IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1440/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 13th July 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

Gerard Rothschild and Jamie Farmer (Instructed by Scott & Scott) on behalf of Clare Mary Joan Spottiswoode CBE

Alexander Hutton KC (Instructed by Hausfeld) on behalf of London Array Limited & Others

Tony Singla KC & Tom Watret (Instructed by White & Case) on behalf of Nexans

Helen Davies KC & Fiona Banks (Instructed by Macfarlanes) on behalf of Prysmian

Michael Armitage (Instructed by Addleshaw Goddard) on behalf of NKT

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Monday, 13 July 2026

(10.30 am)

Housekeeping

THE CHAIR: Right. Good morning. I think I'm supposed to start by reading out the rubric, so why don't I do that? Some of you are joining us by live stream on our website and 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 a contempt of court.

Good morning.

MR ROTHSCHILD: Good morning. May I start with some introductions?

THE CHAIR: Yes.

MR ROTHSCHILD: I'm Gerard Rothschild and I appear for the class representative, Ms Spottiswoode with Mr Farmer. This is primarily a CMC in the collective proceedings Ms Spottiswoode commenced. It's the third CMC in those proceedings since certification. There are three sets of defendants: the Nexans defendants are represented by Mr Singla, King's Counsel, and Mr Watret; the NKT defendants are represented by Mr Armitage; the Prysmian defendants are represented by Ms Davies, King's Counsel, and Ms Banks; and there is also an issue relating to the London Array proceedings for which Mr Hutton, King's Counsel, appears for the London Array claimants.

THE CHAIR: Yes.

MR ROTHSCHILD: You should have at least seven bundles, perhaps electronically: a core bundle; three supplemental bundles, a ROC bundle --

THE CHAIR: Let me just go through my electronic folder, make sure I've got them. So I've got a core bundle, a correspondence bundle, a first supplemental bundle, a second supplemental bundle, a third supplemental bundle -- which I think was a late addition to the proceedings on Friday -- a ROC issue costs bundle, a skeleton arguments bundle and an authorities bundle; is that your list?

MR ROTHSCHILD: It is indeed. There is a long list of issues set out in my skeleton argument, but I'm pleased to report that the issues have narrowed a little since skeletons were exchanged last Thursday. Specifically and firstly -- and this relates to the email we received from the tribunal this morning about the London Array part of today -- that issue, the issue involving London Array, has been resolved. So the issue of the timing of detailed assessment of the London Array claimant's costs -- that's the topic covered in section D of my skeleton argument -- has been resolved. The Parties have agreed to settle the cost liability, so there is now no need for detailed assessment.

THE CHAIR: Right. Okay. So that goes away. Was it worth £23,000?

MR ROTHSCHILD: A figure has been agreed.

Secondly, the class representative's application for summary assessment of the costs of the application for wider ROC costs. That was the topic covered in section E of my skeleton argument; the summary assessment of that application's costs. The parties have agreed to settle that cost liability, too, so there's no need for summary or indeed any assessment.

THE CHAIR: Okay. Well, thank you very much for that. That's welcome.

MR ROTHSCHILD: Thirdly, the small item of the request for SSE’s permission to disclose the draft amended particulars of claim from the SSE proceedings. That's a topic covered at the very end, section P, of my skeleton argument. That falls away because SSE have consented to disclosure, and that document was indeed disclosed last Friday.

THE CHAIR: Right. Well, that's good as well. Thank you very much.

MR ROTHSCHILD: In the sequence of my skeleton argument, those were the first two and the last of the issues for this hearing. I was going to propose that we address the remaining issues in the same sequence as in my skeleton argument, although I'm in the tribunal's hands if the tribunal would prefer a different sequence.

THE CHAIR: Well, let's think about that in a moment, but does what you've said mean that we can release London Array altogether?

MR ROTHSCHILD: Yes.

THE CHAIR: I think that's right, isn't it?

MR HUTTON: Yes, judge. Thank you very much, judge.

THE CHAIR: Thank you very much for coming today.

That then leaves us with just an ordinary case management hearing on the Spottiswoode proceedings.

MR ROTHSCHILD: Indeed.

THE CHAIR: You were proposing to deal with it by starting with, what, disclosure? How are you going to deal with it?

MR ROTHSCHILD: Well, I'm going to suggest the order of my skeleton argument --

THE CHAIR: Which is ...

MR ROTHSCHILD: Which is page -- it's in the skeleton bundle, tab 6, page 89.

THE CHAIR: I've got it loose. Right. Yes.

MR ROTHSCHILD: The issues on pages 94 and 95 have gone away, and therefore, 96, extension of time for the VoC --

Discussion regarding timetable

THE CHAIR: Maybe we should start there. In terms of timing, how long does everyone think -- we're listed for today, and I think we've got an overspill day tomorrow.

MR ROTHSCHILD: I think the parties are optimistic of finishing well within today. I mean, there was a suggestion from the defendants that the disclosure applications might take two hours. I would suggest they could be a bit quicker than that.

THE CHAIR: Okay.

MR ROTHSCHILD: But there was a rough allocation discussed in an email over the weekend, which suggested, with a fair wind, we could finish within the day, even if the London Array issue had taken up half an hour.

THE CHAIR: Yes. Okay. Well, let's go for that. It might be that sometimes judges need to think about things. It might be that I give an oral judgment not today; it might be that I suggest an oral judgment tomorrow, but let's see how we go. I think we should definitely be seeking to finish the oral submissions today. Does that cause angst and consternation on any side?

Submissions by MS DAVIES

MS DAVIES: As my learned friend indicated, we provided a timetable to try and achieve that, which unfortunately didn't get progressed over the weekend because my learned friend didn't wish to engage with it. But we definitely think that we can finish things during the day.

THE CHAIR: Right. Okay, well, let's do that. We're going to come on to wider case management afterwards, but can I just say this? I am concerned about the costs that are being spent on all sides in these proceedings. I'm certainly not in a position to point fingers at anyone. I'm not going to do so. But what I'm concerned about generally is that on one side, on the class representative’s side, we have a litigation funder whose return comes as a multiple of costs incurred.

Now, that is not an obvious disincentive to keep costs to a minimum. I'm not saying anything more than that, but I worry about the incentive on that side. I worry about what strikes me as a huge amount of money that is said to have been spent to date by the defendants. It seems to me to be a large sum of money when we're still a long way away from trial. So I am going to want to ensure, when I'm making case management decisions on disclosure or thinking about timetable, that this litigation is being conducted in a proportionate way, and that the usual incentives for settlement between the parties remain present.

It would be unfortunate, indeed, if the case management of these proceedings, or indeed the way they're being funded, meant that the usual dynamics that should be present for settlement are being warped or skewed. Now, I don't immediately know how to achieve that, but all parties should be aware that I am concerned about this issue.

MS DAVIES: Well, that is all, with respect, totally understood. And the need to keep orders that are made, and requests that are made by the class representative against the defendants for information and disclosure -- the need to keep that proportionate and strictly confined to that which is necessary, is driving a lot of the defendants' position before the tribunal today.

THE CHAIR: I'm sure Mr Rothschild won't accept that, but we will hear back from him.

MS DAVIES: I need to explain by way of background, we are, of course, looking at material that is incredibly historic. The cartel dates back to 1999 to 2009, as found by the European Commission. We're not only looking at historic information which is difficult to extract from historic databases, but we're looking at information in relation to a vast array of projects, because of the nature of the class representative's case covering all supplies within the scope of the Commission decision in Great Britain between 1999 and 2009.

THE CHAIR: Yes.

MS DAVIES: Those factors inevitably mean that this claim is going to involve a considerable degree of expense on the defendants' part. But what we are concerned to do is to make sure that the tram lines of the exercise, if I can put it that way -- the parameters of the exercise -- are properly confined to that which is necessary.

The reason I've stood up is because on the basis of my learned friend’s schedule, the first item on the list is the extension of time in relation to the VoC Excels, and the VoC Excels themselves, in fact, demonstrate some of the complexities of the exercise and the reason why, inevitably, there are going to be significant costs incurred by the defendants if we are being asked to provide the sort of granular detail which the class representative at the moment is suggesting we should.

Now, to explain the background to that a little further, sir. For Prysmian -- and I'm just speaking for my clients, Prysmian -- in total, there are 273 separate suppliers in relation to which information is being provided in the VoC Excels.

THE CHAIR: For Prysmian, 273?

MS DAVIES: For Prysmian alone, 273, of which 95 underground and 13 submarine supplies are supplies that have previously been the subject of what we're describing as "the DPP", so the Direct Purchaser Proceedings.

THE CHAIR: Yes.

MS DAVIES: Then there is a further 165 underground supplies, which are completely new in the sense of not previously being the subject of the DPPs.

THE CHAIR: And am I right that the VoC Excel, this is just a -- this only goes to value of commerce. This is, as its name might suggest --

MS DAVIES: Well, with respect, no; it goes much further because of the nature of the exercise, which, rather than getting into debates about which columns we should fill in or not, we decided we should try to do it all. So the VoC Excel itself has 28 separate columns that, to the extent that we are able to do so, we are completing in relation to each of the 273 projects.

Now, some of those columns are relatively straightforward to fill in. For example, the type of cable: underground or submarine. But many are not so straightforward, for example: the length of cable supplied; the capacity design of the cable; the dates of the contract award; and I could go on.

The important point in relation to the question I just asked: the information required by the VoC Excel is significantly more extensive than the information that was sought for a similar purpose in the previous DPPs, and hence made its way into the value of commerce schedules that were produced in those proceedings. That's a point that Mr Day explains in paragraph 36 of his third statement. But to give the tribunal an illustration, the Scottish Power VoC schedule had just 11 columns, and the National Grid VoC schedule had 13. So we are already, by reason of the VoC Excel exercise, seeking to engage in providing more information to the class representative than was required for the purposes of the value of commerce calculations in the other proceedings.

THE CHAIR: But presumably that's in part because the Scottish power VoC schedule was concerned with a narrower category. No?

MS DAVIES: No, no, no. The columns are per project. So it was 13 or 11 columns for each project, and here we're doing 28 for each project. That leads to the point that even for those projects that have previously been considered in the DPPs, it is not a question of us just transposing information from the VoC schedules that were produced in the previous proceedings to the VoC Excel in these proceedings, we have to be interrogating the OTS disclosure to try and extract more information for that schedule than was previously the case.

Even in relation to the DPP projects there have also been difficulties and delays occasioned by the need to obtain consent from the claimants in the DPPs for use of the information that they provided in those proceedings. That information is of course of relevance both to the position as regards the VoC Excel, but also more generally as regards the class representative's other requests, that we'll come to later, for further disclosure from the DPPs.

But the difficulties that we've already experienced, even in relation to VoC schedules, are in our submission demonstrative of the very real issues that are created by the need to address the collateral use restrictions.

THE CHAIR: And the difference between the parties on this issue, the extension of time, is: you want an extension of time I think until 7 September, and the class representative wanted to give you until 31 July, is that a correct positioning of the debate?

MS DAVIES: Yes, that is. So that explains, in relation to the DPPs, why we haven't yet managed to populate all of the VoC Excels, although those Excels are substantially more complete for the DPP projects.

Then in addition there are, as I said, the 165 further supplies which are listed in the VoC Excels, but where we have to go back and interrogate historic financial systems. That's explained by Mr Day in his third witness statement, paragraphs 38 to 42. But just to summarise very briefly, the extraction process has essentially involved running three different sets of reports across historic financial systems together with manual analysis involving input from a number of different personnel across the UK business, including former employees. So we're in a position, because all this is so historic, where the staff aren't even there; we're having to go back to former employees.

It's not therefore just a straightforward exercise. I mean, it's a long, long way from a straightforward exercise of extracting information from one database within Prysmian somewhere and populating the VoC Excel. The complexities of the exercise for the additional projects are not helped by the fact, not only that they're historic, but also by the fact that many of those supplies are smaller in value or cable only supplies. So, for example, purchases of pre-manufactured cable that were in stock as opposed to large value specific named projects. So, finding the material in relation to them is that much harder because it's not a massive wind farm project.

Just to give you a comparison, it took six months in the National Grid proceedings for the claimants to populate the more limited VoC schedule. We have obviously done what we can -- used our reasonable endeavours -- to do what we can between the April order and June --

THE CHAIR: I understand that, but is that a like with like comparison, because presumably in the National Grid proceedings you didn't have off-the-shelf disclosure or other documents that you could kind of stand on or leverage off?

MS DAVIES: I'll be corrected if I'm misremembering, but the claimants produced the schedules by reference to their own disclosure and some of our disclosure. So we have been making reasonable efforts and I note that the class representative rightly doesn't suggest otherwise, and we've already given them a considerable volume of information that they can be getting on with. But the reality is we need more time to complete the exercise.

Mr Day's best estimate is that we require until 7 September, which is only in fact seven weeks away from today, including much of the vacation period where our ability to get instructions is inevitably going to be curtailed. My clients are in Italy. I possibly need to say no more than that, but August is a serious holiday month in Italy.

Although my learned friend suggests that we should be required to do it sooner, there is no reasoned basis identified for going behind Mr Day's estimate. There's an inexplicable attempt to make a comparison between Prysmian, and for that matter NKT's position, and that of Nexans. But Nexans only listed 14 underground projects and 13 submarine projects in their VoC Excel, so around 10 per cent of the number of projects listed by Prysmian. Totally unsurprisingly, they won't have faced the same difficulties that we have.

Although I would also add that, as we understand the position on the evidence, Nexans haven't been able to complete all the columns in the VoC Excel either for that smaller number of projects, which itself is demonstrative of the difficulties in extracting the sort of granular detail that the class representative is requesting.

The final point in relation to this is we've offered to provide the material on a rolling basis, so 7 September is a long-stop date. We would propose, for example, prioritising the completion of the VoC Excels covering the projects already the subject of the DPPs, which would give the class representative, as complete as it can be, a schedule for those projects first.

There we've got some further queries from Brattle. Of course, the tribunal will recall Brattle were not our expert, but following the April CMC are a new expert so far as Prysmian are concerned. So again, that's added to the complexities of this process.

But that's what we're proposing. We're proposing to do it as quickly as we can, 7 September as a long-stop date, but on a rolling basis, to the extent that there's sensible iterations to provide in the interim.

THE CHAIR: And the existing case management direction provides for you to populate the VoC or use reasonable endeavours to populate the VoC Excel. Then one month later the class representative responds to it.

MS DAVIES: Yes.

THE CHAIR: You've suggested a rolling program, but you're not expecting rolling responses.

MS DAVIES: I think that would be unpracticable (inaudible).

THE CHAIR: I think so too. So what you're suggesting is you'll do your best to give sort of ongoing rolling completion. You suggest EOT -- extension of time -- for the whole thing until 7 September, and then by one month after the class representative gets it, she responds with her response on the whole lot.

MS DAVIES: As I said, the VoC Excels are already substantially complete for the DPP projects where they've got the off the shelf disclosure, so it's not as if that's going to hold them up because they can get on with the review in relation to that, even if they don't have to provide us with the answer.

THE CHAIR: It's 165 that aren't in the off the shelf that are your substantial difficulty.

MS DAVIES: More difficult. Yes, where it's not substantially complete at the moment. Some information has already been provided in relation to those projects which we've taken from certain sources, but there are more investigations to be undertaken in relation to those.

THE CHAIR: Thank you very much.

MS DAVIES: Thank you.

THE CHAIR: Mr Rothschild. Oh yes, sorry, why don't I hear -- yes, that's a good idea.

Submissions by MR ARMITAGE

MR ARMITAGE: Ms Davies has made, I think, all of the general points I was going to make. We're in essentially the same position. We do have fewer projects overall. If you were to look at the VoC schedules you would see that. But the short point in relation to NKT -- this is covered in some detail in Mr Minards-Tonge's statement, paragraph 24, which is supplemental 1, tab 17, page 164 for your note:

"This exercise involves identifying relevant individuals within NKT's business who can assist with the factual enquiries. Given the passage of time, however, that has been difficult. Supplies in Great Britain were mostly, if not entirely, tendered for and priced by NKT Cables A/S in Denmark. People involved in that process for most, if not all, of those tenders have long since retired." [as read]

So we have similarly reached the considered view that we require longer. As with Prysmian, we say we have used reasonable endeavours and as the defendants put it in the relevant section of the skeleton argument, we have provided the majority of the information required in relation to the majority of the projects. So our position on a considered view is that we also need until 7 September; that's a realistic estimate of when we think we can complete this. We will, of course, provide the information sooner should we be able to do that. That's the same position. I can tell you more about the facts in relation to each project if that's helpful, but essentially we're in the same position.

THE CHAIR: No, I understand that. Thank you very much. Nexans are in a slightly different -- you've substantially done it, haven't you?

MR SINGLA: That's right, we've done it - paragraph 35.

THE CHAIR: Yes.

Yes, Mr Rothschild.

Submissions by MR ROTHSCHILD

MR ROTHSCHILD: Well, it is difficult for me to gainsay the accounts that have been given of how long it's going to take and we must be practical and reasonable. The offer to provide this on a rolling basis is gratefully received. It's not currently recorded in the consolidated draft order. If I could invite you just to look at how it is put in the consolidated draft order, which is in the skeletons bundle, tab nine, at the bottom of page 158, paragraph 8. The blue text is the defendants' text. It just says "To the extent possible by 7 September", whereas I thought I heard from my learned friend Ms Davies that 7 September will be the long-stop, and meanwhile we would receive on a rolling basis.

THE CHAIR: And you've already been receiving on a rolling basis, haven't you?

MR ROTHSCHILD: Well, we've received one batch --

THE CHAIR: You've received one roll --

MR ROTHSCHILD: -- by the current deadline. If I could just show the tribunal just one document, although it's all really past history, in the correspondence bundle, tab 3, page 17. Do you have it, sir?

THE CHAIR: I think so, yes.

MR ROTHSCHILD: Yes. That was the order from the last CMC, or the draft order from the last CMC, which was submitted to you for approval. The rival dates in paragraph 8 in coloured text were the class representative proposing that the VoC populated version would come by 18 May, and the defendants saying it would come by 23 June. We just got one version on 23 June and now they're asking for longer. But that's history.

If my learned friends have persuaded the tribunal that longer is needed, then --

THE CHAIR: Well, I think they have.

MR ROTHSCHILD: -- I can't contest that.

THE CHAIR: Okay. Well, why don't we then say give them the extension of time to 7 September. The offer to provide on a rolling basis has been given. I think that should be recorded in the order. A precise legal definition can be found of what that rolling basis is, but it's probably just an obligation to use rolling reasonable endeavours to populate it sort of in instalments or I mean -- that kind of thing.

MS DAVIES: Yes. (Inaudible) it needs to be accompanied by a statement of truth. So, we're not going to be doing it every time we find the answer to another box.

THE CHAIR: Yes, absolutely. Some sort of common sense, sensible instalment. So maybe the statement of truth can come right at the end, once everything has been provided.

MS DAVIES: That would make things easier from our perspective. Thank you.

THE CHAIR: Okay. Thank you very much.

MR ROTHSCHILD: I believe the next agenda item is variation of the order for expert evidence. That's an application by the defendants. This is page 97 --

THE CHAIR: Let me just find that in my notes; I'm afraid I put it in a slightly different order.

MR ROTHSCHILD: I apologise, but it is a fairly straightforward and largely unopposed application. Perhaps I'll -- while I'm on my feet -- just say, the defendants seek to vary the list of economic experts.

THE CHAIR: Yes.

MR ROTHSCHILD: We don't object, so long as the amended order specifies clearly that Dr Davis will cover issues two and three, so it doesn't leave scope for defendants to call a fourth expert. I don't believe that's controversial, but it looks as if Mr Armitage may be about to say subject to that --

THE CHAIR: Let me tell the parties what I've written in my notes. Without giving too much away, on this bit of my notes, I've written down two words: "not opposed". Is it opposed?

MR ROTHSCHILD: Sorry --

THE CHAIR: Sorry, it's not opposed, subject to the proviso.

MR ARMITAGE: Yes and that proviso is not opposed.

THE CHAIR: So I think when I put all the double negatives together, there's nothing for me to decide. --

MR ARMITAGE: (inaudible) That's completely accurate --

THE CHAIR: Okay.

MR ROTHSCHILD: -- we don't need to address you.

THE CHAIR: Okay, thank you. Well, that's good to know.

MR ROTHSCHILD: Thank you.

So we proceed to the topic of the class representative's application for disclosure.

THE CHAIR: Yes.

MR ROTHSCHILD: So first --

THE CHAIR: Sorry, I'm getting some strange on -- a strange pop-up has come up on my screen. (Pause)

How do I make this go away? (Pause)

Thank you. Yes, Mr Rothschild.

MR ROTHSCHILD: And the first part of that is the application for disclosure of materials from the direct purchaser proceedings.

THE CHAIR: Yes.

MR ROTHSCHILD: And there are four categories of documents which are in the defendants' possession from those direct purchaser proceedings, but which are subject -- at least in part -- to collateral use restrictions, which the class representative seeks. So they are: firstly, tender assessment documents; secondly, witness statements; thirdly, expert reports; and fourthly, data sets produced by the experts.

THE CHAIR: Sorry, can I just make sure I'm -- so this is disclosure of materials from the direct purchaser proceedings, and I thought what was being requested here was not so much an order -- right here, right now -- that material be disclosed, so much as a roadmap for the parties to sort of work out what is needed and when. Have I got that right?

MR ROTHSCHILD: Indeed.

MS DAVIES: Without disrespect, that's not quite right, because the class representative's proposal involves, as a next step, us approaching all the third parties for their consent to disclose these materials and so we will be suggesting to the tribunal that we need to grapple with the question, because that will involve further costs and there's a debate about who should incur those costs.

THE CHAIR: Yes, I know. I can see that.

MS DAVIES: We are suggesting the tribunal grapple with the question of whether actually it's necessary to even start down that route, in relation to these materials.

THE CHAIR: Okay. I hadn't apprehended that.

MS DAVIES: You wouldn't apprehend that from my learned friend's skeleton, because he appears to assume that we accept that these letters should be sent. But I would have hoped from our skeleton where we indicated we don't accept the necessity or proportionality of these classes, apart from the witness statements. Witness statements -- and the tender evaluation documents -- are in a different category. But it's the expert evidence really, that there's a debate about.

THE CHAIR: Okay. Well, then in that case, Mr Rothschild, perhaps you'll have to take it slightly more slowly than you were perhaps hoping to. So why don't you start again by telling me what you think these documents comprise.

MR ROTHSCHILD: Four categories.

THE CHAIR: Yes.

MR ROTHSCHILD: Maybe starting with the easiest.

THE CHAIR: Yes.

MR ROTHSCHILD: The first, tender assessment documents.

THE CHAIR: Yes.

MR ROTHSCHILD: Second, witness statements; the third, expert reports; and the fourth, data sets produced by the experts.

THE CHAIR: And here we're talking about only witness statements, expert reports and data sets disclosed by the defendants.

MR ROTHSCHILD: Produced by the defendants in those proceedings, subject to one point, which is -- well, subject two points.

The first is the defendants say that there may be information mixed up in those documents that derive from the claimants in those other proceedings and that raises the collateral use issue.

THE CHAIR: I remember that from last time.

MR ROTHSCHILD: And secondly, the defendants say in respect of witness statements that if the defendants' witness statements are to be disclosed, so should the claimants' witness statements.

THE CHAIR: Right. Okay. So that then will mean you’re definitely going to need to go to the claimants in the direct purchaser proceedings and say, "Can we have consent to disclose your witness statements in these proceedings?"

MR ROTHSCHILD: Indeed, but that's a proposal from the defendants.

THE CHAIR: Okay.

MR ROTHSCHILD: The defendants seem to be conceding the utility in the disclosure of witness statements, so long as both defendants’ and claimants' witness statements are disclosed and one can see that in the core bundle at tab 22, page 225. Do you have it, sir? Page 225. This is Mr Day's witness statement for Prysmian. Paragraph 44.1, witness statements E for Prysmian says:

"The defendants have always been willing to provide disclosure of certain witness statements provided the class representative agrees to a solution that does not breach the collateral use prohibitions. However, the Defendants remain of the view that it's important that not only the defendants' but also the claimants' statements (or some of them) are obtained." [as read]

THE CHAIR: Yes. (Pause)

MR ROTHSCHILD: Tender assessment documents are the first in my list: that seems to be unopposed by the defendants. But the other categories -- witness statements, expert reports and data sets -- seem to be opposed to varying degrees. And opposed by the defendants, the third parties' position, the position of the claimants in the direct purchaser proceedings, is not yet clear. So the position of those entitled to the collateral use restriction -- there has been some correspondence with them, but they haven't reached a settled landing.

THE CHAIR: Because they haven't been approached?

MR ROTHSCHILD: I believe they have been approached but they are awaiting a formal reasoned request, I think is a summary of the correspondence.

THE CHAIR: Right.

MR ROTHSCHILD: So --

MS DAVIES: I'm not sure that's quite accurate: we haven't approached them in relation to the expert evidence. We've approached them on specific documents so far. So we've approached them in relation to the tender evaluation documents. (Pause)

Oh, sorry, I need to be corrected. There was a blanket request at the last CMC and they said "no". They wanted us to go back on specific documents. We've approached them about the tender evaluation documents, but we haven't approached them about the other categories, pending the tribunal's decisions today. But the blanket request has been rejected.

THE CHAIR: Right, okay.

MR ROTHSCHILD: So regarding -- the short point is that this will be a shortcut to understanding the relevant information about the defendants' projects, which is scattered across a range of documents in the disclosure. These documents should not take long to read, but we would hope that they would potentially save significant time, because they're the output of work that was done in the direct purchaser proceedings, which related to the same supplies as are in issue in these proceedings.

Now, these proceedings are broader. They address not just the supplies from the direct purchaser proceedings, but even more. But they will, in my submission, be a shortcut to understanding the relevant information and thereby in the long run ought to save costs.

Specifically regarding the expert reports and data sets, Mr Druce, who is the class representative's instructed expert, has written two letters to the tribunal, which I hope you have seen, one for the purpose of this CMC and one for the last CMC.

THE CHAIR: Okay. I haven't re-read the one from last time.

MR ROTHSCHILD: Can I go to the key paragraphs?

THE CHAIR: Yes.

MR ROTHSCHILD: In the core bundle at tab 16, page 189. This is text within Mr Druce's latest note.

THE CHAIR: Yes.

MR ROTHSCHILD: So paragraphs 25 to 26. Perhaps I can ask you to read those two paragraphs. (Pause)

THE CHAIR: Yes.

MR ROTHSCHILD: And in 26, he refers back to his previous notes. That can be found in the first supplemental bundle, tab 19, page 181, paragraphs 19 and 20. Again, perhaps it would be easier just to invite you, sir, to read them. Page 181, paragraphs 19 and 20. (Pause)

THE CHAIR: Yes.

MR ROTHSCHILD: In light of those points, my submission is that we should be allowed a process which will involve inviting the -- we could call them third parties, the claimants in the direct purchaser proceedings, to tell the tribunal whether they object or not and that is really the only process that my client is asking for.

THE CHAIR: So you want -- if we go to the consolidated order, this is paragraphs --

MR ROTHSCHILD: Two through to four.

THE CHAIR: Two to four.

MR ROTHSCHILD: I should say with respect to paragraph 2, that is largely -- I think that's been completed now, actually. We have very relatively recently heard from the defendants with a list of the witness statements and expert reports, so we may not need that order.

Paragraph 3: the class representative can, in relatively short order of course, inform the defendants which items she considers to be of potential relevance. So the key is paragraph 4. (Pause)

THE CHAIR: So you're presented with -- if I can put it this way -- a menu. You then say what items you'd like to choose from the menu, and then you directly respond, write to the solicitors and ask for their consent.

MR ROTHSCHILD: And then we send the order to the kitchen, using the menu analogy.

THE CHAIR: And then you send the order to the kitchen and there's a debate about who should pay the costs, because the claimants in these proceedings -- they might say "Yes", they might say "No", but the one thing they're not probably going to say is "Yes, and we'll bear all the costs of this".

MR ROTHSCHILD: So in relation to the tender assessment documents, pragmatically and simply to speed things up, the class representative agreed to pay the reasonable costs of Scottish Power and National Grid, but without prejudice and without wishing to set any precedent.

THE CHAIR: Yes.

MR ROTHSCHILD: And the defendants arguably -- so seizing on that, are saying that "We have set a precedent". But look, ultimately, these costs can be expected to be part of the costs of the Spottiswoode proceedings and at the end of the case, if there's no agreement, the tribunal will have to rule as to who ultimately should bear these costs.

So the present dispute relates to who should pay the costs in the first instance. The defendants say the class representative should pay these third parties' costs, but in my submission, that is to mischaracterise this as if it were a request for third-party disclosure. It's not a request for third-party disclosure, and the usual rule for third-party or non-party disclosure -- as you'll be well aware, sir -- is that the third-party pays. But here, these are documents in the defendants' possession or control. They don't feel able to release them, because of the collateral use restriction, but we are really asking for disclosure of documents in the defendants' possession or control and ordinarily a disclosing party bears the cost of its own disclosure in the first instance.

Here, an additional point is it seems the defendants themselves actively want to disclose at least some of these documents. I took you, sir, to the passage of Mr Day's witness statement for Prysmian about the witness statements, in which he identified that Prysmian actively wants to disclose these witness statements, both defendants' and claimants'. So in circumstances where the class representative has, generously, already agreed to pay some of the costs, and the defendants actively want to disclose some of these documents, the appropriate position is that the disclosing party should pay the remainder of the costs in my submission. At least in the first instance, ultimately, these will be costs of the proceedings which will need to be dealt with at the very end of the proceedings as to who bears them, ultimately.

THE CHAIR: I mean --

MR ROTHSCHILD: We would imagine they're not significant.

THE CHAIR: What are we talking about? We're talking about the third party -- I mean, there'll be copying or scanning. No, it's not even copying or scanning; they've already been copied and scanned.

MR ROTHSCHILD: Perhaps. We will need to review files that go back a few years. One would hope these are not significant costs, but ...

THE CHAIR: Just help me with the costs that we are talking about. So a third party's approached for their consent -- so a claimant in the DPP is approached for consent -- that third party says, "We know the documents you're talking about because they're familiar". They might need to refresh their memory on the documents, but what they really need to do is have a look through the documents, consult with their lawyers, decide whether to say yes or no: is that the process?

MR ROTHSCHILD: That should be the process.

THE CHAIR: Right. Okay. Thank you.

Yes, Ms Davies.

Submissions by MS DAVIES

MS DAVIES: Although it's not actually entirely clear from the class representative's drafting -- because there isn't actually a next step after paragraph 4 -- the class representative appears to be proceeding on the basis that if we go through the process that they suggest for each of the four categories of documents, they will then be promptly disclosed by the defendants.

Now, so far as the tender evaluation documents are concerned, there is no issue. That has been agreed. And as my learned friend just indicated, the class representative has agreed to pay the costs of the parties, so that can be resolved.

For the witness statements, again, as my learned friend indicated, we agree that it would be sensible for the tribunal in these proceedings to have access to the witness statements. But it's not just the defendants' witness statements, because the claimants in each of these proceedings will have given, or did give, factual evidence about their procurement process -- the tender process. And, of course, the defendants can only give evidence about their own individual role in any tender process.

THE CHAIR: Right.

MS DAVIES: It is therefore important when one is considering the question of the effects of the cartel, as the tribunal may recall from London Array and BritNed, that you have a complete picture of the tender in relation to these projects. A number of them will have involved, for example, non-cartelists competing for the projects. Again, the defendants won't have the access to the information, because as a tenderer, they won't have had access to the information that the claimants have had.

There is also information about the nature of the project; to what extent did it involve infrastructure assets and so on, which may affect issues such as pass on. Those are the reasons why we say it's important that there is a full picture.

THE CHAIR: And is that common ground? Is it common --

MS DAVIES: It's not entirely clear to me, from my learned friend’s description, whether he accepts that or not.

THE CHAIR: Right.

MS DAVIES: I should make clear that it's not going to increase the work for the third parties, because the defendants' witness statements include references, inevitably -- because there were reply witness statements -- to the claimant's evidence.

So if we're going to the claimant third parties for their consent in relation to the defendants’ witness evidence, they're going to be having to look at it generally. So for that reason, we don't consider that it would increase the costs. It makes obvious sense to go once, and we should go now for all of the witness statements.

THE CHAIR: Right, okay. I mean, it sounds like I'm not being invited for my perspective on whether the claimants’ witness statements are important or not. Because, I mean, let me just air one point with you. I mean, on London Array it mattered very much how London Array's specific tender was conducted. I mean, that mattered a lot because we were looking at whether there was an overcharge for those specific power cables. But if you're asking yourself a more macro question, "What was the overcharge on all supplies of power cables in Great Britain in the relevant time?" Does it matter so much how a particular tender process was conducted?

MS DAVIES: It may not be such a macro question, because obviously some of these projects, for example, the submarine projects, are very big projects in and of themselves.

THE CHAIR: I see.

MS DAVIES: And those are the issues that are going to be developed as part of the expert evidence. I'm sure the class representative is going to want to be looking at it at a macro level, because that makes their case easier, but it's not entirely clear that that's where the defendants will want to be.

THE CHAIR: Thank you. Because you might be saying that there are particularly very, very big projects where it really, really matters how those particular projects were tendered for?

MS DAVIES: As, for example, BritNed. So a case decided by the tribunal, whether similarly in London Array, they looked at the tender process and decided, effectively --

THE CHAIR: Yes, but that of course was --

MS DAVIES: But the BritNed --

THE CHAIR: -- a direct purchaser proceeding.

MS DAVIES: It is, but the BritNed purchase is within the scope of the class representative's claim, as we understand it.

THE CHAIR: Okay.

MS DAVIES: I'm not trying to be difficult, I'm just saying it's not necessarily as straightforward as just looking -- it may well be that you need to take out particular projects. But also there are going to be issues, as I say, about what components of individual projects are potentially affected by overcharge or pass on, which the claimants' evidence is also going to be relevant to -- individual projects.

But that's leaving aside the question of the costs, and I'll come back to costs, if I may. The debate that we do wish to have before the tribunal today -- which is a follow on from the debate that happened in April -- is whether it is appropriate/necessary for the expert materials in the DPPs to be encompassed in this process as well.

As I say, it's not entirely clear from my learned friend's order, but the implication of his paragraph 4 is that if we write to the third parties in relation to the expert materials, if they consent, there will then be prompt disclosure.

THE CHAIR: Yes.

MS DAVIES: But in our submission, there is a prior question whether this category of materials should be required to be disclosed in these proceedings at all, which is the question that the tribunal in fact left open at the last CMC to be further considered in light of the class representative's review of the OTS disclosure.

I'm not sure, sir, whether you've had a chance to remind yourself of the relevant passage in the transcript. It's actually in the ROC bundle, tab 8 at page 267.

THE CHAIR: ROC issue costs bundle.

MS DAVIES: Tab 8, page 267. Starting at line 6, sir, you indicated that you saw “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're not entirely persuaded of the analogy with academic papers…, we see some possibility that the expert material might provide a shortcut”, but you were “not yet in a position to tell how strong that possibility is”.

"It's 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 the positions taken in the DPPs." [as read]

And overall, you considered that the strength or otherwise the prospects of cost savings from shortcuts remain to be assessed; could not properly be assessed until the class representative has had the opportunity to review the “off the shelf” disclosure, including the notes.

Now, it might have been expected, against that background, that the class representative would now be coming back to the tribunal saying something along the lines of, "We've reviewed the OTS disclosure", which as that passage in the transcript noted, includes the notes that the experts provided in relation to the data, "and for this reason or that reason, we can see that it would be helpful to have the expert data sets or the expert reports".

But that is not what has happened at all. Rather, the only additional material from the class representative in relation to this is the two paragraphs of Mr Druce's second letter, which I'll come back to in a moment. But importantly, those paragraphs have also clearly been written on a basis where it is clear that the class representative has only reviewed a fraction -- a portion of the off-the-shelf disclosure. And Mr Druce himself has only reviewed a very small fraction.

You can see that, sir, from Mr Druce's letter, if we go back to that. It's in the core bundle tab 16 at page 185, footnote 3. It's a long footnote, but what Mr Druce is explaining is that he has only reviewed around 1,300 documents in the off-the-shelf disclosure, which is over 40,000 documents in total. And what he's done, he says, is he's reviewed a sample of 1,000 documents for projects after the relevant period, and a sample of 300 documents provided for the pre-cartel period. So he doesn't actually seem himself to have reviewed any documents for the projects in the cartel period at all.

Then we're also told by Mr Hain-Cole -- and this is paragraph 18 of his second witness statement -- that Scott+Scott, and possibly some others in NERA, have reviewed 17,000 documents in the disclosure pool. So they've reviewed 40 per cent, roughly; Mr Druce himself, only about 3 per cent.

The application that is made by the class representative for the DPP expert materials is not in any way now made on the basis that, "We've reviewed even this part of the OTS disclosure, and we can see that it would be helpful to have the materials because of this reason or that reason". Nor is there any attempt to address the tribunal's concern, which we submit is a very valid one, that disclosure of this material could have unwelcome effects of giving rise to satellite disputes.

Now, if I can give the tribunal what we do have which is a step forward since the last hearing, is a sense of the extent of the materials that we're talking about here. We do have that because we have the letters that my learned friend acknowledged in relation to paragraph 2 of the order, that have now been provided by Prysmian and Nexans.

My client's list of expert reports and witnesses is in the correspondence bundle, tab 58, starting at page 204.

THE CHAIR: 204?

MS DAVIES: 204 is the letter, but the actual schedule starts at 206. (Pause)

Where we've listed out the expert reports filed on behalf of Prysmian in the DPPs, and you will see that in total, there are six separate expert reports, which amount to 755 pages of expert evidence. And NKT's list of expert reports and witnesses is in the second supplementary bundle, tab 8 at page 1107.

And to give you the headline, they list four expert reports comprising 698 pages. Of course, then one has to add to that the London Array expert evidence, which the class representative's --

THE CHAIR: Sorry, how many pages for experts?

MS DAVIES: Four experts, 698 pages. Those expert reports are separate from the data sets that were constructed by the respective experts in each of the DPPs for the purposes of the analysis that was in the report. So the experts take the underlying data, they decide which of it is appropriate to be used, which of it is sufficiently reliable, which of it doesn't look like it's got outliers, and so on and so forth, put it in a data set and then do their regression analysis, in broad terms.

The important point in relation to the data sets is that the data sets were not only specific to each of the separate DPPs, but they were also specific to the respective expert in the DPP. There wasn't a consolidated or common expert data set developed in any of the previous direct purchaser proceedings and nor have any of the data sets that were constructed by the individual experts ever been required to be disclosed in any subsequent direct purchaser proceeding. So the earlier data sets did not in any way inform any of the later data sets. That's explained by Mr Day in his fourth witness statement, paragraph 44.2.1. We say that is unsurprising because each individual expert will need to form their own view as to what parts of the underlying data it is appropriate for them to rely on for what purpose, which is what happened in the DPPs.

Now, I understand that this may not have been an issue that ultimately troubled the tribunal in the London Array proceedings, but the same was true in the London Array proceedings that the experts were working off the same disclosure, but the respective experts produced competing data sets.

THE CHAIR: I remember that. I think we commented on that in the judgment.

MS DAVIES: Well, so you know better than me. My understanding is that one expert's data set had 46 projects in it for contract data and 62 for outturn data, whereas the other had 28 projects for contract data and 33 for outturn data. So, really quite material differences with no doubt a variety of different explanations as to why that was the case -- why particular projects were in or out. The fact that there have never been any common data sets in the DPPs shows that these are points on which experts' views can differ and indeed differ materially.

Then the final point in relation to the data sets is that in the DPPs, unlike in light of the tribunal's ruling in these proceedings, the defendants were each entitled to instruct their own expert on overcharge. So it's not just a case even of one data set for the DPP claimant and one data set per DPP group of defendants. For some of the litigation, in particular the National Grid and Scottish Power litigation, there are competing data sets.

Now, without breaching the collateral use restriction, we have not been able to go back and verify the precise number. But what it means is that there are potentially nine competing data sets from the DPPs which have been analysed by the respective experts in their reports.

Given the fact that there are multiple competing data sets relating to data which was a subset in each of the DPPs to that which the experts are going to have in these proceedings, and given, as I've said, each expert is going to have to form their own views as to what data can be relied on and what cannot, it is, with respect to my learned friend, wholly unclear to us how the provision of multiple data sets could do anything other than lead to a totally unnecessary increase in costs.

Those costs comprise not only the costs of the respective parties in these proceedings reviewing the earlier data sets, but also the costs of engaging with the relevant third parties in relation to the collateral use issues. If I could just interject there, we know already from the correspondence that we're engaging with, with Scottish Power it may not be a simple yes or no from the third parties.

Scottish Power have responded to our request that we can use the VoC schedule in these proceedings from that case by providing us with a heavily redacted version. We've gone back and said, "Please, can you lift the redactions?" We haven't heard further. Inevitably, because it's their information, they are scrutinising these things with care.

I should make clear we know from the letters that are now before the tribunal, from both Prysmian and NKT in relation to their expert evidence, that this isn't a theoretical issue even as regards our expert reports. Each of those expert reports draws on -- its explained in the annex -- material that is subject to the collateral use restrictions. So the third-party claimants would be required, if we go down this route, to review all 755 pages of our evidence, or 698 pages of NKT's, plus all the data sets. One can expect that we will get yes, no, maybe, sometimes -- it's not a straightforward exercise.

Then, of course, that's before we even get to the inevitability that costs will be incurred on unnecessary satellite disputes about why one expert took one view as to which data could be relied on and which couldn't in each of the DPPs.

Now, against all that, if we go back to what Mr Druce has said in relation to the data sets, which is in the core bundle, tab 16, page 189, 25(b). As regards the data sets, his point seems to be that access to them would reduce the scope of data collection for experts as part of this claim, and that's the basis on which he seems to be saying that there will be a likely result in time and costs.

But in the context of where we are already in these proceedings, I'm afraid we find that really difficult to understand. The exp=erts in this case are already going to have the benefit of the VoC Excels and all the information they contain, which we have been busy extracting from the off the shelf disclosure, as the tribunal knows. Those VoC Excels include a requirement that the documents from which that information has been extracted are identified in the Excels, so they will know where we've got the information; from the 40,000 off the shelf disclosures. Those Excels cover both the cartel period and a three-year period thereafter, so a three-year comparator period.

As the tribunal knows, the class representative is also suggesting that this exercise should now be extended to cover other projects' specific data.

Now, I will come back to that because as you know we oppose that suggestion essentially on the basis that to the extent that any such additional information is now needed by Mr Druce, to the extent it's in the off the shelf disclosure, when they're reviewing the schedule they've already got they can add to that information in a more efficient way than requiring us to go back to the drawing board having already done the VoC Excel exercise.

But be that as it may, the overall point is that the parties in these proceedings -- they may be competing -- but they're proposing mechanics by which the necessary schedule can be populated by reference to the OTS data. You don't therefore need to look at potentially nine competing data sets for the purposes of the same exercise.

As for the expert reports themselves, as I've explained that's 1,453 pages across ten reports in total for Prysmian and NKT alone, and it's common ground that none of that actually comprises admissible evidence in these proceedings. There's no permission to adduce it so by definition it isn’t. The basis on which disclosure of any of it is said to be necessary hasn't moved on since the last CMC, notwithstanding what the tribunal said. All that Mr Druce says in paragraph 26 of his second letter is to refer back to what he said last time round, plus the additional point that the expert reports may additionally be useful to review and interpret the data sets I refer to above. I've dealt with the data sets and explain why that's not going to be of assistance or provide a shortcut.

In any event, we can also see from the list of the expert reports that issues as to which project data were generally included in the regression analysis were generally covered in separate appendices to the report. So it's not a reason to take the whole report in any event.

My learned friend took you back to paragraphs 19 and 20 of Mr Druce's first letter, but that wasn't sufficient to persuade the tribunal that the provision of this material would provide a sensible shortcut at the April CMC. In our submission, nothing has changed now which should lead to the conclusion that it is appropriate. To the contrary, the further information that we've got indicates that the suggestion that this is going to be a shortcut that saves costs is just not made out.

For the expert reports, just as with the data sets, the reality is that again this is a category of material where going down the route of disclosing it will just lead to unnecessary additional costs. The same three categories: costs of the parties in these proceedings in reviewing the earlier reports, third-party costs, and also unnecessary satellite disputes about why expert X took this view in relation to this project in Greater Gabbard as an example.

THE CHAIR: So you're asking me to head this off at the pass now?

MS DAVIES: Yes. Because even going to the third parties and asking them to engage in the process that my learned friend is suggesting, will -- and that's the last point I was going to come to -- engage costs of those third parties which are not insignificant given the extent of the expert evidence in the DPPs. As I say, a total of 1,500 pages nearly of expert evidence, plus multiple data sets. So whoever's going to pay those, that's going to add to the cost bill in these proceedings in circumstances where we understand what the tribunal said at the outset. As I say, there's no point doing it at all if this material isn't then going to be disclosed into these proceedings, which is the implication of my learned friend's order, although it's not expressly spelled out.

THE CHAIR: I suppose, a concern that I have with heading this off at the pass now, as you invite me to, is that Mr Druce -- taking your point that he hasn't reviewed all the documents -- still says "I haven't reviewed all the documents, but I can see some upside in having cited this material"; is there a statement from the defendants' experts that says, actually "No, this will bring nothing at all to the party, come what may"?

MS DAVIES: We don't have a statement from Brattle. This has all been rather fast moving in recent weeks but, no, we don't have it. But Mr Druce's letter was written on 24 June before the evidence was served by Mr Day explaining that there isn't a common data set. So Mr Druce's letter wasn't written in the knowledge that there are potentially nine different data sets, and it wasn't written in the knowledge of this extent of the expert evidence that we had in the other proceedings. So he doesn't know that it's 1,453 pages across ten reports, for example.

Of course, sir, as with every case management decision, if the class representative subsequently comes back with a properly reasoned request addressing the sorts of issues that the tribunal identified at the last CMC should be addressed by reference to the OTS disclosure. This is why it would help us to have this, or this is why --

THE CHAIR: Yes.

MS DAVIES: I'm not suggesting that this is a one shot, no one can come back, I'm simply suggesting that looking at the material today, looking at the scale of what we've got on one side of the scales and the absence of any engagement with the OTS disclosure yet by Mr Druce himself -- and I'm not criticising him for this because of the timing -- or with the additional information we've now given in relation to the expert materials, now is not the day to say, "Yes, okay, this is all coming in".

THE CHAIR: Yes, I understand that, but if we do that then the nightmare scenario is that Mr Druce does, having reviewed all 40,000 documents in the OTS disclosure --

MS DAVIES: And the VoC Excels, by the way, which he hasn't reviewed either because they came in the day before.

THE CHAIR: The risk with heading it off at the pass now is that Mr Druce does -- after he's reviewed all relevant material, if I can put it that way -- come back with a clear and cogent explanation of why he needs the expert reports that deals with all of your concerns. Now, I'm sure you don't accept that's a likely outcome, but it must be a possible outcome. If we haven't approached the third parties by that stage, then we're approaching them much later in the process and --

MS DAVIES: Sir, I could see the sense of that if it wasn't for the cost issue which is attached to that, and the costs of those third parties are not going to be insubstantial because of the extent of the expert evidence. My learned friend suggested, "Oh, it's dusting some files off the shelf that have been there for a couple of years"; that's just not right.

The National Grid v Scottish Power case settled in 2020, so it's over six years ago.

THE CHAIR: Yes.

MS DAVIES: No one -- with the best will in the world, this is not material that is readily rememberable by anyone, if I can put it that way. No one is going to be able to do a review without actually going back quite carefully. They're going to have to engage with their clients.

THE CHAIR: Yes, I see.

MS DAVIES: It's just not a sort of de minimis exercise and in circumstances where -- sir, in our submission, quite rightly, at the previous CMC, you weren't persuaded -- and you wanted to be persuaded -- on whether or not this was relevant by reference to the OTS disclosure. The real problem is: we haven't moved on from that from the class representative's perspective.

THE CHAIR: Yes, I see.

MS DAVIES: As regards who bears the cost, obviously I completely acknowledge that this is an issue as to who bears them in the first instance; there will be recoverable costs if we go down this route in due course. Our short point is: as it is the class representative who is in effect requiring the exercise to be undertaken by the third parties, it should be the class representative in the first instance who bears the costs of it.

Now, I appreciate that is a point that I can make with particular force in relation to the expert evidence where we say this is completely unnecessary. But even as regards the witness statements, it's the class representative who is bringing the claim. She is requiring this exercise, therefore, to be undertaken. These documents are not actually within our control, in the sense of readily disclosable by us, because of the collateral use issues and that needs to be grappled with because of the class representative's claim.

THE CHAIR: If the class representative wasn't asking for the witness statements from the claimants in the DPPs, sounds like you would be wanting to put them in anyway, from what we saw of that witness statement. Sorry, I can't remember whose witness statement it was.

MS DAVIES: We want the claimants' witness statements because they're asking for the defendants' witness statements. We can see that there could be some utility to the tribunal having the witness statements; I accept that. But nonetheless, the broader point I'm making is the need to go to the third parties and engage in this process arises because it's the class representative who's bringing the claim and we are -- we're not asking them to bear our costs of this exercise, we're bearing our own costs of engaging in the correspondence which is already building up. As I explained, in relation to Scottish Power, we're having to go backwards and forwards just in relation to one schedule. So we're not asking for our costs of dealing with it, we're only here talking about who should pay the third-party costs at this stage.

THE CHAIR: Yes. Okay.

MS DAVIES: Unless I can assist further.

THE CHAIR: Mr Rothschild.

Submissions by MR ROTHSCHILD

MR ROTHSCHILD: The reason we're making this application is because we seek a shortcut. So you came in to the hearing this morning commenting on the costs of these proceedings. And I assume from that that you have looked at the costs budgets, which for the expert report phase are huge. They're at the back of the core bundle. The class representative’s -- just for the reports phase, the class representative's budget is at page 278. The expert reports phase will total about £1.7 million.

But then when one looks at the defendants’ budgets, just NKT's budget first, that's a relatively small one, page 288, that figure is £4.2 million; Prysmian's budget, that's page 296, that's a further £3.2 million; and then Nexans' budget, page 304, is a further £3.425 million. These are very large figures and we are seeking a way to shortcut some of these costs.

Now, maybe the defendants maintain -- even when their experts are allowed to see these data sets and reports -- that their experts don't need to read them. But the class representative's expert thinks it is a potential shortcut and a way of saving costs.

Now, my learned friend Ms Davies referred to the transcript of the last CMC and to what's labelled "Judgment 4", so this is back in the ROC bundle. She referred to, I believe, page 267, but if one could start a little earlier at page 266, under the heading "Judgment 4: Disclosure of Expert Reports and Witness Statements from the DPD", this is when it came up at the March CMC. (Pause)

So your first paragraph, lines 15 to 25, are what I would invite you to focus on.

THE CHAIR: Yes.

MR ROTHSCHILD: In particular, the observation:

"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 the claim succeed. However, the possibility that she might incur excessive costs [on these materials] does not strike us as a good reason to decline to order disclosure of potentially relevant material." [as read]

So Ms Davies appears to be saying, "Well, this will only incur costs". Well, ultimately that may be something to be determined at the end of the proceedings as to whether those costs were reasonably incurred.

So Ms Davies referred to footnote 3 of Mr Druce's letter for the suggestion that he'd only reviewed a fraction of the off-the-shelf disclosure. She has -- perhaps understandably -- slightly misread that footnote, which is a little unclear, I admit, but my instructions are that Mr Druce has actually --

THE CHAIR: Remind me what page we're on, please? The footnotes.

MR ROTHSCHILD: It's in the core bundle.

THE CHAIR: Yes.

MR ROTHSCHILD: It's tab 16.

THE CHAIR: It's 185, I think.

MR ROTHSCHILD: Yes, page 185, footnote 3. My instructions on this are -- that what he is saying there -- is that he has conducted a targeted review. So rather than read every page in a linear fashion, there's been some sampling and targeting to get to an answer quickly in preparation for this CMC and Ms Davies said, "Well, he's reviewed a 1000 plus 300 therefore 1300 documents". I'm instructed, in fact, he reviewed about twice that number of documents and the reason is, towards the end, it says:

"The S+ S (Scott+Scott team) then ran targeted searches for these types of documents and identified all instances. I used these targeted searches to obtain my 222 project estimate." [as read]

My instructions are that that part is describing an additional search which amounted to an additional substantial number of documents. So ultimately he did actually review about twice the number that Ms Davies suggested. I, of course, accept he hasn't reviewed it all.

But the reason for this application is in the hope that we can shortcut the review of every single page of 44,000 documents in the off-the-shelf disclosure, and on the basis of what he has seen -- so you'll have seen his note and why he says he does seek these expert reports and data sets from the direct purchaser proceedings. And additionally, there is some evidence of my instructing solicitor -- Mr Hain-Cole -- on the same subject in his second witness statement in support of the application, which refers expressly to the disclosure review conducted by the class representative so far and that is behind tab 15 in the core bundle, page 173. This is within the section of the witness statement supporting the application on the subject of expert reports and expert data sets. Perhaps I could invite the tribunal to read from (iii) on page 173 to (v) on the next page. (Pause)

THE CHAIR: Yes.

MR ROTHSCHILD: It sounds from Ms Davies's submissions as if there are a large number of pages of expert reports. We're not suggesting the experts will necessarily have to read every word of them. We're certainly not suggesting that they will be admissible at trial, but simply that they may well be a shortcut.

Now, Ms Davies's approach – the defendants' approach -- will mean we wouldn't be able to look at them at all or we wouldn't be able to ask the direct purchasers if we could look at them. The defendants' approach would just stop us in our tracks at this stage now; the application remains for this set of documents.

THE CHAIR: Yes.

MR ROTHSCHILD: Unless you have any further questions.

THE CHAIR: No I don't, thank you very much.

Can we have a break there for the transcribers? We are transcribed, aren't we? Let's have a break for the transcribers then. Please come back at noon.

(11.48 am)

(A short break)

(12.03 pm)

THE CHAIR: Yes, Mr Rothschild, what have we got next?

MR ROTHSCHILD: So do you wish to give a ruling on that application, or for me to proceed to the next one?

THE CHAIR: Let's proceed to the next one. It might be that I'm able to give rulings on some matters as we go along, but as we stand, I'd like to get a picture of the totality of the requests.

Application for information

Submissions by MR ROTHSCHILD

MR ROTHSCHILD: So the next topic, section I of my skeleton argument, it's another disclosure application by the class representative, or perhaps more appropriately an application for information from the defendants about projects which the expert economists may wish to use in their overcharge analysis.

THE CHAIR: Yes.

MR ROTHSCHILD: So we have narrowed the scope of our application in light of the defendant'' responsive evidence.

THE CHAIR: Yes.

MR ROTHSCHILD: By way of background to this, generally, I know that you've seen the letter from Mr Druce of NERA, the class representative's expert economist, at core bundle tab 16. And in that letter, he explains that he is:

"Concerned to ensure that for his regression analysis, he has a robustly representative number of data points." [as read]

And that's the background to this application. Potentially here, the analysis of overcharge is going to have to estimate the overcharge for each defendant or cartelist group and for each of a number of different categories of supplies. So the categories potentially would seem to be -- or include -- sales to onshore transmission networks, sales to onshore distribution networks, sales to offshore wind farms for the export cables, sales to offshore wind farms for the inter-array cables, perhaps there'll be a distinction between submarine and underground cables.

So for each of whatever turn out to be the different categories of sale, a number of data points will be needed for the regression analysis, both for the cartel period and also by way of comparator for a clean period, a period of time, cleaned of the impact of the cartel and my instructions are that in the London Array proceedings -- with which you will be familiar, more familiar than I am -- the expert for London Array, Mr Bell, used data from the 33 projects and he was only considering the overcharge for just one defendant group, Nexans, and only one type of cable supply, the offshore wind farm of the nature of London Array.

BritNed v ABB was another direct purchaser claim. That concerned cables for an interconnector between Britain and the Netherlands and the defendant was a cartelist who's not a defendant to the Spottiswoode proceedings and I understand that the experts for BritNed thought it fit to include 92 project data points.

The tribunal's heard about the VoC Excels and the fact that they're not complete, not yet complete. (Pause)

Now, those VOC Excels are supposed to provide a picture of the defendant's projects from 1999 to 2012. That's the relevant period, so described, the cartel period, plus an extra three years. Because they're not yet complete, we do not yet have a full picture as to the defendants' projects in that period, yet. How much more is coming is somewhat unclear.

Regardless, Mr Druce wants to be able to check for himself how the data available to him through the VoC Excel, and the off the shelf disclosure, fits within the universe of potentially available data. I submit that he's entitled to that, and that's the background to this application. It's quite appropriate, I'd submit, for an expert economist conducting a regression analysis to take steps to ensure that the data he's using is representative of the broader universe of data out there.

What we originally sought, in our original draft, we only looked at it briefly to show how we have scaled this application back, is in the core bundle at tab 12, page 143. At the bottom of the page, paragraph 5, we thought information as listed in the annex to the order in respect of (a), (b), and (c). Three categories: (a) all projects falling within the scope of the VoC Excel; (b) subsequent projects to 2025; and (c) projects in the EEA, the European Economic Area, more broadly.

Now, in light of the defendants' response that this would be particularly burdensome for them, we have scaled back the request. We are no longer seeking EEA, European Economic Area, data at this hearing. We've read what the defendants have said in their responsive evidence about the difficulties of providing it.

As to the post-VoC Excel period, so the period after 2012, we're now only seeking outline information, and for Great Britain only.

THE CHAIR: Yes.

MR ROTHSCHILD: So it should be, we would hope, relatively easy to produce. It's not the detailed information, it's just outline information. I can explain what I mean by that, perhaps by reference to the consolidated draft order. The consolidated draft order shows our revised request here.

It's, again, behind tab 9 of the skeleton's bundle, page 158. It's still in paragraph 5. (Pause)

What we are seeking here -- the date is perhaps to be discussed -- but we say by 14 August.the information listed in annex 1 for (a) and (b): (a) projects falling within the scope of the VoC Excel; and (b) subsequent projects in Great Britain only, not the EEA generally, up to 31 December 2025,we call those the "GB 2012 to 2025 projects".

Then when one goes to annex 1, there are some asterisks towards the end of the list. The first few are just general, really background information about the project: the description and the type of purchase -- is it onshoreTO/DNO, or is it offshore export or interarray? The scope of the project. The specification -- where there's an asterisk, we're not seeking that information for the GB 2012 to 2025 projects. That's what I mean when I say for the post-VoC Excel period, we're only seeking outline information, and for GB only.

The purpose of that is it will provide, to use the analogy again, a menu to choose from; provide the experts with information, a menu of the broader selection, from which they can then choose appropriate data points.

Regarding projects which are covered by the VoC Excel, we do need more detail than is in the existing columns of the VoC Excel.

Then you'll see in the last bit of paragraph 5 on page 158, we suggest that after all of this has been provided, the expert economists liaise as a single joint expert for the defendants, that's Dr Davis, and Mr Druce for the class representative, should liaise to seek to agree a list of the further data that either or both of them desire for their overcharge analysis.

THE CHAIR: Is it right for me just to understand the scope of the request in this way? So the VoC Excel is going to give you, you hope, the information that you need on projects within the VoC Excel. That then leaves projects 1999 to 2012 that are not on the VoC Excel, where you want VoC Excel equivalents. Sorry --

MR ROTHSCHILD: A bit lighter, actually a bit lighter, I think. It's -- yes.

THE CHAIR: Sorry, I think I set off on the wrong way with that. So off-the-shelf disclosure contains "full" information on the projects that are dealt with in the off-the-shelf disclosure.

MR ROTHSCHILD: Off-the-shelf disclosure is documents.

THE CHAIR: Yes.

MR ROTHSCHILD: Yes.

THE CHAIR: So Mr Druce's concern is that there's a universe of projects that are mentioned in the VoC Excel but where you're not getting the right kind of information in the off-the-shelf disclosure.

MR ROTHSCHILD: Yes.

THE CHAIR: So the request, the ask, is: for those projects that are in the VoC Excel, you want the full information. Now, some of that might already be in the off-the-shelf disclosure.

MR ROTHSCHILD: Yes, quite.

THE CHAIR: How many projects, do we know, are there that are listed on the VoC Excel, but aren't in the off-the-shelf disclosure? Just to help me size the issue, do we know how many additional projects we're talking about?

MR ROTHSCHILD: I would have to take instructions on that. Do we have a ready answer? Part of the reason we don't know is the VoC Excel has not yet been completed; I don't have a ready answer.

THE CHAIR: So you don't know; no one knows. So we don't know how many additional projects you're requesting data on. But if it's on the VoC Excel, you want "full" information, being what Mr Druce sets out in table 1 of his letter to the tribunal.

MR ROTHSCHILD: Yes. I'd like to come back to the word "full" in a moment.

THE CHAIR: Okay. EEA has been dropped, and 2012 to 25, you say you just want limited, or I think you put it "abbreviated", outline financial information, which is date, type of cable, that kind of stuff, which in your position is quite easy to give indeed.

MR ROTHSCHILD: Indeed.

THE CHAIR: Right, okay.

MR ROTHSCHILD: I said I would come back to the word "full", if I may.

THE CHAIR: You may.

MR ROTHSCHILD: So the defendants indicated in their skeleton argument that what they could provide for projects in the VoC Excel are "relevant financial reports or other available information". If you would look at the consolidated draft order.

THE CHAIR: Yes.

MR ROTHSCHILD: Page 158. I took you to the green text in paragraph 5, the class representative's proposal, but underneath it there's the defendants' proposal in blue text. This is where they propose "the relevant financial reports or other available information".

THE CHAIR: I confess I didn't quite know what that was.

MR ROTHSCHILD: Well, nor did we.

THE CHAIR: Right.

MR ROTHSCHILD: And so we asked for a bit more information.

THE CHAIR: Yes.

MR ROTHSCHILD: Because it seemed rather vaguely worded and it wasn't clear what was meant. We've got that information in some letters of 8 and 10 July. I can turn them up: the 8 July letter is in the correspondence bundle, that's tab 64, page 222.

THE CHAIR: Right. (Pause)

Yes.

MR ROTHSCHILD: It seems from this letter that NKT do not actually have any financial reports for the relevant supplies, and that's why we have the words "or other available information". But quite what NKT is offering to provide is a bit opaque.

For Prysmian, it seems that these financial reports would be what they call the "CJ13 and KE24 reports". We've seen some of those reports already in the off-the-shelf disclosure. We've looked at what those reports tend to contain, and it seems that they only provide outturn cost data and, potentially, some information on cables' characteristics. So not all of the information that Mr Druce is seeking.

Now, so Prysmian's offer does not go as far as we requested. So we maintain the request, but equally, we're being realistic; we recognise that we may be asking for things that do not exist, or have been lost over time, or just cannot be located.

For Nexans, this is their letter of 10 July which I can't currently locate in the bundle, but their counsel at this hearing can perhaps supplement. It seems that they think they've already given documents for submarine supplies, and that any additional documents they locate are unlikely to encompass all of the information that we're requesting.

Well, we will be content with an order that will provide us with the results of the search for as much of the information as is available, with a supporting statement. I mean, we're not asking for the tribunal to order the defendants to do the impossible.

THE CHAIR: So for Nexans, where they say they think they've --
MR ROTHSCHILD: Well, in respect of all of the defendants --
THE CHAIR: Right.
MR ROTHSCHILD: -- we recognise we must be realistic. If the information we're asking just, for some reason, doesn't exist, they can't be ordered realistically to provide it. We would be content with an order that provides with the results of a search for as much of the information as we request as is available, with a supporting statement.
THE CHAIR: So the request for all defendants is -- so you say what you'd like them to do is search for the information that you've requested, what I described as, "full" data. If they can't find it, they have to explain what searches that they've done --
MR ROTHSCHILD: Yes.
THE CHAIR: -- and then you can decide whether they think they've tried hard enough?
MR ROTHSCHILD: Yes. I mean, they've referred to statements they've made in previous proceedings. They have a lot of what might be called "institutional knowledge" that we don't have on our side of the courtroom, from their involvement in previous proceedings. What we need is one statement, directly on point, made in these proceedings; cross references to things they've said in other cases gets very complicated.
THE CHAIR: Right, so they've got to search for this material, describe their searches, and hand over anything that the search produces; have you agreed key words? It's not --
MR ROTHSCHILD: No, it's primarily a request for information.
THE CHAIR: Right.
MR ROTHSCHILD: So just looking at the -- again, if I may -- our paragraph 5 in the order. You may be thrown by the word "disclosure". I mean, really, we're seeking

information with supporting documents and calculations. But primarily, we want the information; the supporting documents are not as key.

THE CHAIR: But let me just make sure I understand that. So for example, some of the information you want is the costs of the project at tender contract and outturn stages; that's paragraph 3 of annex 1.

MR ROTHSCHILD: The end result will be a spreadsheet that's easy for the economists to plug into their computer systems.

THE CHAIR: And that material, if it's nicely packaged up in the off-the-shelf disclosure, you'll have had some of that already, won't you?

MR ROTHSCHILD: We may have had some of it. It will be buried within documents. We may have the contracts with some numbers in it; it's not quite the same as a --

THE CHAIR: I see. So you say you want the defendants to own -- even if it is buried in the off-the-shelf disclosure -- the task of populating a spreadsheet with all of this information? And if they have to get it from the off-the-shelf disclosure, so be it; it's their job to provide you with this information?

MR ROTHSCHILD: I mean, this is information about their own projects, so ...

THE CHAIR: Yes.

MR ROTHSCHILD: Yes, and it ought to avoid dispute. So the answer to your question is yes, but the reason is, naturally, these are their projects.

THE CHAIR: Okay. Every time I mentioned the off-the-shelf disclosure, I see your brow furrowing slightly, and I get the sense you feel that I'm asking the wrong question when I refer to the off-the-shelf disclosure. Is there a sense, then, that you say the off-the-shelf disclosure isn't giving you enough? That must be what you're saying.

MR ROTHSCHILD: Yes. I mean, the off-the-shelf disclosure was the disclosure in the direct purchaser proceedings. The present proceedings are broader, as I indicated earlier, in that they cover direct purchasers from those proceedings and more.

THE CHAIR: Yes, but maybe this is where I'm going wrong then in asking you about the off-the-shelf disclosure. The off-the-shelf disclosure is, of course, from the direct purchaser proceedings, with each direct purchaser saying, "You overcharged me on that particular power cable or those particular power cables".

MR ROTHSCHILD: Each of the direct purchasers who brought a claim; not every direct purchaser did.

THE CHAIR: Agreed. Each of the direct purchasers who brought a claim. But the way that you decide -- or it was thought the tribunal would decide whether there was an overcharge on those specific projects -- was by reference to some other projects on which the defendants disclosed information. So that's what happened in London Array; a claim based on overcharge of London Array specific power cables -- 33.40, whatever the number is, other project data supplied to determine how much overcharge on London Array. So even though they're direct purchaser proceedings on particular cables, in the off-the-shelf disclosure, there's going to be quite a lot of information on other broadly comparable projects; am I right thus far?

MR ROTHSCHILD: Yes. We weren't involved in that selection, but it's correct.

THE CHAIR: You weren't involved in that selection, but that's correct. What you're saying with this request is you would like the information specified on annex 1 for each and every project specified on the VoC Excel, and it's a matter for the defendants to get it. As you say: they're their projects by definition, they should have the information, if they get it by interrogating the off the shelf disclosure -- fine -- you don't really mind how they get the information; they've got to give it to you. Is that the long and the short of it?

MR ROTHSCHILD: Yes. At least in respect of the relevant periods and maybe not the three years at the very end, these are projects that this case is concerned with; they are supplies by the defendants within the description of the cartel.

THE CHAIR: So what, if anything, do you get from the off the shelf disclosure? Has the off the shelf disclosure been a waste of time or a dead letter or ...?

MR ROTHSCHILD: Oh, well, far from it because it may become necessary to probe those documents, to do some tests. And what's more, it goes a bit broader because the VoC Excel doesn't align precisely with the off the shelf disclosure.

THE CHAIR: Yes. Right. I see.

MR ROTHSCHILD: It might be necessary to look at the definitions of VoC Excel and off the shelf disclosure (overspeaking) --

THE CHAIR: I mean, maybe you should do that because I suppose what I'm fumbling towards is this point that: if what you wanted all along was the information set out in Mr Druce's table for each and every of the projects specified on the VoC Excel, why wasn't that the way it was put at the last CMC? Why did we have this intermezzo with the off the shelf disclosure?

MR ROTHSCHILD: Perhaps we should have --

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

MR ROTHSCHILD: I will go through all the -- perhaps we should have requested more the first time, but that didn't happen. The initial exercise was nevertheless useful but we're now asking for it to be supplemented. Moreover, the VoC Excel helps to inform the requests that might need to be made of third parties -- non-defendant cartelists. (Pause)

We're struggling a little to find the previous reports. Perhaps I can come back to that --

THE CHAIR: That's fine. If it's important to you, come back to it; if it's not important to you, feel free not to.

MR ROTHSCHILD: But that is the application.

THE CHAIR: Right. Thank you very much.

Yes, Ms Davies.

Submissions by MS DAVIES

MS DAVIES: Can I start by ensuring we've got clarity as to what is being requested here. If we could go to the draft order, and we're focusing obviously on paragraphs 5 and 6. Essentially, the difference between the parties is that the class representative is now asking the defendants to supplement the VoC Excels in relation to all the projects that are in the VoC Excels with a number of different categories of information. Those projects in the VoC Excels comprise those for which disclosure has already been given in the DPPs, as the tribunal knows, the off the shelf disclosure, and some new ones.

So, taking the projects that are the subject of the DPPs, the financial information that is in the off the shelf disclosure is all the material that was disclosed in the DPPs which enabled the experts to calculate their competing views on overcharge. So, either the additional information within table 1 is in that off the shelf disclosure, or it's material which experts previously haven't needed; first point.

Second point: we have, as the tribunal knows, in relation to those projects been engaged in the extensive exercise of populating the VoC Excel. If the information for the additional columns -- and I'll come back to what they are -- is in the OTS disclosure, that material is now available to Mr Druce and his team, and when they are reviewing the VoC Excels, if they want to populate other columns, they can do that; they've got that material. That's the debate in relation to that and I'll come back to that.

The second category, which are projects that are in the VoC Excels that were not the subject of the DPP disclosure -- as I explained earlier, there's 165 of those for Prysmian -- those are the ones which we're intending to encapsulate in our paragraph 6, which is that we will provide the relevant financial reports for the suppliers identified in the VoC Excel, to the extent they haven't already been provided.

So in other words, we will for those projects give the material which is effectively the equivalent to the material that was given in the DPPs, to the extent we have it. We don't have it for all these projects at all because they're different in nature. Some of them are just cable supplies and so on, but we will give the financial reports.

THE CHAIR: What are these financial -- I'm sure it was me, but I didn't quite understand what these financial reports --

MS DAVIES: Well, it's clear Mr Druce actually understands what we're talking about because in footnote 3 to his report he notes even on the basis of his limited review that there are certain types of documents giving information about the financials. The reason I'm not able to give you a list is it differs by different project, but they are documents of the type that gave the information that we could use for the purposes of populating the VoC Excel and the experts used in the DPPs.

THE CHAIR: So is it right to play back your counter-proposal to you in this way, that the financial -- so you say there are 165 not dealt with in off the shelf disclosure, but are on VoC?

MS DAVIES: On my client's side.

THE CHAIR: On Prysmian's side, more on the other.

MS DAVIES: I'm afraid I'm not sufficiently familiar with the details of the others; my learned friends can speak to that.

THE CHAIR: Okay, but there are more --

MS DAVIES: But there will definitely be less for Nexans because they've only got

27 projects in total anyway.

THE CHAIR: Right. But what I think you're proposing is that for those projects that are on the VoC Excel, but not on off the shelf disclosure, you will serve up financial reports to the extent you have them that are broadly commensurate with the kind of off the shelf disclosure that's being served up for the others.

MS DAVIES: Yes. What we've said in correspondence, which is exactly that: intended that the additional financial reports that Prysmian proposes to disclose will be in the same format as those already disclosed in the disclosure.

THE CHAIR: I see. So you'll offer up the same kind of thing that you have given in the off the shelf disclosure -- you'll give it on the extra.

MS DAVIES: The 165 -- just so that there's no lack of clarity on the transcript, because it does depend on the project. It may not be the case that for every project there's an equivalent to everything that's been given for the others, but it's the same types of documents; that's what we're going to give. That's what we're proposing.

THE CHAIR: The same types of documents to the extent you have them.

MS DAVIES: Exactly. Then what we are proposing -- I just need to take you to paragraph 10 of our skeleton. So, in relation to the projects in the VoC Excel, that will give them the equivalent of all the material that the DPP claimants had and which their experts used to calculate overcharges, and to the extent that we have them, the equivalent documents for the additional supplies. So what we're proposing is that if the additional information that Mr Druce is now seeking is within those documents, his team can extract it, and then we will engage with any table that Mr Druce produces with a view to narrowing the issues in dispute and working from a common data set.

THE CHAIR: So is this really, at least the way you position it on your side, a debate about who does the legwork of extracting information from off the shelf disclosure or equivalent and putting it into the kind of table that the class representative wants?

MS DAVIES: In some respects, it may be. I'm going to come back to make the point that: we've already told the class representative that we don't have all this data, so they're not going to get it. It's not all in the off the shelf disclosure, but where there is information that falls within these additional columns, if I can put it that way, that are not in the VoC Excels but which Mr Druce is now saying he wants to look at for overcharge, we do say that -- we, the teams behind me and Brattle having gone through the exercise of reviewing this material for the purposes of populating the VoC schedule -- the more proportionate way forward now is that, given that the class representative's expert has got to check that work, as it were, anyway -- they've got to decide whether they're going to agree to it or not and so therefore are going to be engaged in a review of the same materials now -- they extract anything else out that they want, and then we can agree it. As opposed to pushing us back to identifying information, which maybe if this had been asked for in April there may be different arguments to be had about it, but it wasn't and there is no explanation as to why it wasn't asked for in April, and my learned friend conspicuously didn't have one.

So, we've done all this exercise. They've got a vast amount of material which, with respect, they are not engaging with properly, and in so far as the VoC Excel projects are concerned that, we submit, is the right way forward.

To make good the point that I've already made, which is that we've already told them that we don't have all of this, if I could take you to Mr Day's fourth witness statement, paragraph 25, which is in the core bundle, tab 22, page 218. In particular, paragraph 3 of the annex 1 -- if we have that alongside -- is asking for costs at tender contract and outturn stages, broken down by various subparagraphs.

Now, the VoC schedule already contains cost information, but it doesn't contain cost information at tender stage. What Mr Day is explaining in this paragraph of his witness statement is that Prysmian didn't record in its financial systems the breakdown of costs at the tender stage. So:

"Where limited information in relation to this could sometimes be sourced from project-level disclosure,such information was not always available or, where available… tender. Whereas our outturn data was more consistently recorded in its financial systems." [as read]

And it's his recollection that that was what was used for the economic analysis. (Pause)

So we've used the outturn data for the VoC schedules because that's what we've got.

THE CHAIR: Because you don't record costs at the tender stage.

MS DAVIES: -- the tender stage. And the additional data fields, if we can just look at annex 1 to the order --

THE CHAIR: Sorry, costs not recorded at the tender stage?

MS DAVIES: -- tender stage. No, the breakdown of costs between different elements were not recorded.

THE CHAIR: Right, okay. Presumably some estimate of cost is made, otherwise you can't really decide what price to tender or what price to pitch at.

MS DAVIES: Limited information, as Mr Day says, could be extracted. But if we look at what they're now asking us to -- what I would describe as "supplementing" the expansive exercise we've already been undertaking in relation to the VoC Excels, the additional data fields as we understand it start at 2(e), so the volume of raw material used. (Pause)

And then at 3, "Unit Cost of Raw Materials", "Supply Costs", "Installation Costs", "Accessory Costs", "Allocation of Indirect or Common Costs and Penalties", 4(e).

Those are completely new data fields, but then there's also the complication, as I've said, that for the costs of project, they're actually asking for it at three different stages, which is something we haven't had to do for the VoC excels; we've focused on the outturn stage.

Now, against that background, one then comes to look at, well, why is it being said that this is necessary? And there is obviously a third category of projects, which is the projects post-dating 2012, but I'll come back to those separately, if I may.

So just focusing on the supplementing -- the expense of the exercise already done in relation to the VoCs.

First point to note: no explanation at all has been provided as to why this information is now thought to be necessary but not previously requested.

Secondly: the explanation we have from Mr Druce in relation to this, with respect to Mr Druce, just doesn't make any sense as regards this group of projects, because if we go to Druce 2, paragraph 21 at page 186, the suggestion is, which is the basis on which my learned friend put forward his application, that Mr Druce needs these additional information points -- data points -- in order to comment on the representativeness of the project level of the OTS disclosure.

Now, in relation to that, that was a point that Mr Druce was clearly making before he had even considered the content of the VoC Excels, because his letter is dated 24 June and the Excels were served on 23 June and I'm not criticising him for that, but it is indicative of the nature of the problem of Mr Druce's second letter, which is that it has in many respects been written before a proper review has been undertaken of the materials that are already being provided to the class representative. And we can see that, in fact, in relation to paragraph 21 specifically on page 186. The point that Mr Druce is making here is that the sale by Nexans, covered by the OTS disclosure, is primarily offshore wind and interconnector projects, with less coverage of sales to TOs and DNOs.

And so he says, "Well, it may be that Nexans was involved in very few projects that sold TOs and DNOs and hence the Nexans data in the off-the-shelf disclosure is representative", so it may be okay. Or he makes the point it may be that there was a previous absence of disclosure on those projects in the DPPs, so information on a wider pool of projects is now needed, he says, to see which of those two options is correct.

But, if Mr Druce had had a chance to look at the VoC Excel served by Nexans before he wrote this paragraph in his letter, he would have seen that what Nexans was saying in that is that they've only got 27 projects across the whole period. They haven't got a whole stack of additional projects that were not covered by the DPPs and he can look at that and make an assessment of representativeness based on that. He doesn't need all the detailed granular information project by project to now enable him to do that and the same applies to my clients and to NKT.

In terms of representativeness, you simply need to know the nature of the project, when it was supplied, who the customer was, which is all the information that we're giving in the VoC Excel anyway. (Pause)

THE CHAIR: So representative: if the concern is representativeness, Mr Druce has or will have all of the information that he needs by simply interrogating the very high level --

MS DAVIES: Well, it's not very high level; it's 28 columns, but the information that's already in the VoC Excel because that covers all supplies within the scope of the commission decision between 2009 and -- sorry, 1999 and 2012.

THE CHAIR: Right. But what if Mr Druce thinks representativeness depends on some measure of costs at the tender stage as compared with costs of the outturn stage? I recognise you say --

MS DAVIES: That's not the explanation he's giving. In paragraph 21, he's talking solely about the type of the project and who the customer is. Is it an offshore wind farm project, a DNO supply?

THE CHAIR: I see, so to make sure I've got the point, if I play it back to you in this way, is this right: Mr Druce articulates some concern about representativeness in his letter, he does so by reference to the description of the projects that have been supplied, who they were to --

MS DAVIES: The purchaser.

THE CHAIR: -- and therefore if his concern is representativeness, given the way he's articulated that concern, the VoC Excel will give him all the information he needs.

MS DAVIES: Yes.

THE CHAIR: Right.

MS DAVIES: And there is no attempt -- if we turn on to paragraph 187, which is what Mr Druce says in relation to the further request to the defendants for the expert's overcharge analysis, 23, paragraph 8, subparagraph 1 is the representativeness point again. So is 2. So is 3.

And then 4 is really the only paragraph where anything acknowledges that there is a broader range of information in this document than there was in the VoC Excel and all he says is:

"I have identified…below the additional project-level information not covered by the VoC Excel…that is necessary for the overcharge analysis, and therefore for which the CR will require further disclosure." [as read]

But doesn't go into any detail as to why that is, why in circumstances, as I say, where for the DPPs, the experts didn't need anything more than the OTS disclosure, anything more might be required here; it just doesn't engage. It's so high level that it is very difficult to understand.

Again, we're not trying to shut the class representative out. They will have the OTS disclosure and describe it as the equivalent for the non-DPP documents and I know, sir, you understand what I mean by that, in light of the debate we had earlier. If there are additional columns that they want to populate -- that's available from that material -- they can do it as they're undertaking their review. But what they seem to be contemplating is that, at this stage, we should be going off and conducting broader searches, trying to find documents that are outside the remit of the off-the-shelf disclosure for those projects and for the other projects, in circumstances where we haven't got any properly articulated explanation of why.

THE CHAIR: So let's break it down into categories. So off-the-shelf disclosure: I think your point is really quite simple. Either the information is in the off-the-shelf disclosure or it isn't. If it is in there, the class representative has it and can analyse it as she sees fit. If it's not in there, it wasn't relevant, otherwise it would have been disclosed, or either wasn't available or wasn't relevant. If it's not in there, it's not in there for a reason.

MS DAVIES: The one thing I cannot warrant to the tribunal is that there is a possibility that it wasn't asked for last time around and we didn't search for it. I cannot -- because we're -- particularly for the grid exercise, we're going back, as I say, to the late 2000s, but it's not there, so in order to find it, we'd have to go off and conduct more searches. We know from the material we've got that some of it isn't going to be there full stop.

THE CHAIR: Yes.

MS DAVIES: But I can't stand here today and say with certainty that there may not be something somewhere that fits one of the boxes of this additional information, but the short point is there. Why is it said to be relevant now, when the experts in the previous exercise could calculate overcharge analyses without it?

THE CHAIR: Yes, okay. And then for the stuff that isn't in the off-the-shelf disclosure, where you said you'll provide broadly the equivalent, for this material, you are going to have to be searching anew.

MS DAVIES: Well, we've already started, because remember we've already provided some information in relation to these projects in the VoC Excel.

THE CHAIR: Yes.

MS DAVIES: So we've got some more enquiries to make.

THE CHAIR: Yes.

MS DAVIES: But there is already some information that's been provided. We're in a halfway house, put it that way.

THE CHAIR: In a halfway house, but I suppose what I'm getting at is this: suppose you're doing your searches for -- let's call them the new projects, i.e. those not covered by the OTS disclosure, you say you'll provide the financial reports which are broadly similar to the OTS disclosure. But suppose in your searches on the new projects, you discover some cache of costs at tender stage that perhaps you weren't expecting to see -- you should be handing that over, shouldn't you? You shouldn't be sort of saying, "Oh, well, no, that wasn't in the OTS disclosure and therefore we're not giving it to you now".

MS DAVIES: The reality is that's not a real problem because we're talking about DNO supplies, which are not in that nature.

THE CHAIR: Right.

MS DAVIES: These 165 are additional DNO supplies, so they are in large part purchases of cables, where the cable had been manufactured without a particular client and then they're bought -- you come and you buy a length of cable because you need a particular piece of cable for a particular project.

THE CHAIR: But I suppose my point is -- I mean, sure, that's right, but I hear the point that with the OTS disclosure -- the projects covered by the OTS disclosure -- if the class representativewanted all of this, all singing, all dancing information, that you characterise her as now asking for, she should have asked for it in April; that's a point that you have made.

But with the new projects, there's less force in that point, because you haven't already handed the material -- you're doing new searches anyway. But what I'm troubled by, what I'm concerned by, is a suggestion that when you come to do your new searches, somehow the standard of the OTS disclosure becomes set in stone. Even if when you're doing your new searches, highly relevant material of the kind set out in annex 1, is uncovered.

MS DAVIES: I query whether it would be highly relevant material, given that it wasn't material that was available in the DPPs by definition, and yet the experts in those proceedings succeeded in producing estimates of overcharge.

The second point is: I just want it to be clear, for the purposes of the extra period we've got for the VoC Excel, there are some additional searches we're still undertaking, but we've already done some searching for the purposes of the material that we've already provided.

THE CHAIR: Yes.

MS DAVIES: So that's all explained by Mr Day in his fourth witness statement, which I know the tribunal will have looked at. So yes, there are some supplemental searches that we're undertaking.

Now, of course -- I'm struggling, because we just do not expect that the hypothesis that the tribunal has put to me is a real one, because we know from all the experience we've had, this is the fifth round for those behind me of doing a disclosure exercise. They know how my clients keep their -- what records they keep.

THE CHAIR: But just going back to the off-the-shelf disclosure: in one of our earlier discussions, you said quite rightly, "Look, some of this information might not have been disclosed in the off-the-shelf disclosure because it wasn't asked for". It's a possibility.

MS DAVIES: I'm accepting that as a possibility. I'm not saying it's a likelihood at all.

THE CHAIR: No, it's a possibility.

MS DAVIES: I didn't want to in any way overstate the position.

THE CHAIR: I mean, let's put the point starkly. Suppose one of the particular claimants in the DPPs didn't do a terribly good job of asking for relevant information, just did a sub-par job, then why should the class representative be saddled with the consequence of that sub-par job?

MS DAVIES: I think we are at cross purposes in terms of the sub-par job.

THE CHAIR: Right.

MS DAVIES: I perhaps need to take you to Mr Day's third witness statement.

THE CHAIR: Yes.

MS DAVIES: It's in the supplemental bundle, volume 1, tab 11 at page 145. (Pause) If we can start at paragraph 38. 37; this is the section of this statement in which Mr Day is explaining the steps that Prysmian has taken to identify suppliers that fell outside the scope of the DPPs, and that should be included in the VoC calculation.

THE CHAIR: Yes.

MS DAVIES: And so at paragraph 38 and 39, he describes some attempts to identify the scope. Then at 40, he refers to the explanatory note, which is the notes that

Prysmian provided in the Grid and other proceedings to explain how the material had been extracted.

"Prysmian primarily uses its SAP financial systems in the ordinary course of business to prepare end-of-year financial reporting and to track profitability at the business unit level... These systems are not designed to produce information fitting into each of the categories of information set out in the VoC Excel. It is not possible to search… with reference to a particular customer", et cetera, and "even if this were possible, a significant number of suppliers were made to the DNO indirectly." [as read]

Which is another problem with this, because this covers indirect supplies as well.

Whereas "Prysmian's direct customer would be a civil works provider or other intermediary." [as read]

That's why we ended up running three different sets of reports across the relevant financial systems together with manual analyses of those reports and so on.

Then he explains at the bottom of paragraph 41 that:

"Prysmian has completed the VoC Excel as best it can from the financial information, and now intends to seek to supplement that information from commercial documents, with a view to producing relevant SAP reports and alongside disclosure of relevant commercial documents, and providing disclosure in relation to these suppliers." [as read]

So we've already done an extensive amount of work in relation to these additional supplies, which is what Mr Day is explaining. But what we're going to try and do is see if we can find specific commercial documents that add to it.

THE CHAIR: Right.

MS DAVIES: So the concern, sir -- and I totally understand where the question is coming from -- about saying, "Well, in relation to the 165, why don't you seek to populate a broader VoC Excel?" is that that runs into, in large part, the same problem, in that we've already done quite a lot of searching for those projects, and we're now talking about targeted searches to try and enable us to supplement.

THE CHAIR: Yes.

MS DAVIES: Which is not an exercise that would enable us to provide the extensive additional information that is sought by annex 1.

THE CHAIR: Because you say your systems are just not set up to give the information requested?

MS DAVIES: The combination of that and what Mr Day says in paragraph 25 of his fourth statement, which I took you to earlier. Back at core bundle, tab 22, page 218 --

THE CHAIR: Right.

MS DAVIES: -- is the basis on which we say that.

THE CHAIR: So in response to Mr Rothschild's suggestion that you provide a witness statement setting out the searches that you have done, and why they aren't producing the full gamut of information that was sought on the 165 --

MS DAVIES: Well --

THE CHAIR: -- you say you've done that already?

MS DAVIES: Well, no, I'm not suggesting -- we haven't given, or haven't been required to give, disclosure statements identifying what disclosure exercises were done in the DPPs. There will have been disclosure statements in those proceedings, obviously. But that hasn't yet been required, and we haven't revisited that. Revisiting that is not straightforward because of the passage of time. The first disclosure order made in National Grid was made in 2016, ten years ago.

THE CHAIR: Yes.

MS DAVIES: I mean, there's one thing which is just literally reproducing the explanation we gave last time around, that's fine, in a sense that that doesn't require reconstructing anything. But going further than that and trying to reconstruct anything at this period of time out would be really very difficult.

THE CHAIR: You see why I'm pressing you on this? I mean, I do hear the point that information of this kind could have been asked for earlier; there's something in that. But if there is information out there that will help to populate these additional parts of the VoC Excel, I've got a balancing exercise to --

MS DAVIES: Well, save that, we would submit, that the likelihood is if there is that information, it's in the documents that are equivalent to the off-the-shelf disclosure, because those are the documents which contain, on any view, the key financial information in relation to these projects.

THE CHAIR: Yes, I mean, I see the logic of that, but there is a slight missing link in that, isn't there, that if you go along, and for the 165, you replicate what's in the OTS disclosure -- the kind of information that's in the disclosure -- the concern on the class representative's side is going to be, "Well, how do I know that there isn't more?"

MS DAVIES: Well, I mean, one understands the hypothetical, but with respect, we are looking at multiple previous disclosure exercises here. We've got National Grid and Scottish Power; we've got Greater Gabbard; we've got SSE, Vattenfall. Separate legal teams for the claimants in each of those -- five of them -- and in each of them, we've ended up with documents of the type that are in the OTS disclosure.

So what, with respect, you're really putting to me, is there might be a needle in the haystack you haven't found previously, and that's what I'm concerned about. We submit that's just -- in circumstances where we're looking at issues of proportionality and so on as well, it really isn't ...

Now, of course, if once the class representative has focused actually properly in on the off-the-shelf disclosure, and they come back and say, "Well, there's this particular piece of information which we really would find useful. Even though no one thought it was useful last time round, we would like to have it for this one", then there can be a conversation about that. But where we are is we're getting a blanket long request for information that, if it's not in the OTS disclosure, no one did think was useful last time round, and necessary to be pressed for in five separate sets of proceedings.

THE CHAIR: So I think maybe you admit the possibility that perhaps something was overlooked or something --

MS DAVIES: I was simply trying to say, I can't rule that out. I was trying to be -- I appreciate I've created a rod for my own back. I was trying to be fair and not to be able to categorise -- because none of us sitting in this courtroom have gone back through all those exercises.

THE CHAIR: Yes.

MS DAVIES: That's just itself expensive to do.

THE CHAIR: Yes. So in a nutshell, if this kind of information was not disclosed as part of the off-the-shelf disclosure, there were --

MS DAVIES: No one complained about it.

THE CHAIR: No one complained about it at the time. There were six different sets of proceedings, or however many. Any number of legal advisors who could have requested this information if it is available or relevant or necessary. No one has, and therefore that should give the tribunal a pretty good steer that there's a good reason why it wasn't disclosed.

MS DAVIES: If it existed, which I'm not accepting.

THE CHAIR: If it even existed, which you're not accepting.

MS DAVIES: Some of it we know doesn't exist or, you know, based on our records, we don't -- we know --

THE CHAIR: And therefore, if the class representative wants more, she needs to do better, in your submission, than make a blanket request; it needs to be justified in the light of what specifically has been given already.

MS DAVIES: Yes.

THE CHAIR: Thank you.

MS DAVIES: And then it can be considered. It may be that that same answer is going to come: we just don't have it, or we think the likelihood of having it is so minuscule as to not justify the cost, or so on and so forth.

THE CHAIR: Yes.

MS DAVIES: But we're not in that position at the moment at all.

THE CHAIR: Okay.

MS DAVIES: I need to then deal with the post-VoC Excel period, but I am conscious that it's 1.00 pm.

THE CHAIR: Well, let's break for lunch, then, and perhaps you'd be kind enough to deal with that after lunch.

MS DAVIES: Thank you very much.

THE CHAIR: Thank you.

(1.01 pm)

(The short adjournment)

(2.00 pm)

THE CHAIR: Yes, Ms Davies.

MS DAVIES: Thank you. Before I turn to the post cartel period, can I just pick up one point in relation to the previous disclosure exercises? Because I fear I may have inadvertently given the impression that there was a prospect that the claimants were not thorough in those other cases. That I can easily correct by showing the tribunal a couple of paragraphs in certain orders. We've got the disclosure orders in the National Grid proceedings in the supplemental bundle 2(a), or 2, at page 424, or it starts at 423.

THE CHAIR: Is it volume 1 of the supplemental?

MS DAVIES: Volume 2 of the supplemental.

THE CHAIR: Page?

MS DAVIES: I was going to go to page 424 for present purposes. This is the first of three disclosure orders that were made in the National Grid proceedings. This was the one made by Mrs Justice Rose, as she then was, in 2016. In relation to overcharge, I hope you have a page which has got overcharge and then a column for claimant disclosure and defendant disclosure?

THE CHAIR: Yes.

MS DAVIES: Yes. If you look at the defendant disclosure, 03 at the bottom of the page, we were required to search for:

"Documents showing at the tender award date and at outturn, agreed price terms, payment terms and other commercial terms of supply for final project specification, including: breakdown of the price of the cables project across the various elements of the project; the total price agreed; breakdown of the cost of the cables project across the various elements of the project; and documents explaining how project level costs are calculated, providing explanation of the defendant's accounting policies, and then documents or information on the outturn cost of the project." [as read]

So very broad disclosure.

THE CHAIR: You needn't worry that you gave me the impression that the claimants weren't thorough. What I was canvassing with you in our discussions on this point was a thought experiment of: what if they weren't? And I was canvassing with you whether the class representative should suffer the consequences of that. But you certainly didn't give me the impression that the claimants were --

MS DAVIES: I'm grateful, because what then happened was that there were two other disclosure orders made. The second one -- they're both in the bundle, but the second one has detailed provisions where it's clear the claimants had interrogated the information we provided and asked a whole load more questions.

Then we had a six-day hearing in front of Mr Justice Barling which is actually well stored in my memory. It was three times two days because it kept overrunning on disclosure, so it was an extremely thorough disclosure exercise in National Grid. So all the points I made about the types of documentation that we found and the types of documentation we believe to exist are made against that background, because that was the first one, obviously.

Can I then move on to the post-cartel period. Here the starting point is that the VoC Excels already provide information in relation to a three-year period after the end of the cartel; so from 2009 to 2012. For this category the debate therefore is whether the defendants should in addition be required to provide at least some further information about further projects in the 13-year period between 2012 and 2025 in circumstances where, as I hope the tribunal has picked up from the skeletons, none of the experts in the DPPs required a comparative period that extended to 2025.

We've set out the relevant dates in footnote 6 to the defendants' skeleton. For Prysmian the comparator period for underground projects has extended to 2015, and for submarine projects 2019. So that means that in the off the shelf disclosure the class representative already has the documents of the type that we were discussing this morning in relation to underground projects extending to 2015, and submarine projects extending to 2019. Footnote 6 has the dates for the other defendants.

Now, what we are now being asked to do, in light of the reformulation in the class representative's skeleton, is to provide -- if we can turn to annex 1 to the order -- essentially ten pieces of information in relation to post-2012 projects. Some of these are easy to provide. I mean, I think I can identify the name of my client, so 1(a) will be easy. But some of them are not so. It's not therefore, contrary to the suggestion that my learned friend made this morning, relatively easy to produce because the information is not readily available to us.

To take for an example -- if we go to item 5, "Timings of Project", date of tender submission deadline and date of final contract signature are not readily available. We might know in rough terms what year the project was, but without interrogating documents we won't know those items.

Coming back to (1), "Purchaser" -- well, if it's an indirect purchase, which it might well be, we might know the name of the indirect purchaser, but we won't know the name of the DNO or the TO, for example, without actually potentially interrogating documents.

This is all in the context where we're talking about a wide range of projects, including cable purchases by the DNOs which might not have names, and where the purchaser might be a civil contractor. So this is not just readily extractable material. Even this reduced wish list would therefore involve significant further work, particularly given the number of projects that are involved here.

Mr Day gives us some information in relation to that in his fourth witness statement at the core bundle, tab 22, page 220, where he estimates that in the period 2012 to 2019 there were 226 underground orders in the UK which concerned relevant products, and for the period from 2020 to 2025:

"Prysmian has a further 281 orders, but we haven't been able to filter that to exclude any orders which do not include relevant products." [as read]

So we're potentially looking at another 500 or so projects against a background where we would submit that Mr Druce doesn't, again, explain why this is necessary.

He deals with this in his second letter, to the extent he deals with it at all, at core bundle 16, page 188, paragraph 23(d), under the heading "Defendant Projects after the Relevant Period". In subparagraph (ii) he refers back to paragraph 21, which we looked at this morning, and says he explains why he considers it:

"... necessary to seek further information from the defendants on their wider portfolio of projects in order to establish the representativeness of the projects covered by the OTS disclosure." [as read]

I've already dealt with that; that just doesn't work.

Then over the page in (iii(a)) he says:

" ...all project-level information in table 1 for all GB projects for which the defendants supplied… after the relevant period... This will ensure that the experts' data sets are balanced in respect of the level of the data for the defendants' GB projects during and after the relevant period." [as read]

So he seems to be saying simply "We should have the same level of data for the relevant period and after the relevant period projects", but doesn't in any way explain why it's necessary to go beyond the three-year comparator period we've already got in the VoC Excels let alone past the 2015, 2019 dates that have been used in the DPPs. And that's it; that's all we've got. So we say the necessity or proportionality of this has not been demonstrated, and therefore it should not be permitted at this stage.

The final point on annex 1, table 1, is a timing one. The class representative previously suggested we should do this by 14 September, which Mr Day explained was completely unworkable. In my learned friend's skeleton he has brought the relevant date forward to 14 August without any explanation.

It may be that's because they feel that the scope of what is being requested has been reduced, and so an earlier date is appropriate. But if so, that's misguided, I'm afraid, on the part of the class representative for the reasons that I've explained; this is not a straightforward exercise providing all this material. So whilst we might be able to do it a bit sooner than the March date, which Mr Day had suggested if we were required to do this, in its entirety it's not going to be that much sooner. That's it, unless I can assist further.

THE CHAIR: Thank you very much.

Do any of the other defendants want to say anything on this issue?

Submissions by MR ROTHSCHILD

Mr Rothschild.

MR ROTHSCHILD: It may be optimistic in litigation to expect that a litigation opponent will help you, but here these are the defendants' projects and it is more efficient for them to be assisting with generating this information. So, the class representative's application is very much at least within the spirit of the tribunal's governing principles in rule 4, particularly rule 4(7); the parties are required to co-operate with the tribunal to give effect to the principles in that rule.

In respect of the period covered by the VoC Excel, we are asking really for a topping up; for some extra columns to be completed. Sir, you asked why this request was not made at the last CMC. Well, at the last CMC -- I was reminded over the adjournments -- the VoC Excel request came in the context, as its name suggests, of value of commerce. The issue of information needed for the purposes of the overcharge analysis was parked. Now I'm making this request under the heading "Overcharge", not under the heading "Value of Commerce".

In relation to the other projects that are not covered by the VoC Excel, we've heard from my learned friend that the financial reports, or other information, could be provided. Again, I request that a disclosure statement for the purposes of these proceedings is supplied, identifying that that is the limit of the information that the defendants are able to provide in respect of the categories that we are requesting.

Mr Druce says that he requires this information for his analysis, that it would be "useful" for his analysis, but it's notable that there is nothing from the defendants' experts as to what they think would be useful in respect of finding a set of data points for the regression analysis.

This part of the class representative's application is reflected in paragraph 5 of the consolidated draft order. I took you to it earlier, sir, and identified that in the final sentence of that paragraph we suggest that: after this information is supplied, the expert economists for the class representative and for the defendants liaise and identify what data would be useful for their analysis. So it's a precursor to that.

Now, my learned friend Ms Davis is suggesting that her clients may not be able to provide any of this until next March. Now, that is going to very seriously slow down the process of preparation for trial, and is hard to believe; I mean, it's July now. It's hard to understand how it's going to take nine months or so to generate all of this data.

So, why Mr Druce is asking for this, he wants to be sure that he has a robust data set for his regression analysis. Now, in terms of representativeness of data he is concerned, as I understand it, with a comparison of the cartel period with a clean period. He will want to be matching up comparable projects in the relevant periods.

Now, that requires understanding quite a lot about the projects in question during the cartel period and having a range of possible comparators in the clean period from which to choose the most appropriate comparators. I emphasise again that there's no evidence from the defendants' experts as to what they would expect this analysis to involve, but it is particularly important to Mr Druce to have a full list of projects in the post-cartel period -- the clean period -- from which he can choose appropriate comparators.

THE CHAIR: That's not quite the way he puts it though, is it, in paragraph 21 of his letter when he's talking about representative -- or am I misreading it? He says he can't comment. The first point he makes in paragraph 21 is he says he can't comment on whether the OTS disclosure is representative, and then when he gives an example of representativeness --

MR ROTHSCHILD: Well, representative of the wider portfolio of projects falling within the scope of the CR's claim; I see that. But here in respect of the post-cartel period we're seeking to understand what projects the defendants had in a clean period, an unaffected period.

THE CHAIR: Where does Mr Druce say he hasn't got enough for the clean period in his letter?

MR ROTHSCHILD: I accept that it's not identified in that paragraph, but later on on page 188 "(d) Defendant projects after the relevant period" addresses this topic.

THE CHAIR: Yes. Okay.

MR ROTHSCHILD: Particularly (ii) at the bottom of page 188, which actually cross-refers back to paragraph 21.

"Why I consider that it is necessary to seek further information… on their wider portfolio of projects in order to establish the representativeness of the projects covered by the OTS disclosure." [as read]

I recognise it could be clearer.

THE CHAIR: Yes. Okay.

MR ROTHSCHILD: But by this part of the class representative's application we seek a menu from which the experts can identify appropriate data points for their analysis. I recognise that the defendants will have some difficulty in complying with some of the requests, they may need to be adjusted slightly in light of that, but nevertheless Mr Druce requests as much information as can realistically be provided.

THE CHAIR: Thank you.

Just so everyone knows where we're going, I think I have decided that I'm not going to give rulings on these matters as we go along. I think what I'm realising from the debate is actually these disclosure points have the ability to add quite materially to the burden of one side or the other. So I think I am going to want to reflect on this overnight. So it's going to be an oral judgment tomorrow.

MR ROTHSCHILD: May I proceed to the next category?

THE CHAIR: Please do, yes.

Disclosure

Submissions by MR ROTHSCHILD

MR ROTHSCHILD: Disclosure about the impact of the cartel -- it's section J of my skeleton. So, the class representative seeks disclosure of documents bearing on the impact of the defendants’ anti-competitive conduct. The form of order is slightly adjusted. We've tinkered with it slightly to meet an objection raised by the defendants.

THE CHAIR: Yes, I saw that.

MR ROTHSCHILD: It's paragraph 7 of the consolidated order at page 158, which is to be read together with annex 2, specifically paragraph 1 on page 164.

THE CHAIR: Yes. So I'm working from what I printed out, which I have a horrible feeling might be slightly different from the one in the bundle, but has it changed since the one you sent separately with your skeleton?

MR ROTHSCHILD: It should be identical.

THE CHAIR: Should be identical. Right. Okay.

MR ROTHSCHILD: I hope you're in annex to paragraph 1.

THE CHAIR: I am, yes, thank you.

MR ROTHSCHILD: Yes, that's the form of order.

THE CHAIR: This is the one where you tweak the drafting to add in to -- within the scope of the commission decision -- to take the sting out of the point that they were being asked to search for too much.

MR ROTHSCHILD: Indeed, yes. (Inaudible) these documents, we say these documents should be relevant in addition to the economic analysis, to the issue of whether the cartel conduct, as a matter of fact, caused an overcharge on the supply of relevant products or services. When Mr Druce -- through his expert economic regression analysis -- produces a figure for an overcharge, for a particular category of project, we do not want the defendants at trial to be able to say, "Oh, well, that project wasn't affected by the cartel", or, "The regression analysis ignores the facts", without the defendants having opened up their relevant files for us to inspect through a process of disclosure.

Now, it may be that the defendants are willing to make a concession that they're not going to do that and that might avoid such disclosure. But otherwise, I submit, it's necessary for a fair trial of the issues to understand how the cartel operated and it does seem that the defendants are gearing up to say at trial that power cables projects are bespoke or individualised. My learned friend Ms Davies hinted that in her submissions this morning, but in her skeleton -- well, in the defendants' skeleton argument -- paragraph 19, they do refer to the bespoke nature of power cables projects and also in the witness statement of Mr Day, the solicitor for the Prysmian defendants, at paragraph 39.1, core bundle, tab 22, page 223. The second line of paragraph 39.1 again refers to the bespoke nature of power cables, supplies and projects.

So the defendants -- this is becoming a common theme -- seem to suggest that this sort of disclosure could be practically difficult and costly. But the solution is not to dispense with this category of disclosure -- unless that issue is off the table for trial -- but rather to formulate appropriate and proportionate search parameters and the appropriate search parameters require an understanding of the defendants' own documents and therefore I suggest it's in the first instance a matter for the defendants. Now, it may be that the search parameters need to be informed by a proper understanding of the projects in suit, the full list of which we wouldn't have until the VoC Excel is completed. Obviously, we would at least expect disclosure of the British projects which are mentioned in the commission decision. The parties may just have to discuss proportionate search terms and revert to the tribunal if they can't agree, but in my submission, this category of disclosure is a very important one.

THE CHAIR: (inaudible) you raised the spectre that -- so, I mean, there are, just looking at the off-the-shelf disclosure, there are 222 projects in there, where a good amount of data is given and there are more not covered by the off-the-shelf, so we heard about 163, I think, was the number. So you raised the spectre of: the regression analyses have been produced, people are comparing using a particular project in a particular regression analysis and you're concerned that the defendants will pop up and say, "No, you shouldn't have included that, or you've included that wrongly, or you've drawn the wrong conclusion from that particular project, because here are reasons why it wasn't affected by the cartel".

MR ROTHSCHILD: Indeed and it wouldn't be a fair trial if they were allowed to do that without opening up access to the documents relating to that submission or that project, or --

THE CHAIR: I see.

Yes, Ms Davies.

Submissions by MS DAVIES

MS DAVIES: This paragraph and indeed the rest of annex 2 needs to be considered against the backdrop of the disclosure that has already been provided, in fact in these proceedings and the other proceedings, because so far as paragraph 1 is concerned, our submission is that it is to be expected that to the extent there were revealing documents falling within this category, they would have been covered by the earlier disclosure orders and I say that because the earlier materials that we have disclosed include documents that were obtained by the commission following their extensive investigation in relation to the cartel.

Now, my learned friend just now mentioned projects referred to in the commission decision. Well, they've got all the underlying documents from the commission file; they've already got that. So all the material which is the basis for the commission's decision is in the commission file and they have had access to that.

Then on top of that, there have been searches undertaken for this category of document in the DPPs, so in the direct purchaser proceedings.

Now, as regards those, those orders I accept were made in relation to the specific projects that had been identified by the claimants in those proceedings, but they cover all types of supply, so they cover underground power cable, submarine, TNO, DNO, so they've got the universe of types of projects and we've had to search for this type of document in relation to each of those types of project and there is a real risk of this becoming a very disproportionate search for a needle in a haystack in circumstances where what we're looking at in terms of the additional projects for Prysmian in the cartel period -- the 165 -- are the projects which are, as I explained earlier this morning, lower value, off-the-shelf purchases of cable and so on and so forth and it's in that context that it's of some relevance to note that in National Grid, where this order was made against non-addresses of the decision, it was limited to suppliers in respect of which the claimant claimed more than £100,000 in overcharge. That was done in order to involve imposing a disproportionate burden of searching for needles in haystacks.

Of course, we haven't got the analysis of overcharge yet from the claimants in any detail, but what I can tell the tribunal -- which we've set out in paragraph 17.2b of the skeleton, the Defendants' skeleton -- that for Prysmian, the projects not covered by the DPPs are, broadly speaking, the least valuable underground supplies, with an average outturn of 673,000. So if you take Mr Druce's low case overcharge of 10.4 percent, the average overcharge on those projects would therefore be less than the £100,000 cut-off previously applied, and that's even taking the 10.4 per cent, which we would submit is unrealistic for all sorts of reasons.

But that's why there is a needle in the haystack proportionality issue here. The bigger value projects have already been covered and projects of every type and we submit that that's enough.

THE CHAIR: But how strong is this point, that some disclosure has been ordered in the DPPs, because the DPPs -- all there would have been disclosed was impact of cartel on that particular cable purchase.

MS DAVIES: I accept that, but it's the combination of that and the commission investigation. So the commission investigation: my learned friend says in relation to the commission investigation, well, the commission found an infringement by object; they didn't look at effect. Well, that is true in the decision, that is how the commission analysed it. But inevitably, the commission, in investigating the alleged anti-competitive behaviour, would have been looking for any evidence of anti-competitive behaviour to support the case and there were a variety of different stages in that investigation; I'm not going to go into them all now, but there were. That's led to all the material that is on the commission file, they've got that as well.

So really, what you're being asked to consider, is whether for the remaining low value supplies in large part that are not in the off-the-shelf disclosure, with low average outturns, it's proportionate to require an exercise of going back through all the communications in relation to each of those supplies in order to try and see if there's any additional material which the commission didn't find on its investigation and in circumstances where they have got through the off-the-shelf disclosure, any general communications relating to the big picture projects, which I can't -- obviously, no one can say someone would be -- but one would have thought if you were going to have any anti-competitive behaviour, it would be in relation to the high value tickets rather than lower value ones.

THE CHAIR: And how do you deal with -- Mr Rothschild articulates his nightmare scenario of a particular regression analysis or being criticised or sought to be undermined on the basis of you popping out late in the day saying, "Oh, no, but this project was immune from the cartel because of x, y, z", is that a real concern, or is that not a real concern?

MS DAVIES: All I can say at this stage is there are real issues in relation to some of the higher value projects, particularly bespoke projects. What we're here talking about, though, are lower value underground projects, including a lot of off-the-shelf supplies, where you're literally just going and saying, "Have you got 20 metres of cable of this description?" And it's being supplied.

THE CHAIR: And just tell me again why this relates only to the lower value ones.

MS DAVIES: That's because the DNO purchasers are on average much lower. So the direct purchaser claimants have already included the major distribution networks, who are the ones who, by definition, are likely to be having the bigger projects, building substations or wind farms or the like.

THE CHAIR: So in your submission -- just so I've got this right -- they're getting the commission's file.

MS DAVIES: Yes.

THE CHAIR: And then in the direct purchaser proceedings, the direct -- although you accept the direct purchaser proceedings won't have disclosed impact of the cartel on everything, it will disclose impact of the cartel on the cables purchased in those proceedings, which you say will be the most important ones.

MS DAVIES: Yes. I'm not in a position, because we still are populating the VoC Excel and none of the -- you know, obviously we're only really engaging with Brattle since April, to indicate one way or the other categorically what the position is, as regards those projects that are not subject to the DPPs. So I'm making submissions on the basis of just what we know about the nature of the projects. A lot of them are -- take the example, I want to buy 50 metres of cable from your warehouse.

THE CHAIR: Right.

MS DAVIES: And in relation to those, trying to search is complicated, because we don't even have a name and the likelihood of there having been the sort of anti-competitive behaviour that is described in the commission decision is just much lower, because it's a pure purchase of a small length of cable and the other point that

I've just been reminded of is the DNOs are lower voltages and less complex, so there's much less cost involved, so that's why they're also lower value projects.

THE CHAIR: So, I mean, if we think about Mr Rothschild's nightmare scenario, you say, "Well, it doesn't arise in relation to the lower value claims because they're too small". In relation to the higher value claims, it might arise, the concern might be a valid one, but dealt with by the fact that the disclosure in the DPPs is being handed over and she has the commission file.

MS DAVIES: The commission file, following the commission's investigation. Of course if projects haven't been affected, they won't help the model show an overcharge, because there won't be an overcharge. So take my 50 metres of cable, just bought at this price or something, if they haven't been affected by -- you need to remember that this cartel is not alleged to be a price-fixing cartel, it's alleged to be a bid-rigging cartel effectively, refraining from tendering for projects.

THE CHAIR: And so if the tribunal said to you on the higher value ones, at some point, you should give a -- if you want positively to assert that the cartel had no effect on a particular project, give a list of those where you want to make that assertion; might prompt the class representative to ask for further disclosure in relation to those projects.

MS DAVIES: One can say, effectively, that is a different way of expressing what was done in National Grid, because in National Grid, the £100,000 overcharge cut off was applied in relation to non-addressees, so effectively saying those projects are too low value for this to be a real issue. There are different ways of doing it; we could look at it either way. You see that?

THE CHAIR: Thank you.

MR SINGLA: Sorry, may I --

THE CHAIR: Of course you may, yes.

Submissions by MR SINGLA

MR SINGLA: We submit that Nexans's position is a fortiori, and I'm just being told that the average value for the 14 Nexans projects in the VoC table is £145,000. So it's considerably lower than the figure for Prysmian. We would just adopt all of those submissions, but make that additional point.

THE CHAIR: Yes, thank you.

Mr Armitage.

Submissions by MR ARMITAGE

MR ARMITAGE: Yes, we adopt all of those submissions. Just so you have the point, we also have some evidence about the NKT position. In NKT's case, the off-the-shelf disclosure -- this is paragraph 19 of Ms Haigh’s second statement -- already covers the very substantial majority of the projects relevant to NKT's supplies in Great Britain during the relevant period. Because, as one can see from the VoC Excels provided on 23 June, almost all of the projects in the period covered by this request were to National Grid and Scottish Power, is NKT's case, and a handful of other projects.

THE CHAIR: So you made most of your supplies to National Grid and Scottish Power, who were bringing DPPs.

MR ARMITAGE: Fully covered by the disclosure exercise in the proceedings brought by those entities. Thank you.

THE CHAIR: Yes, Mr Rothschild?

Submissions by MR ROTHSCHILD

MR ROTHSCHILD: As to that last point from my learned friend Mr Armitage for NKT, if NKT considers that they've already provided such disclosure, then obviously we would be content with a clear disclosure statement saying that. But for good order, there really ought to be a discrete disclosure statement responding to -- an order specifically -- relating to that point.

THE CHAIR: Yes.

MR ROTHSCHILD: More generally, I would invite the tribunal to rule in principle on this application. It may then be the parties have to liaise as to the scope of a proportionate search.

I'm not currently in a position to accept the submission by my learned friend, Ms Davies, that only high value projects are relevant. Conceivably, low value projects -- there may be documents about the impact of the cartel on low value projects that don't relate to a specific low value project, but generically span a significant number. I don't know enough about the nature of the documents the defendants have.

THE CHAIR: Yes. So might cover lots of small value ones?

MR ROTHSCHILD: Quite, so it may not follow that because it's a small value project, it can be ignored for the purposes of disclosure of documents relating to the impact of the cartel. There may be such documents spanning multiple small value projects. I simply don't know. I'm not in a position to accept the submission, but nor am I in a position to deny it.

THE CHAIR: Thank you, Mr Rothschild.

MR ROTHSCHILD: Can I proceed to the next heading?

THE CHAIR: Yes.

MR ROTHSCHILD: The next heading, "Disclosure about policies and practices". This is section K of my skeleton argument. It's in the consolidated draft order. It's paragraph 7, linked with annex 2, paragraph 2.

Here, we seek disclosure of documents evidencing the defendants' pricing, bidding and supply policies and practices, which, as we say, in the skeleton argument, one would expect to be at the heart of any claim relating to -- we say, price fixing, but perhaps it should say bid rigging -- cartel conduct.

The defendants do not appear to deny the relevance of this requested disclosure, but they seem to suggest they're unlikely to have any documents to disclose, beyond those that are already in the off-the-shelf disclosure. If that's so, then I submit their disclosure searches and statements should be straightforward. But I suggest it is appropriate for the defendants to be ordered to make a disclosure statement in these proceedings. That's the background to the application.

THE CHAIR: Ms Davies.

Submissions by MS DAVIES

MS DAVIES: Again, the short answer in relation to this one is that the defendants have already been subject to broad disclosure orders in the DPPs, starting with National Grid, which encompasses all this material. It's different to paragraph 1, because the disclosure order isn't limited to the specific projects in suit; it's a broad order. That's explained by Mr Day in his fourth witness statement, paragraph 39.2, core bundle tab 11, page 223, where he quotes the relevant order made in the National Grid proceedings. If I can just show you that, it's at 223, for your reference. (Pause)

In paragraph 39.2, halfway through, he refers to 06 of annex 1 of the order that we were looking at just after lunch:

"Requiring disclosure of documents and/or information on how price terms were constructed, including: any cost categories and the costs taken into account; the market considerations taken into account; and the profits or margins taken into account; and any significant company wide changes in sales or pricing policy that took place between 18 February 1999 to 31 December 2015." [as read]

Now, if we then look at paragraph 2 of my learned friend's annex 2. It covers a narrower period, but broadly exactly the same things:

"Documents evidencing the defendants' pricing, bidding and supply policies…, specifically in relation to projects concerning…, within the scope…, documents evidencing the extent to which any of these policies and practices may have been impacted by the cartel." [as read]

And whilst they're expressed in different language, they're covering the same thing. In those circumstances, it's totally unexplained why it is necessary for the defendants to conduct further searches for such documents.

Now, the only answer that my learned friend has given, which he just reiterated just now, is to say, "Well, if you're unlikely to have any additional documents, disclosure searches and statements should be straightforward". But if, by that, what they mean is that all we would have to say is, "We've been required to search for this material previously, and you have our disclosure", that begs the question on why on earth we have to have a further order made against us now, because that is already clear.

If, as I apprehend might be the case, they wouldn't accept that, that begs the question of what exactly it is they are suggesting that now needs to be done. As to that, given the broad terms of the disclosure order we've already been subjected to, and given also a point I picked up earlier -- that this was made in October 2016, so that exercise was done some time ago, so trying to reconstruct it now is not straightforward -- we submit there's just no necessity for this order.

THE CHAIR: So is that second point. I mean, obviously when one conducts a disclosure exercise in litigation, one gives a disclosure statement, and you know what you've done, it's fresh in your mind; you've been living and breathing disclosure for the past ten months, and with the appropriate deep breath, you can sign the

disclosure statement there and then.
MS DAVIES: Yes.
THE CHAIR: But is the point that you're making now this: that if you now have to go back and revisit disclosure that was done in 2016, you have to revisit the whole exercise in order properly to sign the disclosure statement?
MS DAVIES: Yes. If that's what they're asking for, that is wholly disproportionate. They're asking -- I mean, it's just unclear. When my learned friend says, "We're entitled to a disclosure statement in these proceedings". That's just wholly unclear. So there's a whole range of possibilities, but they seem to be wanting a proper disclosure statement in the sense of the person in 2025 saying, "I am satisfied that there are no more documents falling within this category". That would require us to go back and revisit a whole exercise that we did -- oh, sorry, it's 2026, so ten years ago.
THE CHAIR: If they were happy with the statement that said, "In 2015/2016, we signed a disclosure statement saying we'd done the job properly", you'd say, well, there's no point -- definitely.
Anything from any other defendant? Mr Rothschild.
Submissions by MR ROTHSCHILD
MR ROTHSCHILD: I mean, you have my submissions on that already, I mean --
THE CHAIR: What kind of disclosure do you want?
MR ROTHSCHILD: A good order --
THE CHAIR: When you say you're entitled to a disclosure statement, what kind of disclosure statement did you have in mind?
MR ROTHSCHILD: Well, in my experience at least, it's most unusual to, in a responsible disclosure application, say, "Well, something was provided ten years ago

in another case". We, as always with disclosure, are seeking something proportionate. Somewhere in between the two options, which my learned friend Ms Davies has suggested, would probably work. Something along the lines of, "We've conducted a search before in 2016 and for the following reasons, we don't think anything has changed".

THE CHAIR: Well, what about -- I mean, sorry, I'm a judge, not an arbitrator or a mediator -- if they said to you, "In 2016, we did a disclosure exercise. We gave the disclosure statement in that litigation. We are not aware of any other documents that bear on this issue".

MR ROTHSCHILD: Yes, that is likely to suffice, and it links very neatly with the next heading in my skeleton argument, which is about known adverse documents. We are seeking an order in relation to known adverse outcomes. We don't want to get to trial --

THE CHAIR: Yes.

MR ROTHSCHILD: -- and discover that actually all those searches have been done many years ago. The key people in the defendants do know of something adverse to their case. It's unlikely, but for good order, that ought to be clarified.

Submissions by MS DAVIES

THE CHAIR: Ms Davies, if there was a request for you -- I mean, I don't know, I've told you already I'm going to think about it overnight. A request that you're not actually on knowledge (inaudible) additional documents bearing on this category; is that onerous?

MS DAVIES: Can I just clarify, do you mean by that the personnel at Prysmian today are not -- because when my learned friend talks about "key personnel", that's where we then already start getting into a difficulty, because a lot of the key personnel have already left.

THE CHAIR: Yes.

MS DAVIES: So if you're talking about someone whose knowledge -- you know, I can go to Prysmian today and say, "Do you know of any additional documents?" that's a different exercise to what my learned friend may have had in mind.

THE CHAIR: Yes, I don't know. I mean, you've drawn my attention to a distinction that I hadn't thought of when I raised the question.

MS DAVIES: It's a problem because it's such a historic -- so when we did the disclosure exercise in 2016, we had access to individuals that are no longer employed by my clients.

THE CHAIR: Then is your point you no longer have access to those -- or you may not have --

MS DAVIES: May not. I can't stand here and say one way or the other. I can say they're no longer employed. So if I've got to go -- that's the problem, as it were, in relation to my learned friend's point in relation to known adverse documents.

Of course, I understand the tribunal's view generally about known adverse documents. But again, our response to this is set against the context of what has gone before. We've had these disclosure exercises, and disclosure statements were made, and enquiries were made and relevant people were spoken to at the time. But life has moved on quite a lot since then, and when he says, for example, they would be content if a proportionate set of personnel were asked about their knowledge, well, that then begs the question of: who, in circumstances where the people who actually had more knowledge, were the ones who may have been in enquiries made of in 2016, in circumstances where ten years later, a lot of those people have left?

THE CHAIR: Thank you.

MS DAVIES: We submit that this isn't necessarily proportionate either. We've done disclosure exercises in the previous proceedings in relation to both these categories of the nature that we've discussed, and that should suffice.

THE CHAIR: You slightly got your retaliation in first there, didn't you, because Mr Rothschild hasn't quite made his application for known adverse documents yet, but --

MS DAVIES: Sorry, I apologise. I thought he had.

Submissions by MR ROTHSCHILD

MR ROTHSCHILD: I didn't have much more to say on it.

THE CHAIR: Did you have anything more to say on it?

MR ROTHSCHILD: Perhaps I can deal with it in reply. It seems to the class representative there are basic aspects of procedural fairness that at trial defendants must disclose known adverse documents. Sir, you'll be familiar with practice direction 57AD of disclosure and the business and property courts, and the bare minimum --

THE CHAIR: That doesn't apply here.

MR ROTHSCHILD: It doesn't apply here.

THE CHAIR: It doesn't apply here. Do we have a similar concept in the CAT rules or --

MR ROTHSCHILD: No, I don't believe there is.

THE CHAIR: That's the sensible --

MR ROTHSCHILD: Nevertheless, it's well established in the business and property courts as a bare minimum for disclosure. In my skeleton argument -- page 104 of the skeleton arguments bundle, or paragraph 46 -- I extract the two paragraphs of that practice direction on the subject of known adverse documents -- it may be helpful to turn that up.

THE CHAIR: Yes.

MR ROTHSCHILD: Paragraphs 2.8 and 2.9 of practice direction 57AD. They're also in the White Book. Paragraph 2.8 defines known adverse documents as: documents parties are actually aware of without undertaking a further search.

2.9 is worth focusing on, particularly the final sentence which deals with someone who has left an organisation:

"For this purpose it is also necessary to take reasonable steps to check the position with any person who has had such accountability or responsibility but who has since left the company or organisation."

We're only with all of these applications seeking a proportionate approach to disclosure.

It seems from the costs budgets that the defendants intend to call a number of factual witnesses at trial. Prysmian refer to two, NKT refer to up to four, and Nexans assume four. We don't know who these individuals are, but obviously they have someone within their organisation who understands the facts, otherwise they wouldn't be proposing to call factual witness evidence. So we simply ask for a proportionate approach. We don't ask that the defendants bring everyone out of retirement who might have worked in 1999 on these projects if they're still about, but something proportionate, and obviously including those who are going to be giving evidence at trial.

THE CHAIR: I mean, sometimes it's helpful to test this with a real world example. So let's imagine that the defendants are asked to give some confirmation as regards known adverse documents from people who no longer work there; do you envisage this kind of approach that key individuals who might have left the organisation are approached, they're shown the disclosure, all of it -- anyway, we'll come on to that -- and they're asked to confirm "Do you know of any known smoking gun adverse document that we should be disclosing, and we're not?"

MR ROTHSCHILD: Yes, and they may not need to be shown the disclosure because they may just need to identify whether there are any repositories that haven't been looked at. The solicitors can then perhaps identify whether it's already there.

THE CHAIR: I see. And they --

MR ROTHSCHILD: We're not asking for something truly onerous.

THE CHAIR: So you're asking for them to identify potential repositories of adverse documents rather than the documents themselves?

MR ROTHSCHILD: Well, in the practice direction 57AD paragraph 2.9 sense, "reasonable steps to check the position" might suggest that that would be a reasonable step. But there's a range of reasonableness.

THE CHAIR: And if a particular employee says, "I've left. I don't want to talk to you anymore, thanks all the same"; then that's life and they can't be compelled to answer?

MR ROTHSCHILD: It's all dealt with in practice section 57AD through the word "reasonable"; "reasonable steps". I'm not asking for more than that. It's difficult to say in the abstract what would be reasonable and what wouldn't be. It may just require a short statement from the defendant saying what they have done in that regard.

THE CHAIR: Thank you very much.

Ms Davies, I think it probably is your response to that.

Submissions by MS DAVIES

MS DAVIES: With respect to my learned friend, he seems to be stretching paragraph 2.9 of CPR practice direction 57AD beyond its reasonable boundaries. 2.9 is simply talking about whose knowledge, within a company, is relevant for the purposes of determining awareness. It is not talking about people having to identify repositories which different people in law firms can say whether or not there's something in there. So, that part of my learned friend's submissions we really found it difficult to understand.

He does seem to be suggesting that in order to comply with this it would be necessary for us to go back to individuals who've left Prysmian between the previous disclosure exercise and this. We do submit that the necessity for that hasn't been demonstrated; as simple as that, in circumstances where we've already done the disclosure exercise and relevant enquiries have been made. (Pause)

THE CHAIR: What's your point on stretching 2.9?

MS DAVIES: My learned friend said, in relation to that, that if you went to a key person you wouldn't have to show them the documents because you could just say, do you know of any documents that might impinge on this? They could say, "Well, yes, there's this group of files" and if the solicitors knew or didn't know what was in the group of files, then that would somehow rather get you to a known adverse document.

But that's not what this is talking about. It's talking about the awareness of the person you approach, of the existence of an adverse document. This known adverse document request by my learned friend is confined to documents falling within the categories 1 and 2 that we've been discussing. Given the backdrop to that which is: disclosure exercises are already done, commission searches and so on -- in those circumstances, the real question is: is it necessary or proportionate to require going back into the dust of time to people who were there in 1999 and who've since left?

THE CHAIR: I understand that point. But if it is thought to be necessary to look beyond that and look beyond the fact of the existing disclosure exercise, 2.9 of the practice direction does at least seem to be envisaging that there is some duty to make enquiry of former employees.

MS DAVIES: Yes, I understand that. Part of the problem with this is in order to be able to go to those individuals and say "Do you know of any adverse documents?" you would inevitably have to explain to them what documents have already been disclosed. We're talking about trying to get individuals to reconstruct their knowledge of documents dating between 1999 and 2009.

THE CHAIR: Two points, really. (1): the DPP exercise means it's not needed. (2): you wouldn't get much out of it anyway, because in your submission you'd find this former employee, you'd say "Do you know of any other known adverse documents?", he or she would say, "Well, tell me what you've disclosed" and then he or she would say, "Oh, this was 20 years ago, how can I" -- I mean, is that the essence of it?

MS DAVIES: Yes, in broad terms.

THE CHAIR: Yes, okay. Thank you. I think you should have the final -- I think that was a response, I think, to your known adverse documents. Do you wish to say anything more on it?

MR ROTHSCHILD: I don't wish to, unless there are any more questions?

THE CHAIR: No, thank you very much. That's fine.

MS DAVIES: The next topic is trial date and timetable to trial.

MR SINGLA: Sir, I'm sorry to interrupt.

THE CHAIR: Oh, sorry.

MR SINGLA: (inaudible) agenda. I just brought to your attention that in addition to the matters that Mr Rothschild addresses in his skeleton -- so, trial date, timetable, third-party disclosure and cost budgets -- we're also keen to raise an issue about the distribution plan. I'm not suggesting I do that now, but I just don't want that to be timed out, as it were.

THE CHAIR: No, it certainly won't be timed out. I've definitely got it in my notes. I had a separate section called certification matters, which I know is not anything either side use, but under that I had something on budgets and cost budgets and I had something on distribution plan.

MR SINGLA: I'm grateful. It's just to make sure that we have enough time.

THE CHAIR: Well, I mean, maybe we should do that next, do you think, before we talk about timetable to trial. Maybe it is logical next, unless anyone disagrees. Let's do it next then, Mr Singla.

Distribution plan

Submissions by MR SINGLA

MR SINGLA: I'm grateful. So this relates to paragraph 15 of the composite draft order, and what we're asking for is a direction that the class representative should file an updated distribution plan by 11 September with effectively a commitment to a proposed method of distribution. I just need to spend a few minutes explaining the background. In a nutshell, we say that they have refused to commit to a particular approach and we actually say they have failed to comply with an order that you made at the certification stage.

Moreover, there have been some recent developments which bring these matters into sharp focus. First, the decision in the ROC preliminary issues trial, which has a significant bearing on the expected value of each class member's claim, and secondly, the tribunal's decision in the Waterside case which I'll come on to show you. Effectively we say it's time now to grapple with this problem.

Let me just take this in stages by reminding you of the background. You'll recall what you said in the judgment about this, and I won't take up time going back over it, but crucially you will recall that the CR was arguing that it was premature for the tribunal to deal with distribution matters and you rejected that argument. You'll recall in the order itself you said that this aspect of the case would be kept under review -- that's in the recitals -- and paragraph 15 required the CR to serve a report setting out the proposals.

That report was served in July 2024 and it was accompanied by the second witness statement of Ms Spottiswoode, which I do want to show you very briefly, if I can. That's supplemental bundle 1 at tab 26. It's page 282 of the bundle. Can I just take you through this. First of all, paragraph 2 just shows that this is purportedly in accordance with paragraph 15 of the CPO. At paragraph 3 -- and this is important to the position today -- she says:

"It is not possible (nor would it be in the interests of the class) currently to indicate a preference for a single methodology or to be bound by particular reliance on one. Accordingly, I provide the tribunal with a number of options", and "these options have been developed and informed based on [et cetera]." [as read]

Then she says:

"Inevitably, the options set out herein may be subject to change as and when the proceedings reach the distribution stage, for example, as a result of developments in the proceedings and changing case law. However, my expectation would be that the changes required… would be a matter of addressing the fine detail." [as read]

So it's quite important to understand that when the report was filed it was expressly said that they were not committing to one or other of these options.

Can I just quickly show you some later paragraphs in this statement. So if one jumps ahead to page 290 -- this will just save me having to take you to the report itself -- you'll see what those distribution options were. Paragraph 26, "The Proposed Options", and then the heading "Two Broad Models" and top-down distribution being the first, and bottom-up distribution being the second. You'll probably recall the background, but the top-down would require the bill payers accounts to be reimbursed or credited, and the bottom-up would require active participation from the class. So that's the fundamental distinction.

But then at 28 she says it may be considered appropriate to have a hybrid of these two models. Therefore there's actually three options that are being left on the table in this statement. Then you'll see at paragraph 31 relevant factors determining the precise approach.

Then I want to just take you to paragraph 36 where she refers, under the heading "Top-down Distribution", to some correspondence with Ofgem. So this goes back to 2024 and she describes this at the bottom of the page as "engagement by Ofgem". I'll show you the Ofgem letter in a moment because I want to come back to this.

Then she says over the page "I've been encouraged by these initial interactions", and she's right in my submission to describe these as only initial interactions.

Then she quotes from the Ofgem letter, but she omits a crucial paragraph, which I'll come on to show you. But this is all about the proposed top-down method.

Then at 37:

"On the basis of this engagement… I'm confident that… a top-down distribution mechanism could be used." [as read]

Then at 42 onwards she deals with bottom-up distribution. You'll see she says at 45 "By the stage of distribution the recovered sum will be a known quantity" and so on.

Then 47 she refers again to the so-called hybrid between the two approaches.

At 50, importantly, she concludes by saying:

"I do not believe it's possible, nor do I think it's in the class members' best interest to make final decisions." [as read]

So that's what Ms Spottiswoode was saying at the same time as the report was filed. Let me just quickly show you that reference in the Ofgem letter. That's in the second supplemental bundle, volume 1, page 52. So that's the letter, it starts at page 51 just to help you navigate the bundle. It's a letter from Ofgem on 22 June 2024. Again, just in the interest of time let me just jump straight to what I say is an important paragraph that was omitted from the witness statement. On page 52 you'll see the second paragraph under "Potential Routes to Distribute Funds" -- well, in the first paragraph you see that the Ofgem said "both seem feasible and proportionate", so that is quoted in the witness statement.

But then the second paragraph:

"In order to enable the distribution of funds in a way that is specific to this case, it may be that existing regulatory arrangements need to be amended or supplemented. We would expect this would need further engagement with Ofgem and potentially with other third parties, such as government, suppliers or network operators, depending on the mechanism used". [as read]

Then they say they'd be "willing to support and engage with this work as necessary". And at the end of the letter "We welcome the opportunity to engage further". So in my submission that demonstrates that it's actually quite complicated even on the top-down proposed methodology and a lot more work needs to be done both by the CR and Ofgem.

THE CHAIR: I remember this letter came before the tribunal at one of the many CMCs in these proceedings. It's not been suggested before that it's inadequate; is that correct?

MR SINGLA: Well, that's right factually. But importantly, the reason this matter was put on ice was because it was agreed there was correspondence in 2024 -- and in the interests of time, I'll just give you the reference perhaps: it's tab 8 in the correspondence bundle -- where the defendants were saying top-down was the only viable approach and they needed to commit to a position.

But the matter then rested because the defendants agreed to defer the issue whilst an appeal was pending in the Gutmann v Apple case. Because you may recall that, whilst we had existing concerns about the cost benefit analysis, those concerns were heightened by an amendment to the litigation funding agreement which effectively would mean that the funders would recover a three times multiple before distribution to the class. So those matters were proceeding in 2024, which is why --

THE CHAIR: There was a CMC there, I seem to remember, where we said we'd allow the amendment because Gutmann seemed to permit it at the time.

MR SINGLA: That's right.

THE CHAIR: Gutmann we knew at the time was going on appeal.

MR SINGLA: That's right. And although there was a CMC earlier this year I don't believe that the points I'm raising now have come back before the tribunal. The reason it's important to bring them to your attention -- as I say, there have been two key developments: the ROC judgment, which does have a very significant reduction in the value of the claim.

But let me also show you the Waterside case which is in the authorities bundle. If you have the electronic version, it's page 528. Now, this is a decision of the tribunal in April of this year, so it was subsequent to the CMC that you had in March. It's a certification decision. It's in fact a case where the tribunal refused to certify. In my submission, what this demonstrates is that questions of distribution are not premature but have to be grappled with, in particular because they're relevant to the cost benefit analysis.

Again, I'm conscious of time, but I just want to take you through this decision because you'll see the relevant section starts at 536. I just want to show you the heading that this is all under the "Eligibility Condition"; do you see that?

THE CHAIR: Yes, I do.

MR SINGLA: I'm grateful. Then, if we can pick this up at paragraph 16, you'll see a reference to costs and benefits and then a reference to the tribunal rules:

"At the heart of our concerns are the proposed legal costs of these proceedings, as weighed against the anticipated sums which will be returned to the class. [as read]

And that's exactly, in my submission, this case.

So, 17:

"We are alert to the reality that the principal motivation to pursue collective proceedings will sometimes be the benefits those proceedings bring to lawyers and funders." [as read]

This chimes really with, sir, some of the points you were making earlier.

There's then a reference to Gutmann and perhaps I should just let you read what's said about Gutmann, because it will save me having to take you to the case itself. (Pause)

THE CHAIR: Yes.

MR SINGLA: So at 20:

"We take from this, that when considering costs and benefits of the proceedings, it's appropriate at certification to consider how damages are to be distributed." [as read]

Then you'll see Spottiswoode, your decision, is actually cited at paragraph 21. So the decision on certification and the importance of distribution is being relied upon in the CAT's decision, and you'll see the quotations from paragraphs 43, 45 and 55. You'll see the underlined wording in your judgment, it's recorded in paragraph 22:

"The PCR should give detailed consideration to plans for the distribution now so that the tribunal is in a position to make a properly informed assessment of the costs / benefit balance as the proceedings progress." [as read]

And this is important because it's a matter that needs to be kept under review, as in fact the CPO in this case records.

Then what the tribunal goes on to consider in this case -- if you see paragraph 27: the PCR's evidence relating to distribution and take up. Obviously, the detail of that particular case doesn't matter; it's the approach. You'll see, for example, the loss per class member at paragraph 29 is between £1.61 and £8.77. So these are very small sums indeed, again similar to this case.

Then at 33:

"As made clear in the recent authorities, including McLaren and Spottiswoode, it is necessary at certification to consider the likely take up as part of the cost benefit analysis." [as read]

And then again the evidence in that particular case doesn't matter. But you'll see at 37, for example, references to the level of take up. Then there's a long section starting at paragraph 38 about the cost budget and the analysis starts at 45.

You'll see the conclusion at 46 is:

"As currently formulated, the costs and benefits of the proposed collective proceedings [we do not consider] come out in favour of certifying the claim." [as read]

So this is actually quite a significant judgment in my submission because it shows that: (a) you were right at the certification stage to be concerned about these matters, but (b), they are matters to be kept under review. Matters concerning distribution go to the heart of cost benefit and you've seen what the budgets are across all sides, so there is a real question of cost benefit to be grappled with in the present proceedings.

So, after the CAT handed down judgment in Waterside, the defendants wrote to the CR. I just want to show you that letter. It's tab 32 of the correspondence bundle, which is page 131. It's a letter from Macfarlanes, but written on behalf of all defendants at paragraph 2. You'll see in paragraph 3:

"Since the parties last corresponded in 2024… there have been developments which bear directly on the approach to distribution. It's important that these matters are revisited now ahead of the present CMC, especially in light of the ROC issue judgment." [as read]

There's then a reference to Waterside at paragraph 4 and also 5, and then Gutmann at 6 and McLaren at 7.

Then under the heading "Relevance to the Spottiswoode proceedings", these developments are directly relevant to the distribution plan, especially given that the level of damages for each individual class member will be incredibly small. So, following the ROC issue judgment, even at the unrealistic 26 per cent overcharge. Then you'll see footnote 1 explains the calculation. But the range given here is £3.25 to £14 per class member.

There's then a reference in paragraph 10 to the top-down and bottom-up possible approaches and then the hybrid. What's said is the assertion, that was made back in October 2024 by the CR, that the exact distribution plan can only be finalised after knowing the total amount of money is available is squarely at odds with the approach taken by the tribunal in Waterside and McLaren. Even if the exact details of the distribution plan cannot be finalised that doesn't mean that meaningful progress cannot be made at this stage.

Then essentially, paragraph 11 goes on to explain that in this case there are: (a) practical challenges to effective distribution, just given the nature of the case; but (b), there's a very low maximum level of any potential recovery. That's why there is a real concern.

At paragraph 12 you'll see references to the distribution costs having been reduced in the budget which is inconsistent with the bottom-up distribution; I'll come back to that point.

Then at 14:

"To the extent that the CR is willing to commit or has already committed to top-down, we note that Ofgem's letter ... [That's the one I took you to]. As far as we are aware, the discussions remain at a high level and the CR has not taken any steps since 2024 to advance those discussions or to develop a top-down distribution mechanism with Ofgem's cooperation." [as read]

The one that I showed you would be complicated. And then:

"We raise these matters in order to avoid a repetition of the difficulties in other cases." [as read]

So that's what Macfarlanes were saying back in May. All we got back from the CR -- tab 35 -- is a very short letter with a failure to engage in this. So at tab 35 what they say is -- they just repeat at paragraph 2.2 -- this is page 145 of the bundle -- they just repeat that Spottiswoode 2 and the distribution plan proposed two models.

Then they say at 2.3 it ought to be apparent that a top-down approach is her preference, but as set out in that witness statement "not in the best interests of the class to make final decisions".

"Well aware of the cases" they say in 2.4, but they say this is all different from Waterside because she has set out a clear plan for distribution. There's just assertion that everything they've done is in compliance with the case law and the rules.

And you'll see at 3.1 they say that she's taken into account her preference for the top-down distribution model and has allowed for reduction in her budget, given the likely lower costs.

Now, we say that's not good enough. What we're asking for is a direction, as I showed you in the composite order, that they should file an updated distribution plan by 11 September. That would accord with both what you ordered at the beginning of this case, but also the recent case law of the tribunal, emphasising the importance of distribution proposals being clear, so as to carry out a cost benefit analysis. If, as she's now told us, top-down is her preference, then there should be no difficulty in committing to that. If the budget has been reduced to reflect top down over the bottom-up approach, then this ought to be a straightforward thing for the CR to comply with. That's really all I want to say about this.

I mean, we do have real concerns. We've set out in the skeleton some of the arguments that we anticipate we may wish to make in relation to cost benefit. So you've seen what the value of the claim is per class member, the range. You've also seen what the total budgets are. Even on the CR's side, the total budget for these proceedings is something like £21 million, if one includes the pre-CPO costs. That's a huge amount of expense being incurred on all sides in respect of a claim where the ultimate recovery is likely to be very low indeed.

I'm not seeking now to make submissions about cost benefit, but all I'm submitting is in order for the tribunal properly to assess the cost benefit question, which you do need to keep under review as the proceedings progress. We need them to commit to a distribution.

THE CHAIR: (Several inaudible words). So are you saying, in essence, that the tribunal should have available to it a distribution plan so it's got the raw material necessary to assess cost benefit?

And Gutmann matters because it's now clear that the funders can take out three times their costs; as a matter of law, they're entitled to take three times their costs out before the class gets anything.

MR SINGLA: That's right.

THE CHAIR: Because is there baked into the order some override, was there, that the tribunal could say no to three times costs if --

MR SINGLA: (Inaudible) Jurisdiction. But then what that does rather highlight, in our submission, is the benefit to the class. Now that's (several inaudible words).

THE CHAIR: Thank you very much. Nothing else from any of the other defendants on the distribution plan.

Yes, Mr Rothschild.

Submissions by MR ROTHSCHILD

MR ROTHSCHILD: We're over two years since certification; it's the third CMC since certification. It's a very late stage at which to raise these points. I'm still not too sure what my learned friend expects the class representative to do. His submission seems to focus on one paragraph in a supportive letter from Ofgem about Ofgem's willingness to support a distribution mechanism. A paragraph in which Ofgem, as a responsible regulator, identifies that it might need to consult on a distribution mechanism.

But realistically, it seems doubtful that Ofgem would consult the market generally before there's even a damages award to distribute. The class representative has complied with paragraph 15 of the CPO. It's in the core bundle, tab 3, page 15, if it would help to turn it up.

THE CHAIR: Let's have a look.

MR ROTHSCHILD: Page 15 of the core bundle, paragraph 15. That was the order made over two years ago, that:

"By 11 July 2024, the class representative file and serve a report setting out their proposals for a practicable and efficient methodology for distribution of damages if awarded, not limited to a process of distribution of cash, and not limited to a process in which members of the class must come forward and prove their entitlement." [as read]

That report, and my learned friend has taken you to it, is Spottiswoode's second witness statement, supported by an Ofgem letter. My learned friend briefly also took you to Scott+Scott's letter of 1 June 2026, where my instructing solicitors identified that the top down, namely the Ofgem enabled, distribution approach, was Ms Spottiswoode's preference. As I say, it's unclear to me what more is required at this stage.

THE CHAIR: Yes, but let's drill into that a bit more. It may be Ms Spottiswoode's preference, but I think the point that the defendants make is it's got to be workable. And the Ofgem letter, page 52 of the second supplemental bundle.

MR ROTHSCHILD: I'll let you turn it up.

THE CHAIR: Yes. Suggests that it might be necessary for existing regulatory arrangements to be amended or supplemented.

MR ROTHSCHILD: That must be read as a whole. I mean, it's then suggesting -- there's some italicised headings underneath -- how the distribution could work. It could be under the first (inaudible) heading using supplier licence obligations, and explains -- I don't know if you've read this letter.

THE CHAIR: I haven't read it, I haven't.

MR ROTHSCHILD: But my learned friend has plucked one paragraph out of it, and there are options suggested later on on page 52 and going over to 53: the distribution could be using supplier licence obligations is the first one; the second one using network charging methodologies; and then at the end, other possible options could be considered like vulnerable customers getting a greater award.

Obviously, if a distribution is going to affect the network charging methodologies, the network operators are going to need to be consulted. If it's going to be via suppliers, then the suppliers will need to be consulted as to whether their billing systems can cope with it.

THE CHAIR: Yes.

MR ROTHSCHILD: But what Ofgem is identifying, even regarding distribution through suppliers in the middle of page 52, is that recent work -- and I quote:

"... to support consumers during the energy crisis showed direct payments could be made to users via suppliers." [as read]

Ofgem's identifying that in the middle of page 52:

"From 2022 to 2023, the Energy Bill Support Scheme required domestic electricity suppliers to deliver a schedule of payments over six months to support each eligible customer with energy costs." [as read]

So there's a precedent. It's unsurprising that the regulator is not going to commit to something that could affect suppliers or distributors without consulting them.

Of course, if the tribunal requires it, the class representative would liaise further to explore this mechanism with Ofgem, but it may be a premature step before we even know the amount of damages available in this case, or when the distribution will take place. The regulatory scheme may have evolved by 2029/2030, whenever, ultimately, it will happen. If trial is not going to be till the middle of 2028 --

THE CHAIR: Yes.

MR ROTHSCHILD: -- then judgment and distribution might not be till 2029/2030.

THE CHAIR: Well, indeed, I understand that. But do you accept the thesis or the proposition that's advanced by the defendants that top-down is really the only show in town, and bottom-up, which involves people coming forward and claiming between some £3 and £14 each, is just not realistic? I mean, do you accept that proposition?

MR ROTHSCHILD: What has been said in correspondence is, is that the top-down approach is the class representative's preference.

THE CHAIR: Yes.

MR ROTHSCHILD: She hasn't committed firmly to that and nothing else; she doesn't wish to be boxed in by the defendants' correspondence.

THE CHAIR: No.

MR ROTHSCHILD: Because it's conceivable that there'll be developments in the case law that will, for some reason, rule that out. It is conceivable that there'll be some hiccup in the regulatory scheme. But it's certainly a strong preference.

THE CHAIR: Well --

MR ROTHSCHILD: And it does seem likely to be the method.

THE CHAIR: Let me put it this way: the tribunal would be in some difficulty if the class representative came to the tribunal and said, "Here's what we propose, people come forward and claim somewhere between £3 and £14 each". I think the tribunal would be concerned about cost benefit.

MR ROTHSCHILD: I fully understand that, and heard the tribunal's indication at the CPO hearing on that, amongst other things. Of course, the distribution doesn't have to be uniform across the class. Potentially -- and this is suggested in Ms Spottiswoode's second witness statement, and also by Ofgem in their letter -- the more vulnerable or those who perceive to be more vulnerable might get a higher reward. There are options at the distribution stage, but the focus for present purposes, I suggest, should be the trial of which will determine the aggregate damages award.

Unless the defendants are going to offer a settlement sooner, it's only through trial that there'll be a sum of money available to distribute. Of course, the tribunal will have to approve the distribution plan at that stage.

THE CHAIR: Yes, I mean --

MR ROTHSCHILD: Similarly, the funders' return will need to be cleared by the tribunal.

THE CHAIR: Yes. I suppose what I'm thinking is it might actually be in everyone's interest for there to be quite a lot of clarity on distribution, because without a reasonably clear indication of a way forward that involves, almost certainly, top-down, isn't there a risk for both sides? The risk for both sides is that we go to trial, and the risk for your clients, we go to trial, maybe you win something, and then Ofgem comes out of the woodwork after trial and says, "Oh no, we can't possibly make top down work; it's bottom up", and then suddenly the tribunal probably is going to be much less concerned about approving fees for the litigation funders and that kind of thing. I wonder if it's not in everyone's interest for there to be more clarity on this.

MR ROTHSCHILD: Well, I'd suggest that, read as a whole, the Ofgem letter, pages 51 to 53 of the supplemental bundle, is supportive and suggests: this can work; it has worked with the energy bill support scheme.

THE CHAIR: Yes.

MR ROTHSCHILD: It expressly says that Ofgem is willing to support and engage with the work as necessary, where it is appropriate for us to do so. So one would expect that if the tribunal indicated that it wished Ofgem to do further work, it would be forthcoming.

MR SINGLA: (Several inaudible words).

THE CHAIR: Should we break there for the transcribers? It's 3.30 pm, isn't it? Let's break there for the transcribers and come back at 3.40 pm, please.

(3.30 pm)

(A short break)

(3.43 pm)

THE CHAIR: Mr Rothschild.

MR ROTHSCHILD: Shall I proceed to the next topic?

THE CHAIR: Which was ...

MR ROTHSCHILD: A trial date and timetable to trial.

Third party disclosure

Submissions by MR SINGLA

THE CHAIR: Were there other points on cost schedules? Was there a point on a cost schedule or has that gone away?

MR SINGLA: Could I suggest this -- because it may be more efficient to have a discussion or debate about trial timetable in the light of where you end up on the various disclosures.

THE CHAIR: Well, that --

MR SINGLA: And there's also another disclosure matter which relates to third party disclosure.

THE CHAIR: Yes.

MR SINGLA: And I just wonder whether it's more sensible to deal with that point now, and perhaps one or two other items, such as, for example, whether expert evidence should be served sequentially or simultaneously in principle. That, again, would have a bearing on timetable might look like.

THE CHAIR: Yes, that sounds quite sensible to me, because trial timetable will be dictated by how much disclosure I do or don't order. I think sounds something in that; do you say otherwise, Mr Rothschild?

MR ROTHSCHILD: Yes, I recognise that.

THE CHAIR: Okay. Right.

MR SINGLA: In which case, I mean, you're right. Sorry, to answer your question, you're right: there is an issue in the skeletons about costs, but perhaps we could come to that later as well.

THE CHAIR: Yes.

MR SINGLA: If I just deal then with third party disclosure, this is paragraphs 10 to 12 of the composite draft order. As you will see, the defendants are seeking effectively a long-stop date by which third party disclosure applications should be made. The dates we've suggested are 10 August for the CR, 21 September for the defendants, but 11 December for the completion of third-party disclosure.

Now, that is all opposed in its entirety, so we're not merely arguing about dates. I'll show you the most recent correspondence from the CR, but they are saying, effectively, that there should be nothing at all in the order in relation to third-party disclosure, and we say that would be highly unsatisfactory.

Again, can I just take a few minutes to remind you of the background? The background, sir, is that since the outset of this case, all parties have recognised that the third-party disclosure is going to play an important role, and it's going to be essential for the resolution of the issues in this case.

Mr Druce, back in 2022, in his first report, had referred to various categories of third-party disclosure. I'll show you that in a moment. But by the time the matter came before the tribunal in March of this year, the CR had still not formulated her third-party disclosure proposals.

At the request of the defendants, ultimately this wasn't really opposed, but the tribunal did direct in the order at the CMC earlier this year that the CR should set out her proposals for third-party disclosure by 30 April, and she did so on 30 April and provided a schedule which I believe is not in the hard copy bundles, but it was provided to you in native form. I'm not sure I need to bring that up at the moment, but there is a schedule in which she listed various categories of third-party disclosure. But crucially, she said that the only requests third-party requests which in her words were "ready to be progressed" were the third-party disclosure requests as against Ofgem and DESNZ.

Now, just to give you the latest on DESNZ and Ofgem: DESNZ, the disclosure came in on 3 July, slightly later than the original deadline of 19 June, but that third-party disclosure is in, and there's no issue about that today. In relation to Ofgem, we say there has been delay on the part of the CR because she didn't circulate a draft letter to Ofgem until 2 June. But be that as it may, the letter has now gone and it went on 10 July.

But the question really is: what is the CR planning to do, if anything, in relation to the other third parties?

I just want to show you what Mr Druce was saying about this in his first report, and that's in the first supplemental bundle behind tab 27. (Pause)

It's page 584. Just to remind you, this is his very first report in these proceedings. In fact, if you start at 584, please.

THE CHAIR: Yes.

MR SINGLA: You'll see the heading, "Data I expect to be able to use following disclosure":

"This section summarises the data that would be useful to improve my analysis." [as read]

647:

"The key information I expect to receive following disclosure are summarised in table C1, which could be collected from the defendants and the documents already deployed in the BritNed proceedings." [as read]

And then 648:

"Other data summarised in table C2 are information that would be helpful for me to further refine my analysis." [as read]

And then he considers that information to be less crucial. I'm not asking you to look at this in detail, but if you look at the tables and focus on the column source, you'll see: parties; defendants; and third parties BritNed: this is table C1, "Key Information".

And then if you just continue through the tables, just quickly cast an eye over the various categories and then the parties. In particular, when you get to table C2, and again, you look at the column "Source", you'll see third parties feature quite prominently: Ofgem, but not merely Ofgem, and Bays; there are some other third parties there as well.

So that was --

THE CHAIR: On value of commerce, hasn't this rather been overtaken by events, because value of commerce is now being dealt with by the value of commerce spreadsheet? Or is that not your understanding?

MR SINGLA: Well, we don't know. It's really why we're here. So we don't know what they're intending to do now in relation to third-party disclosure. Let me just take this in stages.

So that was Mr Druce's first report. Then what Brattle did was they responded to that in a letter which is supplemental bundle 1, tab 24. (Pause)

So Mr Druce also provided a letter -- we actually saw this earlier -- in February of this year. And the Brattle letter, if you have this at page 233 of the bundle.

THE CHAIR: Yes.

MR SINGLA: You'll see at paragraph 2 that Brattle were responding to Mr Druce's letter in February of this year. So what I just showed you was 2022, his first report, but he also provided a letter in February of this year. And paragraph 4, what Brattle are doing, they are discussing their observations about proposed disclosure in relation to overcharge, VoC and pass on.

Then if I ask you to turn to paragraph 26 to begin with. (Pause)

Mr Druce's qualitative competitor analysis of the bid processes. So he referred in his letter in February to conducting a qualitative analysis. Perhaps just for your note, I won't take up time, but it's page 182 of this bundle is the letter from Mr Druce, and the paragraph is 23(c) of his letter, where he referred to conducting a "qualitative competitor analysis".

Brattle are responding to that, saying that:

"He proposes incorporating unsuccessful bids into that qualitative competitor analysis." [as read]

And he cites Mr Bell's report from London Array. And then Brattle say:

"We've explained why this would require disclosure from direct purchasers. It goes beyond the unsuccessful bid data. The same reasoning applies to qualitative assessment as that described in relation to the quantitative assessment." [as read]

And they go on to explain the disclosure that would be needed. Paragraph 28:

"Overall, then, our view is that for the experts in this case to incorporate unsuccessful bid information into either a quantitative or qualitative comparison exercise, it would be necessary to obtain documentation from purchasers evidencing their assessment and conditioning of the bids they received. Such evidence would facilitate our understanding, [et cetera]." [as read]

That's under the heading "Overcharge". Then 29, you see VoC. They say:

"We briefly explain the likely need for third-party disclosure in respect of calculating VoC." [as read]

And then a heading above 34, which is "Pass On", and that's broken down into (a) upstream pass on; and (b) retail pass on. If we just look at retail pass on at paragraph 37:

"Mr Druce states he has outlined the information that he requires to estimate pass through in addition to that information which he used in Druce~1, in his first and third reports. As such, the Druce disclosure letter does not itself outline additional disclosure requests to estimate the rate of retail pass on, although he did note [and you'll see what's quoted] there may be additional information that's useful for my understanding." [as read]

So Brattle are saying in this, paragraph 38:

"Our understanding is that at this stage the CR does not seek, and Mr Druce does not support the need for third-party disclosure relevant for the estimation of retail pass on." [as read]

And then 39:

"In the following paragraphs, we set out our views on his proposal to rely on the currently available evidence and the need to do this more carefully.

Just to highlight, at 40(a), Mr Druce is referring to an Ofgem study, but that relies on a single year of data, which Brattle says:

"Cannot, in our view, provide a reliable pillar." [as read]

And then can I highlight what they say at 42:

"Our analysis of the relevant materials in the public domain leads us to believe that the rate of retail pass on may vary along various dimensions, such as geographical region, tariff type and supplier, and could be lower than the rate assumed by Mr Druce." [as read]

And they conclude at 43:

"A careful empirical analysis is required, and that will require relevant data." [as read]

And then at 44, you'll see the heading, that requires access to third-party disclosure. So that's Brattle's response to what Mr Druce has and hasn't asked for by way of third-party disclosure.

So the defendants then wrote to the CR to inquire as to what her position was about these documents, and that's correspondence bundle, tab 55. Page 194 of the correspondence bundle. This letter, you'll see paragraph 1, refers to the Brattle letter that I've just shown you, and also the schedule that the CR provided us after the CMC earlier in the year.

"We note at the outset that the class representative considers that only third-party disclosure from Ofgem and DESNZ are ready to be progressed, while the other categories are contingent on the review of the OTS disclosure and VoC table, despite having now had that OTS disclosure for 13 weeks, they haven't progressed these contingent categories of disclosure. So we write to provide our collective comments on these contingent categories and to set out the additional categories of third-party disclosure the defendants' economic experts consider are required." [as read]

And at paragraph 3:

"These categories of additional third-party disclosure in the Brattle letter have not had any engagement from the class representative." [as read]

So the Brattle letter, just to remind you, was March, and this is now 1 July. Then there are comments on various categories of documents, and then you'll see the heading over the page, "Additional Third-party Disclosure".

Under the heading, "Overcharge", ABB:

"We note that Mr Druce identified ABB as a third party from whom disclosure should be sought." [as read]

And then paragraph 9:

"ABB doesn't appear expressly in the schedule. Please confirm "and so on"." [as read]

And then the next heading is "Tender Evaluation Documentation":

"Mr Druce confirmed he wants to undertake a qualitative analysis." [as read]

Reference to Brattle's letter. Paragraph 12:

"The defendants accordingly consider disclosure should be sought from the DNOs, TOs and other relevant purchasers." [as read]

Then the next heading is "Retail Pass On", which is the material I've just shown you in the Brattle letter, and the various categories of documents from third parties, including the CMA. I'll just take you to the headings, the CMA, the big six energy suppliers, and then over the page, mid-tier energy suppliers.

Under paragraph 20, the letter concludes:

"We invite the CR's comments on the additional categories of disclosure outlined above. Please respond to this letter by 8 July." [as read]

Now, in the light of that, we say it's actually very important that we all have clarity as to which categories of third-party disclosure, if any, the CR is intending to pursue. It's clear that she hasn't ruled out making further applications -- that's clear, both from the evidence and the skeleton. All they're saying is they're not at this stage pursuing any further third-party disclosure. That's why we say a long stop date should be provided for.

But we had a response from Scott+Scott to the letter I just showed you. We had a response yesterday. Can I just hand up copies? (Handed)

This letter explains why they oppose those paragraphs I showed you in the composite draft order; if I just perhaps take you through it very quickly. They say -- the first point they make is:

"We wrote to you on 30 April enclosing a schedule distinguishing between those requests, which Ms Spottiswoode considered were and were not contingent on a review of the OTS disclosure." [as read]

So the first point is: they have taken the position since the schedule that there are some categories of third-party disclosure in relation to which they cannot or will not make a decision until they review the OTS disclosure and we simply don't understand that, because we all know -- we've heard lots of argument today about what the VoC and the OTS disclosure comprise. We don't accept for a moment that they need to complete the review of those materials before deciding, for example, whether to pursue the tender review documentation that Mr Druce said he would need to conduct this qualitative analysis and that Brattle referred to as well. I mean, either they want to seek that third party disclosure or they don't, but certainly a review of the OTS disclosure is not going to assist with that decision and in any event they haven't told us when they intend to complete the OTS review. So they've just left that completely open ended.

Then they go on later to say -- no doubt Mr Rothschild can take you to any bits of this letter that he wants to, but you'll see at subparagraph F, they take a point that they don't agree with our proposal for applications for third-party disclosure to be made by a deadline, quite apart from the defendants not having made an application at this

CMC -- well, just pausing there -- with respect, no application was required; we're seeking directions at the CMC and we gave them notice of the point.

But then they tried to take a jurisdictional argument:

"There's no proper basis for the imposition of a long stop date. It would be an unusual direction for the tribunal to make." [as read]

And we can knock that on the head by pointing you to the fact that the tribunal made such an order in the Qualcomm case, which we can provide copies of the order if we need to, but an order has been made by the tribunal in the Qualcomm proceedings and also as I understand it, as recently as last week, there's an order was made in the Lenzing proceedings and again I don't know if the order is available on that one, but we can see if there is a copy that we can provide. But the short point is: there plainly is jurisdiction to make such orders; the question is whether it's appropriate to do so and we say it is appropriate to do so, because we're here arguing about trial dates and trial timetable and there needs to be clarity as to when third-party disclosure is going to be completed. So that's that point.

Then the third main argument that they raise is if you go ahead to paragraph 5.1, in relation to retail pass-on, they say:

"Ms Spottiswoode has significant reservations about the proportionality of the analysis envisaged by the defendants’ expert in relation to retail pass-on and as to whether it's necessary for the determination of this issue. These reservations have been heightened by the extraordinary sums the defendants intend to spend on expert evidence." [as read]

Now, she says:

"She'll be writing on the defendants’ proposed approach to retail pass-on shortly." [as read]

Now, we say, with respect, that is completely unsatisfactory, given that the Brattle letter was sent as long ago as March. So they've had the Brattle letter for several months and this is the first that we've heard about them having reservations about the proportionality of the analysis. We say this is another example of just a complete failure to engage and we're now here at the CMC and there is a real question about third-party disclosure which Brattle have raised as being necessary for the fair determination of the pass-on issue. That, of course, is part of their pleaded case, that there was 100 per cent retail pass-on and we're talking about the material required to substantiate that case and so we say that's regrettable, but it does demonstrate the need for the tribunal to impose some discipline on this whole third-party disclosure process. Therefore, we respectfully invite you to make the long stop date provisions that I drew your attention to at the outset.

Unless I can assist any further, those are our submissions.

THE CHAIR: Thank you.

MR ARMITAGE: Can I just add one small point by way of clarification? The VoC Excels cannot address the points made by Mr Druce in his report, for the simple reason that there are other suppliers apart from the three defendants supplying cables whose VoC the class representative also wishes to bring into account because the claim relates to all suppliers.

THE CHAIR: I see.

MR ARMITAGE: There's a reference by Mr Singla to the order made in the Lenzing case and there's a query as to whether that had been published. So I was in that hearing; that was in this courtroom as it happened a week ago today, an order was -- I can confirm -- made requiring the claimants in that case to make a particular application for non-parties. Just as a point of fact, it's not available on the CAT's website, purely because it's in the usual way still being debated, but it was definitely made, because I was here.

THE CHAIR: Yes. Mr Rothschild.

Submissions by MR ROTHSCHILD

MR ROTHSCHILD: Well, the class representative, of course, acknowledges that third-party disclosure should be progressed with due expedition and that the relevant materials from the third parties need to be available in good time before the expert's reports, but on any timetable it's quite a long time until the expert's report.

The suggested deadline of 10 August for the class representative to make the disclosure applications is too soon, it's unnecessary, it's unrealistic. We have been progressing third-party disclosure. My learned friend Mr Singla mentioned, but very briefly, progress on requests with DESNZ and requests to Ofgem. Those were substantial and have been dealt with and there is ongoing progress with the correspondence; Mr Singla handed up the letter over the weekend, responding to White& Case's letter of earlier this month.

But the third-party disclosure requests by their nature suck parties who are not involved in the case into it and they raise costs. They are a last resort. There's a clear interest in taking a staged approach to third-party requests so that they're not made unnecessarily.

Amongst other things, we do need to know first what data the defendants themselves can supply. For example, through the value of commerce Excel. Now, my learned friend Ms Davies referred to the fact that there are non-defendant cartelists, but the amount of data and the degree of supplies by the defendant cartels will inform the expert's assessment of how much more data is needed.

The topic of tender evaluation documents came up; it's referred to in that exchange of letters between White& Case and Scott+Scott. Mr Singla jumped over paragraph 4.2 in that letter that was handed up from Scott +Scott, which relates to tender evaluation documents and, sir, you'll recall that tender evaluation documents are something that we are applying for under the heading "Disclosure from Direct Purchaser Proceedings", which was addressed earlier in today's hearing. As it says at 4.2 of Scott+Scott's letter:

"As a first step, the class representative is seeking to obtain similar material from the defendants and the disclosure of tender evaluation documents from the defendants should be considered before any requests of third parties are made." [as read]

So a deadline of 10 August for the class representative to make all third-party disclosure applications is too soon and unnecessary, but the class representative will use best endeavours to progress the party disclosure proportionately, expeditiously. (Pause)

Submissions by MR SINGLA

MR SINGLA: In addition to the fact that we say they have been dragging their feet and the tribunal now needs to actually impose some rigour, given that we're now going to come on to discuss the trial timetable, the important point is we need to understand what they are intending to do, because there may be some categories of disclosure which the CR is advised not to pursue and if that's the case, the defendants may have to make their own applications and so it's not just a case of the claimants unilaterally taking as long as they need to decide what disclosure they want to pursue, all parties and the tribunal needs to understand their position is, because we then may need to move an application ourselves and we've said we reserve our position as regards the costs of doing so.

But if, for example, Mr Druce, in the light of the Brattle letter, is saying, "I just don't accept I need any of that disclosure on retail pass-on", then there'll be a decision that the defendants have to make. The directions that we're proposing are that they should confirm what is their final position, so that we can then take a final view and then go off and approach these third parties. If he's saying there's a problem with 10 August, that's one thing, but what he's actually saying is there should be no directions at all and we say that is unsatisfactory, given that the parties are looking at February or March for witness statements and then experts' reports after that.

So we say, really, the time has come now for this to be set in stone, because otherwise this will just be a moving feast and obligation of best endeavours just leaves the whole thing open ended in terms of the final date.

Thank you very much.

MR ROTHSCHILD: I might add just one point on that. In respect of any further disclosure that the tribunal might order at this hearing, the suggestions from the defendants are that none of this will come before 10 August, yet it is obviously relevant to what we seek from third parties.

I'm not sure what the next topic is; I keep suggesting it's trial date and trial timetable, but perhaps on the third attempt, I'll be allowed --

THE CHAIR: It might have to be the fourth attempt --

MR ROTHSCHILD: Yes.

THE CHAIR: -- because I do think there is something in the point that maybe I need to give judgment tomorrow about what disclosure I'm going to order and deal with points like deadlines for -- if any -- third-party disclosure and maybe there can be a discussion after that on trial timetable; I think that might be most productive, because then everyone's got information on what the case management --

MR ROTHSCHILD: My learned friend Mr Singla suggested that maybe there is an issue of principle regarding expert reports and whether they should be sequentially or simultaneously exchanged. But that could equally be dealt with.

THE CHAIR: Maybe we should talk about that, because -- I mean, if they are going to be sequential, obviously that adds to timetable. We might as well hear argument on that now, since we've got a bit of time, and there's still something bubbling around on costs, both sides -- I think there's a suggestion that you want periodic updates on costs; is that right?

Costs

Submissions by MR SINGLA

MR SINGLA: Exactly. We say two things but they are connected: one, their budget is unrealistically low and I can make good that point, but just to give you one example, their budget provides for £830,000, in relation to disbursements on expert reports and we say that is actually just completely unrealistic, given the volume of expert evidence there's going to be at this trial.

That's one example; there are other examples which I can come back to, but one aspect is their budget is too low and therefore they should provide updates and it is a concern that they don't seem to have budgeted properly for the entirety of this case.

But then the other side of that coin is that we say they also don't have enough adverse costs coverage to cover our costs. Now, Mr Rothschild's position on that is to say, "Well, that's because your costs are disproportionate". But we say he's wrong about that: (a) he's not particularised any issues, he's just said that in general terms; but (b) he's making that submission from a point of comparison with his own budget, which as I say, we consider to be unrealistically low.

So there are two connected points, but what we're seeking is twofold: it's an order that they should provide updates of their spend against their budget; but secondly, a direction that they should increase their adverse costs coverage. What I was going to suggest, in order to provide a pragmatic way through, he says in his skeleton that he will listen with interest as the tribunal presses us on our budgets, we say a more efficient and appropriate way to proceed would be for Mr Rothschild, if he has any complaints about our budgets, to particularise them in correspondence after this hearing. We can then respond to them and at that stage we can come back to the tribunal. But we say at the moment, on our figures, there's about 14 million of shortfall between their adverse costs coverage and our budgets; that's significant and they need to top that up.

Now, if he's got some complaints about our budgets, we can look at those, but we say on any view there's going to be a significant shortfall and they're going to have to address that. So we submit there is a practical way to deal with this for the purposes of the current hearing, but again we've sought to introduce some deadlines, so that this can be resolved expeditiously.

THE CHAIR: I mean, it seems to me you're not asking me to -- I'm not even sure if I can positively order the class representative to increase her costs coverage. I thought you were saying you wanted an update on her efforts to get more costs coverage; that's what your para 14 of the document --

MR SINGLA: Yes, that's right. So 13 and 14 are what I was just addressing, yes, exactly. But the update on the efforts to put in place, I'm now saying, in light of what they say in the skeleton about our budgets, we would essentially encourage them to particularise what they say is disproportionate in our budgets, because if they're opposing paragraph 14 on the footing that our budgets are disproportionate, then we say, "Well, actually we need to take that in stages, she should particularise the respects in which our budgets are said to be disproportionate", the correspondence will then play out and we'll see if there's a shortfall at the end of that correspondence, or we'll have to come back to the tribunal.

But essentially, she's saying at the moment that although there's £14 million of a shortfall, she's saying she's not intending to do anything about that. We say that's somewhat surprising, given that one of the concerns is that she would be personally liable for the costs. Again, it's a point that you made earlier, it's actually in everyone's interests that the CR has adequate adverse costs coverage and it's not good enough, we say, for them simply to shrug their shoulders and say, "Well, we're not incurring the cost of obtaining further adverse costs coverage, because your budgets are disproportionate", because they would have to explain away 14 million, which we say they won't be able to do.

THE CHAIR: I mean, is there really a storm brewing here which is at some point it sounds as though you might be applying for decertification on the basis that the cost budget is insufficient, and they've got insufficient coverage for adverse -- I mean, it sounds like that's what you're issue --

MR SINGLA: Well, that ultimately is where this could end up. Yes. I mean, I'm not obviously pressing anything of that nature now.

THE CHAIR: Obviously I'm not going to decide that today.

MR SINGLA: No, but we have to again take this in stages. Perhaps I don't need to at this stage develop our submissions, but their budget is completely unrealistic. Another example is it was it all premised on a trial in 2027 and now that's going back a year. So there are all sorts of just immediate questions that one sees when looking at the budget. That is a concern, because do they actually have the budget to pursue this case all the way to trial; that's point 1. Point 2: do they have enough adverse costs coverage? And is it really an answer to say, "Oh, but look at our budget", because it's all circular. I mean, they're starting with a budget that's unrealistically low. So they've chosen to bring very, very substantial proceedings against three defendants and there is a real question about the viability of these proceedings. That's why -- with respect, again, coming back to the gatekeeping role that the tribunal has -- one needs to keep an eye on these things.

THE CHAIR: Absolutely. Well, I mean, I'm aware of that. I mean, it's an issue that's clearly bubbling below the surface. I mean, could I do something like the following -- I mean, you've said you want them to give you quarterly information on their spend; I mean, shouldn't that be a two-way street so that both sides should provide each other with information on their spend -- and not just their spend at whatever rates are being charged -- but perhaps their spend at 30 per cent above scale rate and what's actually being charged?

Maybe we need to be pencilling in a hearing to grasp this nettle, because at the moment it's being put as: you want information. But on your side, you're making a number of suggestions to the effect that these proceedings aren't viable: adverse costs coverage, and then sort of an hour or so ago you were saying there's not a good enough distribution plan. Maybe we need to think about grasping that nettle just so we don't sleepwalk into proceedings where one side is saying it's going to come out of the woodwork later on and say these aren't viable. Maybe we just need to grasp that nettle if that application is going to be made.

MR SINGLA: Well, I can take instructions overnight and that may be the prudent thing to do. But as I say at the moment we have reached an impasse because she's saying nothing about the criticisms that we have raised. We have identified issues with her budget; we've heard no substantive response. Conversely, she's made the most

high-level assertion that our budgets are disproportionate.
THE CHAIR: Well, it does seem like a large sum of money; is it £46 million?
MR SINGLA: Well, I can take time explaining the detail of that. But just again, just to give you a flavour of the cost of expert reports, I think in the London Array proceedings on our side the expert evidence was over £3 million. These are very complicated, very substantial proceedings. You've seen the number of fields of expert evidence and the number of issues to which the expert evidence will go. The idea that they can produce all of that expert evidence at the cost of £830,000, in my submission, is actually risible.
THE CHAIR: But I suppose I was talking more about your costs.
MR SINGLA: Well, it depends what your point of reference is; that's the question. I mean, if you say, "Well, we're spending £830,000, therefore your costs are disproportionate" that's just a non sequitur. These are very, very expensive proceedings to litigate. We obviously have the burden of disclosure; we've heard all about that. We have the burden of factual witness statements and we are taking the expert evidence seriously and in a way that actually it corresponds to the costs of expert evidence in other similar proceedings.
THE CHAIR: Well, I mean, I can't decide today whether £42 million is too high or too low --
MR SINGLA: No, and you'd be doing so in the absence of --
THE CHAIR: -- it seems like a lot.
MR SINGLA: Well, it does, but you would be doing so in the abstract because we've actually not heard particular points. She says "Well, there's duplication" but of course duplication is being dealt with to some degree, or considerable degree, by virtue of the fact that there'll be a joint expert. So it's easy, as it were, to point to the bottom line and say that's a high number, but so is the £780 million or whatever they said these

proceedings were worth. These are all very, very large numbers. Sir, perhaps I should take instructions on your proposed way forward.

THE CHAIR: Well, I mean, why don't we hear from Mr Rothschild and see what he thinks we should do about this issue.

Submissions by MR ROTHSCHILD

MR ROTHSCHILD: On the class representative's cost budget the order sought is a strange one because it requires updates to be provided to the defendants. Now, it is very odd for a party to litigation to be pressing for updates on how much of their opponent's fighting fund remains. In fact, it could even be contrary to a fair trial because the requesting party can be expected to leverage that information for litigation advantage. I mean, the defendants expressed surprise that our budget has not increased, but the reason is: our budget is capped at the funding available, and the funding available has not changed.

Regarding the defendants' cost budgets, as, sir, you've identified, the figures are very high indeed. I mean, I can give some examples of figures which I suggest would plainly be reduced on assessment. It may not be necessary to turn up the budgets to see them but there is that option.

Counsel fees for trial. So it suggests there will be a seven-week trial. For Prysmian that's suggested to be brief fees of £4.4 million plus refreshers of £782,000. So a seven-week trial, if it were sitting five days a week, that would be about £150,000 per trial day. Now, I realise that brief fees cover preparation as well as trial, but that in itself is around 2.8 times the counsel fees in the class representative's budget.

And of course, the defendants are likely to be aligned at trial, so we would say they could probably manage with a single counsel team or a little over a single counsel team, rather than three counsel teams. But in addition, for trial the defendants have estimated NKT, adding together brief fees and refreshers, to be over £2.2 million, and Nexans's over £2.1 million. So the overall total that counsels' fees for trial and trial preparation comes to £9,518,250, which if you were to divide it by 35 days of trial -- if that's an appropriate way of dividing -- would be £272,000 a day. It's over five times the class representative's budget.

If one were to say reduce the counsel's fees for trial to £2.5 million, which is a sizable number, that would take £7 million off the total.

The expert report phase: the total for expert reports -- so that ignores expert work on other sections of the work phases -- comes to £10,830,000 on the defendant side; that is a very large figure. Mr Singla referred to a figure of £3 million in the London Array case. I wasn't involved in that case but my guess is that that was the figure before any assessment -- the actual figure spent rather than the amount recoverable inter partes. If one were to reduce the defendants' proposed expert report fees down to that level one would be shaving a further £7 million, so that's potentially £14 million saved so far. Of course, this is a broad-brush analysis, but (inaudible) Mr Singla asked for some headline points.

THE CHAIR: Of course, but I mean no doubt one can always make points about the modesty of one's own legal spend as compared with the extravagance of one's opponent's legal spend; that happens a lot and I know that happens a lot. But of more interest perhaps to me is this question: if the class representative runs out of money partway through these proceedings that is a disaster because lots of your money has been spent, lots of the opponent's money has been spent, and the matter can't come to trial, so it's an absolute disaster if you run out of money.

If you don't have sufficient adverse costs coverage to meet the defendants' reasonable costs -- costs on assessment -- whatever they may be, then that's a disaster for

Ms Spottiswoode because she's, on the face of matters, personally liable. So I'm perhaps less interested in forensic points about each other's costs budgets and expenditure; what I'm more interested in is how can the tribunal avoid either the disastrous eventuality that I have outlined to you -- one option, I suppose, is just wait and see. Another option is to see how real the risk is at a further CMC. "Wait and see" seems slightly fraught with danger to me. How do you think I should deal with the risk to both sides of this?

Submissions by MR SINGLA

MR SINGLA: Well, I understand the concern. I will point out that as things presently stand, more or less, the class representative's budget document is filed a few weeks ago, but fairly recently, and identified a remaining budget of £13.26 million. So it's not an immediate problem, running out of funds.

THE CHAIR: No.

MR SINGLA: Similarly, regarding the defendants' budgets, I think I have somewhere. Yes, the £46.4 million includes only £14.5 million -- I say only -- £14.5 million of incurred costs. So there's still quite a long way to go before their total is even incurred, let alone recoverable on an inter partes basis. So it's not an immediately pressing concern. There are of course mechanisms available. Maybe this is a topic that we too, on our side, of the courtroom can consider overnight.

THE CHAIR: Well, perhaps both sides can consider it overnight, because what I don't want to do, and I don't think either side wants to do, is just sleep walk into a situation where this becomes a real problem in eight, nine, ten months time, and we've got non-viable proceedings on our hands. That seems to me to be the nightmare scenario for everyone. What I would, I think, prefer to submissions about the unreasonableness of the other side's costs are proposals about how we can avoid sleepwalking into the nightmare scenario that I've articulated.

MR SINGLA: I'm very grateful, but can I just be clear. I mean, we'll take instructions, but we can see the sense of a further hearing at which all of these issues -- because they are connected to the distribution plan and adverse costs coverage, they all go to whether we are being prejudiced by the pursuit of proceedings, they just don't have the stomach or the money to fight. But there does need to be a process leading up to that hearing, because if we just come back in a couple of months' time to argue the same points based on the information we currently have, we're not going to be able to have that debate.

So what we will consider overnight is the process that leads up to a hearing at which one can consider all of these matters in the round. But just to put this marker down, that will involve the CR providing us with more information about the position, because otherwise we're no better off than we are at the current hearing.

THE CHAIR: Yes, and I suppose what Mr Rothschild's counterblast to that might be, "Well, yes, maybe, but it's not yet urgent enough".

MR SINGLA: Well, yes, but let me address you on that. You see, it's completely unacceptable, in my submission, for the class representative to say there's no immediately pressing problem, in circumstances where we've just had a day of argument where they are seeking wide-ranging disclosure, which will put us to considerable expense.

THE CHAIR: Yes.

MR SINGLA: It's a completely one-sided way of looking at the progress of this case. They come along saying, "You, the defendants, should incur all of this vast expense and time to provide disclosure that we need, but don't worry about the fact that we may not have enough money to take this to trial or to cover your costs". It's just a hopeless position.

It's deeply unattractive in the context of these sorts of proceedings, where there is actually a whole range of stakeholders, and the tribunal will have to have regard to the interests of the class members and so on. It's in no one's interest for this disaster scenario to eventuate, and we have to therefore grapple with it sooner rather than later.

THE CHAIR: Mr Rothschild.

MR ROTHSCHILD: One procedural mechanism could be cost management. That would require some more granular detail than the budgets, but --

THE CHAIR: I mean I have thought about that. It doesn't seem to be done much in the courts. It's not done in the courts much for claims over £10 million. I have wondered about whether there should be a proper cost budgeting. One's heart slightly sinks, but there's appetite for it at the tribunal.

MR ROTHSCHILD: And whilst I'm not encouraging an application for security for costs, if the defendants were to apply for security for costs, it would be necessary to scrutinise their figures.

THE CHAIR: I mean --

MR SINGLA: Just one point again -- I don't want to take pot shots -- but the ROC issue trial was not budgeted for by the CR. They've ended up having to pay £3.5 million of adverse costs arising out of that preliminary issues trial, and yet their overall budget remains the same for these proceedings. So one can actually see very, very quickly that there are gaping holes, and unanswered questions about how they are going to fund the progress of these --

And Mr Rothschild actually gave the game away, if I may respectfully suggest, when he said, "Well, there are constraints on funding". I mean, that's precisely our point. If they are trying to cut their cloth, then we need to understand, and the tribunal needs to understand, how a budget, based on assumptions that have now turned out to be wrong and quite substantially wrong, withstands scrutiny now, looking at the trial that we're now looking at.

THE CHAIR: Yes. Yes. I mean, I see that --

MR SINGLA: So it's not just a question of, "Well, let's just impose costs management". I mean, as you know, there are lots of costs incurred in relation to cost management. I mean, there are actually some bigger points of principle than a granular exercise.

THE CHAIR: Yes.

MR SINGLA: And it does tie into distribution as well, because this whole question of the CR not wishing to spend any money permeates through all of these points. That's the reason she's not committing to any distribution plan and working that up in the way that she should be; that's why she's not done anything about third-party disclosure; and so on. So it actually runs through all of these issues.

THE CHAIR: Well, I need to reflect on that issue. I mean, one does wonder if spend on all sides could be a bit more proportionate. I mean, I look out and I say it's a terribly impressionistic observation, but I see a full counsel row and I see a courtroom full of people in a case management conference. I do wonder if that's all necessary.

MS DAVIES: As I hope you will see, we've divided issues up really quite considerably between the parties, and obviously there was a joint skeleton. We all do have clients who've got their own information that needs to be presented to the court.

Particularly in relation to the disclosure exercise, you will have seen that in relation to the witness evidence, I took the lead on the arguments, but the evidence is there from all the parties. That's the complication of there being multiple defendants with different --

THE CHAIR: Yes, well, it is a complication. Just huge sums of money are being spent on this. And I am concerned about -- as I think I said right at the beginning -- this case. I suppose I need to reflect about what I do about it.

Mr Rothschild, what --

Expert evidence

Submissions by MR ROTHSCHILD

MR ROTHSCHILD: I see the time. Potentially the only other topic for today would be sequential or simultaneous exchange of expert evidence.

THE CHAIR: Why don't we do that?

MR ROTHSCHILD: The class representative's position is that exchange should be simultaneous. The issues for the experts are very clear. There's an agreed list of issues for trial.

THE CHAIR: Sorry, it should be ...

MR ROTHSCHILD: Simultaneous.

THE CHAIR: Simultaneous, right.

MR ROTHSCHILD: Yes. Amongst other things, that will speed up the path to trial. Because one of the reasons that the defendants are ending up with a May 2028 trial date is because they need to make space for the sequential exchange of expert reports.

But the issues for the experts are very clear from the agreed list of issues for trial, and from the fact that issues were aired at the CPO stage. It was a very full report -- it was more than one very full report from Mr Druce, the class representative's expert, and there were some reports on key issues from the defendants at that stage, too -- proposed defendants, as they then were. So in my submission, simultaneous exchange is appropriate and more efficient.

THE CHAIR: And, of course, the inevitable risk with that is both sides are then doing their own analysis in isolation in a sense, their first cut of the analysis in isolation from the other.

MR ROTHSCHILD: Well, the defendants have seen Mr Druce's framework from his CPO report.

THE CHAIR: Yes.

MR ROTHSCHILD: We have suggested in our draft order a degree of liaison between the experts on overcharge -- the paragraph 5 of the draft order, the suggestion that Mr Druce and Dr Davis could liaise about data for their overcharge analysis.

Maybe there should be a little further liaison on points of principle before the exchange of expert reports, but having full sequential exchange will just prolong the timetable to trial.

THE CHAIR: Right.

MR ROTHSCHILD: And lead to another round of lengthy documents. They're already lengthy documents in the files.

Submissions by MR ARMITAGE

MR ARMITAGE: On the division of labour, as mentioned, this one falls to me. So yes, as you would have picked up the defendants, instead propose a sequential process, which you can see at paragraphs 21 to 23 of the composite order. I understand I'm addressing you on the question of principle today, and we'll come to timings tomorrow.

As my learned friend Mr Rothschild notes, this is an important driver of the difference between the parties on the overall timetable, but in our submission there are significant advantages to a sequential process which justify taking some time to complete that process in the present case.

There are two in particular I'd like to identify: first, the defendants' proposal involves a lower volume of expert evidence overall. If my arithmetic is correct, at the end of a long day in court, on the CR's proposal, you're going to get four expert reports on the first date. So that's one report from Mr Druce and one each from the defendants' now three experts, Dr Davis, Dr Moselle and Mr Holt. You're then going to get another four reply reports from the same experts.

On the defendants' sequential proposal, in contrast, you're going to get one report from Mr Druce, three responsive reports from the defendants' experts, and then a further reply from the CR's expert, which is five expert reports on the defendants' proposal, rather than eight on the CR's proposal.

In my submission, crude as the arithmetic is, that is more manageable for the tribunal and indeed better reflects this tribunal's well-known desire to keep expert reports and expert evidence within manageable bounds.

Indeed, if I may, I'm just going to show you how this might play out in practice. You saw earlier, I think, the lists of expert reports and page counts that have been provided in other proceedings. If I may, can I just turn that back up.

So if one goes to the correspondence bundle, starting at I think page 206. I think, as I say, you were taken to this letter earlier in a different context. (Pause)

You should have an annex 1 expert reports filed on behalf of Prysmian in the DPPs. First you have the National Grid/Scottish Power proceedings. Prysmian and NKT were the defendants for those proceedings, as I think you know. In that set of proceedings, a simultaneous exchange process was adopted for expert evidence, as the CR is proposing here. You can see -- this is just illustrative of course -- that the Prysmian expert, Mr Davies, produced a first-round expert report comprising 203 pages, and then a reply report comprising 141 pages. So going on for 350 pages in total.

But if one moves on two pages to page 208, you can see in contrast, in the Vattenfall proceedings, where a sequential approach was directed by, I think, the High Court before the proceedings were transferred to this tribunal, a single report from the same expert, John Davies, comprising 170 pages.

Of course, you'll have the point, we're not just concerned with Prysmian, but also NKT and Nexans. And that is not just a question of volume and manageability, but also importantly, costs. Mr Rothschild referred you to the figures in the defendants' cost budget for the expert evidence phase, and you've heard some high-level submissions on that. But certainly the NKT defendants -- I think also the other defendants -- have prepared those budgets on the basis of the CR's proposed approach to expert evidence. In other words, simultaneity, in other words, eight reports from the experts in total. You can see that clearly from the NKT defendant's budget at core 288.

So in my submission, on any view, there are going to be lower overall costs for the expert phase if the defendants' experts are only producing one round of reports rather than two.

Then the second advantage I'd like to identify is that the defendants' proposal avoids the ships passing in the night problem. My learned friend has said that the issues for the experts are already clear in this case from the list of issues and from the airing of issues in the preliminary reports produced by Mr Druce at the CPO stage, but sir, as you'll have seen, the expert issues in the list of issues are described in very high-level terms. The CPO reports are expressly preliminary in nature; they don't contain any detailed expert analysis on many of the key issues; they certainly don't take account of the disclosure, for obvious reasons, given the timing of those reports.

It would be, in my submission, a real advantage for the defendants' experts to see precisely how the CR's expert is framing his analysis on the key issues so that they can respond in a way that is constructive and best calculated to assist the tribunal in resolving those issues.

Importantly, the sequential approach also avoids the defendants' experts having to spend time in their primary reports addressing points that turn out to be common ground. Instead, the defendants' experts can skip straight to addressing the key disputed points. In my submission, that would be a considerable economy in a complex case of this nature.

We say our proposal, all of this, is consistent with this tribunal's new expert practice direction, which, although it doesn't in fairness explicitly address this question of sequential reports, is shot through with references to keeping expert reports concise and within manageable bounds.

Then a related point: the defendants' proposal also ensures that the expert issues are well defined in advance of the joint expert process, which can then be used to produce a manageable and useful document setting out areas of agreement and disagreement, and without wishing to give evidence from the bar, those of us who had the joy of being involved in the National Grid v Scottish Power proceedings will recall that in that case, the experts produced an extremely lengthy joint statement that was the subject of some judicial criticism. In my submission, this process will help the expert process, including the joint expert process, to be controlled and concise.

One final point, if I may: we do say that sequential evidence is actually not a particularly unorthodox proposal. As I said, it was adopted in the Vattenfall direct purchaser proceedings. I don't have a copy to hand, but I'd note that the commercial court guide, for example, observes that:

"In many cases, sequential expert evidence may save time and costs by helping to focus the contents of responsive reports upon actual rather than assumed issues of expert evidence, and by avoiding repetition of detailed introductory or explanatory material." [as read]

Sorry, that was a quotation from the commercial Court guide, which we can provide if it's helpful. But essentially, that is exactly why we say that process works in this case. So unless I can assist further.

THE CHAIR: Any riposte?

MR ROTHSCHILD: No, unless you have questions.

THE CHAIR: The debate's been set out, really. Okay, well, I don't think there's much more I can usefully do today.

Okay, well, thank you very much. Let's come back tomorrow. Could we perhaps come back at 10.00 am tomorrow rather than a 10.30 am start? I really would like to be done by lunch time.

(4.42 pm)

(The court adjourned until 10.00 am on Tuesday, 14 July 2026)