defendants today. At paragraph 49, the Court of Appeal says:

"In my judgment, while the existence of the conflict of interest between the relevant parties is a material factor to take into account, the existence of a conflict of interest between the relevant parties is no trump card." [as read]

(Several inaudible words). As it says, just below letter H:

"The two parties, when instructing the experts, are at liberty to put their own distinct views of the property's value to that expert. However, in the end, it is the expert whose overriding duties to the court, who will come to their own view." [as read]

And lastly, in this judgment, paragraph 50, a suggestion was made at one stage -- the principle was that if there was a conflict on the issue upon which the expert was to express an opinion, then the conflict did rule out a single joint expert.

"But that cannot be right." [as read]

Says Justice Birss.

In this present case, we know that the cost of ROC preliminary issue, (inaudible) the trial costs incurred by the Defendants on multiple experts were particularly high, they are stated to be over £1.6 million in total. And that was the preliminary issue trial, in which expert evidence was ultimately not central to the outcome. The Tribunal should be guarding against such replication occurring again.

In my submission, the way to do that is to confirm the Defendants use a single joint expert. The Defendants make various points, summarised in their skeleton arguments, as to why they want more than one. Perhaps I can go through those and explain our response.

So in Nexans' skeleton argument, these points are made -- skeleton arguments bundle page 28, paragraph 15.1. Firstly, at letter A, they say that:

"Each Defendant group has a particular interest in interrogating the allegation that there's an overcharge in respect of their own sales." And they say the extent of their market involvement in the UK is "potentially relevant to the apportionment of damages." [as read]

But other than NKT -- the NKT Defendants being involved in respect of a shorter time period -- the Tribunal is not going to be asked to apportion damages as

between the Defendants contribution claim. My client's allegation is that the Defendants are jointly and severally liable.

Second point --

THE CHAIR: Sorry, as regards NKT, it's not just the duration point, is it? For NKT, it's said that NKT's infringing activities were lesser than the infringing activities of the other Defendants. That's what's said.

MR ROTHSCHILD: Yes, so there may be a point of law to consider there. It is clear that the European Commission position was modified by an appeal to the justice of the European (inaudible), and NKT participated for a shorter time period. The extent of participation within that time period -- a cartelist does not need to have participated in all of the conduct to have been jointly and severally liable with the other cartelists. For the purposes of argument, and assuming, although we may not at trial, that NKT's submission is right that the Tribunal at trial will need to consider NKT being involved in a narrower form of cartel, then that could still be dealt with in a separate chapter of the same joint expert's report.

THE CHAIR: Is your vision of the expert evidence that the experts will produce what they consider to be a single overcharge in the market as a whole, over the relevant period? Or maybe even slicing and dicing it by reference to periods; in this period, it was [n] per cent, in this period it was a different percentage, in this period it was a different percentage, but producing percentage figures. Then the expert will decide how much is passed on to consumers. Is that the end of it, as you say? So relative culpability as between cartelists, you say it's just completely irrelevant.

MR ROTHSCHILD: Relative culpability as between cartelists is irrelevant.

THE CHAIR: So, when NKT say in their skeleton, it's not just a matter of contribution, it's a matter of liability, what do you say to that?

MR ROTHSCHILD: They're saying that -- it's for him to explain.

THE CHAIR: Well, he has in his skeleton.
MR ROTHSCHILD: It's partly that they were involved in different time periods, and partly that they not have been involved in all aspects of the cartel, but that the facts relating to that may be for further investigation in due course. Because if they were aware of the cartel, it may be enough for them to be jointly and severally liable for the whole of the conduct in any event.
THE CHAIR: In your submission, is there any anterior question of legal determination that the court must make before it can rule on the validity or otherwise of NKT's position? Because obviously NKT say, "We need a separate expert because our liability might be different". I mean, that's what they say in their skeleton. You, as I understand it, say, "No, liability is the same". But does that depend on you succeeding on certain propositions of law that will have to be advanced at trial?
MR ROTHSCHILD: It is often the case with experts that they must opine on different hypotheses, so they can best assist. It may be that the experts need to have that and say, "Well, if the position is as NKT contend, then I, the expert, do the analysis on a particular basis; if the position is as the Class Representative contends, then I do the analysis on a different basis". There can still be a single expert report with different sections, different chapters, dealing with these different headings. The Court of Appeal is clear that even if there is a conflict between the parties, they can still instruct a single report.
THE CHAIR: Right, because the expert's duty is to give his or her unvarnished expert opinion evidence on, as you put it, these separate chapters.
MR ROTHSCHILD: At most, the submission by my learned friend, Mr Carall-Green, would mean that there could be an extra expert for a very limited issue, or NKT only. But it should still be a single joint expert for almost everything.

THE CHAIR: Right, okay. (Pause)

Right.

MR ROTHSCHILD: If I may continue with the response to the points being put against me in Nexans' skeleton argument, the point at (b) on page 28 is (inaudible), so I can proceed to page 29 and paragraph 15.2(a).

First it's said here is that data from different Defendants may well be in different formats. Well, Mr Druce on our side is, on his own, going to have to deal with all of the different Defendant's data by himself. Following the Defendants' logic in this paragraph, we on our side should have three different experts on our side too, collecting three groups of Defendants. It's plainly disproportionate. It may be that the Defendants' data is stored in different ways, but the factual witnesses can explain that; can still be a single expert doing the analysis.

The next point, Nexans's say that Dr Davis and his support team have already spent a great deal of time getting to understand Nexans's data. Well, that may perhaps be a good reason for Dr Davis to be chosen as the single joint expert by the Defendants, but it doesn't mean that there needs to be three experts.

Then (ii), Nexans say that there is real uncertainty at this stage whether it would be possible or meaningful to conduct a single regression analysis, building sales by all Defendant groups, as opposed to a Defendant-by-Defendant analysis. Keywords: there are real uncertainties "at this stage". Because, of course, it may be possible to do a single regression analysis and, in any event, one expert can do multiple regression analyses. This suggested approach in Nexans' skeleton argument seems to be encouraging there to be at least three different methodologies, rather than endeavouring to coordinate, and that is only going to complicate the task for the Tribunal at trial.

At letter b at the bottom of page 29, Nexans then say that each Defendant will likely

have liaised already with its own expert over the course of 2026 and 2027, pursuant to the pre-trial value of commerce process, suggesting there that it would be efficient for separate experts to continue to be involved.

Well, permission to rely on only one testifying expert for trial does not, of course, preclude other people, other experts from helping the Defendants in the background if they consider this to be appropriate and proportionate. The question we're concerned with here for purposes of trial directions, is who should be the testifying expert or experts given permission to give evidence to the Tribunal.

Then Nexans say that the claim is a large claim. That's 15.3 at the top of page 30. Well, it's *Stellantis* that makes clear the same principles apply to the claim, small or large. That's paragraph 48 of the attachment date which I took you to.

Lastly, paragraph 15.4 on page 30. They say that if the evidence is not approached proportionately, the Tribunal will have the power to limit recoverable costs. Well, the problem from our perspective is that multiple experts increase the cost burden and the complexity of the case for our side and for the Tribunal. The Defendants' cost recovery is only relevant if the Defendants win at trial. We're rather hoping the Defendants will not win and will not be able to recover their costs at all. So the point really does not go very far.

For all those reasons, the Defendant should be limited to a single joint expert on the economic issues.

THE CHAIR: Thank you very much. Well, that's probably a convenient point to break for lunch. We'll hear the response to that after lunch at 2.00.

(12.55 pm)

(The short adjournment)

(1.59 pm)

THE CHAIR: I'm having an issue with my computer again. Good afternoon.

Submissions by MR LUCKHURST

MR LUCKHURST: Good afternoon. Can I ask whether the Tribunal has the composite draft order? It's the multicoloured draft order consulting.

THE CHAIR: Yes.

MR LUCKHURST: Thank you. If you could look, please, at page 6 of that, in paragraph 15. (Pause)

You'll see the way that it's formulated by the Defendants at 15A. "Permission for expert evidence on economics, such evidence to cover issues", and then it's the green text at 2-6, 9 and 11 of the list of issues. The Defendants are to instruct experts jointly in respect of issues 4-6 and 9, but different jointly instructed experts, different sub-issues.

I'd just like to briefly, please, run through the list of issues to explain how that works and the discrete nature of the topics that that covers. And if you could go please to core bundle, tab 8, page 4. (Pause)

THE CHAIR: Yes.

MR LUCKHURST: The agreed list of issues. Can you turn, please, to page 5, and the first thing to draw your attention to is (ii) at the top of page 5, which identifies, as a defined term, the "Narrower Infringement". It's the NKT point, that they were found liable for a narrower chronological infringement and a different type of infringing conduct, a narrower category of infringing conduct.

And if we then go to page 6, please, and the issues that the experts will be addressing. We've got at 2 and 3, which is the overcharge issue, was there one, what was the extent of it. And 2 and 3 need to be read with 11, which is on page 9. And you can see there:

“How, if at all, are the answers to Issues 1(a) and (b), 2 or 3, which refer to the Infringement, different in relation to NKT, given that NKT can only be liable in respect

of the Narrower Infringement?" And we say separate experts for that discrete topic, although seeking to avoid duplication, and particularly focusing on sales by the Defendant group instructing them.

And I'll come back to the merits of that proposal, but I'm just explaining the issues and the division of proposed labour at the moment. But every other topic we agree to the instruction of a single expert.

So running through, if we go back to page 6, please, on the list of issues, and issue 4A. This is the question of regulatory pass on by TNUoS and DUoS charges, and we propose a joint instruction of Dr Moselle. And I just pause to note that this is also an area of specialism for Dr Hesmondhalgh, an expert that my client rates very highly, and who's already filed a report on this specific topic at the certification stage, that Nexans says pragmatically agreed to jointly instruct a different expert on this topic to go some way to meeting the concerns of the Class Representative.

Then turning over the page, please, to page 7, you see 4B, which is the renewables obligation scheme issue, and again we propose a joint instruction of Dr Moselle on that; the same comment I've just made about Dr Hesmondhalgh applies here too. Ordinarily Nexans would have wanted to instruct her, but we agreed to a joint instruction of a different expert.

4C and D, foot of page 7 and the top of page 8, that is electricity retailer pass-on. So that's whether any increased charge is payable by electricity companies were passed on to consumers in their electricity bills. The proposal is for Dr Davis to address this, and he's filed evidence on this at the certification stage, quite detailed evidence.

Issue 5 on page 8 is pass-on by class members. Now, that's a different and discrete area of pass-on, that all the preceding issues involved an alleged overcharge making its way down to class members. Issue 5 is whether the class members themselves

passed on that loss. It will involve a different data and evidence, and Dr Davis is proposed to deal with that.

Issue 6 is the avoidance of loss, and 6A, it is proposed that Dr Moselle will deal with that, because it links with the regulatory pass-on point, the TNUoS and DUoS charges. And just in a nutshell, TNO and DNO purchases were paid compensation for the infringement, and that compensation is alleged by the Defendants to have reduced the extent to which any alleged overcharge flows down to consumers, because under the regulatory structure, consumers benefit from compensation paid to the network operators. And so that's for Dr Moselle, because it sits alongside issue 4A.

6B to E: these are all points about the avoidance of loss by class members. Dr Davis is proposed for that because it sits most naturally with issue 5, so pass-on by class members, but they are distinct factually and conceptually, those sub-issues.

And then 6F is a point about people ceasing to be class members. Again, we propose that Dr Davis deals with that because it sits naturally with issue 5.

And then issue 9, there are two points described there: one is a discount rate for damages for future loss; and the second is sort of number crunching of the outputs of the other issues that I've been through. That's a mechanical exercise rather than an evaluative one, and the two members of the Tribunal who sat in London Array may recall that the experts were able to produce a spreadsheet calculator at the end, where the inputs could be adjusted to produce an output figure. The Defendants haven't yet identified who's going to deal with that perhaps unenviable task, but we are content for a single expert to deal with that, as per the consolidated draft order.

So the first point of dispute is whether we should be allowed any division of labour at all, or whether the same person has to deal with all of the discrete topics I've just run through. The Class Representative objects to the division of labour, and I make two

submissions in response.

The first is that these are completely discrete topics. So take for example ROO 2013 and electricity retailer parcel. They take place at different levels of the waterfall that the Class Representative relies on to establish consumer damages. There's no overlap between them, and the Class Representative is therefore only dealing with one opposing expert on each discrete topic.

The second point I make is that the Tribunal will be assisted by experts with a particular specialism on each topic, if our proposal is agreeable to the Tribunal. We say that Dr Moselle has a particular specialism and experience when it comes to the renewables obligation and the TNUoS and DUoS issues, and indeed the Tribunal has heard at length from Dr Moselle at the ROC issue trial on that point. And likewise, we say that Dr Davis, one can see from the report he's already filed at the certification stage on electricity retailer pass-on, that he has thought deeply about those issues, and he'll be a good expert to assist the Tribunal on those points.

The next issue is whether the Defendants should be required to have only one expert for overcharge. Can I ask you just to go briefly, please, to the authorities bundle and the Practice Direction, which my learned friend did refer to, but this is authorities, tab 5, page 76, paragraph 6, and it's the final sentence of paragraph 6: "Where it appears that the interests of two or more parties are aligned on particular issues, the Tribunal may require those parties to instruct a joint expert rather than individual experts." So it's a discretion, not a rule , and it arises only insofar as the interests of the parties are aligned on a particular issue." [as read]

And my learned friend said that *Stellantis* governs how that discretion is to be exercised. I don't say that *Stellantis* isn't an important authority; it obviously is, and I'll deal with it and perhaps on some of the differences between this case and *Stellantis*. But that does pre-date this Practice Direction, so the Practice Direction is

issued by the Tribunal after *Stellantis*, and this was the way it's been framed by the Tribunal, with that judgment no doubt in mind.

And then just to clear up the question of whether or not there's a mystery fourth expert: there's no fourth expert, and the proposal is to have Dr Davis dealing with Nexans' projects, Dr Moselle Prysmian and then an economist for NKT, and you've seen a note from Mr Hughes of AlixPartners in that (inaudible).

If you could then please have open my skeleton at paragraph 15, and I'll work through the points made there. Mr Rothschild's already helpfully shown you that, so hopefully it's familiar. (Pause)

At paragraph 15.1 of my skeleton, the first point I make is that the Defendants' interests are "not fully aligned", to use the language of the Practice Direction.

So first, regarding NKT, they are found, by a combination of the Commission Decision and a judgment of the Court of Justice, to have been party to a narrow infringement. And they wish to say that the narrower infringement had no effect on prices, or in the alternative they want to say it had a very small effect. And in that regard, NKT's interests diverge from Nexans'. We all want to say it had no effect, but once you get beyond that basic position, actually it is a divergent interest. The Class Representative says, well, you can just have a sub-chapter of a joint report dealing with the position of different Defendants. In my submission, that's wrong for two reasons.

First, this is an actual conflict; NKT's case seeks to narrow the scope of its liability for damages. Any narrowing of that liability, broadened the liability of Nexans' (inaudible).

So a sub-chapter doesn't really deal with that. There's a practical difficulty with instructions coming from three firms on behalf of three clients with a conflict of interest, and that doesn't in any way detract from the independence of an expert, but

those instructors are entitled to ask questions to test things, and that's a bit more difficult when you have (inaudible).

And the second point is that in assessing NKT's distinct position, different methodological approaches or assumptions may be adopted, and that's developed in some detail in AlixPartners's letter that Mr Armitage may have taken you to. So, it isn't just a simple question of sticking in a sub-chapter. To be clear, it's not just the NKT issue, because even as between Nexans and Prysmian, each Defendant supplied distinct projects and has a particular interest in interrogating the claim that their supplies included a material overcharge, and one is not dealing here with a commoditised product. Some of the sales in issue are for very high value bespoke projects, as the Tribunal will recall, the London Array claim. Whether the overcharge on a large project supplied by Nexans is 0 per cent, 5 per cent, 25 per cent, that could really matter, if the Defendants get to the stage of trying to apportion responsibility for any award of damages.

And in that sense, this is a different case to *Stellantis*, where the products were commoditised. They were seat belts, airbags, steering wheels, and the expert evidence in that case was not going to be capable of distinctions between the overcharge on specific projects associated with specific Defendants. I can see that from paragraph 73 of the judgment.

THE CHAIR: So can I make sure I'm understanding this? So the claim by the Class Representative is for overcharge on power cables supplied into the market generally.

MR LUCKHURST: Yes.

THE CHAIR: To the extent passed on to consumers. I think what you are canvassing with us now is, even putting to one side the NKT issue, you're envisaging a world in which the overcharge generally is derived, or might be derived, from looking on overcharges by your clients specifically; is that right? So when we're

looking at the overcharge in the market, you're envisaging it's instructive to look at whether there was any overcharges in supplies of cables by Nexans, Prysmian, NKT separately. I think what you're saying is that each of those cartel members has an interest in seeking to establish that the supplies on their cables were lower than anyone else's, or relatively lower than others. But where does that get you? If, at the end of the day -- and global overcharge is going to be determined -- putting NKT to one side for a moment, you're all jointly and severally liable for any loss that arises in consequence; where does that get you?

MR LUCKHURST: Well, I accept that what the Class Representative (inaudible) global (inaudible) basis, and what I'm dealing with is the subtle kind of issue between the Defendants as to who's going to pay how much.

THE CHAIR: But if there is a subsequent -- I can quite see how that subsequent issue might arise. I mean, one might say, "Well, the overcharge on ours was much smaller than the overcharge on yours". I can understand that. But, if that debate does surface, why should the Class Representative bear the cost of multiple experts being instructed at this stage? Why isn't the more proportionate course, if that debate does surface, if liability is established, to say to the Defendants, "Well, you need to spend your own money apportioning any liability as among yourselves", rather than potentially asking the Class Representative to bear the risk of that cost.

MR LUCKHURST: Fair question. Two points in response. One is: once the evidence is given, the evidence has been given. So we may be having an argument about apportionment further down the line. The analysis has been done and it's been aired in a public trial. What was the overcharge on a huge wind farm? 0 per cent, 25 per cent.

THE CHAIR: Yes.

MR LUCKHURST: It's inevitably going to arise as long as, at trial, at least one

expert is doing the job of saying, at least for this huge, great, big, important project, which is a big component of the damages, "I'm going to look at it individually". So, one can't duck the issue in that sense.

The second point is, if the Tribunal takes the view that the Class Representative just shouldn't have to bear that cost, then that can be dealt with as a matter of costs recovery. Tribunal always has a jurisdiction to regulate cost recovery. It may be that the Defendants can't have unnecessary duplicative costs.

MR NEUBERGER: Can I just take you up on one other question? You talk about a conflict of interest and I haven't got it clearly in my mind because it's not clear to me why Nexans should be concerned about whether NKT's -- sorry, it seems to me that all the participants, all the Defendants, have an interest in the individual damages on individual cases to be minimised. I can't see why there's some lump sum of damage which they're trying to apportion between them. If we're trying to assess the total amount of damage, surely your interests are all aligned in the sense of wanting to have a minimum figure for each of the projects.

MR LUCKHURST: I agree that they align at that point but my submission is that they do actually diverge at two different stages depending on whether it's a Nexans, Prysmian issue or an NKT issue.

The NKT issue, NKT is actually saying that the outcome of this trial should be a finding that NKT is not liable to the same extent as Nexans and Prysmian and Mr Armitage will develop that point. But that is their position. So that's a conflict as to liability. They will say "We are not liable for the joint and several award" (inaudible).

The Nexans and Prysmian conflict arises at a second stage. So, as I canvassed with the Chair, if, despite our defences, there is an aggregate award of damages, there will then have to be a debate as to who pays how much and at that point, the

evidence given on Prysmian sales, NKT sales, whether or not there has been an overcharge on those, is potentially relevant to that apportionment issue.

MR NEUBERGER: But why should there be a conflict in the volume of sales between the two parties?

MR LUCKHURST: I don't suggest there's likely to be a serious dispute as to the volume of sales, volume of commerce issue, it's more that each Defendant has a strong interest in interrogating the overcharge on the supplies.

I agree that there is an aligned interest up to a point in that all the Defendants will be saying they are low, but you could well imagine that, if a project like London Array is a huge part of the damages in the claim, at least theoretically, Nexans has a particular interest in (inaudible).

MR NEUBERGER: Sorry, I can see why you've got particular interests in particular parts of the damages. What I cannot see at the moment is any clear conflict between the interests of the different parties.

MR LUCKHURST: As I say, I word it slightly differently for the NKT point, where I say that there is a conflict and then with the other one, I say that there's a potentially divergent or at least a strong individual interest in interrogating the figures. In my submission, the difference here with *Stellantis* and the nature of the products is quite an important one. Because, if you look at paragraph 73 of the *Stellantis* judgment, that was a case where the products were all the same. As I say, there were commoditised, there wasn't going to be anything in the expert evidence that differentiated as between, there was this large product, this supplier, overcharge X or Y.

The second point I make is paragraph 15.2 of my skeleton. This is a pragmatic point. The data disclosed by each Defendant will not be in an identical format and there may be different approaches to constructing bids, recording expected or

realised margins. That, in our submission, makes it efficient for Nexans to instruct Dr Davis on issues of overcharge. As a result of the London Array proceedings, he and his support team have spent a great deal of time getting to understand that data and it would be correspondingly inefficient for him to take the lead on opining on alleged overcharges on sales by other Defendants. He doesn't have that experience in respect of Prysmian data, NKT data.

This is not, as my learned friend suggested, to encourage different methodologies, (inaudible) the data point. The data differences also may mean that it's more useful to do a Defendant-by-Defendant analysis, so that you're comparing apples with apples. By that I mean testing for an overcharge on Nexans sales, testing separately for an overcharge on Prysmian sales, because then at least the data is recorded in the same way as directly comparable. That's addressed by Mr Israel at Israel 3, paragraph 39(b), which is core bundle 1, tab 22, page 265 and we don't know at this stage. Disclosure is yet to happen and analysis has yet to occur, but it is a distinct possibility.

The third point I make is at paragraph 15.3, the proportionality point. It's perhaps the most important variable in the damages claim. In that context, it is, in my submission, fair to permit the Defendants to rely on their own experts on this specific sub-issue. I accept that the size of the damages claim is not a trump card. That's clear from *Stellantis*. But, nonetheless, it is a relevant consideration when you're exercising your discretion under the Practice Direction. This is a very large claim.

Paragraph 15.4 of my skeleton, Mr Israel's firm evidence, paragraph 39(d) of his witness statement. It might be worth turning that up. It's core 1, tab 22, page 265.

(Pause)

He says, paragraph 39(d), at the bottom of the page:

"The Defendants are conscious of the need to avoid duplication wherever possible

and will seek to ensure that this is done even within the context of the overcharge POC issue." [as read]

As I've explained, the Defendants are suggesting a particular focus on sales by the Defendant that's instructing the individual expert. If the evidence isn't approached proportionately, the Tribunal does have the power to limit recoverable costs.

THE CHAIR: But, I mean, as Mr Rothschild said: recoverable costs, that's after the event and it's recoverable costs only if you win. I suppose something that I'm certainly conscious of is that, if you get your order for multiple experts at the overcharge stage, how is the Tribunal or the Class Representative protected against the risk that Lord Justice Birss identified in *Stellantis*, of all of the experts coming up with competing methodologies, fighting among themselves and fighting with the Class Representative such that the trial becomes unmanageable. I see Mr Israel's references to a wish to control costs. Of course I see that. But how can we get comfort that the nightmare scenario, if I can put it that way, of different competing methodologies doesn't eventuate.

MR LUCKHURST: Three points on that, sir. The first is that if the focus is Defendant-specific and non-duplicative, is it necessarily the case that the number of issues is increased? Particularly when one is dealing with, as I was submitting earlier, on the issue of overcharge, essentially a margin comparison analysis -- maybe with a regression, maybe testing for statistical significance. It's not necessarily one of those cases in a new and developing area of competition law involving digital markets, where someone's taking a particular conceptual approach and then someone else is saying, "Well, you're just analysing the market" (inaudible). It's fairly bread-and-butter stuff for a competition economist.

THE CHAIR: Certainly, well, that may be right. But are we still exposed to the risk, even if it is bread-and-butter stuff, of one expert saying, "Well, we should be doing

our regression by reference to these four variables". And another expert saying, "No, it's not those four, it's these five". We still have scope for that dispute, even if you're right and it is bread-and-butter stuff.

MR LUCKHURST: That is possible. In that regard, it is worth bearing in mind that the Tribunal does have various tools for making the expert evidence manageable. So, for example, that the new Practice Direction envisages, at paragraph 23, that the Tribunal may direct a meeting of the experts and then follow that with (inaudible) expert reports for trial addressing only disputed issues. So that's one way of controlling the type of evidence that you get at trial.

The Tribunal is also able to encourage an early exchange of methodology statements, for example. So those are two ends of the process. You can have an early exchange of methodology statements. You can also, after reports have been exchanged, have a meeting and then thin down the reports for trial to make the issues more manageable and directly addressed in the trial statements.

Finally on this, if a different approach is taken, for example, by NKT's expert. Well, that might reflect NKT's distinct interest. In that case, facilitating the different approach is actually promoting fairness and allowing that point properly to be aired.

THE CHAIR: Okay, yes.

MR LUCKHURST: Those were my submissions on the expert reports.

MR NEUBERGER: Can I just ask one other question? I'm not clear the extent to which the supply is subject to the infringement of all supplies of Defendants in this case, and the extent to which supplies from people who are not Defendants in this case -- how the amount of overcharge, if there is one, would be estimated there.

MR LUCKHURST: The umbrella damages question, potentially. Well --

THE CHAIR: I don't think it was so much umbrella. I think, Professor Neuberger's point was like, what about people like ABB.

MR LUCKHURST: Yes, non-Defendants.

MR NEUBERGER: Non-Defendants.

MR LUCKHURST: Yes, well, insofar as those are properly put in issue by the Class Representative, the non-duplication point would apply, in the sense that we are not suggesting that you would have three experts opining on that. We would seek to ensure a non-duplicated approach to such. Unless the Class Representative goes and gets lots of third-party disclosure on that, it's also going to necessarily be a higher-level analysis, as well.

The Tribunal might recall in (inaudible), if you're not dealing with the actual margin data from a particular seller, then you have to sort of take a more general approach to the question of (inaudible) overcharges.

MR NEUBERGER: And if there were three different experts, they might all have different views about what this would be?

MR LUCKHURST: Well, in my submission, this is caught by what Mr Israel says, which is that we're going to strive to avoid duplication, so that must also encompass duplication of the non-Defendant sales. But it wouldn't be acceptable to have three different people defending on that.

MR NEUBERGER: Thank you.

THE CHAIR: Yes.

Submissions by MR ARMITAGE

MR ARMITAGE: This is the NKT position. I should say at the outset, NKT fully supports the position articulated by Mr Luckhurst in relation to the expert evidence issues and the position of the Defendants generally. As has already been canvassed to some extent in argument, there are some specific considerations that arise in relation to NKT which I would like to develop with your permission, sir.

Essentially, we say that on any view, NKT should be permitted to produce its own

expert economic evidence, focusing just on the overcharge issue in relation to the so-called Narrower Infringement. This is dealt with in detail in our skeleton at paragraph 6 to 12. And if I could begin with a tiny moan, it had been addressed in our witness evidence served on 11 March, which appended a short memo from NKT's proposed expert, Mr Hughes of AlixPartners.

Unhelpfully, there was literally nothing in the CR's skeleton argument on this point which addresses the specific considerations that applied to the NKT Defendants. So until 12.55 this morning, roughly, we didn't know their position on those specific points. I'll move on swiftly from that, but I did want to just make that clear; their position has been unhelpful.

Subject to those remarks, I just wanted to make four points. If I may, I'll give you the headline points briefly, and then I'll develop each of them a little further.

The first headline point is that it's common ground that NKT can only be liable for the effects of what's referred to as the Narrower Infringement. That's an infringement that is substantially more limited than that of the other Defendants in both temporal and material scope.

The second headline point is that it's also common ground that deciding the impact of the Narrower Infringement is a matter that needs to be decided at the trial of these proceedings. It's reflected in issue 11 in the list of issues that's now been approved, and it's not simply a matter of relative responsibility or contribution.

The third headline point is that analysing the impact of the Narrower Infringement pursuant to issue 11 is going to require a separate economic analysis from the analysis of the effect of the overall infringement. That's Mr Hughes's memo.

Fourthly, to the extent necessary, we do also say that there is a conflict of interest between the Defendants in relation to issue 11. So that's in relation to the impact of the Narrower Infringement, as distinct from the impact of the infringement overall. As

I say, if I may, I'll briefly develop those four points.

So point 1, which is about the narrower scope of NKT's liability. The Commission Decision found that there was a single and continuous infringement in relation to the supply of high voltage underground and submarine power cables lasting in total between 18 February 1999 and 28 January 2009, so nearly ten years. But in the Commission Decision, NKT was only found to have been liable for that infringement for a much, much shorter period, from July 2002 until February 2006. All of that is clear from the operative part of the Commission Decision, which we probably don't need to turn up -- none of that's in dispute.

The story, as you may know, doesn't stop there because NKT appealed to the Court of Justice ultimately, and that appeal was partially successful in annulling aspects of the findings of infringement as against NKT. I will just show you NKT's Defence, which conveniently sets this out.

So if we could look at supplemental bundle F, tab 28. Page 68. That's NKT's Defence at paragraph 5, which summarises the effects of the Court of Justice's Decision.

THE CHAIR: Sorry, can you give me that page reference again?

MR ARMITAGE: 68 of the supplemental bundle, page 68.

THE CHAIR: Yes.

MR ARMITAGE: Paragraph 5:

"By judgment of the Court of Justice, the Decision was annulled insofar as it found the NKT Defendants liable for the Infringement from the period 3 July 2002 to 21 November 2002." [as read]

So the temporal scope of the infringement is shortened by a period of some months.

And then:

"It follows that the Defendants' liability for the Infringement is confined to the period

from 22 November 2002 to 17 February 2006." [as read]
So that's the NKT Infringement Period. That's a much shorter period, as I say, than in relation to the other Defendants. But then it goes on:
"The CJEU Judgment also annulled the Decision, insofar as it found the NKT Defendants liable in respect of:
"1. conduct related to sales in countries that were not members of the EU or the EEA;
"2. a collective refusal to supply accessories and technical assistance." [as read]
Taking those temporal, geographic and material scope issues in one, that's what we refer to as the Narrower Infringement.
THE CHAIR: And you characterise that as a matter of liability, not contribution.
MR ARMITAGE: Yes.
THE CHAIR: So if we fast forward to the Tribunal's decision on this, are the parties going to be asking the Tribunal to make a decision not, as Mr Rothschild says, on a global overcharge figure; you're going to be asking the Tribunal to do something different.
MR ARMITAGE: Certainly. We would like permission to adduce expert evidence focusing in on the Narrower Infringement, which is the only infringement for which my client has been found to be liable. It's important to emphasise, I'm sure we all have it in mind, this is a follow-on claim, so there's no scope for going behind the findings of infringement against any particular Defendant.
We will come to this in relation to the conflict of interest, and it's been touched on to an extent already. In relation to whether the overall infringement has an impact, of course, an overcharge, it's obviously right to say that the Defendants have a fully aligned interest. We have an interest in an analysis that establishes that there's no effect from the overall infringement, because then the question of the Narrower

Infringement doesn't come in.

We're proceeding on the basis that it's conceivable that that may not happen, and we want to put forward our own analysis, focusing in on the infringement for which we've been found liable. What is the impact of that? And I'll develop the point that we say that is indeed --

THE CHAIR: Yes, I'm sorry. So are you envisaging then, that the Tribunal's judgment will have, "Part A: this is what the overcharge resulting from the Narrower Infringement was." Is that an overcharge referable to your own behaviour only, or is that an overcharge referable to the cartel?

MR ARMITAGE: It's a slightly tricky question, actually. I wasn't planning to go to it, but we refer to the decision of the Supreme Court in the *Deutsche Bahn* case. It's a very different context, but what's emphasised there is that actually although you have one infringement decision, one document, in these cases, the correct analysis of that is you actually have a bundle of individual decisions against the individual defendants.

So although it's tempting to think of this as there is a narrow period in which NKT were held to have been participating in the overall infringement, of course, you've also seen NKT has been held to be liable only in respect of a narrower geographic and material scope. So yes, we're not for a minute seeking to pre-judge how the Tribunal would write its judgment. It may be that the way to deal with it is to address the overall infringement first.

I'm going to come to issue 11 in a moment. What that issue asks is: does the fact that NKT has been held liable for a narrower infringement impact the answer in relation to these issues of overcharge in relation to --

THE CHAIR: You can carry on with your submissions, but let me just say to you that something that I think is exercising all of us is: what exactly is the boundary between

liability and contribution? Because we hear loud and clear that NKT says, "No, this isn't about contribution; this is about liability".

MR ARMITAGE: Yes.

THE CHAIR: But speaking for myself, I don't yet understand what that actually looks like. And because I don't quite understand what that actually looks like, I find it quite difficult to understand exactly what your separate expert evidence will bring to the party.

MR ARMITAGE: Yes.

MR WOODGATE: Can I also ask: the question is going to the ultimate issue of the practical craft of the final outcome in this case. Isn't it the case that many Commission decisions of these long-running cartels, detected after dawn raids and perhaps immunity applications, have shifting numbers of participants -- so some of lower duration -- where the proof of individual participation in every manifestation of conduct and every territory is lacking, and the Commission accepts that or an appeal that's vindicated.

So this has happened before, and you're urging us to allow targeted economic expert evidence for NKT to show why that's important, and the practical impact we can think about later. But I'd just like to suggest this has happened a lot. I think you're going to point us to a Deutsche Bahn case which says something about this, but there must be many of these cases where duration is less than full.

Now, I think you have duration of a third, perhaps, of the overall cartel period broadly.

MR ARMITAGE: Yes.

MR WOODGATE: And you say it shouldn't be prorated, so let's understand that. And some conduct and territory issues. But that's happened in many cases, and I'm not aware of the practical outcome of that in decision making in tribunals that have to

award damages.

MR ARMITAGE: So --

MR WOODGATE: So that's what we're asking for guidance on.

MR ARMITAGE: I completely understand the question. Just on the point you've just made, sir. It is obviously important to distinguish between the question of substantive liability for the infringement as found in the Commission Decision, or in broadening things out in another regulatory decision.

Mr Rothschild made a point at one point, which I think to some extent touches on the point you just raised, which is that cartelists don't need to have been found to have actively participated in the relevant conduct; it's sufficient for the purposes of ascribing liability that they were aware or could have been aware. That partly reflects the point you made about evidence and the fact that evidence may be sporadic. But the distinguishing feature of this case is that the parameters of NKT's liability have already been settled by the Commission Decision. So there's no further question of whether it would be reasonable to ascribe liability for, let's say, conduct outside the EEA. That question has already been decided; this is a follow-on claim. Therefore, the Tribunal does have to grapple with: what are the implications of that narrower finding of liability? And I would just make one point: it wasn't necessary to sue NKT; it would have been perfectly possible to bring a claim against just one of the Defendants liable for the overall infringement. This issue wouldn't have even arisen. But the fact that NKT is in there means this issue needs to be grappled with. And I'm not aware -- we've looked at this -- of any judgment of this Tribunal or of the High Court, where this particular issue has been grappled with. The *Deutsche Bahn* case is very different, it's an issue about limitation -- I'm sorry. I see you've got a further question.

MR WOODGATE: No. So, when a Commission decision is binding on the parties,

then it can be modified through appeal. And actually the legal liability for follow-on damages is made once the Commission decision finds a shorter or different and narrower infringement on the facts. And there are many other cases where elements of a full cartel participation or full duration for cartel have been found by the General Court to be incorrect. So exactly the same circumstances as NKT has in this case have been found in -- I think -- many other cases, because these Commission decisions have different durations and sometimes different conduct found to be proven on the limited evidence the commission collects.

So I don't see why NKT's position is different from any other cases. Now, it could be that it's important to address that and it hasn't been done properly in the past. I'm just asking, practically, where it is in the case law or the practice, that we can see the impact on legal liability and understand how that's been handled by other tribunals.

MR ARMITAGE: So I'm not aware that it's a question that's been specifically grappled with in the context of a follow-on damages judgment, in a case involving multiple cartelists. I actually don't know whether that has been grappled with in the authorities, but I'm not aware that it has. Perhaps if it had been, you'd have had the decision before you now. I'm sorry; sadly that's not a very helpful answer in one sense, but I believe that is the position.

Now, what is common ground, though, bringing me to my second sub-topic, is that as well as it being common ground that NKT is only liable for the narrow infringement as a matter of substantive liability, it's common ground that the impact of that fact just stated is going to have to be grappled with at the trial of this claim, and it's not just a matter of contribution. I promise I will get on to the practicalities of that. But can I just show you again the agreed list of issues for trial? Obviously, Mr Luckhurst showed you this, but it's at core bundle, tab 8, page 9. (Pause)

And it is important to emphasise what this says. So the agreed issue for the trial:

"How, if at all, are the answers to Issues -- 2 or 3, [which are the overcharge issues, whether there was an overcharge and the extent of that overcharge,] which referred to the Infringement, different in relation to NKT, given that, [and I'd underline 'given that'], (following the judgment of the Court of Justice) NKT can only be liable in respect of the Narrower Infringement." [as read]

And I emphasise the words "given that" because they reflect the fact that it is common ground that NKT can only be liable in respect of the causal consequences of the Narrower Infringement. Of course, we're in a follow-on claim; what the Tribunal is asked to -- is obliged to determine -- is questions of causation and quantum only.

So what issue 11 means is that at the trial of this claim, the CAT is going to need to decide whether the general conclusions it reaches about the impact of the Infringement on the prices of affected -- or arguably affected -- power cable projects during the relevant period, the whole period, can also be applied to NKT.

Now, that brings me to the need for the separate analysis and the question of practicalities, my third point, and we say a separate economic analysis is going to be needed, in respect of the impact of the Narrower Infringement period. (Pause)

Putting that another way, the analysis of the overall infringement is going to look at whether the overall infringement, by which I mean the infringement covering the period from 1999 to 2009, with the full material scope referred to in the Commission Decision, whether that overall infringement inflated prices across the relevant period. It may be that's done by identifying an average overcharge that applies across the period as a whole.

In contrast, the analysis of the Narrower Infringement is going to focus on the much shorter period, in which NKT was found to have committed an infringement of competition law. So even just focusing on the temporal point, there's going to need

to be a different analysis. It's more disaggregated, because it's focusing on a much, much shorter period. Then, as I say, that will be further complicated by the need to consider the fact that NKT has no liability for the impact of any conduct outside the EEA, insofar as that bore on prices inside the EEA, or any of the refusal to supply conduct. Those are not features of the analysis of the overall infringement, and just to be clear, this isn't a point about the NKT proposed analysis needing to focus only on NKT sales -- it's not that sort of point -- it's really about focusing in on this much shorter temporal period with these different features in terms of geographic and material scope and looking at the impact of that infringement. It is a separate analysis, and that's the point that's been addressed in the memo prepared by Mr Hughes, the economist that NKT currently envisages conducting this NKT-specific overcharge analysis. I hope the Tribunal has had an opportunity to read that memo.

I mean, the key point -- we can go to it in a moment -- that Mr Hughes makes is that the economic analysis required for assessing the impact of the Narrower Infringement is not simply a scaled down version or a pro-rata version of the analysis of the overall infringement, it's a different exercise.

Now, there's no evidence or even submissions in writing from the CR contradicting that view, but if I may, I'll go to Mr Hughes's memo briefly. It's at core, section E, tab 21, page 221. (Pause)

We should have a memo dated 11 March 2026. I should emphasise this is a preliminary document; Mr Hughes is not setting out the methodology he is definitively going to want to adopt, he's just pointing out some of the relevant considerations that go to the case management issue that's before you today. So, as I say -- you can see this from paragraph 1.2 -- he is addressing here what would be needed in terms of expert analysis to quantify damages given NKT's liability for

a shorter period and more limited conduct. So picking up on issue 11 in the agreed list of issues. And just -- he gives at figure 1 over the page, a pictorial representation of what this looks like, setting out the relative temporal periods of the various infringements.

And at paragraph 2.3, he makes the point that as well as being the temporal difference, there are differences in material scope, having regard to the annulment of the Commission Decision.

And then at paragraph 2.6, he identifies, in summary, what the analysis of the Narrower Infringement would entail. So rather than considering what the average cartel overcharge was over the entire period, it would entail considering whether an overcharge can be identified specifically during the narrower period, whether that overcharge differs from earlier or later periods -- in other words, whether there are potentially changes in the cartel effect over time -- and then 3: "whether it is plausible at estimated price effects can credibly be attributed to the narrowly defined competition infringements", and he says at 2.7 that these distinctions "require an analytical framework that's capable of isolating and contesting price effects within the shorter period and arising from different forms of conduct". And those are self-evidently different questions from the questions that need to be answered when looking at the effects of the overall infringement; you wouldn't need to get into this analysis if NKT wasn't here, and there was no issue 11 in the trial list of issues.

Mr Hughes goes on in section 3 to consider the implications of this for the expert analysis, and explains that in his expert view, analysing the narrow infringement requires a different analytical framework.

Paragraph 3.1: it's a version of the same point, but he distinguishes between a model that looks at data across the whole period to identify an average overcharge versus a model that looks at statistically significant differences between periods.

And then if I might just invite you to reread to yourselves, paragraph 3.2, where he summarises what he says this different econometric analysis requires. (Pause) And then he goes on to say, in consequence of the points he identifies, applying the discrete analysis that would be required for the narrow infringement requires careful consideration of what he calls "additional trade-offs".

And then over the page at 224, paragraph 3.6 to 3.7, he refers to a particular issue relating to averaging and attribution. I'll come back to this in relation to the question of conflict of interest.

And then at 4.1, this is the key conclusion, as I say, not contested in writing, that: "The economic analysis required to quantify damages for the narrower infringement is not a scaled down or amended version of a full period analysis. It is a different exercise that requires focusing on the competitive conditions during the period in question and building an economic model relevant to that period. This may require different modelling choices, identification strategies and judgment calls." [as read]

So if I can proceed to boil that down, the essential point in my submission is that if you're trying to work out the impact of the Narrower Infringement pursuant to issue 11, it's not simply a case of looking at the average overcharge across the period and applying that on a pro-rata basis to the narrower period, and hey presto, that's the scope of NKT's joint and several liability. Rather, assuming that the wider infringement is found to have caused an overcharge, the question is: what proportion of that overcharge can NKT properly be held liable for, given that it only committed the Narrower Infringement, as is common ground? It may be the case that the wider infringement, depending on the analysis, led to a significant overcharge when averaged across the period, but it may be that the analysis of the Narrower Infringement reveals that that led to a much smaller average overcharge, in relation to that period.

Or the converse may be true, but these nuances need to be considered in an analysis of issue 11, but may be omitted by an analysis that looks at the overall infringement on a more aggregated basis. And we really say that it's clear from this evidence from Mr Hughes that the NKT position does require a distinct analysis, and that NKT should have permission to produce its own evidence on this.

THE CHAIR: Why don't you just deal -- we hear the point that it requires a different analysis; why don't you just tell us very briefly -- because I'm conscious of the time -- why that analysis needs to be performed by a different expert.

MR ARMITAGE: So I'm certainly not suggesting that it's beyond the wit of a single economist to have a go at doing this. And I'm going to come on to conflict of interest, because that's my main answer to that question, but the point I'm emphasising under this, my third point, is that it's certainly a separate and different analysis. You're answering a different question, and it may be, as Mr Hughes says, you're using different tools to do it.

Now, the reason I emphasise that is because the principal basis on which the CR has objected to the Defendants having separate economic experts is that it will result in a multiplication of duplicative analyses, and so poses a burden for the CR and for the Tribunal, and that's the sort of consideration that was, at the heart really, of the issues considered in the *Stellantis* case. That was why having multiple experts was seen as undesirable. And my submission in a nutshell is that those considerations don't apply to the analysis that the NKT expert is proposing to conduct, because that analysis needs to be done in any event. It's a separate non-duplicative analysis looking at a different question.

And the simple point we make -- and this is before getting to conflicts of interest -- is that because the analysis is focused on NKT's specific position and because it's not duplicative of the analysis of the overall infringement, it makes good sense for NKT's

own expert to do it, just as a matter of practicality.

THE CHAIR: Sorry, you've got a question?

MR ARMITAGE: Yes, I'm sorry.

MR WOODGATE: Could I put that another way? I see you say it needs to be done, maybe it could be done by the same economic expert. When I read Mr Hughes's submission, the internal note to his instructing solicitors, it looks like it will look in methodology, potentially -- maybe not methodology. In what's taken into account, very different to the other analyses in the case. So that's another way of looking at it, if I can suggest it. Mr Hughes says, and NKT says, this work has to be done, properly addressing the narrow infringement. But if I read the paperwork by Mr Hughes, it looks like it's really going to be a unique approach looking at statistically significant changes related to the period in question, so forth. Now, a single expert can properly take account of the difference relating to NKT and consider whether that can be accommodated in a methodology that applies to the whole period, but properly takes into account the position of NKT. As I read that submission that you've just taken us through in some detail, I thought we were going to get something really different to anybody else in the case, potentially, and that concerned me and I can see can be looked at both ways. It should be done properly by somebody. You said should be done by an NKT expert. The chances of it being hard to mesh with the other work in the case, the economic expert evidence in the case, seems higher if it's done by an NKT expert, whereas it could be done properly by a single expert who does properly take into account the special position of NKT but makes it easier to read, if I can put it that way, and more consistent across the piece with the full period for the other Defendants as well, but taking into account NKT's position. I'd like to hear your response to that.

MR ARMITAGE: Two points. The first point, a major part of my answer to that is

conflict of interest because, as I'm going to say, there is a clear conflict of interest here and that is, on any view, a material consideration. In fact, under the CAT's Guidance, Mr Luckhurst has shown you it, it appears to be presented as though, where one has a conflict of interest, joint experts will not be appropriate.

But the second point, just on the question about whether you're going to get something very, very different and that's going to give rise to complexities. I don't want to speak for Mr Hughes, I don't think that that was the intention of that document. I think, if I may, the intention of that document was simply to identify the point that one is looking at a different question. It has different both geographical, substantive and temporal elements and, in order to properly take account of those different elements in looking at the much narrower period of time and whether that has given rise to any overcharge and whether there's any contributory impact to the effect of the overall infringement, you need to grapple with those questions and that requires a separate analysis.

I should emphasise, we're at a relatively early stage here. We don't have before the Tribunal, as has occurred in other cases, provisional methodology statements setting out exactly what the expert is going to do. Tempted to turn around, but I suspect Mr Hughes would have no problems doing that and setting out exactly what he wants to do in a little more detail.

As I say, this document is intended to do a different thing, which is to point to the potential difference in the questions that are being answered and the methods that may be used. I don't think, I hope, it's not envisaged that some way out-there, different form of overcharge analysis is going to be adopted. It's really a question of what questions have to be grappled with in relation to that analysis, arising from the different features of NKT infringement.

MR WOODGATE: Perhaps I'm overreacting to the heading, narrower liability

requires a different analytical framework.
MR ARMITAGE: Yes. I think, when one looks at the substance of the report, what -- sorry, perhaps we can go back to it.
THE CHAIR: We are going to need to move on, I think. Tell us briefly about the conflict and then I think we're going to have to move on to another topic.
MR ARMITAGE: All I was going to say on that was when one looks under the heading, "different analytical framework" [as read] and, in particular the questions at 3.2(a), (b), and (c), it's those sorts of decisions that may result in -- it's not some different overall methodology. It's simply looking at different questions but within a recognised econometric framework, in my submission.
On the conflict point -- and I'll deal with this quickly because Mr Luckhurst actually made the essential points -- we do also say there is a conflict of interest as between the Defendants in relation to issue 11, and this is a further relevant consideration, weighing in favour of NKT being permitted to have its own expert on the overcharge issue and, indeed, on the narrow infringement issue specifically. The authorities you've seen. So Lord Justice Birss in *Stellantis* at paragraph 49 made clear that the existence of a conflict of interest is a material factor, even if not a trump card. Then Mr Luckhurst also showed you the CAT's new Practice Direction post-dating *Stellantis*. Paragraph 6 talks about defendants being required to share experts where their interests are "aligned", to use the language of the Practice Direction.
In my submission, though, that is not the case in relation to issue 11. Now, as I've already made clear, the Defendants naturally all share an interest in establishing that the overall infringement had no impact on prices. They're aligned to that extent. But we obviously cannot assume now that the Tribunal will find that the overall infringement had no effect and insofar as there is a real possibility that the Tribunal will find that the overall infringement had some effect, the Defendants' interests

diverge and are certainly not aligned at that stage. To put the point shortly, NKT's interests are in arguing that the Narrower Infringement had no, or only a limited, contributory impact in comparison to any overall effect and the other Defendants' interests, once you get to that stage, obviously diverge and point in the opposite direction. So it's quite a short point.

THE CHAIR: Yes, no, we understand.

MR ARMITAGE: I hope that's clear.

THE CHAIR: Thank you very much.

MR ARMITAGE: If there's no questions, that's the position for the NKT Defendants. Thank you.

THE CHAIR: Yes, briefly, Mr Rothschild.

MR ROTHSCHILD: Should I briefly reply? Before moving onto the --

THE CHAIR: I think so. I think we've -- yes. Please do, yes.

Reply submissions by MR ROTHSCHILD

MR ROTHSCHILD: As for Mr Armitage's submissions for NKT, I think he has conceded that potentially the analysis for NKT could be done together with the rest, but his clients would prefer not.

Now, you referred to Practice Direction 3 of 2025. Worth drawing to your attention paragraph 25 of that Practice Direction, authorities bundle, on page 81. What the Defendants really seem to be saying here is that they would prefer to be able to influence the experts in the sense of -- guide or shape the evidence that they provide. They want their own bespoke evidence. But paragraph 25 on that page makes very clear that:

"Unless the Tribunal directs otherwise, the involvement of the parties' legal teams in any expert report or joint expert statement should be limited to providing guidance as to the format of the report ... and the issues to be addressed ..."

Not the substance of the analysis in any way. The guiding principles here should be proportionality and efficiency. Expert evidence should be restricted to that which is reasonably required. Mr Luckhurst explained a rather complicated scheme dividing up issues as between different experts. He did not satisfactorily explain why one expert could not cover all topics. Instead, under his complicated scheme, dividing up topics, the Class Representative's expert, Mr Druce, will have to deal with multiple experts on the other side, which will be burdensome and will, again, lead to inequality of arms unless we, too, on our side are allowed multiple experts. (Overspeaking).

THE CHAIR: Okay.

MR ROTHSCHILD: As for the conflict of interest, the Court of Appeal in *Stellantis* was clear that conflict of interest was not an absolute bar to having a single joint expert. In any event, here, the mere fact that there may subsequently, at some future date, be issues between the Defendants as to apportionment of (inaudible), well, that's not an issue for the Tribunal currently on pleadings.

THE CHAIR: Thank you, Mr Rothschild.

MR NEUBERGER: Can I just ask one question? Leaving aside the overcharges here, do you see a particular problem in the other issues being divided between two distinct experts covering distinct parts of the piece. Is that a problem?

MR ROTHSCHILD: The problem is, it causes some difficulty for the Class Representative. It's an extra burden having one expert on our side dealing with two experts on the other side, admittedly on different systems. But it does lead to a degree of inequality problems.

MR NEUBERGER: Thank you.

THE CHAIR: Okay, should we break there? I was thinking of doing the value of commerce issue next. Maybe let's break there, but I'm sort of slightly worrying about

the time. On the VoC spreadsheet issue, let me just share a discussion, if I may, that we were having. We were wondering, on this side, whether the debate about who goes first or who goes second is actually that important to debate. What we wonder on our side is we see the Defendants who have the information on the value of their own commerce and the value of the cables that they've supplied. They know that information. We weren't immediately sure why they shouldn't just give that information, yes, within a realistic timescale. Rather than ask the Class Representative to go first and then critique her approach. If there is more to it than that, we'd like to hear. But if it is just a debate about who goes first, we wonder if that could, perhaps, be short circuited. Maybe the parties could reflect on that while we have a five-minute break for the transcribers.

(3.08 pm)

(A short break)

(3.18 pm)

THE CHAIR: Right. I think value of commerce.

Value of commerce

Submissions by MS BANKS

MS BANKS: I'm sorry, (inaudible).

THE CHAIR: That's all right.

MS BANKS: I just want to quickly explain why we do still oppose this --

THE CHAIR: Yes.

MS BANKS: -- and that's because this isn't a straightforward exercise. It's not a case of us just taking the output from the database. It's far more involved than that. If we could just go to the core bundle, the VoC spreadsheet is at tab 12. So what is sought is a variety of information together with supporting documentation

and a supporting witness statement and we say that isn't a straightforward exercise, and we don't think that it will lead to substantial time saving overall. That is because all of this material will be held in the off-the-shelf disclosure and the Class Representative has got to get on top of that anyway, in pleading back to whatever we put in.

So, in respect of the off-the-shelf disclosure that she does have, we say there simply isn't a justification for reversing the normal course of things. We do say that's not just a technicality. That's a basic requirement of fairness because this is going to be used as the four corners of the claim. We say that, where she's got the information, the Class Representative should do that first.

The difference with the DNOs is that we can see that if we go first, there is a genuine cost saving, because it may cut down the scope of disclosure, which obviously doesn't apply in relation to the off-the-shelf disclosure, because that's already been done; the searches have been made.

Obviously, if we can go first on the DNOs with supporting documents, and then that cuts down the disclosure exercise, there is a benefit to us in doing that and we recognise that it's more efficient overall.

But certainly in respect of the rest of the supplies, we would resist going first, because we say that the Class Representative has the information she needs and she's going to have to get on top of it anyway.

THE CHAIR: Thank you.

Mr Rothschild.

Submissions by MR ROTHSCHILD

MR ROTHSCHILD: We do not have the information yet; we still have not received the off-the-shelf disclosure. It's obviously easier for the Defendants to do this than the Class Representative, who is not familiar with the materials -- apparently about to

be sent 22,000 documents. It will take up time.

One might have the impression that the Defendants are trying to slow down the progress of the case. We respectfully submit that the Tribunal was right to say that the portion of the Defendants to go first, and perhaps they need a bit longer than we had suggested to do it, but ultimately they're going to have to get involved in the task of filling up the table at some stage. And they are best placed to start the exercise if one looks at this from a perspective of proportionality and efficient case management.

THE CHAIR: Thank you very much. Any other perspectives on that or should we just move on from that?

Submissions by MS BANKS

MR WOODGATE: I have a question. If one looks left to right on the VoC questionnaire -- and I don't by any means decry the key point you made, Ms Banks -- these seem fairly objective, readily answered questions from the left, and then they get more difficult to the right. Do you have any particular -- and then the right-hand column is a list of relevant disclosure documents available, which you may have submissions on. But I just wonder: are there aspects of this in particular that you think are unreasonably burdensome at the current context, or is it the general point?

MS BANKS: Sir, what I would say to that is if it's that straightforward, there's absolutely no reason why the Class Representative shouldn't be first.

MR WOODGATE: When they've had the documents?

MS BANKS: They've got the documents, and they have to get on top of it. There's no world in which the Class Representative is just going to accept whatever we record.

MR WOODGATE: Okay, thank you.

MS BANKS: Their team is going to spend a lot of time interrogating this body of documentation, and we say that there's no reason therefore why the usual course should be reversed.

MR WOODGATE: Thank you.

THE CHAIR: Thank you very much.

Is the next topic industry expert? Whereas the --

Industry expert

Submissions by MR ROTHSCHILD

MR ROTHSCHILD: I can address that next. We apply for permission to rely on an industry expert. This is relevant to the --

THE CHAIR: In the interests of time, I think what we would like to focus on is why do we need an expert? I think we understand, as a general term that you need some evidence -- some evidentiary underpinning -- of what the regulatory regime is, how electricity suppliers respond to it, what their pricing practices might be. I think we understand that.

What I think we don't understand is why that evidence needs to be given by way of expert evidence, and why it also needs to be accompanied by a punchline, if you like, which is an expression of opinion on the likelihood of the overcharge being passed on to consumers. I hope that helps you in your submissions.

MR ROTHSCHILD: Actually, we're content to clarify that permission is only sought for industry expert evidence in relation to narrow points; it really is just issues for trial 4C and 4D. That's the core bundle, tab 8, page 7. Specifically relating to pass-on, bottom of page 7, C, and then D is at the top of page 8. The issues of whether suppliers of electricity passed on increased to TNUoS to DUoS, our own costs to members of the class, and the rate of such pass-on.

Now, that's partly a quantitative analysis, partly will involve understanding how suppliers price.

THE CHAIR: Right.

MR ROTHSCHILD: So why expert evidence? Well, we recognise we could potentially pull factual evidence from those involved at electricity suppliers. There are a large number of electricity suppliers that could potentially involve a large number of factual witnesses.

We think it's more efficient to have a witness under the category "expert" rather than factual. That said, an expert can of course give factual evidence. That's in the White Book, volume 1, page 1114, "The nature of expert evidence". (Pause)

Middle of the page, referring to *Kennedy v Cordia*, the Supreme Court observing:

"An expert witness can give expert factual evidence either by itself or in combination with opinion evidence." [as read]

And referring to *Declan Colgan*:

"Deputy Master Henderson, reviewing the case and giving examples of types of evidence which may be given by an expert witness, which are more or less detailed analyses as evidence of fact." [as read]

So, for example:

"(ii) where an expert draws on the general body of his knowledge and understanding, in which he's an expert, to give evidence as a matter of observable fact, or whether expert collates and presents the court, in an efficient manner, the knowledge of others in his or her field of expertise." [as read]

We were proposed to adduce evidence which will probably be from Mr Badger or Mr Benwell, who gave evidence at the CPO stage and had been involved in the electricity industry and supplier's pricing, on how pass on changed over time and how suppliers price, drawing on their knowledge as consultants; the way things are

done in this industry. And by virtue of being experts, they'll be bound by the CPR 35 and the expert regime, which was --

THE CHAIR: But why do you need to --

MR ROTHSCHILD: (Overspeaking) Control the evidence in a slightly different way from factual witnesses.

THE CHAIR: Sure, but why do you need this industry expert to opine on whether they would pass-on? I think I can understand that you might want a single person who knows about all electricity suppliers to talk about all of their pricing practices, because otherwise, at least in theory, you might need to call someone from every single electricity supplier; they might have different pricing practices. That I understand.

But what I don't immediately understand is why, given the volume of econometric evidence that we're going to get, you need this industry expert to go on and say, "And in the light of that pricing practice, I think that this particular cost would have been passed on". What does that bring to the party?

MR ROTHSCHILD: The expert economist we propose to instruct, Mr Druce, would appreciate the assistance of the industry expert as set out in paragraph 29 of his note, which is tab 15, page 38. (Pause)

I know he doesn't say very much there; he says he would support the Class Representative seeking additional evidence from industry experts with knowledge of the supply market.

THE CHAIR: Yes. Okay.

MR ROTHSCHILD: We seek permission at this stage to ensure that all the relevant information is before the court. It may be we need to reflect on (inaudible) the Tribunal.

THE CHAIR: Yes.

MR ROTHSCHILD: We may not use the permission, but as things stand, it's evidence that we think is likely to be relevant and useful in relation to those issues 4C and 4D.

THE CHAIR: Sorry, without sort of labouring this point too much, it's helpful to see what Mr Druce says he wants, but what he says he wants is information on pricing practices?

MR ARMITAGE: Yes.

THE CHAIR: Yes. Okay. Thank you very much. Yes.

MR ARMITAGE: Several significant concessions there for Mr Rothschild. He recognises that they could call factual evidence, in terms we may not use the permission if it's granted. Backdrop to the applications now before you.

Just looking, please, quickly at the Guide at 7.65, which is authorities tab 3, page 72.

(Pause)

THE CHAIR: Actually, I don't think we need trouble you. I think we don't need any more on this. Thank you.

Right, what's the next topic? The next topic I think is CMCs and fixing trials -- is there, no?

MR ROTHSCHILD: Well, perhaps I might start with trials. There's currently no trial date in the diary, but this claim was started in May 2022, and certification was almost two years ago in 2024, and this is the second CMC in these proceedings in certification. It is the usual practice of this Tribunal to set a trial date at the end, paragraph 7.5.

Of course, the claim arises out of a cartel which commenced a very long time ago, indeed in the last century, 1999. And the Class Representative's case is that class members started to suffer a loss a quarter of a century ago in 2001. So, the evidence is potentially becoming a bit stale. And it's important, in my submission,

a trial date is now set and directions are given to enable preparations for that trial to continue expeditiously.

The date we request that the trial be listed now for Michaelmas term 2027. That's still 18 months away; plenty of time for the pre-trial stages. The precise pre-trial timetable -- I have some suggestions in an argument. They're not agreed, but one can see that there is enough time for them to take place.

That is my request: that the trial be listed now for Michaelmas 2027. We've seen in the past, in this case, difficulties in co-ordinating the diaries of preferred counsel and also of the Tribunal, so the sooner are dated the easier.

THE CHAIR: Thank you very much. Well, why don't we do the related topic of the CMC? Why don't we do them both together?

Directions

Submissions by MR ROTHSCHILD

MR ROTHSCHILD: The parties --

THE CHAIR: I think you both agree. Everyone seems to agree on this.

MR ROTHSCHILD: Maybe a CMC in June or July.

THE CHAIR: Tribunals are sometimes slightly sniffy about counsel's availability driving timetables, but there are some constraints on our side, which I might as well just tell the parties. On our side, we have real difficulty with one of our number doing a CMC on 10 July, or from 20 July to the end of July. I'm not saying that all other dates are free, but those are particular dates that I'm afraid are difficult for us.

MR ROTHSCHILD: Is the suggestion that we should liaise with the registries on that?

THE CHAIR: I think that is the suggestion, please.

Right. A response on trial date?

Reply submissions by MR ARMITAGE

MR ARMITAGE: I can take the lead on this point for the Defendants, my learned friends may have other points. Our position, in short, is you shouldn't schedule the trial today. We fully accept that it's generally a very good thing -- capital letters -- to set cases down for trial and the Tribunal, as a matter of general practice, does seek to do that as early as possible.

But we say there is too much uncertainty over the scope of disclosure to list the trial and make case management directions to trial today. As you've heard, the CR has already started to receive, in fact, substantial off-the-shelf disclosure from the Defendants. The CR's position is that she needs to review that disclosure before deciding what additional disclosure to seek, both from the Defendants and from non-parties. Should say, in relation to non-parties, you'll have seen the Defendants have a proposal that the CR should, in short order after the CMC, set out what she intends to seek in that regard. We say that's a very important case management issue that hasn't been adequately grappled with.

But in circumstances, though, where it's common ground that we should come back in June or July, subject to the Tribunal -- if the Tribunal can accommodate that -- to consider the need in particular for further disclosure, we're simply making a modest suggestion that it's better to make decisions about listing the trial and trial timetable at that further CMC, when the scope and likely timings of further disclosure are known, rather than seeking to pre-empt that today.

We say that deferring a decision on listing the trial for a couple of months ought not to make a material difference in terms of overall delay. On the other hand, it will enable a more informed view to be taken both on the date for the trial as well as trial length and the timings for the detailed intervening case management steps.

Just to develop that submission briefly as to why we say you shouldn't list the trial today, there are a number of uncertainties about the scope of disclosure in particular, which are relevant to this question, but which will be much less uncertain when we get to the next CMC in a couple of months.

I should say the CR's proposed timetable to trial envisages that disclosure will be completed by 18 September 2026. You get that from paragraph 45 of Mr Hain-Cole's witness statement. We don't need to turn it up. In other words, the assumption underpinning the proposed timetable is that disclosure, including, one infers, any non-party disclosure, can be completed within as little as two months, a period which spans the August vacation from CMC in June or July. We say that's unrealistic.

THE CHAIR: So the assumption is that disclosure will be finished by --

MR ARMITAGE: 18 September.

THE CHAIR: 2026?

MR ARMITAGE: Yes. That's Hain-Cole, paragraph 45, core E, tab 16 page 55.

THE CHAIR: Yes.

MR ARMITAGE: And just to say a little bit more, if I may, about those uncertainties. So starting with the question of disclosure from the Defendants. With the exception of the London Array off-the-shelf disclosure, which I think was provided very recently, the CR has not yet received the OTS disclosure, but it's coming by the end of the month, and you have evidence as to how extensive that will be. I don't necessarily need to give you the references, but it's 22,000 documents from Prysmian, about 19,000 from Nexans and then from my client it's a smaller number, but it's still around 900 documents, so about 42,000 documents in total.

The CR has already had the Commission File disclosure; that's in the region of 3,000 documents. But the CR has indicated that it's "likely that further disclosure will be

needed from the Defendants beyond the Commission File and off-the-shelf disclosure", [as read] and that can be seen from their application letter for today, paragraph 5.5 at core, page 26.

And can I just show you what is actually potentially envisaged in terms of further disclosure from the Defendants? That's Mr Hain-Cole's statement at paragraph 20. So core page 47. (Pause)

So these are the categories of disclosure which are not in the event being pursued today, but in relation to which the Class Representative reserves the right to come back, presumably in the CMC in the summer. And just looking at the italicised headings, you have "data relating to supplies in the USA and Canada"; B, you have "pre cartel period data"; and at C, you have "documents relating to price setting and the impact of the cartel". So, three categories, potential further disclosure from the Defendants there beyond what's already been agreed or provided.

You may also have picked up that the CR had applied for disclosure of documents relating to unsuccessful tenders.

THE CHAIR: Yes.

MR ARMITAGE: That's no longer pursued at this CMC, but that's another request that may be revived at the next CMC. Short point - on any view, these are potentially very significant disclosure categories ranging across the globe and going back potentially multiple decades and you also have evidence just on the unsuccessful tender documentation alone. Mr Day for Prysmian gives an estimate that there may have been around 1,000 unsuccessful tenders for Prysmian across the relevant period -- that's paragraph 55 of his statement -- and you have similar points made by Mr Israel, paragraph 23 for Nexans, and then Ms Haigh for NKT at paragraph 11C.

Now, we don't know if the CR is going to pursue these categories, or if so whether the Tribunal will order them. The Defendants may well resist them, but you can't

sensibly form a view on that today. Instead, we respectfully invite you to consider the matter on the footing that there is a reasonable possibility that this disclosure will be sought and ordered for the purposes of case management decisions today. And if so, the idea that all of this could sensibly be provided by September, following a hearing in June or July, seems extremely optimistic, to say the least.

On the other hand, in June or July, you'll be making these decisions, you'll have the benefit of any evidence from the Defendants on the extent of the disclosure and how long it's going to need, if it's to be provided, and we say that's a sensible juncture to be making decisions about timings.

THE CHAIR: I think we've got the point.

MR ARMITAGE: Thank you.

THE CHAIR: Thank you very much.

MR LUCKHURST: Very briefly listing a practical point. I endorse everything Mr Armitage has said, but as a fallback, if you are actually thinking of listing at this hearing, it's proposed to do it in Michaelmas 2027. Ms Spottiswoode has brought another collective proceedings claim in this Tribunal against Motorola, and that was recently listed for a six-week trial commencing in October 2027.

THE CHAIR: Right, and she's going to have a busy Michaelmas.

MR LUCKHURST: Well, I would urge the Tribunal to avoid a clash there, because there's three overlaps in terms of personnel: first is Professor Neuberger is on the Tribunal in both sets of proceedings; second, the Class Representative, and whilst she doesn't necessarily have to attend every day of the trial, it would be a bit unusual to be involved in two substantial trials at the same time; and last and least importantly, myself and Mr Armitage are both instructed in the Motorola case, and I've been acting for Nexans for several years, including the London Array proceedings, and my clients are hopefully keen to retain me in the Proceedings. And

that's all.

THE CHAIR: Thank you. I don't think we need to do -- do you want to say anything more? Do you want to --

MR ROTHSCHILD: If I may, I'll update to 18 September for disclosure.

THE CHAIR: Yes.

MR ROTHSCHILD: That isn't something that would normally be put in directions. We proposed in the draft order deadlines, including witness statements on the 13 November 2026, expert reports February 2027. With witness statements, mid-November 2026, still seven and a half months; should be ample time for disclosure and we may not pursue categories referred to by Mr Armitage.

THE CHAIR: Okay, thank you very much. Are those all of the non-follow-on, non-ROC additional ROC costs issues?

MS BANKS: I can take it very quickly.

THE CHAIR: Yes.

Submissions by MS BANKS

MS BANKS: Just to pick up on what Mr Armitage just said about third-party disclosure. We do seek this order, paragraph 8 for clarification.

THE CHAIR: So which order is this?

MS BANKS: So this is the consolidated order that's at tab 6 of the skeleton bundle.

THE CHAIR: Yes.

MS BANKS: It's very straightforward. We just asked the Class Representative to identify this -- paragraph 8 sorry -- the third-party disclosure request she intends to make in these proceedings. We're assuming she has a strategy for dealing with this and we just want to know what it is, so that we can be put in an informed position, both in respect of disclosure and timetabling.

THE CHAIR: This was the very important case management point that Mr Armitage

made; it's not a different point.

MS BANKS: It's not a different point; I just wanted to draw your attention to it because I don't want it to get lost.

THE CHAIR: Yes.

MS BANKS: And we set out in paragraph 6 on page 58 what the current blueprint is in respect of third-party disclosure, and we just want to know the extent to which that's still being pursued, because obviously wide-ranging and also it's not dependent on the off-the-shelf disclosure. So, for example, the off-the-shelf disclosure won't have those. You're going to (inaudible) supply also won't have any relevant documents in it, and so we really do think that the Class Representative should be articulating now what she's proposing to do in respect of third-party disclosure.

THE CHAIR: Yes.

On that, Mr Rothschild?

Further submissions by MR ROTHSCHILD

MR ROTHSCHILD: Well, we do get to a firm date. We put in an order for identifying all the third-party disclosure requests. We have made progress with third-party disclosure; the Tribunal might have seen there's been ongoing correspondence involving all parties with (inaudible) about the Department for Energy, Security and Net Zero, about documents relevant to the Renewables Obligation (Amendment) Order 2013.

There's also been correspondence -- or parties have been involved with Ofgem, about the treatment of settlements with direct purchasers in price controls. We have been making progress with disclosure.

THE CHAIR: But what do you object to? Do you object to 7 April 2026, or do you object to the idea that your feet are being held to the fire and you've got to articulate

every single third-party disclosure application?
MR ROTHSCHILD: We will be constructive and we will seek to liaise with the Defendants, but we do need to review the Defendants' off-the-shelf disclosure, some of which may make third-party disclosure requests redundant. We have not received it in its entirety yet. Also, third-party disclosure requests ideally will need to be discussed between the experts, for the parcels.
THE CHAIR: Yes.
MR ROTHSCHILD: Because we want third-party disclosure that's useful for all of the experts, and until the outcome of today's CMC, we don't know for sure who the Defendants' experts are going to be.
THE CHAIR: But do you object to the principle of that the Tribunal might make an order requiring you, by some date, to give some articulation of the third-party disclosure applications that you are presently considering making?
MR ROTHSCHILD: Content with such a direction; we're concerned with the tight timescale and suggesting the formality.
THE CHAIR: Okay, thank you very much.

Tender evaluation
MS BANKS: I'm sorry. That just leaves tender evaluation.
THE CHAIR: Yes. So that leaves wider ROC costs. No? What does it need?
MS BANKS: Sorry, I was talking about the case management issues. It's just, I think, tender evaluation.
THE CHAIR: Tender evaluation reports? I know that issue?
MR ROTHSCHILD: I don't believe there's a formal application in relation to it, although my learned friend slipped it into the draft order. I think it should have been a formal application.

THE CHAIR: I think if there's no application -- is there an application? I don't even know what the issue is. I'm so sorry, I don't know --

MS BANKS: The Class Representative brought an application for unsuccessful tender documents from us.

THE CHAIR: Yes.

Submissions by MS BANKS

MS BANKS: And we put in evidence, as Mr Armitage just alluded to, explaining why that would be disproportionate, but also why it wouldn't give the Class Representative what she needs, which is what she wants to be able to do is to do a competitor analysis for different projects during the (inaudible) period.

THE CHAIR: Yes.

MS BANKS: And we made the point that you can only do that if you're clear as to the comparability of the bids, and also we can only give disclosure for our own efforts.

And so trying to be helpful, we identified that there was this other body of documents that we were aware from previous litigation, these tender evaluation reports, that at least were produced in the National Grid and Scottish Power proceedings. And we suggested that we would invite the Tribunal to disapply the collateral use restriction in order to allow us to disclose those. Since then, you've seen the letters from National Grid and Scottish Power. They object to that course, but they don't object to us liaising with them.

So what we would propose is that the Defendants be given permission to liaise with the Claimants from the direct purchaser -- sorry, the proceedings, in order to identify relevant documents and consent can be given on an informed basis. And we only knew the National Grid and Scottish Power position this morning, so I'm afraid I've only had a chance to do this over lunch, but we've put together some proposed

wording for that. I'll just be grateful if I could hand up. (Handed)
This replaces what is paragraph 6 in the composite order. And so it's just saying that the Defendants are to engage -- that's paragraph 6 -- and that for that purpose, under paragraph 7, the collateral use restriction is lifted for that limited purpose, and then we would ask -- we'd have to write and make a written application to the High Court for equivalent.
THE CHAIR: Yes, I mean -- a drafting point on paragraph 7; if the Tribunal were minded to make an order like this, the paragraph 7 permission would have to be, to the extent the Tribunal has jurisdiction, the Tribunal (rather than the High Court) has jurisdiction to give this permission -- we give the permission, because there is this question of split jurisdiction.
MS BANKS: Yes.
THE CHAIR: And perhaps there'd have to be a consequential in the second sentence as well.
MS BANKS: Yes, and I think we would have to go to the High Court, unless the Tribunal was willing to rule that wasn't necessary. But I'm not sure actually you could do that, sorry. It's a question for the High Court; you'd have to go to the High Court.
THE CHAIR: Indeed.
MS BANKS: This is what we propose, and it's a constructive proposal on our side in response to a terribly broad application that was the Class Representative's.
THE CHAIR: Yes, thanks.
Mr Rothschild.
Submissions by MR ROTHSCHILD
MR ROTHSCHILD: It's an unusual proposal without an application. There was no formal application by my learned friend for this, and this document has only just been

handed to me and I noticed that it suggests in paragraph 8 that my client pay the cost of this process. So, we'll be happy to consider it in correspondence, but it may well be the outcome is that this is a proportionate way forward, but it ought to have been foreshadowed in our application.

THE CHAIR: Okay.

MS BANKS: Sorry, can I just make one additional point? They only agreed to compromise their application, in part on the basis that we would say that we would invite the Tribunal to disapply the collateral use restriction in relation to these documents. That's how it's --

THE CHAIR: Yes. Okay. Well, thank you for that.

In terms of where we go from here, I think we would like to give you a ruling on some issues that we can give you a ruling on today. I certainly need to hear from the parties on wider ROC costs. Can I suggest that we do this: that we the Tribunal rise for ten minutes and talk about those case management issues on which we feel we can give you a ruling today and give you -- probably not with full reasons, but an outline of what we're going to do. And then we come back and take it from there and perhaps hear on wider costs.

(3.51 pm)

(A short break)

(4.07 pm)

THE CHAIR: Right, I'm afraid that as we rather envisaged, time has been tight today. There are, though, some issues on which we feel we can give you an indication -- or give you a decision today.

(4.07 pm)

Judgment 3 - Disclosure of EDQs and disclosure reports from the Direct

Purchaser Proceedings (DPPs)

THE CHAIR: Our judgment is that these should be disclosed. We give the parties some latitude to agree a reasonable timescale for disclosure. It seems to us that this is a short, self-contained set of documents. They have the capacity to be relevant and disclosing them will not be unduly burdensome on the Defendants.

We note the difference of opinion between the parties as to how useful these documents will actually be. However, they certainly have the capacity to be relevant and declining to order disclosure on the basis that they might not actually turn out to be helpful strikes us as the wrong approach. The documents may or may not turn out to be useful. However, in our judgment, the balance comes down in favour of ordering disclosure of this material.

Judgment 4 – Disclosure of Expert Reports and Witness Statements from the DPPs

THE CHAIR: A number of principled objections were made to the Class Representative's application for disclosure of this material. We are not persuaded by some of those principled objections. One of the Defendants' points is that there is a lot of expert material that will cost the Class Representative a lot to review. We found that unpersuasive. The expert material from the DPPs is potentially relevant and of use to the Class Representative. If she obtains the material it is a matter for her to decide how much by way of costs to incur in reviewing it. If she incurs costs that are unreasonable in amount or disproportionate then she will not recover her costs should her claim succeed. However, the possibility that she might incur excessive costs does not strike us as a good reason to decline to order disclosure of potentially relevant material.

Nor are we persuaded by the Defendants' point that the DPP expert reports should

not be disclosed, because the experts in this case need to reach their own view. We do see some possibility for the expert material from the DPPs to help with the process of producing expert reports in this case. We acknowledge the point that the expert reports in this case might follow a familiar course and take the form of some kind of “before/after” comparison (whether on a “group to group” or “individual to group”) basis, potentially involving regression analyses. However, we still see some potential for sight of the material to save the Class Representative’s experts costs simply because of the insight it might give as to how other experts have approached similar problems in the past.

That said, we are not entirely persuaded of the analogy with academic papers. As I have explained, we see some possibility that the expert material might provide a shortcut. However, we are not yet in a position to tell how strong that possibility is. It is possible that the shortcuts offered are modest and disclosure of the material has unwelcome effects in opening up an undesirable avenue of enquiry as to how the Defendants’ economic experts’ position now can or should be reconciled with positions taken in the DPPs. Overall, we consider that the strength or otherwise of the prospects of costs savings from shortcuts remains to be assessed and cannot properly be assessed until the Class Representative has had the opportunity to review the “off the shelf” disclosure. That disclosure will include notes given by both Prysmian and NKT’s experts in the DPPs which may give a good insight into their respective approaches.

So we see a plausible, but not determinative, case for the material to be disclosed. If there were no issues about collateral use then we might simply have determined that issue as best we can today. However, in our judgment, collateral use is a real concern and we have no workable proposals today as to how we can deal with that issue. We do not even know whether collateral use is something the Tribunal alone

can sanction or whether some court orders would be needed as well. We do not see how, in circumstances today, we can fairly order disclosure of either DPP expert reports or witness statements.

The parties will have to work together to see how this issue can be taken forward. It may be that disclosure of redacted reports/witness statements or a non-confidential version of these reports/witness statements in the first instance might be a sensible way forward. That has already happened with material from the London Array trial and no-one seemed to think that gave rise to any problems with collateral use.

It might be that, to the extent that does not unlock the door, the parties will want to make a coordinated approach to the Defendants' litigation opponents in the DPPs and seek permission of the High Court and the CAT, as needs be, for collateral use of material that is referred to in expert reports or witness statements. Indeed the Defendants seem amenable, for their part, to disclosing witness statements in the DPPs and go further suggesting that the claimants' witness statements could be disclosed as well.

So we are not going to make today any order for disclosure. We are prepared to give permission to the Defendants, to the extent it is in the CAT's gift rather than the High Court's gift, to review material for the purpose of engaging with the Class Representative on the request for disclosure and to review the material with a view to engaging with litigation opponents in the DPPs, for the purpose of formulating a workable way through. We will give that permission to help oil the wheels on this issue. For completeness, we will give the same permission (again to the extent only that the CAT has the power to give it) in relation to the tender evaluation reports that were discussed briefly towards the end of oral submissions.

However, given that we do see the issue of collateral use as a difficult and complicated issue, we are not in a position today to make any disclosure order that

goes any further than that.

Judgment 5- The Valuation of Commerce Spreadsheet

THE CHAIR: We will allow the parties latitude to agree the relevant deadline, but we consider that the Defendants should use reasonable endeavours to populate the VoC spreadsheet within a particular period. It seems to us that that information is useful and relevant. It is readily at the hands of the Defendants and much less readily at the hand of the Class Representative, such that it is proportionate to require the Defendants to go first. We did notice that one of the columns in the spreadsheet is a requirement that the Defendants provide a list of all disclosure documents that substantiate the information they have given. It struck us that that is quite onerous at this stage. We will leave it open to the Defendants to decline to do that exercise of "marrying up" information with documents, if they consider that that is unduly onerous for them to do so.

Judgment 6 – Subsequent CMC and more general case management

THE CHAIR: On the question of whether there should be multiple or single experts, we regard this as a quite difficult issue. We would like to think about it and we are going to give a reserved judgment on that point.

The parties agree, and so do we, that there should be a further CMC in June or July. It is already clear that disclosure will feature heavily at that CMC. Within a period to be agreed between the parties, the Class Representative should give an indication of the third-party disclosure that she presently intends to seek. If she does not mention a particular item of disclosure when doing so, she is not forever precluded from seeking it. However, we consider that the defendants are entitled to know what is on the horizon on third party disclosure.

Well in advance of the next CMC the Class Representative should provide an indication of the additional areas on which she is seeking further disclosure from the Defendants, so that work at the next CMC can be as focused as possible.

We are not minded to fix a trial date at the moment. We certainly do want this case to proceed expeditiously. We see the force of the point that it has going on for a long time, and the infringement was a long time ago. However, with the best will in the world, we see just too many imponderables, particularly on the issue of disclosure, at the date of today's hearing, to put a trial in the timetable. Indeed, we are not even sure that seven or eight weeks is necessarily the right length, again because of the imponderables on disclosure.

(4.15 pm)

THE CHAIR: I think those are the issues. Can someone tell me if we have missed any item of case management out? I'm afraid we have to be out of this courtroom, we're told, by 4.30, because of the silk ceremony. Have I missed anything out, Mr Rothschild?

MR ROTHSCHILD: Industry expert?

THE CHAIR: Oh, thank you. Yes, the industry expert. We do have something to say on that.

(4.15 pm)

Judgment 7 – Expert evidence from an "industry expert"

THE CHAIR: Mr Druce sent a letter to the Tribunal on 27 February 2026 that explained why he wanted assistance from an industry expert. Very broadly, he considers he needs information on pricing practices of direct purchasers and of electricity suppliers. Mr Druce would use information on what those pricing practices

were to inform his opinion on the issue of pass-on.

We took all parties to agree that this is relevant evidence. The issue is whether it should be permitted as expert evidence or whether it should be given as factual evidence.

If the Class Representative considers that evidence of this kind needs to be given as expert evidence (for example so that a single expert can speak to his or her opinions as to practice in the market generally without being limited evidence based on first-hand knowledge of a particular electricity supplier), we are prepared to give her permission for such expert evidence. It may be, on reflection, that the Class Representative considers that the evidence can be given by a factual witness only, in which case she is free to take that course instead. We are not, however, prepared to give permission at this stage for an industry expert to go on and provide opinion evidence on what I think I referred to as "the punchline" during discussions with counsel, namely the question of whether, given those pricing practices, pass on could be expected. We do not see any utility in that kind of opinion evidence but, as we have explained, we do see some utility in a single witness giving evidence on what the pricing practices actually were, so that the economic experts can use it to inform their own analysis of pass on.

(4.16 pm)

THE CHAIR: Anything else?

MS BANKS: Just one other thing, and that's the tender evaluation.

Tender evaluation (continued)

THE CHAIR: Oh yes, the tender evaluation reports. I think the parties are going to have to discuss that between themselves. They're going to be discussing other

issues, and given that I don't think we're going to make an order on that today, particularly given that a request was made that we impose cost consequences on someone.

MS BANKS: All we'd ask is if the collateral use exemption could be lifted to allow us to communicate --

THE CHAIR: I see.

I don't see why we shouldn't, to the extent we've got permission to lift the collateral use restrictions so that they can at least consider the issue. I think that's the request, isn't it?

MS BANKS: Yes.

THE CHAIR: Yes. I mean, we've done that in relation to the other DPP witness, so we'll do that for the tender reports as well, to the extent the CAT has power, the drafting point I think I made to you.

Industry expert (continued)

Submissions by MR LUCKHURST

MR LUCKHURST: I'm very sorry to (inaudible) on the industry point.

THE CHAIR: Yes.

MR LUCKHURST: Just, it may be helpful to avoid further disputes down the line just to really have clarity on that which is, is it essentially factual evidence, rather than expert opinion evidence, which the Tribunal is (overspeaking).

THE CHAIR: I think we were minded for it to go -- I think one of the points the Class Representative made is, if it's limited to factual evidence, then the witness would need to speak from his or her own knowledge of a particular supplier's practices. We are prepared to obtain evidence as to what the practices were, perhaps even in the opinion of a particular expert. So, the witness in question does not need to have

worked at a particular supplier, for example, to give that evidence. They can give evidence as to, in their opinion, what were the pricing practices generally prevailing of electricity suppliers generally. So that the Tribunal has some corpus of information as to what the practices were. I think that's what we had in mind. You seem resistant to that or are you not sure how it would work?

MR LUCKHURST: Slightly the latter, sir.

THE CHAIR: Yes.

MR LUCKHURST: You didn't hear submissions from me on that point and I suppose it needs then to be -- if it's going to be factual evidence but, in a sense, from a consultant who's a little removed from an individual supplier, I think the Defendants need to be at liberty to challenge that in the sense of, you haven't actually particularised the factual basis for this if you haven't said, "I've had a conversation with supplier X and I understand, on that basis, they do Y". Then we may say it doesn't carry that much weight as factual evidence. That may be where we get to.

THE CHAIR: I mean, and it might be that, on reflection, the Class Representative chooses to get factual evidence from people who worked in the industry or rely on published third-party material. I mean, of course, if you say that the evidence doesn't prove what it says it proves, of course it's going to be open to you to challenge it and say it's not good enough. Our thinking on giving this kind of evidence is simply so that there is material in front of the Tribunal that sets out what those practices actually were and that's the limited scope of the permission we're giving, and it may be that, on reflection, it's not expert evidence at all and it's given in another format. But I hope we've given the flavour of the scope of the evidence.

MR LUCKHURST: I'm grateful.

THE CHAIR: Anything else? I'm ever so sorry. As perhaps I did anticipate, I was concerned about whether we would get to wider ROC costs.

I know Mr Marven -- I hope you haven't been sitting here all day for wider ROC costs, Mr Marven. Maybe you have.

MR MARVEN: I learned a great deal, sir.

Wider ROC Costs

THE CHAIR: Well, that's good. I hope I have as well.

I have full skeleton arguments. We're giving you a reserve judgment anyway on experts. Is there anything more? I mean, both sides have canvassed the matter in their skeletons. I mean, it does seem to me -- well, maybe I can just play back one or two questions to the parties and they can help me with this.

I was shown some authorities which suggest that the courts, at least, have got power to make orders like this. It does seem that the basis for the request is that the Class Representative is now amending. She's amending to withdraw assertions that she has previously made and the point made is that, in those circumstances, the Defendants should have some of their costs of dealing with those assertions to date. I use the word "assertions" deliberately because I know the case law talks about abandoning a cause of action and that kind of thing. It does seem to me that the courts have taken different approaches on that. I've been shown different authorities on the issue, which I've noted. In particular, *Packer v Packer*, which has got some similarities.

But perhaps I could just ask the parties for brief submissions on this point. It does seem to me that the Class Representative is not abandoning a course of action. Is that agreed or is that not agreed? I, myself, was not sure that I got much assistance from the *Merck* case, which was the case where a litigant asked for a preliminary issue and Mr Justice Nugee, as he then was, made an order that costs should follow the event and the person who was on the losing side of the preliminary issue said it

should all be deferred until trial. I'm not sure that gives me much guidance on what to do in the situation that is currently before me. So what I'm proposing to do is to: consider *Packer v Packer* and just consider the circumstances in which the amendments were made; consider the difficulty, or otherwise, of making the order; and apply those principles. But what should I do? Mr Marven, what should I do?

Submissions by MR MARVEN

MR MARVEN: Sir, certainly I can rely on *Packer v Packer* and I think that's the case where the word "abandoned" was used. It was a technical amendment, it was an abandoned allegation of fraud. So I do say the analysis there is helpful and it's not all in one direction. There are judges taking --

THE CHAIR: I saw that.

MR MARVEN: -- on different facts. But the ultimate conclusion, which I would commend, is that it's a rare case and you've really got to be sure that the trial judge, at the end of the day, might not do something different. That's how I would put it in a nutshell.

The reason for putting *Merck* in was simply to say there are recognised exceptions to the general principle, you wait till the end. A preliminary issue trial is one of them, but that's a trial where the court has heard the issues and the costs in question are going to be relatively easy to identify. There's going to be an order for the trial. There's going to be preparation for the trial. There may be some boundary disputes before the costs judge, but they're relatively straightforward.

THE CHAIR: Yes.

MR MARVEN: If I just have one minute, the point I would emphasise is the breadth of what's being asked for and the wholly unresolved issue of what do you do with common costs? If someone says, well, we had a conference that was on ROO 09, 10, and 13, and the pleadings were on that. An issues-based order at this

stage -- I mean, firstly, simply saying it's the costs of the abandoned issues. That potentially means that some common costs, which is to say costs that would have been incurred in full in any event, will be apportioned to those issues. And that's not fair. If an order at this stage is to be made, it should be -- against my primary position -- costs exclusively attributable to the abandoned issues.

But the breadth of what's being sought here is -- what's now sought is not 41 per cent. What's now sought is an issues-based order and we see that in the draft order. But if one looks at the schedules, what is being sought is going back from the beginning, and it's clear in the case of all three Defendants, they're going back to 2022. If you look at their statements, they include the costs pre-certification. They include the costs of the abandoned reverse summary judgment, so strike-out application. It simply isn't appropriate for those costs to be -- and they will say to the costs judge, "Well, that was costs incurred in respect of 09 and 10 and that it was relevant to that and that's the order that the Tribunal has made".

THE CHAIR: Yes.

MR MARVEN: I do stress it includes all those things. It includes certification. They're all going back to the beginning of proceedings in 2022.

One, it's not fair in principle. Two, it will be a nightmare for the costs judge because, on every item, there's going to be an argument. "Well, you'd have had this conference anyway. Half of it was to do with 9", et cetera, et cetera. But so --

THE CHAIR: One, I think, question that I should ask you is do you accept that the Tribunal has power to make --

MR MARVEN: (Overspeaking) We've never said you haven't. I accept you have jurisdiction, you have a broad jurisdiction under Rule 104.

THE CHAIR: Okay, and another point I think you made, which I've noted down, is that, ordinarily, one's able to look at all of the conduct of the parties, including,

without prejudice --

MR MARVEN: Yes.

THE CHAIR: -- correspondence, and I don't have that here.

MR MARVEN: Precisely. At the end of it, you should be able to take a proportionate which you can't do now. Indeed, it's not now pursued as a proportionate application. It's obviously a non sequitur to say, well, it's 41 per cent of the value of the claim, ergo it's 41 per cent of the costs.

THE CHAIR: I should give someone 3 minutes because we really do need to set up for the silk ceremony.

Submissions by MS BANKS

MS BANKS: Sir, there's an awful lot in this and I would ask that this be deferred to the next CMC because I just can't do it justice in 3 minutes, and we take issue with a lot of what's just been said. You did previously indicate in your judgment that you didn't feel you had exactly (overspeaking) to determine this issue.

THE CHAIR: Well, I didn't. I didn't, but I've had much fuller submissions now. What do you feel is missing from the submissions that I've got? Everyone seemed very happy for me to make a determination on costs on the basis of seven lever arch files of material that somehow appeared in my office. I don't quite understand why --

MS BANKS: (Overspeaking) points that have been taken just now, I'd like to be able to properly address them. I just don't know whether I can --

THE CHAIR: But they're in Mr Marven's skeleton argument.

MS BANKS: But we do take issue with them, sir.

THE CHAIR: Right.

MS BANKS: So, in relation to *Packer v Packer*, loss of the essence of the cause of action would be statutory duty claim and a whole aspect of the claim has now gone. What *Packer* doesn't deal with is a judgment which has the immediate consequence

of the claim fails. Can we just quickly turn up *Packer*? At paragraph 29 at page 246, this is tab 16 of the authorities bundle. If the Tribunal could just read from, "In my judgment", please.

THE CHAIR: Sorry, what page?

MS BANKS: Sorry, 246 from, "In my judgment" down to the end of the paragraph.

THE CHAIR: What paragraph?

MS BANKS: Sorry, 29. Page 246.

THE CHAIR: Right.

MS BANKS: We say the substance of the claim does not remain the same because an entire branch has been lost --

THE CHAIR: Right, okay.

MS BANKS: -- and that's not ever going to be resurrected. So at the end of these proceedings, the Tribunal is going to be in no better position to determine this tranche of costs.

THE CHAIR: Right.

MS BANKS: We do say that the overlap between 2009 and 2010 and 2013, on the other hand, has been really exaggerated. 2013 wasn't even part of the claim until the amendments made on 3 October 2023, following Druce 2 in August. Each banding decision was a freestanding decision and, therefore, each decision necessitates a separate analysis as to whether the overcharge was too small to have an impact on the banding decision.

THE CHAIR: Okay, right. I'm afraid we have to get out of this court so that the silk ceremony can take place. I mean, what do you say -- if it did have to be deferred to the next CMC, which is the request that's being articulated, very briefly what do you say about that request.

MR MARVEN: (Inaudible) the end of the trial?

THE CHAIR: Yes. Maybe.

MR MARVEN: I (inaudible) in a position. (Pause)

We're in the Tribunal's hands. If the Tribunal felt it was necessary, so be it. But it's not a course that we would encourage.

THE CHAIR: Yes. Okay, I understand that. There is a danger of making decisions quickly, sometimes are imperfect decisions. So let me reflect on your point that it can't be dealt with fairly today and I will give the parties an indication shortly about whether it's going to be the subject of a reserved judgment or perhaps come back. Thank you very much to everyone for their submissions today.

(4.32 pm)

(The hearing adjourned)

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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?