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IN THE COMPETITION
APPEAL TRIBUNAL

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

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 6th July 2026

Before:

Hodge Malek KC

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Lenzing AG and Others

Claimants

v

Westlake Vinnolit GmbH & Co. KG and Others

Defendants

A P P E A R A N C E S

Michael Armitage and Ciar McAndrew (Instructed by Stewarts) on behalf of Lenzing AG
and Others

Sarah Ford KC and Conor McCarthy (Instructed by Willkie Farr & Gallagher LLP) on behalf
of the First to Third and Fifth and Sixth Defendants

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1 Monday, 6 July 2026
2 (10.30 am)
3 (Proceedings delayed)
4 (10.37 am)
5
6 Housekeeping
7 THE CHAIR: Some of you are joining us via livestream on our website, so I must start,
8 therefore, with the customary warning. An official recording is being made and an
9 authorised transcript will be produced, but it is strictly prohibited for anyone else to
10 make an unauthorised recording, whether audio or visual, of the proceedings and
11 breach of that provision is punishable as contempt of court. There will be, probably,
12 a written ruling at the end of this, which will reflect the outcome of the various
13 applications today.
14 Mr Armitage.
15 MR ARMITAGE: Morning, sir. As at the previous two hearings, I appear for Lenzing.
16 On this occasion, I'm appearing with Ms McAndrew.
17 THE CHAIR: Yes.
18 MR ARMITAGE: The Westlake defendants: my learned friend Ms Ford KC appears
19 on this occasion alongside Mr McCarthy who, like me, was in the lineup at the two
20 previous CMCs.
21 THE CHAIR: Exactly, yes.
22 MR ARMITAGE: You should have, I hope, hearing bundles running from A to H --
23 THE CHAIR: Yes.
24 MR ARMITAGE: -- as well as two volumes of authorities.
25 THE CHAIR: Yes.
26 MR ARMITAGE: And there is an agreed agenda for today.

1 THE CHAIR: Whatever the agenda is, I'll --

2 MR ARMITAGE: Of course.

3 THE CHAIR: -- hear in a second.

4 MR ARMITAGE: Yes. So subject to your input, sir, I propose to turn up the agenda

5 immediately and see what is on it and then take you through the points, unless you

6 have any preliminary points you wish to discuss.

7 THE CHAIR: Okay. So look, I've read the skeletons, so you've both done your

8 advocacy on paper.

9 MR ARMITAGE: Yes.

10 THE CHAIR: I've been through, very carefully, bundles A to C, but that's about as far

11 as I've got.

12 The authorities: I think many of them are familiar friends, but insofar as we need to

13 look at any particular passages, you can do that.

14 A couple of things to start off with. I did find it useful that both sides did give us an

15 update in their witness statements as to what's been happening, the cost. The

16 disclosure statements: I have been through those, very helpful; that's the sort of detail

17 that I need, so I've got no criticism about any of the disclosure statements. I see what

18 you both said about the others, but quite frankly they're fine, happy with that. There's

19 a few queries, but we will come up with those during the day.

20 It is useful to know what the costs have been and I think for every hearing -- when we

21 deal with disclosure -- it's always good for me to know: what have we done, and at

22 what cost? So I can bear that in mind in the sort of proportionality of what further

23 disclosure measures that we need.

24 In relation to the disclosure applications against you, my inclination at the moment is

25 to make some orders, because I think it's going to take a long time, potentially, to get

26 to the end of the section 1782 process. In my experience, it varies. You know,

1 sometimes you get an answer, everything within two months and it's brilliant, other
2 times you are talking about six months. But I think that -- with that delay in mind -- it's
3 not a great idea to postpone all the issues on disclosure.

4 The two statements you've done on pass-on and on your financing costs: I've looked
5 at those. They contain sort of detail that I wanted and the information statement has
6 the sort of detail that I wanted from the defendants. So that's all clear, but obviously
7 that's a starting point where we go further on.

8 What I would like to deal with -- what I think is the most important thing to get right -- is
9 the section 1782 application, because with these cartel cases, the evidence is often
10 fragmentary and it's going to be -- I think -- pretty important to see what the
11 submissions are. That's your first category of the three categories that you're looking
12 for under section 1782. What you're trying to do is: you look at the information you're
13 getting from the defendants as to actual prices and where they are and you're going
14 to look at what's being submitted -- or what has been submitted -- to IHS by the
15 relevant alleged cartelists and to see if there's a mismatch. If there's a mismatch, then
16 your case may have legs. If there isn't a mismatch, your case is going to have
17 problems. I think that's where I am on that.

18 The other thing to bear in mind is -- you know -- this isn't the first cartel case I've dealt
19 with. I know exactly how cartels work and it's not simply a question of looking at what's
20 on the systems, what the messages are on the submission desk, or the sales desk,
21 whatever it is. I was involved in both Forex and LIBOR and various others, both as
22 a lawyer, advisor, as well as -- in some of my judicial roles -- I've been dealing with
23 cartels, so I've been dealing with them outside the jurisdiction. So I know how they
24 work and it's naive to think that you just look at one; you need to see whether or not
25 there's something that's fragmentary and I think that's what you're trying to do in this
26 case.

1 But what is difficult in this case is that this is not a follow-on, because what happens
2 is that, in many cartel cases, you get dawn raids, the phones are taken, the systems
3 are looked at and interrogated and so you do get evidence of messaging. But in this
4 case, you're coming in after the event and having looked at what's happened here, we
5 will need to go into what's happened about two particular phones, because something
6 clearly has gone wrong and it certainly does not look good for the defendants to see
7 what's happened on those two major people from the sales desk. Not acceptable; we
8 need to find out why that happened and the explanations to date I'm not happy with.
9 We're going to have to get something, more detail and get to the bottom of it.

10
11 Ruling (submitted to the learned judge for approval)

12
13 So that's what I wanted to say on the application. The next question to deal with is the
14 issue of collateral use and it's an important point to get to the bottom of as to whether
15 or not collateral use is effectively involved, when you seek to use documents disclosed
16 on disclosure for the purposes of seeking evidence for these proceedings. And so, if
17 you could help me on that, of course I'm aware of the general cases on this, but it may
18 be that it would be useful if you say something about that and then Ms Ford can come
19 back on that, because I would like to get to the bottom of that issue. But that's not
20 going to be conclusive, because I would like to point out that there are CRO documents
21 here. So even if I do take the view that it is not collateral use if you use this material
22 for the purposes of getting disclosure from America, I will need to address the points
23 being raised by Ms Ford about CRO documents, because I do think that that raises an
24 additional issue. So what I suggest we do is we deal with first whether or not it is
25 a breach and then, if it is a breach, I'm going to have to make a ruling on whether you
26 can use that material.

1 But even if it's not a breach, I still need to go to this question that's raised by Ms Ford
2 in relation to CRO documents and on that, I need to have a slightly clearer picture
3 of -- if you exhibit a CRO document for the purposes of the section 1782 application,
4 will it enter the public domain that way? Because if it will, then that may be something
5 that we need to make sure we're covered and that appropriate steps are taken by the
6 US lawyers to ensure that it doesn't go into the public domain, because that way you
7 could just defeat the CRO if that's not covered. But that's a whole topic; we'll come to
8 that topic, but I do consider the points raised by Ms Ford on that is an important thing
9 to get to the bottom of, and to rule on today. So let's -- having done the easy bit, which
10 is: is it a proper use, so far as we're concerned? Is it a proper exercise for you to do,
11 which is to apply under section 1782; this tribunal has said it is, but we now need to
12 look at the collateral use.

13 MR ARMITAGE: Very grateful, as always, for the introductory remarks. Just to be
14 clear, it won't surprise you that we're very happy with the proposal to provide, in draft,
15 our section 1782 application. It reflects a proposal we made in the non-party
16 disclosure update that you've seen and to provide that also in copy to the defendants.
17 We had also raised the possibility of a supporting letter from you, sir. I think in light of
18 the remarks you've very helpfully made today, that may fall away.

19 THE CHAIR: Look, I don't think I need to write a letter.

20 MR ARMITAGE: Not now.

21 THE CHAIR: But I know sometimes that on these you do get a letter from the foreign
22 court saying -- addressed to the US court -- that this is something that would assist or
23 whatever, but I don't think we need that.

24 MR ARMITAGE: Yes.

25
26 Submissions by MR ARMITAGE

1 MR ARMITAGE: So beginning then on the question of whether this proposed use
2 constitutes collateral use, we say -- I should have picked up -- that use of documents
3 from the defendants' disclosure for the sole purpose of obtaining evidence for these
4 proceedings is not prohibited collateral use.

5 THE CHAIR: Just to make sure I've got a copy of the rules. (Pause)
6 Yes. Sorry.

7 MR ARMITAGE: I appreciate, sir, of course, that you'll be very familiar with the
8 applicable principles in relation to collateral use generally. Both parties' skeletons
9 quote from your textbook on the point. As you put it in your textbook, sir, by reference
10 to the House of Lords case of Home Office v Harman, the basic test for collateral use
11 is whether the disclosed documents are being used for a collateral or ulterior use that
12 is not "reasonably necessary" for the proper conduct of the action.

13 In my submission, there is no collateral use, whereas, here, the proposed use is that
14 the disclosed documents will be deployed in an application in the United States, where
15 the sole purpose of that application is to obtain disclosure for use in these proceedings.
16 I will, if I may, just show you one authority.

17 THE CHAIR: So, on that, you'd be willing to say that, insofar as you do get documents,
18 they will only be used for -- you will only use them for the current proceedings, and
19 that if you want to use them for anything else, you'll come back.

20 MR ARMITAGE: Yes. I mean, we would be subject to that restriction, in any event,
21 but insofar as it is necessary, of course, we'd be willing to say that. We confirm today
22 that that is exactly what we envisage.

23 THE CHAIR: Yes.

24 MR ARMITAGE: If it assists, I'll just show you one authority, which is the
25 Wilden Pump v Fusfield case.

26 THE CHAIR: Yes, Wilden Pump I know.

1 MR ARMITAGE: Which you have a --

2 THE CHAIR: I know Wilden Pump, so don't worry.

3 MR ARMITAGE: Yes.

4 THE CHAIR: On that, it cited, I think, at 1924 or something, and that the relevant

5 passage I remember looking at is on the last page of the judgment, because there

6 were two competing views there as to what -- let's say, the limits of the collateral use

7 restriction was. So when I looked at that -- unless you've got another key passage

8 in -- I was just going to look at 605, unless you've got another passage.

9 MR ARMITAGE: No. The only point I was going to just show you, just in terms of the

10 background. If one looks at page 583 of the report.

11 THE CHAIR: Yes.

12 MR ARMITAGE: This was a claim for copyright infringement. The plaintiffs essentially

13 discovered during the course of the proceedings that certain documents were no

14 longer in the possession of the defendants. I was just going to show you, towards the

15 bottom of the page, in fact, the second paragraph in Mr Justice Falconer's judgment:

16 "The matter arises from the admitted use by the plaintiffs of documents" --

17 THE CHAIR: Mr Armitage, where are we? What page?

18 MR ARMITAGE: I'm so sorry, page 583 of the report. Two-thirds of the way down,

19 the start of Mr Justice Falconer's judgment. You see the second paragraph:

20 "The matter arises from the admitted use by the plaintiffs of documents disclosed by

21 these defendants in this action in another action, numbered [number set out there],

22 brought by the plaintiffs against [the] potential witness ..."

23 So it was a separate action, not an application for third-party disclosure within the

24 same proceedings.

25 THE CHAIR: But have you got any case where documents have been used for

26 a section 1782? Because it happens all the time, in practice --

1 MR ARMITAGE: Well.

2 THE CHAIR: -- when you're seeking disclosure under section 1782 (inaudible), you
3 make your application. You may exhibit some documents. They may well be
4 documents for the proceedings. But is there any express case that you can think of
5 where a judge -- I'm sure it's happened, but where a judge has actually considered
6 and said ...?

7 MR ARMITAGE: No. So we've obviously looked at that. We've
8 certainly -- Ms McAndrew and I, for example, were involved in the Qualcomm litigation,
9 which I know you're familiar with, sir, in which section 1782 applications were made in
10 the US. This point didn't arise for discussion.

11 There'll be other examples, I'm sure. We're not aware of any express judicial
12 consideration. So we rely on, sir, as you say, page 605 of Wilden Pump for the general
13 principle, where the --

14 THE CHAIR: Let's see what Ms Ford has got to say on the collateral use point, but,
15 you know, in a way that they're right to raise it as an issue, and it's right that we have
16 to rule on it.

17 But what is also unusual, Ms Ford, about this application -- this is an application that's
18 been made with the -- effectively, with the consent of the tribunal. We know they're
19 making this application. You'll remember at CMC2, we were both saying -- you weren't
20 there -- both me and your team were saying: this needs to be done. You know, this is
21 what you -- because if you're right, and there's no cartel, and there's no high balling,
22 you want to get these documents in, so you can say, "Well, this is where we are. You
23 look at this and that. If you look at this, what we were submitting and what the others
24 were submitting wasn't high balling, and it reflected what the market was, so that's it".
25 So I think we all want this to be done sooner rather than later.

1 Submissions by MS FORD

2 MS FORD: So yes, we have not been trying to obstruct this happening. We've been
3 taking, what we submit, is a perfectly reasonable approach. What we've said is we
4 have no objection to facilitating the use of specific documents.

5 THE CHAIR: Yes.

6 MS FORD: The concern we have is that it's not appropriate to grant blanket access
7 to the supply and use of our documents, including confidential material, in foreign
8 proceedings beyond the supervisory jurisdiction of the tribunal.

9 In many ways, the threshold question of whether this is collateral use or isn't collateral
10 use is something of a red herring, because, of course, to the extent that it were to
11 constitute a collateral use, it remains possible for the tribunal to make a direction to
12 the effect that it should be collateral.

13 THE CHAIR: Yes, I think that the real issue between us is not this issue; it's the CRO
14 aspect of it. That's where I think the dividing line is, because -- you know, you can try
15 and persuade me to the contrary, but I take the view that -- looking at the authorities,
16 and what I've said about this in my book, I know what I think about it, and I'm willing to
17 be persuaded that I've got it wrong, but my general view is it's not a breach of the
18 collateral use restriction to use documents disclosed in disclosure, for the purpose of
19 making an application under section 1782, as long as it's -- I'm satisfied that that's
20 what the documents are going to be used -- sort of being sought on and what they're
21 being used for.

22 There are all sorts of things which I'm going to add on when we come to the second
23 issue, which I know that's (inaudible), which is what's going to be put forward,
24 mechanics, how does it fit in with the CRO?

25 On the first issue, which is, in principle, is it a breach of the collateral use restriction,
26 is there much more that you really want to say?

1 MS FORD: So it ties into the legal test. In this respect, the tribunal has to be satisfied
2 that these documents are reasonably necessary for the purposes of the application.

3 We are not in a position to make submissions on that, because we haven't been told
4 specifically which documents are sought and why.

5 Now, that seems to us to be a slightly bizarre situation in circumstances where, as we
6 understand it, the claimants don't have any objection to providing us with a draft
7 application. I would think, if we see a draft application, we will know then which
8 documents they're proposing to rely on.

9 We do say, insofar as they're proposing to rely on our documents, we are entitled to
10 know about it, and that is how it feeds in, then, to the question of collateral use. We're
11 not in a position properly to assess that question in circumstances where we haven't
12 been given any clarity about which documents are actually required.

13 The oddity, in our submission, is one would think that the starting point would be, "Well,
14 here are the pleadings; these are the matters in issue between the parties. These are
15 the categories of documents that are sought which go to the matters in issue between
16 the parties". None of that actually involves documents within the confidentiality ring,
17 the pleadings are not in the confidentiality ring. So we have been asking which
18 documents specifically do you need for the purposes of this application? We are
19 willing to facilitate it.

20 THE CHAIR: The American court doesn't need -- normally, you'll need reams of
21 underlying documents to determine these applications, and on a more rough and
22 ready basis, they appreciate it's not for them come to a final view of the relevance of
23 the law. So I don't necessarily want to burden them with a huge amount of documents.
24 The courts are busy enough as they are. But, frankly, I'd be surprised if there's going
25 to be a huge amount of documents that are going to be exhibited.

26 MS FORD: I'm sorry, sir, I can tell that there's some instructions to take ...

1 THE CHAIR: No, I'm sure, well, he (inaudible). (Pause)

2 MS FORD: Sir, I understand that there is a particular concern about the degree of
3 protection that were to be available in the event that confidential documents are relied
4 on. That's really a secondary question in the sense that it remains unclear to us why
5 it is necessary to rely on these documents at all.

6 THE CHAIR: Yes. On that secondary question, I have raised that already, and as you
7 know, and we'll come back to that.

8 MS FORD: In our submission, it is very difficult to reach an informed conclusion as to
9 whether the test for collateral use is made out in the abstract. That is why we have
10 been saying we are willing to facilitate this application, but we need to know which
11 documents they are proposing to use.

12 THE CHAIR: Okay. That's enough on that one.

13 On the next issue that we need to look at, in the context of this, is the admission or
14 otherwise of the relevant team in the US law firm. So should we -- do you want to
15 address me on it?

16
17 Reply submissions by MR ARMITAGE

18 MR ARMITAGE: Yes. Before doing so, and it comes in here, just to be clear, I think
19 part of the issue here is there's something of a mismatch between the position on the
20 two sides, because really the issue here, it's not so much specific documents that may
21 be referred to, let alone exhibited the application. It's the fact that we need to use the
22 documents, documents that have been disclosed generally in order to decide the
23 scope of our application, identify relevant custodians, et cetera. Sir, you're obviously
24 very familiar with how strict the collateral use restriction is, where it applies. (Pause)

25 THE CHAIR: There are cases that say that if you pass on documents, let's say, to
26 counsel that's involved in the civil proceedings, but other proceedings still apply,

1 (inaudible) merely giving them access to those documents is a breach.
2 Robin Knowles has done it; it's a phone case. But what is critical here is, at the end
3 of the day, what is actually going to go before the US court? On the -- what goes to
4 the US lawyers?

5 You will say, "Well, I need to show them to the US lawyers so they can decide what
6 goes to the court". If that's all you're doing, I don't think that's truthfully a breach.

7 MR ARMITAGE: Yes, yes.

8 THE CHAIR: But it is -- we do need to get to a position whereby Ms Ford's team know
9 what documents within the CRO disclosed by the defendants are going to be either
10 put before the court or their contents are going to be referred to in the application.
11 Once we get that list, then we -- I can take a view, and Ms Ford can take a view as a
12 team as to whether or not that is an appropriate thing to do, bearing in mind the CRO.

13 MR ARMITAGE:: Yes, I understand.

14 THE CHAIR: I mean, it's the way I'd rather do it is look at it through the mechanism of
15 the CRO, rather than whether or not supplying it to US counsel is going to be a breach
16 of the collateral use restriction.

17 So you've got your American law firm -- do you need five people from the American
18 law firm to have access? It seems a lot of people for -- I don't expect them to be doing
19 the sort of review that Stewarts are doing. They will obviously want to filter and say,
20 "Look, for the UK prism this is what we need", and they will give you advice as to what
21 you need to put before the American court for that. Anyway, so you've got five people
22 from the American law firm that you (inaudible).

23 MR ARMITAGE: Sir, may I just say first, the way in which you've just formulated the
24 role that we envisage for the US lawyers is exactly as you've just put it. It's exactly
25 that.

26 THE CHAIR: It's going to be too expensive otherwise.

1 MR ARMITAGE: Indeed, indeed. I better turn around in relation to the number of
2 people. (Pause)

3 I think the named individuals are essentially the team who are advising in relation to
4 this matter. If there's an issue in terms of the number, I'm sure we'd be prepared to
5 cut the list down somewhat, but we do think it's important that we're able to take advice
6 on these matters from the team that we've engaged.

7 In relation to the separate question of exhibiting documents, I think we would need to
8 take specific US advice on that. I don't think it's envisaged necessarily that the draft
9 application -- rather the application that we make -- will refer to reams of disclosure or
10 the contents thereof. As I say, the point is that one needs to consider it first.

11 Obviously, there's the draft application process, though, in which case you and the
12 defendants, as we've agreed, will see the draft application before there's any question
13 of it going before the US court. So that may provide a route through that.

14 THE CHAIR: I presume both parties are aware of the ruling I gave in Weis about
15 admission of people to the CRO. Although it's not cited, I don't think it is in the
16 authorities bundle, but that was a case involving adding someone within the business,
17 we are coming to that issue later. But when we come to that issue later, the parties
18 will need to be aware of what was said about that to argue (inaudible).

19 Yes.

20 MS FORD: Sorry, sir, I didn't hear the name of the judgment.

21 THE CHAIR: Weis. That was a decision that I gave where I went through all the
22 principles about adding people to the ring and that's relevant for when it comes to their
23 application to add people to the ring on the client side and we will have that debate
24 probably after this one. So we have a quick break, read Weis and then we'll come
25 back to dealing with that. I want to get that one sorted out.

26 MR ARMITAGE: So as I say, I think if the concern is the number of US lawyers in the

1 ring for these limited purposes we would say, for the purposes of simply seeking advice
2 as to the scope of the application, having on the Stewarts side obviously looked
3 carefully at the disclosure to identify potential IHS custodians to identify potential date
4 ranges -- all of the sorts of things one would expect Stewarts to be responsibly
5 doing -- it does make sense for us to be able to seek advice generally from the US
6 advisers that we've engaged, rather than giving a sort of running commentary to the
7 defendants on every document we want to show them; we don't think that would be
8 appropriate.

9 Then there's the separate question, as you say, sir, of the application itself: what would
10 need to be put before the US courts and any onward implications there? As I say,
11 I think that really depends on what goes into the application, which you're going to see
12 in the draft. It may be that it's sensible for that issue to be revisited at that stage.

13 THE CHAIR: Can I see the names of the individuals?

14 MR ARMITAGE: Yes. It's bundle H -- it's in the composite order -- bundle H, tab 3,
15 page 53. (Pause)

16 THE CHAIR: I've got the composite order, yes?

17 MR ARMITAGE: Yes. Internal page 5 of the composite order at paragraph 20.
18 They're the named US lawyers at the firm Selendy Gay who have been assisting
19 generally in relation to the section 1782 application.

20 THE CHAIR: Yes. (Pause)

21
22 Reply submissions by MS FORD

23 MS FORD: So as I understand the submission that's being made is that the claimants
24 shouldn't have to disclose which of our documents they're relying on because they will
25 be using them for the purposes of obtaining privileged advice. In our submission there
26 is a real oddity about that in circumstances where the whole purpose of the exercise,

1 we are told, in order to avoid the collateral use restriction, is to obtain materials for the
2 purposes of the present claim, and the documents that they are showing their lawyers
3 for that purpose are our documents. It seems very odd to be saying "We can't tell you
4 which of your documents we will be showing to the lawyers because that's somehow
5 a matter that's privileged to us".

6 THE CHAIR: We'll see what Mr Armitage says to that.

7 Mr Armitage.

8
9 Reply submissions by MR ARMITAGE

10 MR ARMITAGE: So first point -- I think I've already made the point -- it's not just
11 a question of showing documents. We need to be able to consider the disclosure
12 generally, discuss the documents insofar as necessary with our US advisors solely for
13 the purposes of taking advice on the scope of the US application. That's why I say we
14 think it's both inappropriate, because of the privilege issue, but also inefficient for us
15 to give, as I say, a sort of running commentary on any document we may wish to show.
16 Obviously, the reason we seek to have the named individuals admitted to the
17 confidentiality ring is precisely to ensure protection for any confidentiality
18 (overspeaking) --

19 THE CHAIR: This is basically competition. Are they competition lawyers? Obviously,
20 they're experts in civil procedure in dealing with section 1782 but --

21 MR ARMITAGE: I understand that they're general commercial litigators rather than --

22 THE CHAIR: Exactly. They're a serious litigation firm, they're not known for this type
23 of thing. But surely, at the end of the day, it's Stewarts and you that are going to
24 determine what you're looking for, and the work on the documents is done by Stewarts
25 and that whatever you give to the American law firm you're not going to give a huge
26 amount of documents; that costs money.

1 MR ARMITAGE: Yes.

2 THE CHAIR: If you send the documents they're going to have to review them.

3 MR ARMITAGE: We absolutely have no desire to rack up costs by sending reams
4 and reams of documents to our US lawyers. It's very specific and very focused. It's
5 just the question of whether we have to tell the defendants every single time we want
6 to discuss the contents of a document, or documents; that's the thing we object to.

7 (11.17 am)

8
9 Ruling (submitted to the learned judge for approval)

10 (11.27 am)

11 MR ARMITAGE: Sir, we're very grateful. Did I hear you say you considered dealing
12 with the other confidentiality issues?

13 THE CHAIR: Well, that comes next. So, we'll have our break now, because I don't
14 want to have that argument with you, neither of you, without having read the relevant
15 authority on it. But we'll come back in about 15 minutes. And so the next item on the
16 agenda is going to be whether or not your three -- is it three individuals? -- should be
17 admitted to the CRO.

18 MR ARMITAGE: Not quite, sir. There's an issue about de-designation, but I think you
19 would have picked up that our real concern here is that the relevant individual should
20 be able to see the specified documents. Actually what we're seeking is that they be
21 named as limited access persons rather than admitted to the ring.

22 THE CHAIR: Yes, just like in the Weis case. Yes, that's fine.

23 MR ARMITAGE: Yes.

24 THE CHAIR: So if we look at the Weis case -- and we have your submissions on
25 that -- then we'll come to a ruling on that. I haven't made up my mind on that; it can
26 go either way that one, it's not particularly clear and that's one of the things I'm toying

1 with -- I'm quite open with everyone as to where I am -- one thing I'm toying with is: is
2 this an application together with the de-designation application that should be dealt
3 with further down the line? Because, you know, the authorities show that the nearer
4 you get to trial, the more the tribunal may relax -- let's say -- strict conditions of the
5 CRO. But when you're at a fairly early stage -- and frankly we're still at a relatively
6 early stage given that we haven't completed disclosure -- it may be that the tribunal
7 will say, "Well, look, maybe not now, but we may need to look at this further down the
8 line", as regards the de-designation of the number of documents, I don't feel from all
9 the material that I've read -- and you may persuade me otherwise -- that that dispute
10 has actually crystallised between you. I think there's a lot more work that needs to be
11 done on that.

12 I can see that there will be documents that are particularly sensitive; there's no way all
13 documents are in that category, but we need to at least have that sorted out at the
14 next CMC. What we don't want is a Qualcomm-esque problem, whereby you have all
15 these problems about third-party interests all coming out on the last day, at the last
16 moment, and it's not been dealt with properly for the purpose of the trial. I like to know
17 what's confidential, what's not confidential, how are we going to deal with it at a CMC
18 well before the trial, probably in this case before the witness statements have been
19 done. But at the moment no one's talking about the witness statements and so it may
20 be that -- you know, there's three possibilities at the moment on the application, first
21 in relation to limited access to -- certainly in relation to de-designation: one is the
22 applications get dismissed; two is the applications get allowed; three is we park them
23 until the next CMC and I think that it'd be much easier for me to make a decision, but
24 it's up to both of you. You need to talk and agree where you both are. I want to give
25 both sides everything done fairly and if I feel like it would be easy for me to make
26 a decision today, I'd have no problem in making one.

1 But sometimes I think it's better to leave things to another hearing; when we're further
2 down the line the materials can be more historic, as you know. Go along in time, it's
3 going to be a much easier decision. But what I do want is to have it sorted out before
4 we have the exchange of witness statements.

5 So that's where we are. You can speak to Ms Ford; she's a very reasonable person
6 and you can see that -- I don't mean that facetiously, I mean that seriously. Ms Ford
7 is very experienced in these things and she's generally really sensible. But we'll see
8 where you both are.

9 So if we have a break for 15 minutes, I'll give you the chance to look at the authority,
10 give you two a chance to see where you are, in the light of what I've said so far. You
11 can be sure I have read everything you've both given me and my view, subject to
12 further argument, is probably one of the three possibilities. But yes, it's for you to
13 have a chat with your opposition.

14 MR ARMITAGE: I don't want to pre-empt the discussions we're going to have.
15 I suspect that we certainly will want to address you on the points. I mention that now
16 purely because there is a chance then that we may need to go into closed session
17 briefly, because two of the three individuals who we wish to be admitted to the ring are
18 actually here today, Mr Wirth and Mr Innerhofer.

19 THE CHAIR: Yes.

20 MR ARMITAGE: To an extent, I can make the points I need to make without reading
21 out confidential information, but I think probably --

22 THE CHAIR: We'll see where we are.

23 MR ARMITAGE: It's just to forewarn you of that possibility.

24 THE CHAIR: But, you know, these are issues that are important. I know with CROs
25 that they can descend into real contention and it can be like working through treacle.

26 MR ARMITAGE: Yes.

1 THE CHAIR: And you know sometimes it's better just to cut through some of these
2 issues. (Pause)
3 Let's say we'll come back at 11.45; that'll give you time to hopefully look at the
4 authority, both come with a view as to what you want to do and we'll go from there.
5 (11.34 am)
6 (A short break)
7 (11.52 am)
8 THE CHAIR: Yes, Mr Armitage. So we've got two aspects, haven't we? You've got
9 the de-designation of certain documents and then you've got limited access persons.
10 MR ARMITAGE: Yes.
11 THE CHAIR: You decide how you want to proceed.
12 MR ARMITAGE: Yes. There's a third aspect, which is third-party confidentiality.
13 THE CHAIR: I think you just want a bit of guidance on that, don't you?
14 MR ARMITAGE: We do.
15 THE CHAIR: We'll come to that.
16
17 Submissions by MR ARMITAGE
18 MR ARMITAGE: I should say that Ms McAndrew is going to deal with that issue,
19 insofar as it arises. But yes, exactly, that's the point where we're simply seeking to
20 steer on the proper approach.
21 So yes, we've considered this, we've looked at Weis, as I've just indicated to Ms Ford.
22 So we are very content with the tribunal's proposal to defer the de-designation aspects
23 to a later occasion; we think that's very sensible and we completely hear and accept
24 the chair's points on that.
25 THE CHAIR: Where I am on that is that: if it's not necessary for this stage of the
26 proceedings -- and we've got this section 1782 application we need to deal with, and

1 we're going to have another CMC.

2 MR ARMITAGE: Yes.

3 THE CHAIR: I do want a bit more crystallisation of the dispute between the parties,
4 because obviously I've read what you're both saying; I do feel it hasn't necessarily
5 crystallised and neither party's really got to grips with what the other side is saying,
6 which perhaps you were (inaudible) today anyway. But if you sit down for now, let's
7 just see what Ms Ford has to say.

8
9 Submissions by MS FORD

10 MS FORD: I had understood Mr Armitage's position to be that they were prepared to
11 defer the de-designation, but they are pursuing the limited access persons application.

12 THE CHAIR: They can run that.

13 MS FORD: Yes. Well, our position is that we strongly resist the limited access persons
14 application, because it's a huge concern to us that access should be given to this
15 highly sensitive information and I can address the tribunal in closed session in relation
16 to the evidence that we've put in.

17 THE CHAIR: Yes, of course you can.

18 MS FORD: However, we would be content for both those aspects to be deferred for
19 the reasons the tribunal has indicated. If it is pursued, we strongly resist it.

20 THE CHAIR: You see, the problem that Mr Armitage has got is that when it comes to
21 these de-designation applications, the critical point is: is it necessary at this stage if
22 I'm satisfied in the first place? And that if I'm not satisfied at this stage then it just goes
23 to the next CMC, which I proposed anyway. So we may just be going round in a circle.
24 Let's just see what Mr Armitage is going to say.

25
26 Reply submissions by MR ARMITAGE

1 MR ARMITAGE: Before we talk about closed sessions or anything like that, can
2 I immediately identify non-confidential, as it were -- why we say the LAPs issue is
3 important, potentially does need to be considered --

4 THE CHAIR: Yes.

5 MR ARMITAGE: -- today. It relates to the proposed amendments that you may have
6 seen indicated by my learned friend. Would it be helpful to turn those up so I can show
7 you exactly how the point arises? And it may be that if any more detail is needed, we
8 would have to go into closed session at that stage.

9 THE CHAIR: Yes.

10 MR ARMITAGE: So --

11 THE CHAIR: You're saying that you need this limited access for the purposes of
12 considering the proposed amendment.

13 MR ARMITAGE: Yes. Can I show you the particular one that this has given rise to,
14 because it's directly relevant to the particular documents to which we have directed
15 our application? So it's in bundle H at tab 2. It's appendix 1 to my learned friend's
16 skeleton. (Pause)

17 THE CHAIR: Yes.

18 MR ARMITAGE: And sir, the paragraph in question is marked as confidential, so I'm
19 only going to show it to you; it can't be read out at the moment. Paragraph 4 of the
20 proposed amendments indicates what is described as a non-responsive pleading
21 amendment that the defendants intend to make.

22 THE CHAIR: Wait a second. (Pause)

23 And when are these amendments going to kick in?

24 MR ARMITAGE: Well, they're described as "non-responsive". We haven't actually
25 discussed timings for those. You'll have seen we have not indicated at the moment
26 any intention to make amendments. We think we need effectively to go off and get

1 the IHS materials before we can sensibly do that. So we haven't discussed the
2 timings, but you'll see -- I mean, again, without discussing the nature of the proposed
3 amendments, the point is that it directly relates to the documents that you've seen in
4 respect of which we seek --

5 THE CHAIR: But the thing is --

6 MR ARMITAGE: -- access.

7 THE CHAIR: But in view of the next CMC coming up and the importance of the
8 section 1782 application, and how that may come out, it's very likely -- no, that's an
9 exaggeration, it's likely that amendments will flow, at which point you will produce
10 a draft re-re-amended particulars of claim. Then it's for them to say whether or not
11 they oppose the application. If it's contested, it can.

12 Then they will, in response to that, want to file their defence or amend it, the
13 re-amended defence. If they will have a number of amendments -- they may be
14 consequential; they may not be consequential -- (inaudible) going to happen. We're
15 also going to have a hearing confirming that.

16 Are you saying at this stage you really need to do that? Because I'm not inclined to
17 allow amendments to the pleadings until the next CMC, because I just want to get the
18 disclosure done. That's my focus at the moment.

19 Yes, Ms Ford.

20
21 Reply submissions by MS FORD

22 MS FORD: Sir, if it assists, the reason we put this in is because there was a direction
23 in the tribunal's order that we set out in broad terms what amendments might be
24 contemplated. So we've done that.

25 THE CHAIR: You've said that you've done that. But I asked you to do it. You've done
26 it.

1 MS FORD: Indeed, we're not --

2 THE CHAIR: But I didn't envisage -- and it's how things worked out, but I want to get
3 through the section 1782 application before we get to this, because they need to -- we
4 all need to know what their case is.

5 MS FORD: Sir, indeed.

6 THE CHAIR: I understand what their case is, and I'm sure you do. But we need to
7 have it -- let's say, thrashed out in the light of what comes out in disclosure from you
8 and disclosure from the section 1782 application, because that's bound to sort of have
9 an impact.

10 I don't really want you to start fiddling around with your pleading now until we've got
11 through this stage. So we may all be at cross purposes. It may be that Mr Armitage
12 thought you were (several inaudible words). Now, I didn't envisage that, yes.

13
14 Reply submissions by MR ARMITAGE

15 MR ARMITAGE: Sir, I think the difficulty is -- it's not so much about the formal question
16 of when the amendments are made, no, and I completely accept there may be
17 efficiencies in having things done in dribs and drabs. The issue is what is set out in
18 paragraph 4 is a new line of defence. It's a very fundamental line of defence. We
19 want to know, by taking instructions from our relevant personnel, what they think about
20 that. I think one point you, sir, make in the Weis case, which we have read over the
21 break --

22 THE CHAIR: Yes.

23 MR ARMITAGE: -- is that one reason why having individuals from the business may
24 be given access to disclosure documents is that it's important for assessing the merits
25 of the case and in deciding what points to take or not take; paragraph 43 of your
26 judgment, sir.

1 THE CHAIR: We may get to a stage whereby we need to do that. That, of course, I'm
2 aware of that. That was a particular case where I was prepared to allow someone on
3 the client side to see what is potentially very important commercial information, which
4 could be to the advantage of the claimant, but I put in protections and mechanisms. If
5 I am going to give access to anyone on the client side, we are going to have to talk
6 about the sort of protections in place.

7 But all of that, my preference is to deal with that next time. You know, I'm not saying
8 you can't have it because, you know, of course, if you have a serious application that
9 is worth arguing, I don't think today is the day that we're going to do it.

10 MR ARMITAGE: I'll just turn around for one moment. (Pause)

11 So we obviously hear what you say. May I just gently push back to a limited extent?
12 So we see the issue in relation to Mr Nader, who is a member of the relevant business.

13 THE CHAIR: Yes.

14 MR ARMITAGE: We would respectfully suggest that the same issues don't arise in
15 relation to Mr Wirth and Mr Innerhofer who are in-house lawyers.

16 THE CHAIR: Yes, they're the in-house lawyers; I understand that.

17 MR ARMITAGE: Insofar as there's a concern over involvement directly in negotiations
18 and so on and so forth, we do wonder whether, given the need to discuss this
19 potentially significant new line of defence --

20 THE CHAIR: Yes.

21 MR ARMITAGE: -- sooner rather than later, whether you might be prepared to
22 consider the application in relation to the lawyers rather than Mr Nader and to defer
23 the question of Mr Nader to the next CMC .

24 THE CHAIR: No. I can assure you, if once you've read the Weis decision, you'll see
25 this is something where I would want to fashion a particular order to allow anyone to
26 have that limited access to documents. And these things take time. You know, that

1 Weis ruling, I think it probably took a day just to get to wherever I was on that.

2 On this, what you've raised is something that is -- I'm not saying you're not going to
3 get it. It clearly is something that we're going to have to factor in at the relevant time.
4 I'm not saying that the other side are unreasonable in being concerned about.

5 Quite -- these cases, when you have that, as dark as this can be, can be very fine.
6 You say, "Well, it's not as fine as this". Because if you've got someone who's just
7 purely an in-house lawyer, then maybe okay. But then I want to know a lot more about
8 that person. I'd probably want to have a witness statement and all that sort of stuff
9 and have a copy or a sight of that practising certificate: are they still practising?

10 All these things, I want to know. That's why, when I came in, I said, "Look, I've looked
11 at all this. I've understood what you're both saying. I'm not -- I don't feel comfortable
12 in making a ruling today, because it may be unfair on either you or Ms Ford's team".

13 I always put the position up front as to where I am, and I sympathise with both sides'
14 positions on this. The answer is not as clear as it normally is. There are certain things
15 I'm missing. See? You look at it, and you know what the answer is. Others like this
16 one, it's going to be more of a mixed thing whereby it may not be necessarily what you
17 want, but it may be something that I'm satisfied that sufficient protections are in place.

18 It takes time, and you're going to have to come up with details of what the protections
19 are and all of that. But you can work with Ms Ford's team. So by the time we come
20 to the next CMC, it's all crystallised.

21 MR ARMITAGE: Thank you. Well, we've obviously heard those comments. We will
22 take that away and we will come up with a proposal in that regard. We do think
23 particularly in relation to the amendment, this is a very important issue that needs to
24 be grappled with sooner rather than later. We can see -- we've heard what you say,
25 sir, about the next CMC.

26 THE CHAIR: So let me just give a short ruling. So there's no doubt that everyone

1 knows where they stand for when it comes back.

2 (12.06 pm)

3
4 Ruling (submitted to the learned judge for approval)

5 (12.15 pm)

6 Now, let's look at the next one. I think it's third-party confidential information.

7 MS FORD: Sir, just before we move on, may I raise a point of clarification just in
8 relation to the matter we dealt with before the short adjournment in relation to the US
9 law firm. It concerns how the tribunal would enforce compliance with the relevant
10 terms of the confidentiality order in relation to persons who are outside the jurisdiction.
11 Our understanding would be that if they were to sign the confidentiality ring
12 undertaking, then that would bring them within the tribunal's jurisdiction for the
13 purposes of enforcement, but we just wanted to air that issue given that --

14 THE CHAIR: Well, it would be covered by their undertakings. They're going to have
15 to sign appropriate undertakings. I've got no worry about these guys. It's a proper law
16 firm. They're subject to their own local bar and if they breach an undertaking given to
17 this tribunal, it's going to be just as relevant to their regulators as it would be to us if
18 an English solicitor breaks an undertaking to the US court. I take these things fairly
19 seriously and nothing's going to go to them unless they have given the undertakings.
20 You're right to raise it. Thank you very much. Mr Armitage, are you content with that?

21 MR ARMITAGE: Yes, thank you.

22
23 Submissions by MS MCANDREW

24 MS MCANDREW: I'm grateful, sir. The next issue is the third-party confidentiality one
25 to which you've just referred. It's essentially the question of how we deal with potential
26 third-party confidentiality information in the disclosure. The claimants have made

1 a proposal for how that can be done. I'm happy to talk you through it, sir, it's in our
2 application at paragraph 55.

3 THE CHAIR: Yes. It'd be nice to listen to you for a while; it's good practice. It's
4 different, with a junior, you know, you need to be able to say what you want to say.
5 It's different when I'm dealing with -- you're still a junior, aren't you?

6 MR ARMITAGE: Yes.

7 THE CHAIR: Yes. He's like an old bear, he -- you present it whichever way you want.

8 MS MCANDREW: Well, I'm very grateful, sir, thank you. So essentially the problem
9 for the claimants is that we cannot exclude the possibility that third parties may have
10 legitimate confidentiality claims in respect of some of the information that we have
11 disclosed to the defendants. The pragmatic sort of interim solution that we arrived at
12 was to disclose all potential third-party confidential information into the ring. That's an
13 interim solution obviously.

14 To sort of progress to the next stage we suggest that the process which is set out at
15 paragraph 55 of our application be followed. That's a two-stage approach. It's
16 essentially modelled, sir, in the order that you made in the Whistl and Royal Mail
17 proceedings to which we have had regard when proposing it. The first stage,
18 subparagraph (a), simply reflects what we've already done: so, identifying that the
19 material contains potential third-party confidential information at the point of
20 disclosure.

21 The second stage, at subparagraph (b), sets out the process to be followed if the
22 receiving party wishes to de-designate the document as non-confidential and
23 essentially it provides for two options. The first is that the material can be redacted if
24 that's feasible and appropriate to do so in the particular circumstances. The alternative
25 is, if that can't be done, that the third party should be given the opportunity to object to
26 the de-designation of its information. You'll see that we've proposed a process

1 | whereby the third party is notified, it has a four-day window in which to object, and
2 | then any objections can be resolved by the tribunal if they can't be dealt with in
3 | correspondence.

4 | THE CHAIR: You've followed -- because I have spent a lot of time on this -- but you
5 | followed what I've done in Whistl, have you?

6 | MS MCANDREW: Essentially, yes, sir. So we say that the benefit of this proposal --

7 | THE CHAIR: You've mirrored the order I made there, have you?

8 | MS MCANDREW: We haven't precisely mirrored it. There are a few minor
9 | differences. I think in that ring there was --

10 | THE CHAIR: Okay, show me the order then. Where is it?

11 | MS MCANDREW: Apologies, sir, I don't think the order actually made it into the
12 | bundle, but I do have hard copies here.

13 | THE CHAIR: Give me the hard copy. Can you make sure that Ms Ford has it as well?

14 | (Pause)

15 | Okay, so that's the Whistl one that you've given me, yes?

16 | MS MCANDREW: Yes.

17 | THE CHAIR: And where's the one that you want to make?

18 | MS MCANDREW: Oh, sorry, (inaudible) a misunderstanding. It's in --

19 | THE CHAIR: (Inaudible) tell me where the differences are.

20 | MS MCANDREW: Yes, I understand now. It's in bundle H.

21 | THE CHAIR: Yes. I really don't want to reinvent the wheel unless Ms Ford forces me
22 | to, but --

23 | MS MCANDREW: Sorry, sir, we haven't actually brought forward specific
24 | amendments to the confidentiality ring order at this stage. The proposal is as set out
25 | in our application. We would bring forward amendments which mirror that proposal,
26 | which itself is closely modelled on the terms of the Whistl order.

1 THE CHAIR: What I suggest we do, subject to what Ms Ford says, is that you prepare
2 the draft order, let Ms Ford have a look at it, and then it comes to me, but I will want
3 to go through it properly at that stage.

4
5 Submissions by MS FORD

6 MS FORD: Sir, it may assist to articulate what our concerns are because we do have
7 concerns about the workability of this as a proposal. The present confidentiality ring
8 order, which is in bundle C, tab 17, page 167, is essentially what we would describe
9 as the orthodox position. So if the tribunal looks at clause 2 within the present order
10 there is the classic definition of confidential information within clause 2.2. It is broad
11 enough to encompass the information of third parties.

12 Then under clause 5 on page 172, there is a mechanism which puts the burden on the
13 disclosing party to designate information as confidential information because, in our
14 submission, they will be in the best position to know because it's their document. That
15 is the case even if they're designating, as confidential information, material which is
16 confidential to the third party.

17 Then clause 5.3 indicates that documents should be marked up to highlight
18 confidential information and in doing that the disclosing party has to state the basis on
19 which the identified information is claimed to be confidential information.

20 Now, our concern in a nutshell is that Lenzing's proposal is reversing essentially the
21 usual order, and it's suggesting that where a document contains third-party
22 confidential information, the disclosing party simply designates the entirety of that
23 document as being confidential, and then the burden transfers to the receiving party
24 to seek de-designation of the document by identifying the third-party material and
25 contacting the third party to seek representations, and then applying for essentially
26 a de-designation before the tribunal. So the burden is transferred to the receiving

1 party to identify the material, to challenge redactions, to contact the third party in
2 circumstances where they will be less familiar with the document itself because it's not
3 their document, and in all likelihood they won't have any dealings with the third party
4 either. Just to give the tribunal an idea of the scale of the issue, our understanding is
5 that Lenzing has disclosed a total of 14,014 documents, of which 11,443 have been
6 made available for inspection, and 85 per cent of those have been marked as
7 confidential. So 9,755 documents marked as confidential and put into the ring.

8 THE CHAIR: But one of the problems with these cases is that if you're the disclosing
9 party, it's much easier to manage your own stuff (inaudible) if you want to do anything
10 that prejudices third parties who may then come in and say "Look what you've done",
11 effectively given all this stuff out and it's restriction on stuff which could relate to people
12 with whom you're rivals. That's why it's particularly difficult in the context of this type
13 of case and so it's not that far removed from what we had in Whistl.

14 I understand what you're saying and we don't want to have too much of a burden on
15 your clients in this process -- we'll have to see what the claimants say as to how they
16 can mitigate that -- but I do need to see the draft order that's going to be made to
17 finalise this application. So I've got the point you've got to make. I do think we
18 probably do need a particular regime because this is a case where it's a cartel case,
19 and the potential information may well be potentially part of the cartel (inaudible)
20 lasting directly (inaudible) and it may well be that sensitive stuff anyway because it
21 relates to rivals. But we do want to come up with a mechanism that works that doesn't
22 impose unnecessarily a too-high burden on you. But these cases do have real
23 difficulties and I had to work it out in Whistl. I don't want to reinvent the wheel unless
24 I have to. Let's just see what the claimants have got to say.

25 MS FORD: Sir, yes, just before I sit down -- just to emphasise, the real risk in our
26 submission is that this confidentiality regime becomes unmanageable at trial because

1 85 per cent of documents that have been disclosed into it -- 85 per cent of documents
2 in the case -- are supposedly subject to a confidentiality regime. They're not marked
3 up. We're not in a position to mark them up because they're not our documents and
4 we don't know what the third-party confidentiality regime is.

5 THE CHAIR: What we're talking about is, effectively, a regime that's going to work for
6 now. When it comes to trial -- you know what I'm like, I want to make sure that
7 I understand what's going to be cogent and (inaudible) what and all that stuff, well
8 before the trial. I'm not going to have a Qualcomm-esque fiasco in one of my cases.
9 I know what the risks are and everyone knows that I won't be happy. You've got to
10 get to a position whereby when it comes to trial we all know where we stand on
11 confidentiality. But sometimes there's a real cost difficulty and there are different ways
12 of handling that when it comes to trial.

13 Because -- let's say you have a case which is -- you've got 100,000 documents, raised
14 confidentiality of third-party; you do not want 100,000 documents being the subject of
15 blanking out and all of that for trial. So sometimes what you're going to have to do is
16 accelerate the process for the trial bundle and so once you've got the trial bundle, you
17 know exactly what documents you want. If there's going to be any additions to the
18 trial, it's a limited amount, but conducting an expensive exercise -- a huge number of
19 documents to pick out this line and that line that may be confidential to someone
20 else -- is a vast expense and it's not to be encouraged.

21 This is an important case on both sides and I know both sides have spent more than
22 a few bob on this case, but this issue has got the potential of being extremely
23 expensive. I'm not keen to have that and what they're trying to do is cover the
24 Whistl-type problem I've dealt with. As long as everyone knows that we will
25 have -- probably -- a situation whereby the trial bundle is provided early, so if there are
26 issues about blanking out, it's going to be very early.

1 MS FORD: So that's a potential way through. The tribunal has my submission that
2 we, as the receiving party, are not in the best position to make the judgments about
3 whether or not this material is or isn't confidential.

4 THE CHAIR: Yes, but then what will happen is that they are going to have to -- they
5 will, for the trial bundle, it's their job to prepare the trial bundle, they're going to have
6 to go through documents for the trial bundle, figuring out where the third-party
7 confidentiality is and we can get that resolved and probably what will happen is
8 third-party confidential material will be redacted -- okay -- and protected. Everyone is
9 very experienced in dealing with this in this tribunal.

10 I think where we are on this is that -- I have to take it by stages. Do you want to say
11 anything else?

12 MS FORD: Well, sir, we've heard you. We will bring forward the amends, because
13 we say that the confidentiality ring order doesn't cater for this specific --

14 THE CHAIR: You're going to have to come up -- yes, but the thing is: you want an
15 indication of the route of movement of traffic, okay? I've given you an
16 indication -- I might explain it in a bit more detail in a minute -- but you've got the
17 direction of travel here. You know, we're not -- unless I have to, I don't want to reinvent
18 the wheel; I've spent enough time on this issue in another context. You've got that as
19 a sort of working template, I need to be able to see what differences you're making
20 from this and we'll need to probably have a mechanism that will work out at the next
21 CMC or where we are on things like trial bundles and stuff like that, so when it comes
22 to the hearing bundle, we're in the right place. And when it does come to hearing
23 bundles, I do not want a dustbin approach, whereby you have masses and masses of
24 documents -- say bundle X -- and that there's no clarity as to what documents are
25 really an issue. Everyone's going to be focused at trial.

26 But my experience of trials is that parties like to have lots of documents in case

1 something comes up, but then it means there's a lot of documents which never get
2 referred to at trial. It may not matter, at least in certain types of cases, but it does
3 matter in this tribunal when you're handling confidential information, because the more
4 documents you have in that trial bundle, the more complexity you get in relation to
5 dealing with confidentiality, both of the parties and non-parties. So we'll need some
6 discipline when it comes to the bundles for trial.

7 MS FORD: Sir, thank you. We've obviously heard what you say. We see the direction
8 of travel and we will bring back proposals which are in line with what you suggest.

9 THE CHAIR: All right. Let me give a ruling then.

10 (12.31 pm)

11
12 Ruling (submitted to the learned judge for approval)

13 (12.38 pm)

14 MS FORD: I'm grateful, thank you, sir.

15 THE CHAIR: Anything else to say on that? So you can see what I'm trying to do and
16 it's just going to be too expensive to do this exercise on -- it may well be a lot more
17 than (inaudible) the end of the day, the documents have been disclosed by the
18 claimants: just too expensive.

19 MS FORD: So yes, so the tribunal has taken on board our point, that the burden
20 should not fall on us to do it. So --

21 THE CHAIR: But we've got this pro tem thing for now, we're going to have -- what
22 really matters is what's going to happen for the trial bundle, where we need to be there,
23 how are we going to get to that. Thank you very much.

24 What's next on the agenda?

25 MR ARMITAGE: That clock says 5.10; seems I've lost track of time.

26 THE CHAIR: I've lost track of time.

1 MR ARMITAGE: (inaudible) for the adjournment. I think we still have a bit of time.
2 I don't know if it makes sense to go to the start of the agenda now and at least make
3 a start on the points.
4 THE CHAIR: Let's just see what else we need to resolve today --
5 MR ARMITAGE: Yes.
6 THE CHAIR: -- and if there's any ones that are easy to resolve --
7 MR ARMITAGE: Yes, that's true. We may be able to --
8 THE CHAIR: Just give me a couple of minutes. (Pause)
9 Okay, so what do you think, Mr Armitage -- what do you want to deal with next?
10 MR ARMITAGE: Well, A and B really go together; that's the phone messages points.
11 THE CHAIR: Okay, we can deal with the phones; I think that's probably a topic in
12 itself, isn't it?
13 MR ARMITAGE: It is. I just wonder if a somewhat shorter topic before lunch could be
14 more -- I suspect that will take us a bit longer than we have between now and the lunch
15 adjournment.
16 The other -- so for example, point (c) is a discrete point in relation to LRS category 1.
17 Similarly for point (d). And then there's a cluster of points actually Ms McAndrew will
18 be dealing with at (e). So it's a sense of take your pick. I mean, I could, for example,
19 address you on point (c), which I think is a relatively discrete point.
20 THE CHAIR: Ms Ford, what do you think? Are you happy to deal with point (c) before
21 lunch? (Pause)
22 MS FORD: Sir I'm just rummaging to find point (c).
23 THE CHAIR: LRS category 1, "Further disclosure".
24 MS FORD: Yes.
25 THE CHAIR: You're happy to deal with that one? Okay.
26

1 Submissions by MR ARMITAGE

2 MR ARMITAGE: So sir, just so you have in mind what was ordered, pursuant to this
3 category last time, you could look at bundle C, tab 27 --

4 THE CHAIR: Let me just find out where I am in my notes. (Pause)
5 You want me to look at bundle C?

6 MR ARMITAGE: Yes, it's the Lenzing Redfern schedule, annex to the CMC2 order.

7 THE CHAIR: Where have I got the --

8 MR ARMITAGE: Bundle C, tab 27, right towards the back, page 429.

9 THE CHAIR: That's the CMC2 order; yes?

10 MR ARMITAGE: That's the CMC2 order, exactly, from February this year.

11 THE CHAIR: Yes.

12 MR ARMITAGE: That is the claimants' Redfern schedule. You'll recall we spent an
13 afternoon going through the disputed categories very efficiently. Final column reflects
14 your decision in relation to this category.

15 You will see this is about communications between the defendants and Argus. I think,
16 sir, you'll recall that in our pleading, one of the various factual matters by reference to
17 which we have inferred the existence of --

18 THE CHAIR: Which -- so it's LRS category?

19 MR ARMITAGE: 1.

20 THE CHAIR: 1. I'm looking at 429.

21 MR ARMITAGE: Yes. Then the right-hand-most column is the tribunal's decision on
22 this category.

23 THE CHAIR: That's one where I made a limited (overspeaking).

24 MR ARMITAGE: Yes, exactly. So just as a reminder of brief context, one of the
25 relevant factual matters -- you'll recall the paragraph in our pleading when we go
26 through the various inferences. One of those is the differences that we observed

1 between the IHS index and the Argus index.

2 Now, we had sought disclosure in relation to this category across a broader temporal
3 period, across the full relevant period, for the purposes principally of making
4 comparison between the submissions made to Argus and submissions made to IHS.

5 Sir, you heard submissions from Mr Holmes, King's Counsel, who appeared for
6 Westlake on that occasion. Having regard to those submissions, as you say, you
7 adopted a narrower, temporal period for this category covering October 2019 to
8 October 2020.

9 THE CHAIR: To see where it went.

10 MR ARMITAGE: Indeed. So what you were told at CMC2 by the defendants was that
11 giving disclosure across a broader temporal period in relation to this category would
12 involve a "massive trawl". That was a point made by leading counsel at page 66 of
13 the CMC2 transcript.

14 As I say, you confine the category to a one-year period. We now do seek an order,
15 expanding that to cover the relevant period. That is the period of just over three and
16 a half years between July 2017 and February 2021, obviously, minus the one year.

17 THE CHAIR: (Inaudible) from February ...?

18 MR ARMITAGE: Sorry, July 2017 to February 2021. That's paragraph 1(b) of the
19 re-amended particulars of claim.

20 THE CHAIR: Then remind me -- my recollection is that they produce very, very few
21 documents on this. So you're going to give me the number of documents and then
22 the number of documents that they say they had to --

23 MR ARMITAGE: Exactly.

24 THE CHAIR: -- manually review.

25 MR ARMITAGE: Yes.

26 THE CHAIR: You know, you can review these things electronically quite easily, but

1 the number that they had to manually review to get to that, I'd like to know.

2 MR ARMITAGE: Yes. So exactly, I'm going to take you to that. So my submission,
3 there are two good reasons for making the broad order that we now seek. One is what
4 we now know about the number of documents reviewed, so I'll take you to that directly.
5 Secondly is by reference to actually one of the documents being disclosed, as we say,
6 raises questions.

7 THE CHAIR: So I say that the only documents I didn't read in bundle B, the two tabs
8 which had documents which have been disclosed. I flicked through it.

9 MR ARMITAGE: Yes.

10 THE CHAIR: But because it -- you understand the ones I mean.

11 MR ARMITAGE: Principally that was the de-designation documents. There are a few
12 others which what -- some of which I will show you, and they're not confidential, but
13 yes, I understand. So I'll take you in a moment, on my second point, to a particular
14 document.

15 In terms of the "massive trawl" and what actually happened, we know -- if I take you,
16 please, to the most recent iteration of the defendants' global disclosure statement, the
17 one dated 30 June.

18 THE CHAIR: Yes.

19 MR ARMITAGE: That's G, tab 7, page 48. That's the disclosure statement. Then
20 behind that you have annex 1, which sets out the details.

21 If you could go along please to page 72. That's bundle page 72, or rather 71. That's
22 where they address what they've done for LRSC 1, so the category we're concerned
23 with.

24 So paragraph 92, you'll see:

25 "The Defendants conducted keyword searches set out under Annex 2 across ... emails
26 and attachments in the agreed custodian inboxes ..."

1 I should say this is one of the categories in relation to which phone messages were
2 searched or, at least in principle, attempted to be searched. This is talking about
3 emails. As I said here, this reflects the temporal scope of your order, 14 October 2019
4 to 14 October 2020.

5 Then:

6 "To avoid a disproportionate volume of documents, the Defendants refined the search
7 results to only capture documents that contained an email domain used by Westlake
8 or Argus ..."

9 Then at the end of that paragraph:

10 "This search produced 1,119 documents [extending to just 5500 including family
11 documents], which were manually reviewed."

12 We're told that no documents relevant to LRSC 1 were identified as a result of that
13 manual review. But we then see that the defendants say at paragraph 93 that:

14 "Given those searches produced no relevant documents, yet mindful of the importance
15 placed on [this category] by the Claimants ... additional searches to those requested
16 by the Claimants [were conducted] ..."

17 What was done there?

18 THE CHAIR: What paragraph are you looking at?

19 MR ARMITAGE: Sorry, it's 93. So we've had -- so the initial approach was apply
20 keywords; 1,119 documents manually reviewed. So that's part of the answer to your
21 question, sir.

22 THE CHAIR: Yes.

23 MR ARMITAGE: But then they do this further and different approach. If you see,
24 again, three lines down, paragraph 93:

25 "This [approach] resulted in the Defendant searching the relevant custodian inboxes
26 for all emails from the applicable temporal period that contained an email domain used

1 by Argus ... This search was not limited by any search terms, and therefore captured
2 all email communications exchanged between the Defendants in [that one-year
3 period]. This produced 258 documents (including family documents), [and those] were
4 manually reviewed."

5 THE CHAIR: Yes. I understand that. What do you want them to search? Just the
6 emails?

7 MR ARMITAGE: So we certainly think that -- in light of the explanation in paragraph 93
8 of what happened when the searches were limited to all email communications
9 exchanged between the defendants in August that only produced 258 documents, we
10 say that clearly extending that out based on that information to the relevant period
11 would be proportionate, if 258 is the number thrown up by this approach in relation to
12 the one-year period, it's a very small number of documents in context.

13 We would also be interested to know what would happen in relation to the first
14 approach in relation to the full period, which produced only 1,119 documents before
15 one throws up the family documents. But certainly the external emails, yes.

16 THE CHAIR: But if you break it down, you've got the external emails between these
17 defendants and Argus. That's covered in paragraph 93. I can see you saying: Well,
18 that's not a particularly difficult task (inaudible).

19 On the other hand, there's more to it than that, because there may be internal
20 communications in relation to Argus and that could be a much bigger task for the
21 defendants to do. But is there anything outside those two big categories that we're
22 looking at?

23 MR ARMITAGE: I don't think so. Sir, just to be clear, the paragraph 92, the figure of
24 the 1,119, we understand that that effectively covers both external communications
25 and internal records as such.

26 THE CHAIR: Yes, I know that. That's what it says at the bottom.

1 MR ARMITAGE: Following the application of keywords, yes.

2 THE CHAIR: Yes, exactly.

3 MR ARMITAGE: So there's no other category, as it were though, no, no.

4 THE CHAIR: You're saying, "Okay, the task wasn't as bad as everyone had feared,

5 but clearly it wasn't".

6 MR ARMITAGE: Yes.

7 THE CHAIR: Because I thought it was going to be a much bigger job than (inaudible).

8 MR ARMITAGE: Yes.

9 THE CHAIR: But, you know, all these things still cost money. They've already spent

10 2.3 million or whatever. So I need to be satisfied it's cost effective to do anything else,

11 because we're really at the stage -- I'm looking at this from the lens of a specific

12 disclosure application. That's the stage we've got to.

13 Anyone asking for documents primarily by saying, "I can justify this on specific

14 disclosure terms". I know you both try to play and say, "Well, I haven't complied with

15 the original in the first place". It's not normally a great constructive approach to do that

16 at this stage.

17 MR ARMITAGE: No.

18 THE CHAIR: It's much better to focus on what you actually need now, and let's see

19 where we go.

20 MR ARMITAGE: No, no, we completely agree with that, sir. So insofar as the concern

21 is proportionality, as you see, when this alternative approach was conducted, just

22 focusing on the external communications, it really was a very small number of

23 documents that need to be reviewed. So certainly we would press for at least that

24 across the relevant period.

25 I'm sorry, the second point, though, is that while the existing searches, the searches

26 we've just been looking at in paragraph 93, identified only three documents which have

1 | been disclosed -- that's three, we think, out of the 258.

2 | Can I just show you one of them? It's a B/12/294. It's not confidential.

3 | THE CHAIR: Can I just look at it?

4 | Okay. You want to show me the document. That's in bundle C, no?

5 | MR ARMITAGE: Sir, it's bundle B. It's a bit of bundle B, we say. It's tab 12, and then

6 | it's page 294.

7 | THE CHAIR: Well, let me get that. (Pause)

8 | Bundle B, yes.

9 | MR ARMITAGE: Tab 12.

10 | THE CHAIR: Yes.

11 | MR ARMITAGE: Page 294.

12 | THE CHAIR: Is this a CRO document?

13 | MR ARMITAGE: No, this is not confidential. I should say this is a machine translation

14 | of the original document, which is -- you can see it.

15 | THE CHAIR: It's in German, presumably.

16 | MR ARMITAGE: The original is in German. You see that at page 292 of the --

17 | THE CHAIR: Yes. As long as I have both, that's fine.

18 | MR ARMITAGE: So, as I say, not confidential. You can see it's bilateral email chain

19 | from June 2020, so during the relevant period, between Ms Konig of Argus and

20 | Mr Kempf of Westlake. You've seen -- you've heard about Mr Kempf --

21 | THE CHAIR: I have.

22 | MR ARMITAGE: -- and we'll come on to him.

23 | Picking up at the bottom of the chain on the page, Ms Konig emails Mr Kempf to say:

24 | "Have you decided on Q3?"

25 | So she's clearly asking about Westlake's pricing intentions.

26 | From the email above, Mr Kempf replies and says:

1 "We will not make up our minds until tonight or Monday. I will let you know then."

2 Then Ms Konig replies to say:

3 "I'm curious. By the way, the Dow makes +35/dmt."

4 Now, we obviously can't take this too far today, but we do say it's of interest that this
5 email appears to show the pricing information relating to Dow, one of the other alleged
6 non-party cartelists, being conveyed by Ms Konig of Argus to Mr Kempf in a context in
7 which Westlake is still in the process of deciding their own pricing.

8 As I say, we can't take it much further than that today, in the absence of witness
9 evidence. We do say it's at the very least an interesting document and provides
10 reason to think that the further limited searches we do advocate for in relation to this
11 specific category.

12 THE CHAIR: On the IHS, these -- as I understand it, the general practice was the sort
13 of ring around, rather than written submissions that you might see in LIBOR, for
14 example, "I have both actually been around and have the various figures for the
15 different tenders".

16 With Argus, was it exactly the same thing? Sort of --

17 MR ARMITAGE: I think we've been told in the information statement that my learned
18 friend's clients have prepared, which covers both IHS and Argus, that essentially the
19 same approach was taken to both, yes, yes.

20 THE CHAIR: Okay. Why are you not trying to get disclosure from Argus to see what
21 they have from their end?

22 MR ARMITAGE: Yes. Yes. Sorry. Perhaps we should have addressed that when
23 we were talking about non-party disclosure.

24 So, sir, yes, we are very much considering making an application against Argus and
25 we've been corresponding with them.

26 THE CHAIR: Yes. Because I read the letter you sent to me two weeks ago, explaining

1 | where you are, and that you said that you'd like to wait to see the result of what you're
2 | going to get from the defendants. You want to do it on a sort of staged approach.
3 | What the defendants are saying, as I understand it, is that essentially, "We were giving
4 | the same sorts of information and the same figures to both". But it may be there's sort
5 | of timing issues between (inaudible).
6 | So if they're giving according to them, one figure to Argus , they'd be giving the same
7 | figure to the other one, I'm not sure -- that I am sure that it's a great idea -- it's not
8 | necessarily the best idea to wait until the end of this process with the defendants for
9 | you take out any application for non-party disclosure from Argus.
10 | I think that it's almost inevitable that you will do it. You might as well bite the bullet
11 | and do it now. Because it may take time to get what you want from America. Then
12 | when you get it, you'll want to see, "Well, are they giving the same information?" You
13 | may find the records are fragmentary, and I don't know to what extent Argus would be
14 | keeping records of calls .
15 | Some of these people are really good -- you know, they've got the audio sent, and the
16 | audio can be really important. You pick up those audios and you can know exactly
17 | what is being said.
18 | Others you don't have the audios. The best you have is someone making notes of the
19 | call (inaudible) being told by individual people. In case you've got that, that's probably
20 | useful enough.
21 | Sometimes it's not even as good record keeping as that. You would have thought if
22 | you are managing an index, which is to be relied upon, you're going to have a proper
23 | audit trail. But in this life, you know, what you may expect doesn't always happen. So
24 | my feeling is just with the section 1782 application, I am encouraging you to do it now
25 | and not wait for what Ms Ford's clients may or may not produce. I just think it's going
26 | to have to be done.

1 Yes, this case could go, you know, a number of directions. If they're right and that
2 what they've been giving is precisely where the market was at the relevant time, you
3 don't have a case.

4 If, in fact, there is some manipulation or attempted manipulation, people feeding in
5 wrong figures, as we saw in the LIBOR case, I want to know where we are at the next
6 CMC. The case is costing more than a few bob, so we want to get to that.

7 The way I see the defendants is that they will -- they're not saying, "We're against you
8 getting this information from two critical sources outside themselves".

9 MR ARMITAGE: Yes.

10 THE CHAIR: I'll put it in the ruling, but I'll say that we encourage you to take out an
11 application. I'd expect it to be taken out before we go out on holiday for the summer.

12 MR ARMITAGE: That's very helpful. I hope it was clear from the update that we are
13 certainly very keen on pursuing that.

14 THE CHAIR: But what you said in the letter about -- unless I've misremembered, and
15 that's always possible -- is that you will wait until this process is over with the
16 defendants' final decision. My point is, I want you to make your application, if you can,
17 this month.

18 MR ARMITAGE: Just to be clear, it was only in circumstances where, for example,
19 we're seeking the expansion of a category that specifically relates to that. But we have
20 of course heard your comments and we'll take those away.

21 THE CHAIR: We need to see it.

22 MR ARMITAGE: Without prejudice to that point, though, we are seeking the expanded
23 disclosure in relation to this category. This document is an example we say. of
24 a document that may be identified as a result of the further, we say very proportionate,
25 searches that would need to be done if you were to grant the order we seek --

26 THE CHAIR: Okay.

1 MR ARMITAGE: -- and those are our submissions on LRSC 1.

2 THE CHAIR: Ms Ford.

3

4 Submissions by MS FORD

5 MS FORD: Sir, I do have a fair amount to say in resisting this application. I'm

6 conscious of the time.

7 THE CHAIR: What is the time?

8 MS FORD: I believe it's 1.00 pm (overspeaking).

9 THE CHAIR: We can do it after lunch, but I'd like to hear you on this and try not to

10 spend more than 15 minutes on it because we've got a lot of other things to get through

11 today and this isn't necessarily the sort of key one that we need to sort out today.

12 MS FORD: Sir, I can give you the three headline points by way of --

13 THE CHAIR: Do it when you come back. But the, because we do need to deal with

14 all your applications and I don't want to squeeze at the end of the day, we spent the

15 morning dealing with their applications. I've got it, it was important to get some clarity

16 on those things we've done so far, but I'm conscious that you want time to talk about

17 your applications, and I'm keen that we get them today. So we'll come back at

18 2.00 pm.

19 (1.04 pm)

20 (The short adjournment)

21 (2.07 pm)

22 THE CHAIR: Yes, Ms Ford, I'm ready to hear your reply on that first category.

23 MS FORD: A key development since the last CMC that's relevant to this first category

24 is that the claimants have obtained a summary of the methodology that is adopted by

25 Argus. So we are now able to conduct a comparison between the IHS methodology

26 and the Argus methodology. What we say can be derived from that is three things.

1 First of all, we get an insight into how they go about gathering information from market
2 participants, how they assess the information, how they select the data to use, how
3 they exclude data, how they take out what they consider to be anomalous data and --

4 THE CHAIR: We have that for both, don't we now?

5 MS FORD: We have it for both and that's the key. You had it for IHS last time; we
6 now have it for Argus as well.

7 THE CHAIR: Yes.

8 MS FORD: What comes through very clearly is the high degree of the subjective
9 assessment involved on the part of the analysts. In the light of that, Westlake's
10 position is that these indices are simply not capable of being manipulated in the way
11 that is being alleged.

12 Secondly, it's very clear that the IHS index and the Argus index have different
13 methodologies. Given that they have different methodologies, it's unsurprising that
14 they produce different results, and the tribunal will appreciate that that is particularly
15 relevant to this issue that we're considering now about whether or not the explanation
16 for discrepancies is the provision of different data, on the one hand, or different
17 methodologies on the other.

18 The third thing we --

19 THE CHAIR: It could be both, can't it?

20 MS FORD: There's certainly nothing that's come out of the disclosure to date to
21 support the suggestion that it involves the provision of different data -- nothing at
22 all -- and that in my submission, when we come on to deal with the substance of this
23 category, is that the exercise that was directed to be done last time has not assisted
24 at all in conducting that comparison between the data that was provided to Argus and
25 the data that was provided at IHS. So it's not useful in any way for the purpose for
26 which it was directed, but that's jumping ahead slightly.

1 We were looking at what we can see from the indices. What I'd like to do is show the
2 tribunal very quickly the two documents that we now have. In relation to the IHS index,
3 it's a confidential document, so I'll simply point the tribunal to a few passages in it.

4 THE CHAIR: Yes. Where is it?

5 MS FORD: It's in bundle G, tab 3, starting at page 16. (Pause)

6 The tribunal will see this is a 2019 document. There's also a 2020 document in the
7 following tab but they are largely similar.

8 THE CHAIR: The name of the document is not going to be a problem, is it?

9 MS FORD: Well, I hesitate to read anything out because the entire document has
10 been marked as confidential, so I will point the tribunal to the passages we say are
11 particularly relevant. The first one is paragraph 2.1.1, which is concerned with price.
12 Can I ask the tribunal to read the two paragraphs under that heading. (Pause)

13 THE CHAIR: Yes.

14 MS FORD: So the tribunal will see the sorts of variables and the sorts of subjective
15 judgments that are involved in that exercise. I would invite the tribunal to note what is
16 said in particular in the second paragraph about the relationship between index price
17 and transaction price.

18 As to the reporting period, can the tribunal please read 2.1.2. (Pause)

19 THE CHAIR: Yes.

20 MS FORD: In particular concerning the approach that's taken in Europe, that's set out
21 in section 2.2.1.2, headed "Europe". Can I ask the tribunal to just quickly read those
22 paragraphs. (Pause)

23 What the tribunal will note there, first of all: who is surveyed in terms of the numbers
24 of people and the types of people that are surveyed, and the tribunal will note the
25 different variables, how they interrelate to each other, and in particular, the degree of
26 judgment that's involved in the exercise. If we then compare that with the

1 | Argus methodology, which is at bundle G, tab 2, page 7. (Pause)

2 | THE CHAIR: Yes. Next one?

3 | MS FORD: Tab 2, starting at page 7. If we go over the page, please, to page 8. This

4 | is, I understand, not a confidential document, so I can read out passages of this. We

5 | start first of all looking at the reporting period. If the tribunal looks at the heading

6 | "Methodology rationale" in the final sentence of the second paragraph, it says --

7 | THE CHAIR: Which page are you talking about?

8 | MS FORD: Internal page 2, bundle page 8.

9 | THE CHAIR: Yes.

10 | MS FORD: Heading "Methodology rationale", right at the top of the page --

11 | THE CHAIR: Yes.

12 | MS FORD: -- second paragraph within that. The second sentence in that paragraph:

13 | "Argus uses the trading period deemed by Argus to be most appropriate, in

14 | consultation with industry, to capture market liquidity."

15 | Now, that's the reporting period for Argus. The tribunal will have in mind what we saw

16 | was the reporting period for IHS. (Pause)

17 | Third paragraph under this heading, "In order to be included in the assessment

18 | process" we can see the various factors --

19 | THE CHAIR: Yes.

20 | MS FORD: -- minimum volume delivery timing and specification requirements. So

21 | there appeared to be unspecified thresholds for the inclusion of data in the pricing

22 | assessment.

23 | THE CHAIR: How big were your people in the market?

24 | MS FORD: I'm afraid I don't have -- it may well be that they are; I'm afraid I don't have

25 | instructions, but I'm told they're 5 per cent.

26 | THE CHAIR: Yes.

1 MS FORD: I'm making slightly different points, which is that there are thresholds for
2 the inclusion of data and it's entirely conceivable that the operation of those thresholds
3 impact on the results of the index. That's simply the point I'm making.

4 So in terms of sources of data for Argus, if we look under the heading "Survey
5 process", the tribunal will see that it appears that Argus accepts data from producers,
6 consumers, brokers, intermediaries and trading platforms. (Pause)

7 Tribunal will recall what I showed you in the IHS in relation to sources of data.

8 In terms of types of data, we look under "Market data usage"; there's a reference to
9 "Transactions", "Bids and offers", "Other market information, to include spread values
10 between grades, locations, timings, and many other data". Those are the bullet points
11 at the top of the second column.

12 And then under "Verification of transaction data", it mentions:

13 "Transactions, bids, offers, volumes, counterparties, specifications and any other
14 information that contributes materially to the determination of price."

15 So within the limits of the submissions that I can make without breaching the
16 confidentiality ring order, in my submission there are very obvious differences between
17 the two documents, and that is of particular importance when it comes to the question
18 the tribunal was trying to get to in directing disclosure under this category, which is
19 whether or not the differences between the two methodologies reflected -- sorry, the
20 differences between the two indices reflected different data or different methodologies.

21 Turning then to specific submissions on this category, we know that the carefully
22 delineated sampling exercise that the tribunal directed only identified three responsive
23 documents and in our submission that doesn't tell us that it's a good idea to widen the
24 search, it tells us that it's not a useful and productive exercise and it shouldn't be
25 pursued further. It's not a useful and productive exercise for two reasons.

26 The first is that, as Westlake has consistently explained -- and the tribunal, I think,

1 already has the point -- these price interviews were primarily conducted by telephone;
2 that's the point that's been confirmed in Westlake's IHS/Argus information statement
3 at paragraph 19. So it's no surprise that this exercise hasn't returned many
4 documents, because price submissions tend to be undertaken by phone. That is
5 a reason why it wouldn't be reasonable and proportionate to incur yet further cost in
6 extending the exercise.

7 The second reason is that the whole point of the exercise was to try and understand
8 the reasons for the discrepancies between the IHS index and the Argus index, and it
9 can't sensibly be suggested -- on behalf of the claimants -- that the three documents
10 that were produced were of any assistance in achieving that exercise. So we say the
11 whole search that's been conducted -- and the entirety of the cost that's been incurred
12 in doing this -- has not been of any use in terms of the purpose for which it was directed
13 and we say that's hardly a good reason to persist in widening it further.

14 In fact, we also know from Westlake's information statement that the same information
15 was provided to both Westlake and Argus; that's been confirmed in paragraph 2 and
16 paragraph 22 and we know from the comparison of the methodology documents that
17 the two indices adopted different methodologies.

18 So in our submission, the whole point of directing a sampling exercise for a limited
19 period was to test the water in this way and see whether it is or is not a useful exercise.

20 Well, in our submission, what has become very clear is that it is not a useful exercise
21 and so it shouldn't be extended further.

22 Finally, the tribunal has been shown the single email that the claimants seek to suggest
23 might be somehow illustrating the value of this category. That's in B, tab 12, page 294.

24 (Pause)

25 We say, if anything, this email is unhelpful to the claimants. The reason we say that
26 is that the claimants' pleaded case is that there was manipulation of the IHS index and

1 the way they seek to infer that there was manipulation is to compare it with the
2 Argus index. So, insofar as this is an email about the Argus index, it simply doesn't
3 advance their pleaded case. Any allegation about the nature of information shared
4 with Argus, or shared by Argus with Westlake, is completely unpleaded and the
5 claimants have addressed that in their skeleton, paragraph 26(c), and they rely on the
6 well known asymmetry faced by a claimant in a cartel case as to why that's not their
7 pleaded case.

8 But that, in our submission, doesn't actually get them out of this hole, because their
9 whole case that is pleaded is based on comparing the IHS index and the Argus index,
10 to try and establish manipulation of the IHS index. So, if anything, this document is
11 inconsistent with the very thin inference that supports their existing pleaded case.

12 (Pause)

13 It goes without saying that this document doesn't actually assist with the exercise that
14 this category of documents were intended to show, which was the comparison
15 between the material that was submitted to the two indices and we say this single
16 document simply can't justify pursuing further searches that have so far simply proven
17 to be lacking in utility.

18 So we would invite the tribunal to refuse this application to extend these searches
19 further.

20 THE CHAIR: Mr Armitage.

21
22 Reply submissions by MR ARMITAGE

23 MR ARMITAGE: Very briefly.

24 Ms Ford didn't address you on the question of proportionality or take any issue with
25 the figures in terms of what would need to be reviewed, so you've had my submissions
26 on that.

1 A couple of very quick points, if I may, on the points that Ms Ford did make. She made
2 the point that nothing from the disclosure to date suggests that different information
3 was provided to the indices. Two points on that.

4 Well, their own position is that information was provided orally; obviously we are going
5 to pursue disclosure from IHS, who may have records. But the fact that nothing has
6 come out of disclosure on the comparative point, in light of their own description of the
7 process, is not surprising. It also does sit slightly ill in my learned friend's mouth to
8 make this submission about nothing coming out of disclosure for the reasons we're
9 going to come.

10 THE CHAIR: (inaudible) the same information, (inaudible) to the evidence from IHS
11 is likely to be fragmentary, helpful to see going to -- if it doesn't relate to prove or
12 (inaudible) case, but in relation to IHS, where the data would likely be fragmentary or
13 so, I'd like to see indications there are, because although it's primarily (inaudible).

14 (Pause)

15 (2.23 pm)

16
17 Ruling (submitted to the learned judge for approval)

18 (2.29 pm)

19 MR ARMITAGE: And just by way of clarification, so the searches that were done for
20 this category covered phone messages as well. I don't know whether you're ruling
21 would extend -- given that you're interested in communication.

22 THE CHAIR: I think phone messages we definitely need, but they may not be --

23 MR ARMITAGE: Consistently with what's been --

24 THE CHAIR: But now we're on phone messages --

25 MR ARMITAGE: Yes. (Pause)

26 THE CHAIR: I don't know how far you're exploring phone messages and how far you

1 can go. But the work I've done is that there's a number of things that you tend to look
2 at.

3 One is the numbers being dialled on a phone in conjunction with the contact list. That
4 way you'll be getting evidence of communications, but not necessarily the content.

5 The second thing is when a phone has been wiped, what one tends to find is
6 sometimes the materials are on a back-up, such as iCloud. So an unsophisticated
7 person may not realise that it's still on the back-up.

8 The other thing, what people tend to do when they wipe their phone is that they don't
9 wipe everything; they keep their contact list, because they don't want to lose all the
10 numbers on their phone. They may still want to have all their friends -- whatever the
11 numbers are. So whilst you find that they do wipe that, what they tend to do is they
12 keep -- or it's kept for them -- on iCloud or something else, they will want to keep their
13 contact list. So all these things will need to be looked at -- at some stage -- when you
14 come to deal with the phones.

15 The other thing that I tend to look at on these things is the data. You may have a blank
16 phone, but if it's Vodafone, for example, you can go to Vodafone and obviously the
17 owner of the device and the company paying for the bill has a right to exercise within
18 its control. You can go to them, and there's quite a lot they can provide. They will be
19 able to provide, certainly, all the numbers dialled; they can give you the duration of the
20 call. Also that you may find, depending on the operator, they will have the messages,
21 the texts themselves.

22 So if it's purely a WhatsApp call, then that's purely a WhatsApp call, and they're not
23 going to be able to help you. But if it's a call going through the main line, and it's going
24 through Messenger, you may find that there are means of getting that -- that -- let's
25 say the deleters don't quite appreciate that may well be available.

26 But you know, a lot of it's going to be, you know, how far do you go, what sort of costs

1 it is.

2 The other problem you have is: until you know the numbers of all the other relevant
3 people, it -- sometimes just having the raw numbers coming back from Vodafone
4 doesn't help you. You know, normally what the authorities do is they put it all on
5 a program. They analyse it. They will have the list of -- one side, they'll have all the
6 numbers of people who are suspects or whatever. On the other, you have the data
7 coming out of it. You marry them up, and then you can see who's calling who.

8 But I don't know how sophisticated the operation is. I'm more experienced in dealing
9 with, let's say, on the investigatory side rather than, let's say, the sort of commercial
10 side dealing with (inaudible). But hopefully that will give you some ideas as to what
11 you may want to find, because on the cartel cases, it's -- you know, these messages
12 can be very, very important. Also, if phones have been, let's say, wiped or whatever,
13 that may be a reason for going a bit further, looking at other people's phones, which
14 otherwise I would not necessarily have ordered in the first instance.

15 So let's be -- having said what I think about this, let's deal with the phones, because
16 that's quite an important topic.

17 MR ARMITAGE: Indeed.

18 THE CHAIR: We have a limited amount of time to deal with it today.

19
20 Submissions by MR ARMITAGE

21 MR ARMITAGE: Yes, I was going to propose, if we may, sir, to deal with phones, both
22 current and ex-employees. You see we seek orders in relation to both.

23 There's then a very short point relating to LRSC 4 and 5, which are the categories
24 concerning communications, which goes hand in hand.

25 There are some other points relating to information requests. We thought, in light of
26 your indication earlier, that you're keen to hear from Ms Ford and give her fair time in

1 her application that those discrete points could perhaps go lower down the agenda
2 once we've dealt with phones and the LRSCs.

3 THE CHAIR: We'll be able to sit later until we've got an indication on main things. I do
4 not want to anyone to be squeezed.

5 MR ARMITAGE: Yes. So starting with item 1(a), which is the current employees'
6 phone messages.

7 THE CHAIR: Okay, so where do I get 1(a)?

8 MR ARMITAGE: So that's the agenda, sir.

9 THE CHAIR: We're looking at the agenda, yes?

10 MR ARMITAGE: Yes. But I'll show you -- well, let me briefly address you just on the
11 background to the -- you're seeing the main application is that we want a further
12 process for identifying further potentially relevant employees in relation to whom
13 searches of phone messages should now be conducted.

14 Sir, I infer that you've read the documents, and I'm not going to spend a long time on
15 the background how we got to where we've got to. The basic context for these
16 applications, as you have seen, is that two of the three employees who were identified
17 as key employees, following the order that you made in respect of phone messages
18 the last time around, Mr Kempf and Mr Luderer, have taken steps which have resulted
19 in phone messages from during the relevant period apparently being irretrievably lost.

20 THE CHAIR: On that, I'm not satisfied that I've had a sufficiently detailed explanation
21 in relation to how that happened. I do expect the defendants to file a statement giving
22 a lot more detail as to what they were told about preserving it, what the explanations
23 are, and that they should also deal with whether or not they have been able
24 to -- they've tried to look for backup data, whether they do have the contact lists for
25 those phones or any contact list for those persons and obtain those. Because I don't
26 know what -- when someone wipes a phone, are they going to wipe everything or are

1 they going to keep something? And what have they kept? So all these things, basic
2 things need to be done. And that I would expect them in relation to the three people
3 that they do get from the operator the call data for the relevant period.

4 Then where we go from there, we can perhaps deal with that next time round. But we
5 need to see if we've got the contact list, so whether or not it's possible to marry up the
6 call data with the contact list, so you can see that.

7 Similarly, you know, when you -- there's certain things which are quite easy. You'll be
8 able to know what the Argus numbers are and the IHS numbers. Obviously, you'll get
9 them, and that's important (several inaudible words) basic thing you're going to get.

10 So when you look at the call data, you'll be able to see if they (inaudible) to the setters.

11 But you know, I was not pleased with or impressed by what's happened on that. It's
12 clearly something very serious has gone wrong. You can't just -- they're trying to make
13 out as though it's no big deal. It is a big deal.

14 Further down the line, you may want to say there are various inferences that can be
15 drawn, what does appear to be deliberate destruction of evidence. It's an attempt to
16 pervert the course of justice, if, in fact, that was done with the requisite intent, when
17 proceedings were contemplated.

18 MR ARMITAGE: Yes.

19 THE CHAIR: That's where we are on that.

20 MR ARMITAGE: So, sir --

21 THE CHAIR: But at the same time, I want to make it clear, I'm not criticising the
22 solicitors at all. They're doing their job, and I'm sure, in accordance with their duties,
23 they advised the relevant people of the importance of maintaining this data. To be
24 fair, in relation to one of them, it's specifically pointed out that the person being warned
25 had acknowledged the importance of retaining it only four days before it's deleted.

26 You know, one inference might be, confronted with that letter, knowing what there may

1 have been on the phone, they've decided to wipe the phone. But it's a pretty serious
2 situation. Here I need more information from the defendants. When it comes back in
3 the next CMC, you know, obviously, we may look into it in a bit more detail.

4 MR ARMITAGE: Sir, we respectfully agree with and endorse all of that. You'll have
5 seen that we've been seeking to raise questions about the explanations that have
6 been provided. Like you, we don't criticise --

7 THE CHAIR: No, of course not.

8 MR ARMITAGE: -- solicitors on the other side, counsel on the other side.

9 THE CHAIR: No, of course not.

10 MR ARMITAGE: One of the issues we've identified, sir, you'll have picked up is that
11 at the last CMC, we had a debate about disclosure of phone messages. The position
12 advanced by counsel for the defendants, no doubt on instructions, was that these were
13 not approved methods of communication. That was the basis on which the application
14 was resisted.

15 We now --

16 THE CHAIR: Look, we dealt with this last time. Look, the fact is that when people use
17 mobile phones for, let's say, illicit communications or whatever, they often will not use
18 their work phone. They use their personal phone. We've seen that in the other cartel
19 cases and in other setting of index cases that they have their work phone, which they
20 use for work, and they know that may be monitored. Quite often, what you find is when
21 you've got two people in financial institutions, they know that their normal line is being
22 monitored, so they don't use that; they pick up their own personal mobile and do that;
23 and that they will have guidance saying you must only use your work phone or your
24 dedicated number. But that's part of trying to get around the systems and controls that
25 the company has. So I'm not impressed by the argument -- there may be nothing on
26 the personal phones. They're exactly the sort of phones which will be used,

1 particularly if you're communicating with co-cartelists. That's how people do that.

2 MR ARMITAGE: I just --

3 THE CHAIR: In my experience of how these things work.

4 MR ARMITAGE: Yes, indeed. The point goes a little further though, sir, because what
5 we now know is that at the time of the CMC, indeed, from 2023 onwards -- we infer
6 from the description that's been provided -- the defendants were aware that at least
7 one key employee, Mr Kempf, had used WhatsApp, which is not an approved method
8 for business communications. We get that from the disclosure statement.

9 THE CHAIR: Yes.

10 MR ARMITAGE: They knew about that. The defendants knew about that at the time
11 of the debate at the last CMC. They knew about it at the time of their EDQ. They
12 made no mention of it. They resisted the application that we made for disclosure of
13 these messages on the basis that this was not an approved method of business
14 communication. That's a matter of real concern.

15 THE CHAIR: (Overspeaking) I ruled against them on that.

16 MR ARMITAGE: I know.

17 THE CHAIR: They're not inviting me to revisit it.

18 MR ARMITAGE: I know.

19 THE CHAIR: They're not saying that, Peter Roth and the Court of Appeal are wrong
20 on what the scope of the jurisdiction is. In Phones4U, you know, it's fairly clear what
21 the law is.

22 MR ARMITAGE: So in terms of the factual questions -- and we've been pursuing that
23 in correspondence -- one of the issues, indeed, we've been pursuing is the question
24 of whether there are backups. We don't find the information that's been provided to
25 date (inaudible).

26 THE CHAIR: Once it's directed, we are going to have to (inaudible), yes.

1 MR ARMITAGE: Indeed, so sorry. That is just to say, I think that largely deals with
2 the information request aspect of our application.

3 In terms of the precise orders that we still do seek today, can I show you the composite
4 order at H, tab 3, page 50?

5 THE CHAIR: I've just got it separately. So would you just give me the paragraph.

6 MR ARMITAGE: Paragraph 1 of the composite order, with the heading "Current
7 employees".

8 THE CHAIR: Yes.

9 MR ARMITAGE: So to summarise our proposal, sir, we say that in the circumstances
10 that emerged in recent weeks, it's right that the defendants should produce a list of
11 any further current employees who may hold relevant phone messenger data. There
12 should then be a process of discussion between the parties about that list. Then
13 having liaised in advance with the claimants about the precise search to be adopted
14 rather than proceeding unilaterally, there should then be reasonable and proportionate
15 further searches.

16 We say -- I can take this quickly -- that that process is justified for two reasons. First,
17 broadening the net in this way is justified precisely because of the issues around the
18 loss of data by two of the three employees whom the defendants identified as key
19 employees the last time around.

20 Secondly, though, and in any event, we say the approach is justified because the
21 approach that the defendants took to identifying key employees the first time around
22 was unduly narrow and seems to have been apt to miss employees who may have
23 held or may hold relevant phone messages.

24 Could I just develop at that second point very briefly?

25 THE CHAIR: But given what's happened with those two, and I made the order that
26 I did, one of the things that I want to be done, insofar as it's possible, is to obtain the

1 data from the provider, whether it's Vodafone or whatever, and that should be obtained
2 now, because sometimes they've got data retention periods like that. I do think that
3 they need to dig deeper than where we are, but I've indicated what I think I'd expect
4 to see and the defendants can see that.

5 Of course, it's in their interest to do it. Because if they don't do it, you're saying there's
6 an inference in relation to what has happened. But on the other hand, if they come up
7 and they do find, say, the backup messaging the data and all that, and it showed
8 nothing, it helps them and, let's say, rebut an inference that might otherwise be made.

9 MR ARMITAGE: Yes. We entirely and respectfully agree with all of that.

10 If I could just briefly develop, though, the point that, we say, the existing identification
11 of key employees was defective and was unduly narrow. Can I just show you why
12 I made that submission?

13 THE CHAIR: Yes.

14 MR ARMITAGE: So could we look at Willkie Farr & Gallagher's letter of 25 June,
15 which is at bundle D, tab 34, page 129.

16 THE CHAIR: I know solicitors like writing all these long letters. At the end of the day,
17 it's like growing teeth on your own when you're reading a solicitor's correspondence.

18 MR ARMITAGE: So they're reasonably dense.

19 THE CHAIR: Which one do you mean?

20 MR ARMITAGE: Sir, this is the 25 June letter.

21 THE CHAIR: Yes, which is which tab number?

22 MR ARMITAGE: Tab 34 of bundle D.

23 THE CHAIR: Yes.

24 MR ARMITAGE: This has been described as 'the disclosure letter'.

25 THE CHAIR: Yes, I've read it already.

26 MR ARMITAGE: I think you'll have read this. Can I just show you paragraph 8. We

1 had asked them, having received the first disclosure statement on 29 May, how they
2 identified Mr Kempf, Mr Luderer and Mr Quintus as key employees. You'll recall that
3 what you ordered was that there should be reasonable and proportionate searches of
4 key employees' --

5 THE CHAIR: Yes, fair enough.

6 MR ARMITAGE: -- private messages. What they said in their disclosure statement,
7 as you see quoted there, is that they were considered to be key employees -- this is
8 the underlying text:

9 "... by reason of their being members of the Sales Team at various points during the
10 Relevant Period and therefore being responsible for caustic soda sales and pricing,
11 including engaging with IHS and Argus."

12 We queried that, and what they say is:

13 "What this means [in other words, their membership of the sales team] is that these
14 are the only three current employees that could have had any relevant
15 communications with IHS or Argus. Put another way, any other current employee ...
16 had no relevant communication with IHS or Argus. Therefore, it follows that they will
17 have no relevant documents."

18 What we say is that that's a non sequitur, because even if one accepts that those are
19 the only employees who could have communicated with the indices, it simply doesn't
20 follow that they're the only possible employees who could have relevant, for example,
21 messages with other alleged cartelists, and that isn't suggested.

22 THE CHAIR: But didn't we look at this last time and didn't I say something about that
23 to the effect that, you know, you're not just looking at people communicating directly
24 with the indices. You'll be talking about people within, for example, the businesses
25 contacting each other. If you look at how it worked in LIBOR when they were trying to
26 influence what BBA was being told at the end of the day. So you have one guy at the

1 bank whose job is to be the relevant person to speak to the indices. He's not
2 necessarily the person who's speaking to the other cartelists. That's the point. It may
3 well be what will happen is that other members of the firm, of the defendants, are
4 speaking to other people and they -- because let's say you're in a firm. There's two
5 firms. There's a chap in firm B who's mates with someone in firm A, and if they're
6 going to do something which is a bit risky, he's going to leverage on that personal
7 relationship and they'll do whatever they need to do. Then it's the chap within firm A
8 whose job is to get it over the line by speaking to the person who's making the, let's
9 say the reporting. So it's not wise simply to look at the phones of the person who is
10 submitting the data. It's just not how it works in the real world.

11 MR ARMITAGE: Yes. No, that's exactly our point, sir. We tried to engage with them
12 shortly after the last CMC. We wrote to them and said, please, can we discuss what
13 you're going to do? They didn't respond to that letter. They proceeded unilaterally.
14 We got their disclosure statements on 29 May. In fairness, I think on 1 May they told
15 us the names of the three key employees, but it wasn't until 29 May that we saw the
16 explanation.

17 Just to give -- we do have a concrete example. Obviously, we don't know what we
18 don't know about who the other potential employees may be. There is one named
19 individual, though, I would like to mention. So there's a Mr Karl-Martin Schellerer.
20 He's a managing director of the first defendant. Although I can't go into the details in
21 open court, you would see if you were to look at some of the confidential documents
22 that were the subject of the now deferred de-designation request that he -- I think I can
23 say this -- was heavily involved in matters of pricing and strategy generally relating to
24 caustic soda. He's not a member of the sales and marketing team, so he's been
25 omitted not only from the private messenger searches pursuant to these categories,
26 but also, in fact, from searches of emails pursuant to these categories, which we think

1 is an issue also. I'll show you one document, if I may, in relation to this gentleman,
2 which is not a confidential document. It's at G, tab 1.

3 THE CHAIR: Yes.

4 MR ARMITAGE: I'll show you this very quickly. Two points that have been made as
5 I showed you in the --

6 THE CHAIR: I've looked at this already, but yes (overspeaking).

7 MR ARMITAGE: So one thing that they said is that the three individuals they identified
8 are the only individuals who could have communicated with IHS. This, I concede, is
9 from before the relevant period; I do accept that, obviously. But what you see here is
10 an email from a Mr Raae of IHS to a number of individuals, including Mr Schellerer,
11 saying:

12 "Dear Vinnolit friends,

13 "Thank you for the hospitality yesterday, and for a very good session. As promised
14 we enclose a copy of yesterday's slides."

15 So not only do we have the evidence that Mr Schellerer was involved in pricing and
16 strategy in relation to caustic soda generally, there's also evidence here, at least in
17 2016, that he was involved in meetings and discussions with IHS. So we say, at the
18 very least, his messages and indeed emails should be searched in relation to the key
19 categories to which this application relates.

20 There's also the question of the ex-employees. I don't know if you'd like to hear me
21 on that before Ms Ford responds.

22 THE CHAIR: Yes.

23 MR ARMITAGE: There what we seek is an order, essentially -- and this is it --

24 THE CHAIR: That's the phones for us --

25 MR ARMITAGE: That's the Phones4U order. There's a related issue here because
26 we now know from the correspondence in recent days that when they identified again

1 four named ex-employees for the purposes of the order you made last time -- there
2 were four named individuals -- again they've taken this unduly narrow approach of
3 focusing on members of the sales and marketing team. So what we say is there should
4 be an order that the defendants write to the named ex-employees asking if they would
5 be prepared to provide their personal devices for inspection, insofar as they were used
6 during the relevant period.

7 But we also say that that request should extend to other ex-employees who, while not
8 members of the sales and marketing team, again may have had involvement with
9 matters more generally because again they've taken this unduly narrow focus. So we
10 say those are two reasonable and proportionate orders covering current and
11 ex-employees which are capable of producing relevant further information that could
12 be of real assistance in pursuing this case.

13 There's one final point. You'll have picked up, one of the three key current employees,
14 Mr Quintus, reliance has been placed in this context on the fact that his phone, unlike
15 the phones of Mr Kempf and Mr Luderer, his phone -- his work device -- from during
16 the relevant period is available and has been searched. We're told that he's not
17 prepared to make his personal device from the relevant period available for searches.

18 But we --

19 THE CHAIR: Where is he located?

20 MR ARMITAGE: I don't know the answer to that, actually, I was -- defendants may be
21 able to assist.

22 THE CHAIR: Yes.

23 MR ARMITAGE: We'll seek to find out.

24 MS FORD: I'm told he's in Germany.

25 THE CHAIR: Thanks very much.

26 MR ARMITAGE: The point I was going to make about Mr Quintus, though, is that it

1 wasn't clear to us from the disclosure statement whether all of Mr Quintus' messages
2 on messenger apps during the relevant period had been manually reviewed. What
3 we've been told in the long letter that came in last night is that 468 documents were
4 extracted from Mr Quintus' work device from the relevant period. But rather than
5 review all of those documents for potential responsiveness to these key
6 categories -- so it's LRSC 4 and 5 and so on -- key word searches were applied to
7 those 468 messages. But in my submission, given the limited number of documents,
8 it would plainly have been proportionate -- we've only learned this information
9 overnight, I should say -- for the full suite of 468 documents from Mr Quintus' phone
10 to have been searched pursuant to the order that you made last time.

11 Certainly what can't be said in circumstances where not all of those documents have
12 been manually reviewed, well, Mr Quintus' phone messages haven't revealed
13 anything of relevance because they haven't all been looked at. I think those are the
14 sort of cluster of points.

15 THE CHAIR: Yes. Hopefully you're going to work that out with the other side. But if
16 it's not worked out, certainly in relation to the mobile phones, you're going to have to
17 write to me with any things that you can't agree.

18 MR ARMITAGE: Yes. On that one, agreed.

19 THE CHAIR: I've made it pretty clear what I expect to be done and to be seen. As
20 regards the defendants, I have got questions to ask Ms Ford, we'll go through and
21 she'll answer them.

22 MR ARMITAGE: Well, as you've seen, sir -- I will sit down in a moment -- the process
23 we are asking you to order today involves a process whereby a list of current and
24 ex-employees --

25 THE CHAIR: I understand what you're trying to do --

26 MR ARMITAGE: (Inaudible) then we liaise and indeed raise points with you if

1 necessary on the papers.

2 THE CHAIR: So if I've got problems with what you're proposing, I'll tell you at the time
3 and then you answer it. But by and large -- until I hear -- but obviously I've read what
4 they've had to say about this; it's not as if I am reaching provisional views without
5 knowing what their views are. I've looked at it and I looked at all the evidence, I've
6 been through disclosure statements quite clearly and I know exactly what I was
7 looking for last time and, you know, I am quite frankly disappointed. But it's no one's
8 fault, you know; we are where we are and the springboard for your application to going
9 further and looking at ex employees and the way you're looking at, is what's happened
10 in relation to the two employees.

11 I'm not sure if any written ruling is wise for me to say the names of the two people
12 who've wiped, because it could be that this could end up having other implications
13 other than what can be done by you, in the context of civil proceedings and everyone
14 has a privilege against self-incrimination, if in fact they've done something intended to
15 pervert the course of justice. So I've got to be quite careful about what's in the public
16 domain not put in the public domain, you know.

17 But what they will say is it's all unfortunate and all unintended and all of that and that
18 may well be true, but we've got to see -- insofar as we can -- what can be done, to look
19 at what data is out there, have an understanding of what's gone on. There's
20 a reference to a privileged investigation and one of the things that I will want to see is
21 a letter from the solicitors indicating what was that investigation was about, who was
22 conducting it and on what basis is it said the whole investigation itself is privileged,
23 because you've got all the points that you probably know -- Three Rivers and stuff like
24 that -- and the limits of privilege are quite often, let's say "narrower" than people often
25 envisage and it may be that there will be original documents -- or documents which
26 are created -- which themselves become relevant documents, but they're not

1 | privileged.

2 | So just because you have a cloak of a privileged investigation doesn't mean everything
3 | in that investigation is automatically becoming privileged and certainly if there's
4 | non-privileged information, it doesn't become privileged, because it is incorporated into
5 | a privileged investigation. But we will get to the bottom of what that investigation is
6 | and whether or not there is any further information that needs to come out of that, get
7 | an understanding of what very unfortunately has happened in this case.

8 | MR ARMITAGE: And I should say Ms Ford will take you to it. There's been some
9 | degree of further explanation in relation to the investigation overnight. We've been
10 | told it was for the dominant purpose of an issue that doesn't arise in these proceedings,
11 | but clearly more that could be said and sir, respectfully, the suggestion you've made
12 | of a witness statement may well cut through the need to pursue particular points.

13 | THE CHAIR: Let me deal with it, because I think that at the end of the day it's
14 | a matter -- it's an order that the tribunal made. The tribunal is not happy, is
15 | disappointed with what's happened. It may be this is a complete red herring and it
16 | goes nowhere, but I do want to get to the bottom of something that's happened on my
17 | watch, which I'm not -- let's say it's rather unfortunate what's happened.

18 | MR ARMITAGE: Yes.

19 | And then the final point before I sit down: you'll have seen in our skeleton argument
20 | there's an issue around waiver of privilege. We've been told in the disclosure
21 | statement that Mr Kempf has provided an assurance that the only app that he used
22 | for business purposes was WhatsApp; that's relied on in the disclosure statement,
23 | whether the searches have been reasonably proportionate and so on. We've asked
24 | when that was provided.

25 | THE CHAIR: But we're going to get a more detailed explanation of what was on the
26 | phones and everything on -- I don't think now's the time to deal with that.

1 MR ARMITAGE: I respectfully agree given what's been said, yes.

2 THE CHAIR: Let's get what I've indicated we need to get to the bottom of. It is going
3 to entail a bit more work -- maybe a lot more work -- it's going to be done.

4 MR ARMITAGE: Thank you. I'm obliged.

5 THE CHAIR: Ms Ford.

6
7 Submissions by MS FORD

8 MS FORD: Sir, can we start by reminding ourselves of the applicable legal principles
9 which govern this jurisdiction? It's in the Phones4U case, which is tab 9 of the
10 authorities bundle, starting page 234. (Pause)

11 There are just really two paragraphs in this judgment I would draw the tribunal's
12 attention to.

13 THE CHAIR: Let me just get my notebook out then, on this. (Pause)

14 Phones4U. So where is it in the authorities?

15 MS FORD: Authorities, tab 9. So the first authorities bundle, tab 9. (Pause)

16 THE CHAIR: It's such a development of the law, because, you know, if you look at
17 this 20 years ago, it was certainly not as developed as in this judgment and I think the
18 courts have gone further over the years in relation to this area.

19 MS FORD: It is a development --

20 THE CHAIR: I deal with it in my book at 5.98 and if there's anything in there you say
21 that's wrong, I shouldn't apply that paragraph, tell me. But at the end of the day, these
22 are issues I've spent a lot of time looking at and a view as to where the boundaries
23 are and I don't think you're saying that we haven't got any jurisdiction and I think what's
24 happened -- different from last time -- is the unfortunate experience of the two people
25 that I won't name. I think that that has justified, in my view, the approach that Mr
26 Armitage is running, I think. If everything had gone smoothly and we'd got

1 | what -- something that had come out of it, good, clean and useful, then I would have
2 | said, "Yes, that's great, we can probably just stop there". But life is full of things that
3 | happen that you don't normally expect and I hadn't expected that to happen.

4 | So it's all very unfortunate, because it's the last thing if you're a lawyer acting in a case
5 | that you want to happen. The thing that you want is the data to be there, no wiping,
6 | you'll be able to say to the tribunal, "It's all been done". Unfortunately it's not like that
7 | and it would have been helpful to have told me last time that you had an issue in
8 | relation, at least, to one person on that list that had already arisen and you're aware
9 | at the time I made the order that the phone had been wiped.

10 | I'm not criticising Mr Holmes, because I know what it's like as counsel on the front line;
11 | you don't necessarily know all the ins and outs of everything. But I know if it was you
12 | and you were aware of that fact you would have.

13 | MS FORD: I'm not in a position to make submissions on that.

14 | THE CHAIR: No, you don't need to be, because you weren't there last time, but we
15 | do know what's happened and I do know if I was making an order in relation to that
16 | and you knew the phone had been wiped -- in relation to one of the individuals -- you
17 | would have told me, but at the end of the day I made the order that I did and we are
18 | where we are. But you could take me to the relevant parts of Phones4U and we'll
19 | move --

20 | MS FORD: So there is a lot to unpack in some of the remarks you've just made and
21 | I am going to come back to deal with it.

22 | THE CHAIR: Of course.

23 | MS FORD: I am starting with what we say is a deliberately, very carefully, bounded
24 | jurisdiction.

25 | THE CHAIR: Oh, it's very carefully worded by Roth and the Court of Appeal looked at
26 | it. Yes, this is an excellent judgment.

1 MS FORD: So I derive two points from it. The first comes from paragraph 49 and it's
2 the circumstances in which the court considered it appropriate to exercise this
3 jurisdiction in the Phones4U case and we get that from the second half of paragraph 49
4 and that's where Mr Justice Roth is noting:

5 "That the use of a personal device is not mere speculation in the present case and
6 that was shown by the fact that EE states that when its CEO, Mr Swantee, received
7 anti-competitive approaches from the CEO of O2, as pleaded in EE's defence...
8 Mr Swantee made audio recordings of 'all or part' of those conversations on his
9 personal iPad (albeit that this iPad cannot now be found)."

10 In our submission that is an important part of the justification for exercising the
11 jurisdiction in that case. The circumstances of the present case are not even close,
12 because they are speculative. Contrast to the situation in front of you, they are
13 speculative in two respects.

14 Firstly, the allegations that are being advanced as a whole have not derived any
15 support from the wide ranging disclosure which has been provided to date.

16 Secondly, it is mere speculation in this case that former key employees -- or the key
17 employees or former key employees -- might have used their phones for the purposes
18 of engaging in conduct. So we say it is -- in contrast to the circumstances of
19 Phones4U -- doubly speculative.

20 Second point --

21 THE CHAIR: You say they haven't got direct evidence of personal mobile phones at
22 this point.

23 Secondly, you say that you don't accept that there was a cartel or false information
24 was being provided and they haven't even got evidence of that and before you can
25 draw inferences at the moment, I can say (inaudible) incriminating data, well, they
26 haven't even got the first base in relation to showing that there was any manipulation

1 in the first place.

2 MS FORD: I do make that submission and I make that submission against the
3 backdrop of a very careful disclosure exercise having taken place and I will come back
4 to show the tribunal.

5 THE CHAIR: If we unpack that a bit, what they say is that when you look at what's
6 coming out of the indices and the pricing for you, there's a disconnect between the two
7 and for some reason the index is materially lower than where the market should be in
8 the sale of caustic soda and that they say that in itself is a base for saying that there
9 is a case.

10 Now -- but you say there are obviously flaws in that. One of the points (inaudible) is
11 when you look at the two documents we were looking at earlier, it is not simply
12 a mechanical extraction of what they're being given by your client but it's a lot more
13 sophisticated and to a certain extent (inaudible) than what they seem to have
14 indicated.

15 This is not a simple case. This is why -- in a way we all want extensive disclosure
16 because if there is extensive disclosure and nothing comes out to support that -- that
17 being said, if there weren't different figures being given to what the reality is -- then
18 there is no case against you.

19 So that's why I think in a way you're quite happy to get the section 1782 application,
20 because if that comes up and it doesn't bring up anything, you say, "Well, where's this
21 case going?" This is a very frustrating case for me as a judge, because some cases
22 you look at and you know, "Oh yeah, this is a likely winner, this is a likely loser". This
23 one, I'm really -- I'm not saying frustrated, but I mean, I really don't have
24 a feel -- whether this case has got the beef. I really don't know. It may do, it may not
25 and I'm keen to know sooner rather than later whether it is. That's why let's get all the
26 disclosure done as quickly as we can get to a position whereby we come to the next

1 CMC, we say, "Look, we've given you extensive disclosure, where is it?" And if we
2 get to that stage and it doesn't seem this is a case that they can make, there will be
3 consequences.

4 I just feel that we've had this case -- this is my third CMC -- and I'm still not that far
5 down the line in understanding where the case is really going. Maybe I say more than
6 I should do, but I've got the same sort of messages from both sides. I know what I'm
7 looking for, I know what needs to be done, but I want it to be done before the next
8 CMC so we know where we're going.

9 I understand your point about this. You know, I can see what you're saying, that this
10 is further than Phones4U and I accept that on the facts you are right about that. What
11 makes it different is the first two phones point. I think that's what worries me about
12 this. It leaves a very sort of uncertain feeling in the gut of the tribunal and the guy's
13 told and acknowledges four days before and then there's a wipe. It's been done, it's
14 been done, but it's something that makes me feel that they may well be right, that there
15 is something on personal messaging, but then you may end up having the same
16 scenario with everyone else saying, "Well, we haven't got our phones anymore, it's
17 wiped", or whatever, and then you get even more unsatisfied and uneasy because
18 then you say, "Well, anyone we seem to ask would have done the same thing".

19 But we are where we are; I'm very keen to get to the bottom of this. It's to your
20 advantage. It's an irony because sometimes you're resisting disclosure because you
21 think that's the best thing for your client, but on the other hand, they want the disclosure
22 in order to prove where we are and I'm really keen that we -- as far as we can -- do
23 get to the bottom of this. We haven't at the moment.

24 MS FORD: Sir, those are all helpful indications. I'm simply at the moment trying to
25 lay the boundaries of the legal distinction that's in issue.

26 THE CHAIR: Ms Ford, you know, I've read these cases -- I won't say many times, but

1 on more than one occasion -- and the view I take -- and I think the view you take -- is,
2 well, there is jurisdiction; it's a question of whether I should exercise it. That's the
3 particular case and I do agree with you that the facts of this case are not (inaudible)
4 all Phones4U; I agree with you on that.

5 MS FORD: I'm grateful.

6 The second point then I would draw out comes from paragraph 56, which is on
7 page 236 and again in our submission this is important. The judge:

8 "... recognises that ... devices are the personal property of the individuals and are likely
9 to contain a lot of personal and private information, and that this interferes ..."

10 THE CHAIR: Can I say one thing on that? I'm sorry to keep pulling you away, but I do
11 understand that point.

12 What I think is only fair is that if they are being asked to hand up their personal phone,
13 it's going to have to be to an independent expert. All this happens all the time in
14 relation to, as you know, criminal fields, intelligence fields, you name it. There's
15 practices that most people follow and protocols in how to deal with getting phones
16 from third parties.

17 You may find that they'll have all sorts of personal things. They may have things about
18 a divorce. They may have all that sort of stuff. The last thing they'll want is anyone
19 associated with their employer or their ex-employer knowing that they had a problem
20 with this and that or had a family bereavement. That's why there are a large number
21 of people who specialise in taking this material and giving you an independent report
22 and giving you the hits of anything that's conceivably relevant that that can go there.
23 But all the sort of personal family difficulties and stuff like that, or maybe someone's
24 got something about drugs on their phone, all of that is never going to be seen by other
25 people.

26 So I think that, you know, if phones are going to be delivered and an expert is going

1 to be instructed, then we'll need to have an expert; we'll need to find out how much it's
2 going to cost. I'm inclined to say that the claimants should pay for the costs of the
3 expert to do the filter, because I don't see why you should pay for it.

4 But I also am very conscious always in these cases that people have personal health,
5 family information that they would not want other people to see, and the best way to
6 get people to co-operate is to say, "We have got this provider and we do this all the
7 time. They are trusted. It's a firewall. They will not be giving your personal information
8 to anyone. They're only going to get stuff that relates to ..."

9 MS FORD: So again -- (several inaudible words) indication --

10 THE CHAIR: I am thinking about the practicalities of how it's done in practice
11 without -- I am 100 per cent with you on personal data.

12 MS FORD: It is important to emphasise that what underlies this is a very serious
13 interference with an individual's right of privacy under article 8.

14 THE CHAIR: I agree, and that's why you need to have an expert in between so that
15 those rights are not infringed. I am not keen for ex-employees phones simply to be
16 handed over to your client in circumstances where they may have all sorts of medical
17 information and stuff. I really wouldn't see it.

18 But this happens all the time. It's dealt with all the time on a practical level, and I'm
19 sure the solicitors on both sides have got some experience in dealing with this. If they
20 haven't -- at least one of them will, and they'll know what to do. If they don't know what
21 to do, come back to the tribunal for guidance. But there is a well-trodden path on what
22 to do.

23 MS FORD: Yes, those measures go some way to mitigating the interference. But
24 when the court is considering or the tribunal is considering exercising this jurisdiction
25 at all or extending the exercise, it is a countervailing consideration which should weigh
26 very heavily on the tribunal.

1 THE CHAIR: It does.

2 MS FORD: That what it is doing is interfering with the article 8 right. That is the point
3 of principle that I derive out of this case.

4 THE CHAIR: I agree.

5 MS FORD: Now, when the tribunal made the CMC2 order paragraph 7(b)(ii), in my
6 submission, as was appropriate with such a highly intrusive search, it was very
7 carefully founded.

8 THE CHAIR: Hopefully, I did it right. Let's -- show me the order.

9 MS FORD: It's C, tab 27, page 422. (Pause)

10 THE CHAIR: Yes. Yes.

11 MS FORD: The relevant paragraph is 7(b)(ii). So the direction was:
12 "the Defendants [were directed] to make proportionate arrangements to undertake
13 reasonable and proportionate searches of phone messenger apps of key employees
14 still in the employ of the Defendants."
15 So, in my submission, the tribunal was rightly very careful to bound the scope of the
16 search, both by reference to reasonableness and proportionality in the first instance
17 and with regard to the particular employees concerned. Our submission is we have
18 complied with that direction. It's also important to remember that the searches in
19 question --

20 THE CHAIR: But you've complied it in the sense that you have answered it. There's
21 a dispute about whether you've done it properly. But what I'm doing is I'm going to
22 look at it on a specific disclosure basis. I'm not going to debate on whether or not you
23 responded to it. We're now looking -- we are where we are. We're now looking at
24 what's the appropriate further order.

25 MS FORD: So yes, my submission will be that, in all the circumstances, it's not
26 appropriate to extend this carefully bounded order any further. But I will develop that

1 submission.

2 It's important to recall that the searches were directed to be undertaken in relation to
3 priority disclosure categories 5(a) and (b). So can we just remind ourselves of those?
4 They're in C/20 at 277.

5 Paragraph 5(a) and (b):

6 "Communications (if any) between [in this case, the defendants] and IHS in respect of
7 the compilation of the IHS Index, including ... any written records of interviews between
8 [the defendants] and IHS.

9 "Internal communications and documents prepared by it in connection with the
10 preparation and provision of information to IHS."

11 So those are the underlying categories in respect of which these searches have been
12 directed.

13 Now, the claimants have, for obvious reasons, chosen to focus their attention on
14 phone messenger apps. But in our submission, it is important not to lose sight of the
15 fact that that wasn't the only repository that was searched in respect of these
16 categories of documents.

17 So if we can turn up the disclosure statement at G/7, page 64, please.

18 THE CHAIR: Can I just get this in my head. (Pause)

19 Can I just ask Mr Armitage? I mean, Mr Armitage, where you are on this is
20 that -- Ms Ford has pointed out, when you look at the order at 7(b)(ii), she says you
21 look at what they've been -- the priority categories 5(a) and (b), for example.

22 MR ARMITAGE: Yes.

23 THE CHAIR: That's dealing with communications between the defendants and their
24 employees and IHS. Where is it caught if there's communications between them and
25 co-cartelists?

26 MR ARMITAGE: You made the same order in respect of phone messenger apps in

1 relation to LRS categories 4 and 5, which was the other point I was going to come on
2 to, actually, in relation to emails as a point there. But yes, it's in the annex to the CMC2
3 order.

4 THE CHAIR: As long as it's there somewhere. But I want to make sure that, you
5 know, we don't have to come back again, that we've got the wording.

6 MR ARMITAGE: Exactly. No, no, no. So that's within the scope of our application.
7 Then LRSC 1. You didn't make it, so that's the Argus category we discussed earlier.
8 Actually, the defendants agreed to conduct searches of phone messenger apps in
9 relation to that category as well.

10 THE CHAIR: Yes. That's right.

11 MR ARMITAGE: So it's 1, 4, 5 and 5(a) and 5(b). (Pause)

12 THE CHAIR: Yes, Ms Ford.

13 Are we going to have our break now?

14 Is that -- Ms Ford, can I just have a five-minute break, if that's okay?

15 MS FORD: Sir, yes.

16 THE CHAIR: Then we can carry on. But we are not making a huge amount of practical
17 progress. There's a lot to be gone through. I don't know how we're going to get
18 through everything by the end of the day. I don't know whether we can finish off
19 another day between now and the end of term, but what's unfair is that we've been
20 concentrating on the applications against the defendants, and then they've got their
21 application against you. So we may have to try and figure out how we're going to do
22 that. It may be that, for now, I'm going to finish off this category. Then I may say the
23 next item is to look at their application against you.

24 Because at the moment, the view I take is that I do want you to do further disclosure
25 on those issues, as Ms Ford is asking for. The question is really scope of those, rather
26 than the issue is: should we be leaving it to another stage? Because I think at the

1 moment I'm keen to get the disclosure done before the next CMC.

2 MR ARMITAGE: Sir, yes. So we would be keen -- briefly, also to deal with the very
3 short point relating to LRSC 4 and 5, which follows on from the points we're making
4 now. We, of course, then --

5 THE CHAIR: Yes, of course. Yes, we'll do that, yes.

6 MR ARMITAGE: You'll be relieved to hear actually Ms McAndrew's going to address
7 you on the pass-on related points. So you'll hear from her rather than me. Yes, yes.

8 THE CHAIR: So look --

9 MR ARMITAGE: I see the point.

10 THE CHAIR: We'll try and do that today. Anything to do with these phones and
11 everything plus their applications against you. Then at the end of the day, we'll see
12 where we are.

13 MR ARMITAGE: Thank you.

14 (3.24 pm)

15 (A short break)

16 (3.33 pm)

17 THE CHAIR: Yes, Ms Ford.

18 MS FORD: Sir, I was coming on to show you the searches that have been conducted
19 in respect of the categories for which phone apps are potentially relevant. Because
20 although there's been a lot of focus on phone messenger apps, it's important not to
21 lose sight of the fact that other searches were conducted as well in response to these
22 categories. So if we go, please, to page 64 in the global disclosure statement G, tab 7.

23 THE CHAIR: Can I put C away for now?

24 MS FORD: Yes, thank you.

25 THE CHAIR: They're all piling up now. (Pause)

26 Yes, G?

1 MS FORD: G tab 7, starting at page 64, which is setting out the searches that were
2 conducted in relation to priority disclosure categories 5(a) and (b). I'm trying to take it
3 reasonably quickly.

4 At paragraph 67, it's explained that searches were run over the Arctera archive of
5 Microsoft Exchange documents and Salesforce Chatter, which is a messaging
6 function in respect of seven custodians.

7 If we go over to paragraph 67(a), that's giving explanations about searches, run over
8 custodians' emails and their attachments. 67(b) is explaining:

9 "Given the importance placed on PDC 5(a) by the Claimants, and not whilst not
10 required ... in addition to the searches set out above, the Defendants conducted
11 a search for all emails containing the domains "ihs" or "ihsmarkit" [which] was not
12 limited by [reference to] search terms and [it] captured all email communications
13 exchanged between the relevant Defendant custodians and IHS during the Relevant
14 Period."

15 Sub-paragraph 67(c) is explaining that Salesforce Chatter was reviewed.

16 Paragraph 68 explains what was disclosed in tranche one:

17 "... disclosure and inspection of 351 documents in total under 5(a) and (b) ..."

18 69 explains that in tranche two:

19 "The scope of [those disclosure categories] was extended by paragraph 7(b) ... which
20 required the Defendants to search two additional repositories: (i) the European File
21 Server; and (ii) messenger applications ..."

22 Paragraph 70, European file server was duly searched; 1,233 hits produced; no
23 responsive documents identified.

24 That's categories 5(a) and (b).

25 Then in relation to LRS categories 4 and 5, which are the ones Mr Armitage just
26 mentioned, if we look, please, at page 75. There is that detailed summary of the

1 searches that were conducted under LRS category 4.

2 Then, over the page at 77, is the detailed description of the searches that were
3 conducted under LRS category 5.

4 So the point that I'm seeking to draw out is that the messenger applications were by
5 no means the only repository searched for these particular categories of disclosure.
6 Much broader searches were conducted. It's in the context of those much broader
7 searches that we make the submission that nothing's been identified, which actually
8 supported the claimant's allegations. So insofar as the inference is sought to be
9 drawn, that if only more messenger apps were searched, the position might be
10 different, we say that taking the scope and comprehensiveness of the searches as
11 a whole, that is not right.

12 Now, a criticism has been advanced in relation to our selection of key employees.
13 That is obviously a matter which is, in my submission, uniquely within Westlake's
14 knowledge and it's the sort of assessment which, in our submission, the tribunal should
15 be slow to second guess. The basis of the selection of key employees in this case: all
16 dealings with IHS and Argus, and all pricing and sale of caustic soda, and all
17 commercial dealings with purchasers of caustic soda were conducted by the sales and
18 marketing team. There were only three current employees who were members of the
19 sales and marketing team during the relevant period, and they are the ones which
20 have been identified as key employees. Now, as has been explained in
21 correspondence, they are the only three current employees that could have had any
22 relevant communications with IHS and Argus.

23 Now, in my submission it is important to tie this back to the claimants' pleaded case.
24 I'm reading out here the wording of the amended claim, paragraph 40. They plead
25 that Westlake engaged in collusion:

26 "... in order to manipulate the IHS Index, through the co-ordinated submission of

1 artificially high pricing information and/or a failure to disclose accurate pricing
2 information."

3 And they draw a comparison with the Argus index. So in our submission these key
4 allegations turn on communications with IHS and Argus and so it makes absolute
5 sense that the key employees that have been identified for the purposes of testing that
6 allegation are those that could have had any relevant communications with IHS and
7 Argus.

8 Similarly, I showed the tribunal the wording of disclosure categories 5(a) and (b), and
9 they focus on communications, if any, between the defendants and IHS:

10 "Internal communications ... prepared by [the defendants] in connection with the
11 preparation and provision of information to IHS."

12 Again, the clear focus of those categories is on communications with IHS, and we say
13 it makes absolute sense to focus on the employees who are in a position to do that.

14 Now, the submission that was made in the claimants' skeleton and that has been
15 repeated orally is that, even if it's right that no other individuals were in a position to
16 communicate with either IHS or Argus, it doesn't follow that no other individuals could
17 possess relevant phone messages, for example messages exchanged with other
18 alleged cartelists.

19 Now, we make three points in response to that. First is that this is getting into the
20 realms of pure speculation. The reason we say that is that there is no support in the
21 document for the claimants' allegations at all, let alone some sort of convoluted
22 arrangement whereby particular employees were involved, despite the fact that they
23 weren't members of the relevant sales team, and despite the fact that they weren't in
24 a position to have communications with IHS, which is one of the key allegations that
25 is being pursued.

26 Secondly, if the category were to be widened to employees who did not communicate

1 with IHS and Argus then in our submission it's difficult to identify any sensible or
2 principal basis to identify which employees would then fall within the next scope of
3 persons to be searched. There's no obvious penumbra of employees around those
4 that have already been identified if you discard the relevance of actually
5 communicating with IHS or Argus; there's no obvious limiting factor.

6 Thirdly, in our submission, the direction was for good reason founded by reference to
7 key employees, and we say that direction has been complied with and there's simply
8 no good basis to come back and have another go.

9 Now I'm turning to the circumstances of the loss of messenger app data. We say that
10 the circumstances in which that occurred have been explained clearly and in some
11 detail in the disclosure statement. Can I ask the tribunal to turn up paragraph 72 of
12 the statement, page 66. The tribunal was obviously concerned to explore the
13 possibilities of whether or not this information was backed up. As has been set out in
14 this statement, those steps have already been taken. There's been a lot of work done
15 to try and recover this material. So, for example -- I'm starting in subparagraph (a),
16 and I'm looking partway down the page where it says:

17 "This issue was identified on 27 July 2023 ... immediate steps were taken by the
18 Defendants to seek to restore the contents of [this] mobile device."

19 You can see the reference there to the confirmation:

20 "... that the only messenger application that [was] used for anything work-related
21 (which was contrary to the Defendants' policies about messenger applications not
22 being permitted for work purposes) was WhatsApp. This was not backed up. In the
23 circumstances, the Defendants instructed FTI's specialist in IT recovery to seek to
24 retrieve all contents from the mobile device that had been lost and which was not
25 backed up anywhere." So efforts have been made. It's not that --

26 THE CHAIR: On that, I just wanted to be clear that there's been some sort of

1 | interrogation as to whether or not the devices are being backed up by iCloud and stuff
2 | like that. I know there's an assertion there hasn't. I do need to know a bit more about
3 | backups and stuff like that. I probably do need to have a statement from Mr Kempf
4 | himself explaining the circumstances and what he's done with, for example, his contact
5 | list and what he actually did, because as I said before, you know, when people -- this
6 | is my own experience, we can only go by what you see in other cases -- whether
7 | anything was backed up anywhere else and whether anything was kept, such as the
8 | contact list. These are all fairly basic questions that I'd expect to see in black and
9 | white probably (inaudible). But it's happened, you know, I'm not angry or anything;
10 | this is what's happened. But I do want to get to the bottom of it as I said before. I want
11 | a bit more than (inaudible).

12 | MS FORD: Well, sir, that's understood, but I wouldn't want the tribunal to proceed on
13 | the basis that information hasn't been given and that steps haven't been taken. Just
14 | to draw the tribunal's attention to what's said further down this paragraph:

15 | "For completeness, WhatsApp data on [the current] mobile device ... was imaged and
16 | searched by Alvarez. Alvarez recovered ..."

17 | If I could perhaps ask the tribunal to read this. But again, steps taken --

18 | THE CHAIR: They're very good at doing this type of work. They're very good.

19 | MS FORD: And if we go over to subparagraph (b).

20 | THE CHAIR: Yes.

21 | MS FORD: Similarly, a lot of work has been done. So if we look partway down this
22 | paragraph we can see that while this individual:

23 | "... categorically confirmed that he never used messenger applications for work
24 | purposes, he made his personal device available to Alvarez in order to determine
25 | whether a back-up was available. The Defendants worked closely with Alvarez ... to
26 | identify whether a back-up of [the] pre-2023 messages ... could be located on his

1 family iCloud account, which [he] also made available."

2 THE CHAIR: The relevant period goes back some time.

3 MS FORD: Yes.

4 THE CHAIR: But were either of them using Messenger and not just WhatsApp or
5 regular texts on their phones and stuff like that? Has that been checked? Because
6 WhatsApp is very popular now. When you talk at the earlier period you're going back
7 to 2017. WhatsApp didn't have the same let's say prominence, and at that stage a lot
8 of people were just sending normal phone texts.

9 MS FORD: Well, the answer in relation to subparagraph (a), it's a passage we just
10 looked at. Partway down the paragraph, the confirmation:

11 "... that the only messenger application that [was] used for anything work-related
12 (which was contrary to the Defendants' policies about messenger applications not
13 being permitted for work purposes) was WhatsApp."

14 So that is the position in relation to that individual.

15 Then if we turn over to subparagraph (b).

16 THE CHAIR: But it doesn't really answer the question because my experience in these
17 cases is that what they tell you isn't necessarily -- it's unwise to take it at face value;
18 you need to dig deeper. If, for example, he says, "Well, I didn't use it for office
19 purposes, if I did, I would have used WhatsApp", it doesn't help. It's not conclusive
20 because it may not be true; his recollection may not be right. It's maybe that he was
21 sending texts -- normal texts -- on his phone, particularly in the earlier period. This is
22 the sort of digging that needs to be done and you do not accept simply what people
23 say about the use of their phone; you've got to go further.

24 I understand your policy was that private phones, for example, should not be used for
25 work purposes. If you're dealing with cartel behaviour it can encourage them to use
26 their other devices and other means so they can't be picked up, but you've got the

1 point. That's paragraph 72(a).

2 Then (b) we're going through.

3 MS FORD: Yes, although I'm told that there's a relevant footnote that I should be
4 drawing the tribunal's attention to. I'm hoping somebody can give me the page
5 reference.

6 THE CHAIR: Oh I've seen that on page 67.

7 MS FORD: Maybe the tribunal's ahead of me. Yes. (Pause)

8 THE CHAIR: They're saying when they looked at the messenger application on his
9 current mobile device (overspeaking). Exactly. What I was saying was that, given
10 that the relevant period goes back so much longer, it may be in those days people
11 weren't using WhatsApp to the same extent or if at all.

12 MS FORD: I'm reminded that, as is set out in this statement, there has been
13 investigation to the extent to which there was any backup. So we were looking at what
14 was said about Alvarez:

15 "The Defendants worked closely with Alvarez [and the individual in question] to identify
16 whether a back-up ... could be located."

17 THE CHAIR: Let's see what comes up when you get them to check the contact list.
18 See what happened to that. That needs to be done. I want a statement from him;
19 what's he done? What about all his contacts on his phone, what's he done with that?
20 And see how that's worked out.

21 MS FORD: It may be that it's going to be difficult to go beyond what is set out here:

22 "Following a thorough investigation by Alvarez, using multiple different forensic tools,
23 it was confirmed that there [was] no retrievable back-up of [the individual's] pre-2023
24 messages."

25 THE CHAIR: Two mobile phones, okay. You want to wipe (1) and you want to put
26 stuff on (2). Okay. So what you do is you extract whatever you want to keep from (1),

1 put it on (2), but not necessarily sending it direct. One thing that you would want to
2 keep is your contact list. You may not want to keep the messages, you want all those
3 in the bin. Okay. But the contact list, I want to know what's happened to that. It may
4 be Alvarez are clever enough that they've already done that, trying to figure out what
5 did the guy actually do on the day about the contact list and other things. People tend
6 to want to keep something; that's all what they do (inaudible).

7 MS FORD: I wonder if I can take instructions on the (overspeaking) tribunal are
8 saying.

9 THE CHAIR: Yes, it's fine, but let's just keep moving because I'm keen that we -- what
10 you're saying is all very helpful. It's fine. It's very helpful to look at this.

11 MS FORD: We've been dealing with the steps that have been set out in this statement
12 to try and recover what was available. I wouldn't want the tribunal to proceed on the
13 basis that these thorough steps have not been taken. But the claimants are trying to
14 rely on this in order to attempt to broaden the scope of the searches which the tribunal
15 has directed to undertake in relation to phone messenger data, and that we say is not
16 a step that should be taken. The tribunal rightly directed a limited, carefully bounded
17 search for key employees and key employees have been identified. It doesn't make
18 sense in our submission to broaden the scope of the searches -- these intrusive
19 searches -- to other employees who, for good reason, were not previously identified
20 as being the target for these intrusive searches.

21 Now, the way it's put in the claimants' skeleton at paragraph 13 was that the loss of
22 this data leaves an evidential gap. But in our submission there is no reason to think
23 that it will assist to look further afield at employees who were rightly not identified first
24 time around.

25 Now recall that -- and we do place a degree of reliance on this -- the phone messenger
26 apps for Mr Quintus were available. They were searched and they produced no

1 relevant documents. He was identified as a key employee. He was a member of the
2 caustic soda sales team and may have communicated with IHS or Argus, but he had
3 no relevant documents. The process of searching his messages was conducted by
4 reference to keywords that were agreed with the claimants. So insofar as there was
5 a suggestion that that process had not been done properly, key words were the
6 subject of agreement.

7 I've also shown the tribunal that in the context of these disclosure categories there
8 were equally searches of emails, of Salesforce Chatter documents and of documents
9 deriving from other custodians and they equally did not produce anything that assists
10 the claimants. So in our submission, notwithstanding the focus on this particular data,
11 there is nothing to suggest that it's appropriate to expand the search to non-key current
12 employees.

13 Now, a point was taken that the search was conducted on work devices and didn't
14 extend to personal devices and that's been addressed in correspondence. If I can
15 show the tribunal our letter of 3 July, which is in G, tab 19. (Pause)

16 THE CHAIR: I don't think I've seen that; is that something that's come in separately?

17 MS FORD: It's dated 3 July and it's in response to points taken, amongst other things,
18 in the claimants' skeleton argument.

19 THE CHAIR: You're saying it's tab ...

20 MS FORD: Tab 19.

21 THE CHAIR: That's an insertion which hasn't come into my file. (Pause)

22 Okay, so the Willkie Farr letter, 3 July.

23 MS FORD: Yes.

24 THE CHAIR: Okay, take me through it.

25 MS FORD: So I'm looking in particular at page 2 of this letter, where we're responding
26 in relation --

1 THE CHAIR: Which dates? I want to make --

2 MS FORD: It's 3 July.

3 THE CHAIR: 3 July. Yes.

4 MS FORD: I'm looking at the information that's then set out at page 2. It's

5 subparagraphs (1), (2) and (3). So in relation to first individual:

6 "[He] didn't have a separate personal mobile phone during the Relevant Period (and

7 does not to the present day). [He's] at all relevant times used his work mobile device

8 for both business and personal purposes. So there is no additional mobile device that

9 can be searched [in relation to him]."

10 In relation to the second individual:

11 "[He] also did not have a separate personal mobile phone during the Relevant Period.

12 [He] used his business mobile device throughout the Relevant Period for both

13 business and personal purposes."

14 And what's explained is that this is -- in some respects -- repeating the information that

15 had been provided in the disclosure statement following a company wide upgrade via

16 a mobile phone for personal use. So:

17 "Whilst [he] was not obliged to do so, as part of the process undertaken to retrieve the

18 WhatsApp messages that were wiped from his work phone, [he] made available his

19 personal mobile device, and gave his personal iCloud account ... Despite having made

20 his personal device iCloud account available, the pre-2023 WhatsApp messages were

21 not retrievable ..."

22 So that is essentially echoing --

23 THE CHAIR: So the iCloud didn't have the pre-2023 backup; is that right?

24 MS FORD: Well, he made -- I'm afraid I only have the information as it's set

25 out -- access to the iCloud account available, but it didn't permit those messages to

26 be retrieved.

1 I'm told there was no backup on the iCloud account.

2 THE CHAIR: So -- was there a backup on iCloud for certain periods? So after
3 a certain date, is there some iCloud backup or is it none at all? There's no iCloud at
4 all?

5 MS FORD: So post the 2023 date there's a backup, but the issue was pre-2023. Yes,
6 so actually I should correct what I've just said. The position -- because the focus was
7 on what had been lost pre-2023, the position post-2023 has not been investigated,
8 because what was sought to be recovered is the pre-2023 position. (Pause)

9 THE CHAIR: All I wanted to figure out was whether or not at any stage the guy had
10 backup on iCloud. It seems from what you're saying is after 2023, he did have backup
11 on iCloud.

12 MS FORD: Oh well, that's the correction I've made. I think I'm being told that that
13 hasn't been investigated, because what was thought to be recovered was the period
14 pre-2023.

15 THE CHAIR: When you have iCloud, okay, you can switch it on and off on your backup
16 function and you can also delete what's on there and so what I wanted to know is
17 whether or not there is anything on iCloud, because certain people they never use
18 iCloud at all for backup and they take out the default and that they make sure that
19 there's no backup on iCloud at all. Other people, what they do is: they allow it to be
20 on iCloud and other people, they change the period and they can take the stuff out of
21 iCloud. It is just to know: what is the iCloud position for that person's account and back-
22 up? So when you come to clarifying it, just find out: is there anything on iCloud ever,
23 and if there is, for what periods and has there been any deletion from iCloud in relation
24 to any period?

25 And once you've got the answer to that, then you'll have a clean answer one way or
26 another. But we should do that.

1 MS FORD: If I can just take instructions; I think I'm being told something in relation to
2 what tribunal's just said.

3 THE CHAIR: Yes. (Pause)

4 MS FORD: Sir, I'm told that the iCloud account in question was a family iCloud
5 account and so it did contain family items, but it did not contain anything from his
6 mobile phone. It contained his wife's data.

7 THE CHAIR: We don't want that; we just need to check out whether or not his data
8 was ever put on there and deleted (inaudible) by checking. Yes.

9 MS FORD: And then the position in relation to Mr Quintus.

10 THE CHAIR: Yes.

11 MS FORD: "[His] business mobile phone was collected and searched ... Nothing had
12 been removed from that device ... he does have a personal mobile phone ... does not
13 use his personal mobile phone for work-related purposes. [He] was questioned
14 whether he would make his mobile phone available for searching and [he's] not agreed
15 to do so as is his right."

16 THE CHAIR: Yes, okay.

17 MS FORD: So we have sought to respond to the inquiries that have been made.
18 A point has been raised in relation to Mr Schellerer and that's also addressed in this
19 letter.

20 THE CHAIR: I don't have that letter. (Pause)

21 Sorry, is this it? Okay, I've got it now.

22 MS FORD: So the next paragraph is responding to the criticisms of the identification
23 of "key" employees and it reiterates the basis that key employees were identified.
24 What's explained is that Mr Schellerer, who's the other individual whose name has
25 been raised:

26 "... wasn't a member of the Sales and Marketing Team. He had a role of

1 Managing Director and Senior Vice President and he had managerial responsibility for
2 that team, amongst others within the European business. He had no day-to-day
3 responsibilities in respect to the sale and marketing of caustic soda, nor did he have
4 any dealings with IHS (or Argus) as to the submission of information."

5 So in our submission he doesn't fall within the definition of a key current employee.

6 THE CHAIR: Yes, okay. So we've got -- looking at this aspect, then we've got the
7 former employees point to deal with.

8 MS FORD: Yes.

9 THE CHAIR: Let's hear about the former employees.

10 MS FORD: I should probably first deal with the point about waiver of privilege.

11 (Pause)

12 THE CHAIR: Is that going to be material? If he's going to give his own statement
13 explaining what went on and all of that, then look at that. (Pause)

14 I don't need to see what he said to your lawyers if he's going to give a direct statement.

15 MS FORD: No, but there is a point I do need to take instructions on.

16 THE CHAIR: Oh, sure. (Pause)

17 MS FORD: So this is obviously in relation to a particular individual and the issue which
18 arises is in terms of the tribunal's jurisdiction to require an individual to make
19 a statement. Our understanding is that the tribunal doesn't have the power to require
20 the individual to make the statement.

21 THE CHAIR: So you're saying that under the rules I don't have power to require an
22 individual to give information? Haven't we dealt with this before?

23 MS FORD: Of course, the case that, subject to all the --

24 THE CHAIR: Yes.

25 MS FORD: The individual in question, of course, is not a party to these proceedings
26 and is not within the jurisdiction. The approach in Phones4U, in relation to mobile

1 | phone data in particular, was that the judge was prepared to direct the individual to be
2 | asked whether they would allow searches of their mobile phone device and of
3 | course --

4 | THE CHAIR: We were doing that. We can do that.

5 | MS FORD: But that obviously admits to the possibility that the individual in question
6 | might say no and presumably the same follows in relation to giving a statement.

7 | THE CHAIR: Oh yes, if they refuse to give a statement then we'll have to go from
8 | where that goes. Looking at 19(2). (Pause)

9 | I can ask under 3C, but what you're saying is it's a different -- I think you accept that,
10 | but I think what you're saying is what happens if they don't take up that invitation.

11 | MS FORD: So that's the --

12 | THE CHAIR: That's what you're saying.

13 | MS FORD: I think I'm raising, yes.

14 | THE CHAIR: I think that what we would should do, at least at this stage, is I'll direct
15 | that a statement should be filed and if it it's not filed, then we can talk about the
16 | consequences at the next CMC as to where we go. But I'd be surprised if he's been
17 | willing to provide information directly to your solicitors, to put into a statement,
18 | disclosure statement, prepared for this tribunal, but not prepared to provide
19 | a statement at the request of the tribunal directly. But if he's not, he's not, we'll go
20 | from there.

21 | But, I said before that he does have privilege against self-incrimination so if he has,
22 | for example, done any act which could be construed as an attempt to pervert the
23 | course of justice, he can quite easily say, "I'm raising the privilege against
24 | self-incrimination, I'm not willing to answer". I'm not taking away anyone's right of
25 | privilege against incrimination. So I need to make that clear in any case. They can
26 | decline to answer that it would incriminate him in a criminal offence. They have to

1 specify what the offence would be.

2 MS FORD: I do need, then, to address the suggestion that it's been some relevant
3 waiver of privilege.

4 THE CHAIR: Okay. (Pause)

5 If you want to.

6 MS FORD: Well, I can give the tribunal the headline position as we say it is. There
7 has been no relevant waiver of privilege. The reason is that although the claimants
8 have cited the general circumstances in which waiver of privilege occurs in the
9 PCP Capital Partners case, we say that the position is relevantly different in
10 circumstances where a party is referring to privileged information in order to comply
11 with the duty to the court. For example, a duty of full disclosure, or in our case, a duty
12 to set out the scope of searches conducted and the limitations on those searches by
13 analogy to the practice direction under the CPR.

14 We have cited certain authorities in the bundle, which I can take the tribunal to, which
15 addressed that point.

16 THE CHAIR: You don't need to. I've said I'm not going to find it that privilege has
17 been waived.

18 MS FORD: I'm grateful. In that case, provided no such finding is going to be made,
19 I think I can probably leave the point there that we certainly don't accept that there was
20 any relevant waiver for the reasons that have been indicated.

21 THE CHAIR: Yes. But I tend to push on things that I'm not sure where I am, but I'm
22 happy with your position. I think I made it clear about waiver that it's not as
23 straightforward as it seems. It's all fairly peripheral. At the end of the day, I just want
24 to know what happened. The state stated by the (inaudible), in light of the things I've
25 said today and what I expect to see and where I want to see what the potential gaps
26 are.

1 MS FORD: Well, in that case, I'll address the position in relation to key former
2 employees.

3 THE CHAIR: Yes. You've identified four, haven't you?

4 MS FORD: We've identified four. The basis on which they were identified is consistent
5 with the identification of current employees. So these were individuals who were
6 members of the caustic soda sales and marketing team at some point during the
7 relevant period and had substantive responsibilities relating to pricing and/or sales of
8 caustic soda. These --

9 THE CHAIR: Can I just say where I am on that. Then we can see if it saves any time.
10 But when people are no longer employed, it needs a pretty strong justification to make
11 orders in relation to them or their devices. But in relation to these four, I'm inclined to
12 give the direction sought. But I'm not inclined to give any further direction.

13 In relation to the other key employees' point, where I am on that is that we should just
14 focus on doing what we're doing at the moment on the other fronts. But I'm not keen
15 to extend you to go through another exercise and identifying further key employees,
16 but I do want the material -- just looking at my notes -- in relation to Mr Schellerer,
17 because I think he is quite an important person within the organisation. I know he's
18 not a member of the marketing team, but he's an important person within the system.

19 MS FORD: Sir, I do push back on that.

20 THE CHAIR: It's not merely a question -- but yes, it's not merely -- as I said before,
21 it's not merely a question of what's going on from the sales team to IHS. These cartels
22 work differently or can work differently. I would like to look at these to see if there's
23 anything there. Because if there's nothing there, then the arguments -- maybe other
24 employees may have something -- they fall away. But I do want to have that as
25 a useful cross-check.

26 It's a relatively limited task to do that. But it's a substantial restriction on what they're

1 seeking. It's up to you as to whether you want to sort of roll the dice on that. But I do
2 feel that, given what's happened, I want to look further than what we've done so far,
3 but not extensively. A relatively proportionate approach would be simply to say in
4 respect of him, let's look and see what we've got there. But let's call it quits, at least
5 for now as regards to current key employees and as regards former key employees.
6 Let's just stick with the four of them, given that's a proportionate way of clearing.
7 So that's where I am. You know, you've persuaded me to restrict a lot more sought
8 by Mr Armitage, and that's been a really useful exercise we've done today, which
9 shows that, you know, Malek's got to listen to what you say sometimes, and reflect
10 on how that impacts and certainly that the things that you said today have been really
11 useful in crystallising where we are in a rather unfortunate situation where we've got
12 issues with those two employees. If we hadn't had that problem, it would be much
13 easier. But we ...

14 MS FORD: If I can just briefly take instructions on that indication. (Pause)

15 The point of clarification, sir, in relation to the former employees. The position, as
16 explained in correspondence, is that they returned their work mobile devices to the
17 defendants.

18 THE CHAIR: Correct. So they've been cleared. It's their personal ones, yes.

19 MS FORD: Yes. Well, that we say is a particularly intrusive order to direct.

20 THE CHAIR: But I -- my view is that they're far more likely to have incriminatory
21 messages on their personal devices than their work devices. Because, you know, in
22 my experience in those cases, the work devices are the ones that don't really have
23 much, because they're monitored and they're picked up. It's the personal devices
24 which are more likely to have the incriminating material.

25 They can come back, and they say they're not prepared to do it. You know, we
26 have -- we can ask. It may be a nil return. I think it's worth asking.

1 MS FORD: So in that case, I will leave that point there. I think that covers issues on
2 mobile phones.

3 THE CHAIR: Mr Armitage, you see where I am at the moment.

4 MR ARMITAGE: I do.

5 THE CHAIR: We've got limited time.

6 MR ARMITAGE: Yes.

7 THE CHAIR: If, at the end of the day, there's further things you want to argue in
8 relation to other employees, you can do it at the next CMC. But it's unfair on the
9 defendants that they do not have their fair share of getting orders against you. Given
10 that at the moment we've got no date for the next CMC, and I'm keen that I am going
11 to make orders in relation to your clients. I am keen that I do make those orders today,
12 if I can.

13 MR ARMITAGE: Sir, yes, I'm not going to spend time persuading you out of the view
14 that you've just indicated. We're grateful for where the debate has reached.

15 THE CHAIR: Can I just give a quick ruling on that.

16 MR ARMITAGE: Could I just make one -- just one -- clarification point just before you
17 do that? It's just on the witness statement. My understanding is there will at least be
18 a request that both Mr Kempf and Mr Luderer give a statement. If they're not willing
19 to, though, of course, the defendants' solicitors could give a witness statement on an
20 explanatory basis. Rather depends on the response, but it was just (inaudible).

21 THE CHAIR: It does. It's up to them what they do. Look, they know what I'm looking
22 for.

23 MR ARMITAGE: Indeed, indeed.

24 THE CHAIR: They're regulars. They know what they're doing. That -- my impression
25 of Willkie Farr is that they're always very helpful, and that they do their best. It may
26 be sometimes the clients may not help themselves, but I know that they will do what's

1 necessary.

2 As I said, I'm very pleased by the way that they've done the disclosure statements.

3 They've done a lot of work, so nothing's wasted. In particular, I appreciated the fact

4 that they were giving me a clear indication as to what they'd done, how much it's cost.

5 It makes it much easier to deal with these hearings.

6 So you sit down for a minute and then I'll give my ruling.

7 (4.20 pm)

8

9 Ruling (submitted to the learned judge for approval)

10 (4.30 pm)

11 Is there anything else I need to say over and above what I've already said during the

12 hearing and now in relation to this aspect?

13 MR ARMITAGE: I don't think so.

14 THE CHAIR: You're going to be very quick on LRSC 4 and 5.

15 MR ARMITAGE: I can do it in one minute.

16

17

18 Submissions by MR ARMITAGE

19 So these are the two key categories – liability-related categories -- focusing on

20 communications between the defendants and the other alleged cartelists, focusing for

21 these purposes on emails and not phone messages and specifically focusing on the

22 external communications, not the internal records thereof. So it's similar to the LRSC 1

23 point we debated earlier.

24 THE CHAIR: Can you show me where it is in the Redfern schedule?

25 MR ARMITAGE: Yes, sorry. It's C 27, 430. (Pause)

26 THE CHAIR: We're looking for at 4 and 5, aren't we?

1 MR ARMITAGE: Yes, exactly. So category 4 is communications between the
2 defendants and any of the other alleged cartelists regarding information prepared for
3 or submitted to IHS including notes in internal records of the above. Then category
4 five is a broader category again covering communications between the defendants
5 and the other alleged cartelists regarding any aspect of caustic soda supply, demand,
6 pricing, et cetera.

7 Focusing specifically on the external communications, the concern here is that there
8 are emails that have been extracted but not manually reviewed pursuant to these
9 categories. We've been seeking to ascertain how many emails there are in that camp
10 because we say, obviously, if they're a manageable number then it's sensible that they
11 are all manually reviewed rather than being subject to keyword searches.

12 We now know from the letter from Willkie Farr last night that in relation to external
13 emails between the defendants and the non-defendant cartelists, just during the
14 relevant period, there were 494 documents, 855 including family documents, but they
15 were not all manually reviewed. Search terms were applied and only 301 documents
16 were manually reviewed. We say the delta between the 855 and the 301 is really very
17 manageable in the context of this very important category. We say that those
18 remaining documents ought to be manually reviewed also to avoid the spectrum of
19 relevant documents, communications between the alleged cartelists sitting there
20 unreviewed. That's the point.

21 THE CHAIR: That's it? That's LRSC 4 and 5?

22 MR ARMITAGE: That's it on LSRC 4 and 5.

23 THE CHAIR: Okay.

24 Ms Ford, at the moment I'm inclined to order it and let's move on to your disclosure
25 category because this doesn't seem to be too burdensome. But it's up to you because
26 we've got --

1 MS FORD: So the simple point --

2 THE CHAIR: I don't mind arguing about it, it's fine.

3

4 Submissions by MS FORD

5 MS FORD: The simple point we make is that the search terms in question were agreed

6 so it's not in our submission appropriate to come back and say, "Well, having agreed

7 the search terms to be applied over these actually we'd like you to go back and

8 manually review them". Just for completeness, the relevant page is bundle G,

9 pages 98 to 99.

10 THE CHAIR: Sorry, let me go back. 98 to 99.

11 MS FORD: I'm sorry, I'm being corrected with the submission I've made. I'm sorry.

12 (Pause)

13 THE CHAIR: That's not the relevant page, is it?

14 MS FORD: Sir, I'm being told I'm incorrect to have submitted that these search terms

15 were agreed, so I apologise for that. But there is a relevant communication that was

16 sent very recently that addresses this point.

17 THE CHAIR: Okay.

18 MS FORD: Those behind me are just trying to find the relevant page number. (Pause)

19 THE CHAIR: The point is it's not going to take that long to manually review the

20 remainder of these documents.

21 MS FORD: The point I'm told is that they were searched by reference to a search term

22 for caustic soda. So insofar as there are emails which haven't been manually

23 searched, they are likely to be irrelevant because they are the ones that didn't respond

24 to a caustic soda search term. So in our submission it's again declaring additional

25 cost for unlikely return.

26 THE CHAIR: Okay.

1 (4.36 pm)

2
3 Ruling (submitted to the learned judge for approval)

4 (4.37 pm)

5 THE CHAIR: I'm going to have a five-minute break and then we will deal today with
6 the application by the defendants in relation to points in your application notice. I will
7 hopefully give a ruling today. I do want to just get it done so at least we've got things
8 moving.

9 We will need another 15 minutes at the end to deal with the question of where we go
10 from here, the timings and that sort of stuff. At the moment I think as a minimum they
11 should be given the categories that they've already accepted they're going to give you
12 further information. So you really need to focus on if you want further stuff over and
13 above what they've offered, then we'll see where we are. Thank you very much.

14 (4.38 pm)

15 (A short break)

16 (4.47 pm)

17 THE CHAIR: Yes, Ms Ford.

18
19 Submissions by MS FORD

20 MS FORD: Sir, mindful of needing to address this quickly, I think the quickest way to
21 get through this is to look at two documents at once. First is Ms Forster's fourth
22 statement, the annex and the table that's in it which indicates the offers that the
23 claimants made.

24 THE CHAIR: Yes. Then we can go through it one by one.

25 MS FORD: I can go through them. I can also refer the tribunal to the letter that's
26 behind tab 24 in bundle G which is the latest correspondence setting out our response

1 to that position.

2 THE CHAIR: So, your letter that's at tab 24 will not be something that I've read, okay,
3 because I think that's all been added this morning.

4 MS FORD: It has, yes. It has been sent very recently. I'm afraid matters have been
5 moving fairly quickly.

6 THE CHAIR: That's all right. It doesn't matter as long as I get it at the end of the day.
7 Let me put the file together. Okay, so I've got tab 24. So you want me to have that
8 open.

9 MS FORD: Yes. So this is --

10 THE CHAIR: That's at one. All right, what's the other one I need to have open?

11 MS FORD: Ms Forster's fourth statement in bundle B, tab 17. This is the annex to it
12 starting at page 369. These are the claimants' alternative submissions as to what --

13 THE CHAIR: Those schedules, I've been through those.

14 MS FORD: I'm grateful. So what I was proposing to do was indicate those requests
15 that we maintain that have not been conceded in Ms Forster's schedule.

16 THE CHAIR: That's brilliant, okay. Yes.

17 MS FORD: So, starting with row 1. Row 1 is concerned with 15(a), and 15(d) and (e).

18 THE CHAIR: Yes. So look, I've been through the price setting paper pretty carefully
19 and your comments on that. Probably the best way of doing it is that when you finish
20 one of the categories we see what Mr Armitage has got to say, and then I'll give
21 a ruling. I think that's the quickest. Okay.

22 MS FORD: This one, it's probably best to do three lines together because they all
23 relate to dissolving wood pulp. So it's row 1, but also row 3 and 4.

24 THE CHAIR: But wait, what page are we now looking at?

25 MS FORD: Row 1 is on page 369.

26 THE CHAIR: Yes, but when you say row you mean item 1?

1 MS FORD: I'm looking at -- yes, the table in the annex to the fourth witness statement
2 of Ms Forster.

3 THE CHAIR: Yes, there's number 1 and there's paragraph 2. Item two. What do
4 you --

5 MS FORD: Under item 1, or request 1 the claimants have agreed to provide
6 disclosure in relation to Redfern schedule categories 15(d) and (e) insofar as they
7 relate to cellulose fibres.

8 THE CHAIR: Yes, 15(a)?

9 MS FORD: 15(a),(d) and (e), yes.

10 THE CHAIR: Yes.

11 MS FORD: So the remaining dispute concerns the position in relation to dissolving
12 wood pulp.

13 THE CHAIR: Yes.

14 MS FORD: The reason I suggest that we need to address 3 and 4 at the same time
15 is because they are also concerned with dissolving wood pulp.

16 THE CHAIR: Okay, yes.

17 MS FORD: What we understand from Lenzing's pricing statement is that caustic soda
18 is a variable cost in the production of dissolving wood pulp.

19 THE CHAIR: Correct.

20 MS FORD: Lenzing is vertically integrated. The majority of its DWP production is
21 used in its downstream production of cellulose fibre. Some of it is sold externally, so
22 there is a distinction between DWP sold externally and DWP sold internally to its own
23 downstream entities.

24 THE CHAIR: Yes.

25 MS FORD: As regards DWP sold externally, the claimants' position we understand
26 from this table is that this only occurred on rare occasions. However, the caustic soda

1 that's referable to the production and external sale of DWP is, we understand, still
2 included in the claimants' claim, in the sense it still forms part of their overcharge claim
3 and it still forms part of their VoC figures. So we say, unless they are proposing to
4 exclude it, we are entitled to disclosure in respect to the possibility that any overcharge
5 in respect of it was passed on to external customers. So that's the position in relation
6 to externally sold DWP. It still forms part of the claim and so we're entitled to disclosure
7 in respect of it.

8 THE CHAIR: And do we know how much -- you say forms part of the claim, but how
9 much, do we know?

10 MS FORD: The information that we're given is that it was only sold externally on rare
11 occasions; that's the wording.

12 THE CHAIR: But you've got no figure?

13 MS FORD: I don't think we've been given a figure. (Pause)

14 THE CHAIR: Are you saying insofar as it was, you just want to have the documents
15 in relation to that?

16 MS FORD: We say it forms part of the claim unless they want to exclude the relevant
17 value in respect of DWP sold externally, we say we're entitled to disclosure in respect
18 to the possibility that's passed on.

19 THE CHAIR: As you say, if it's been passed on, then it's been passed on in
20 that -- that's a defence to that element of the quantum of the claim.

21 MS FORD: Sir, yes.

22 So that's the position in relation to DWP sold externally. In relation to DWP sold
23 internally, the tribunal will see there is a passage marked "Confidential", which relates
24 to the position after 1 January 2018. I just ask the tribunal to read the confidential
25 passage.

26 THE CHAIR: Yes. (Pause)

1 Yes, that's quite sensitive stuff.

2 MS FORD: Yes. So in relation to that period of time, in the light of the point that's
3 marked "Confidential", subject to the provision of certain information -- which I'll show
4 the tribunal -- we are content not to pursue the requests from that date onwards, but
5 the information that we need is the information that's highlighted as "Confidential" in
6 our letter.

7 THE CHAIR: So where do I need to look at now?

8 MS FORD: This is the letter that's behind tab 24 in the bundle.

9 THE CHAIR: Yes.

10 MS FORD: Page 247. (Pause)

11 THE CHAIR: Yes.

12 MS FORD: What we're explaining -- this is in the context of request 1, our position on
13 dissolving wood pulp, we are saying that we are prepared to not pursue these requests
14 from 1 January 2018 onwards, subject to the provision of the highlighted confidential
15 data, which is necessary for the expert analysis. That's the highlighted passage in our
16 letter. I could ask the tribunal to read that. (Pause)

17 THE CHAIR: Yes.

18 MS FORD: And also the DWP sales data, which has been offered.

19 THE CHAIR: You want the stuff that's highlighted.

20 MS FORD: We want the stuff that's highlighted and the DWP sales data offered by
21 the claimants at request 4 of the annex. Subject to that, we say we don't pursue the
22 request further in relation to the period post 1 January 2018. We do maintain these
23 requests for internal sales prior to 1 January 2018, because by definition, the position
24 that's highlighted doesn't apply pre that period. (Pause)

25 THE CHAIR: Yes.

26 MS FORD: So that's line 1 and also the relevant 3 and 4, that also concern DWP.

1 Moving on to "margin targets", which is line 2. The tribunal will want to hear from
2 Mr Armitage before I move on to a separate.

3 THE CHAIR: Yes. So we'll just deal with 1, shall we now? Hear what Armitage has
4 got to say.

5 MS MCANDREW: Sir, so it's actually --

6 THE CHAIR: So you've got the short straw; that's okay.

7
8 Submissions by MS MCANDREW

9 MS MCANDREW: So I understood my learned friend to say that there wasn't any
10 outstanding point of disagreement in relation to cellulose fibres. The claimants had
11 understood that there is still one point of disagreement, which relates to the scope of
12 the defendants' request generally, which is the temporal scope over which they should
13 be ordered. The defendants contend for the broad temporal scope. The claimants
14 contend for a narrower temporal scope. I don't know if you want to address that at the
15 end or whether it's convenient to pick it up now.

16 MS FORD: Grateful to my learned friend for flagging that up. Our position on temporal
17 scope is in this letter, the top of page 246 and the simple point we make is that the
18 relevant underlying Redfern schedule category, so category 15, had been directed in
19 respect of the broad temporal period and these requests that are now being pursued
20 are in respect of that category and they're being pursued because the pricing
21 statement was provisionally directed to address that category, but without prejudice to
22 coming back. So we say the same broad temporal scope applies.

23 THE CHAIR: Okay, so you're going to have to say something about temporal scope
24 and reply to what's said, page -- top 246.

25 MS MCANDREW: Sir, the claimants disagree. Our position is that it should only cover
26 the relevant period, which is the cartel period, beginning in July 2017 and ending in

1 February 2021 and what's called the "alleged run-off period", which the defendants
2 characterise as the period between March 2021 and the end of February 2022. The
3 claimants' position as to the precise duration of that period is reserved for the time
4 being, but we're adopting that as a working definition.

5 That's a total of nearly five years, so it's already a long period and indeed that was the
6 period that the claimants understood this application to have been made in respect of,
7 because that's the period that was set out in Mr Bronfentrinker's second statement
8 where this application was made.

9 In consequence, the claimants' responsive evidence was directed at that narrower
10 period and you will have seen, sir, in Ms Forster's evidence that even addressing these
11 requests in respect of that narrower period would be a very significant undertaking
12 indeed. Because our evidence was addressed to a narrower scope than the
13 defendants now pursue, I'm not able to give you sort of precise information about how
14 long we think the broader temporal period would require, but it would be significantly
15 more.

16 One further point: we do resist the suggestion that the tribunal has already determined
17 that the temporal scope for this category should be the broad temporal period. The
18 tribunal at the last CMC was concerned with the pricing statement, that it directed the
19 claimants to give. No disclosure at all was ordered in relation to category 15 at the
20 last CMC and so we say it's plainly important to consider the proportionality of the
21 requests that are now made and not the pricing statement temporal scope, which was
22 the issue in the last CMC.

23 So that's our submissions on that, sir.

24 THE CHAIR: Okay and then have you got anything else to say about the categories?

25 MS MCANDREW: Yes. So that's cellulose fibres. Then my learned friend turned to
26 external sales of DWP. The claimants do oppose this request as disproportionate and

1 unnecessary, given one, the disclosure which they've already given and agreed to give
2 in relation to pass-on; and two, the very small volumes of relevant external sales that
3 were actually made.

4 We're here concerned with the first claimant, which did produce DWP, but consumed
5 the vast majority of it itself. Sir, if you look at the pricing statement at paragraph 18, it
6 doesn't contain information for every year, but --

7 THE CHAIR: And where do I find the pricing statement?

8 MS MCANDREW: So that's behind tab 27 of bundle B at page 442 and so we give
9 the example there, sir, of financial year 2020 and that was approximately 0.08 per cent
10 of C1's production volume that was disposed of via external sales.

11 So we say that that is minuscule, de minimis and it would be disproportionate to
12 require the claimants to be put to the expense of providing it.

13 In relation to the internal DWP sales, this relates primarily to C4, as you've seen, sir,
14 and the claimants -- as my learned friend said, the defendants have agreed not to
15 pursue their request for searches, in relation to the period from January 2018 onwards.

16 That's conditional -- the defendants' agreement to that is conditional on the provision
17 of this information that's highlighted in their letter received overnight, that my learned
18 friend took you to. I believe that's in G24, the relevant page is 247. (Pause)

19 You will see, sir, that there's two different bits of information which the defendants
20 seek. The first one is described in paragraph 21 of the pricing statement and my
21 instructions are that the claimants would agree to give that, in relation to the temporal
22 scope for which they contend.

23 The second item of information, the second quite large category of information, which
24 is referred to in the next sentence, the claimants don't agree to give, because that
25 information, we say, will have already been provided -- to the extent it's necessary at
26 all -- in relation to DRS category 18, which you ordered at the last CMC.

1 THE CHAIR: But in relation to that, if it's already been disclosed, then you just say it's
2 already been disclosed and this is where it is.

3 MS MCANDREW: Well, we say that everything that should be disclosed has been.
4 I don't know whether my learned friend pursues that request beyond what's already
5 been provided under DRS category 18.

6 MS FORD: I think in practice we haven't had the opportunity to ascertain what has
7 and hasn't been fully disclosed, insofar as it transpires that it's there and then I imagine
8 that would suffice to answer our position to the extent that it isn't.

9 THE CHAIR: Yes, exactly. Okay.

10 MS MCANDREW: And sorry, so there's just one final thing, which is the searches
11 prior to 2018 and the claimants' position is the same in relation to the temporal scope,
12 so we would agree to do searches in respect of that period, but only from the beginning
13 of the relevant period and not the beginning of the broad temporal period.

14 THE CHAIR: Ms Ford.

15
16 Reply submissions by MS FORD

17 MS FORD: The rationale for needing the broader temporal scope is the one set out
18 in the second paragraph on this page 246. We do say it's necessary to look at the
19 position prior to the alleged cartel; that's why the relevant category was the broad
20 temporal period and that's what we understand the tribunal to have ordered and we
21 note that the claimants have -- in other circumstances -- accepted the disclosure of
22 documents from outside the relevant period and the alleged run-off period is relevant
23 to this category and so they provided documents for this period in support of their
24 pricing statement. We say that's correctly recognised and appropriate to order the
25 broader scope.

26 In relation to --

1 THE CHAIR: Shall we just move -- just sit down for a minute.
2 (5.04 pm)
3
4 Ruling (submitted to the learned judge for approval)
5 (5.10 pm)
6 THE CHAIR: Ms Ford.
7
8 Submissions by MS FORD
9 MS FORD: Sir, just a point of correction, I think you refer to row 2, but it is in fact row 1
10 that we were talking about.
11 THE CHAIR: Yes, I meant row 1.
12 MS FORD: Okay. I'm moving on then to row 2.
13 Row 2 is concerned with margin targets, or the dispute between us is concerned with
14 margin targets. Request 15(c) is concerned with:
15 "documents setting out margin targets, revenue targets or sales targets for the
16 Claimant's products and whether those targets were reached".
17 The tribunal would have seen from the pricing statement that there were measures of
18 that sort. It's paragraphs 38 and 39 at B/27, page 449. The tribunal looks at
19 paragraph 38, line 6, for example. There's a reference to "target minimum prices".
20 A few lines lower, there's a reference to "target and achieved prices".
21 Then paragraph 39 explaining:
22 "... target minimum prices were determined by reference to the net price achieved in
23 previous sales ..."
24 It goes on to give some detail about that.
25 So we say that there were some form of price targets being used, according to the
26 pricing statement. As the tribunal will appreciate whether and to what extent margin

1 targets in particular were used is highly relevant from a pass-on perspective, because
2 if an undertaking applies a percentage margin to their prices, that would suggest that
3 they are passing on cost changes to their customers.

4 THE CHAIR: But it depends, yes, okay.

5 MS FORD: It would be indicative of that as an outcome. Our understanding is that
6 sales targets are ...

7 THE CHAIR: Okay, but the issue between you is what? They're willing to look at
8 some -- it's the scope of the search, isn't it? Is that where the ...?

9 MS FORD: No, the issue is they don't say that they don't have any margin targets, but
10 what they say is, to the best of their current understanding, the claimants' historical
11 margin target information is unlikely to be available.

12 THE CHAIR: No, that's what they're saying, yes.

13 MS FORD: So we say, given the importance of the point, that's not a reason to not to
14 conduct a reasonable search. The position is not that there aren't any margin targets.
15 It's an assertion that there might not be historical margin target information, and we --

16 THE CHAIR: Wait, I misunderstood this. So I read this wrongly. So they're not willing
17 to do any search for the historical margin target and that they're -- is the offer to ask
18 relevant individuals. That's only in relation to sales targets.

19 MS FORD: Sales targets, which is a potentially a different exercise.

20 THE CHAIR: Yes. But would it be enough if they do -- asking the relevant individuals
21 to see if they've got stuff similar to that?

22 MS FORD: In relation to margin targets?

23 THE CHAIR: Yes. Is it?

24 MS FORD: I imagine so, yes.

25 THE CHAIR: That's probably the way to do it.

26 MS MCANDREW: Yes. Sir, I'm instructed that we could agree to carry out similar

1 enquiries in relation to margin targets.

2 THE CHAIR: Yes, that's fine.

3 (5.14 pm)

4

5 Ruling (submitted to the learned judge for approval)

6 (5.15 pm)

7 THE CHAIR: So that is that one. Two?

8

9 Submissions by MS FORD

10 MS FORD: Sir, as I indicated, rows 3 and 4 are concerned with dissolving wood pulp.

11 So we maintain those requests, but we anticipate that the same will apply as we

12 indicated in relation to row 1. So the same approach in relation to the distinction

13 between internal and external. We say we're facing the same arguments from the

14 claimants about why not to do it, and the same logic in our submission applies.

15 (Pause)

16 THE CHAIR: Anything you'd like to say?

17 MS MCANDREW: Sorry. Can I just clarify, is this in relation to row 5?

18 MS FORD: No. Sorry. This is in relation to dissolving wood pulp, rows 3 and 4, which

19 I think, we say, are essentially dealt with in relation to row 1.

20 MS MCANDREW: Yes, we agree.

21 THE CHAIR: Yes.

22 (5.16 pm)

23

24 Ruling (submitted to the learned judge for approval)

25 (5.16 pm)

26

1 Submissions by MS FORD

2 MS FORD: Row 5, there are two parts to this request. It's concerned with contracts,
3 and it's concerned with negotiation documents on the basis of which those contracts
4 were concluded.

5 In relation to the first part, the contracts themselves, the claimants' position, we
6 understand, is that it's duplicative of disclosure that's been provided under
7 category 16.

8 THE CHAIR: Well, I'm not going to order that again.

9 MS FORD: Well, our position is we've only received that on 16 June. So we're
10 essentially reserving our position as to whether or not it is or is not sufficient.

11 THE CHAIR: Well, reserve your position. I can deal with that later, but ...

12 MS FORD: I'm grateful.

13 As to the second part of the request, negotiation documents, the answer there seems
14 to be, "Well, there will be a large number of documents". But in our submission, they
15 are necessary to understand the basis of the spot prices that are negotiated
16 individually with customers on a monthly or quarterly basis, and in particular, to
17 understand whether those spot prices reflect the underlying cost of caustic soda or
18 not. That's the point for the tribunal's reference that is made in Mr Parker's letter at
19 B/15/346. We can turn it up. But it essentially gives exactly that justification that I've
20 given the tribunal. It's necessary to see these negotiation documents, because they
21 enable us to tell the basis on which these prices were negotiated; did they include
22 caustic soda prices or didn't they?

23 THE CHAIR: Is that going to be a lot of work?

24 MS FORD: Well, they say there's a large number of documents, but we say it's
25 a necessary exercise because otherwise you don't know whether or not there's
26 a pass-on in relation to these spot prices. You need to know whether or not, when

1 concluding these contracts, they were negotiated on the basis of caustic soda costs
2 or not.

3 THE CHAIR: What would you like to say?

4

5 Submissions by MS MCANDREW

6 MS MCANDREW: Sir, if I may, it would be an awful lot of work, because the pool of
7 disclosed contracts, constitutes approximately 2,200 documents. So there are likely
8 to be very many thousands of negotiating documents which relate to those over
9 a nine-year period, as the tribunal has directed.

10 The defendants have the contracts themselves. They haven't yet reviewed them. We
11 say it would be disproportionate to put the claimants now to the task of providing all
12 relevant negotiating information, which may not prove necessary and is certainly
13 disproportionate.

14 THE CHAIR: Okay. Ms Ford, on relation to this category, I'll give my direction now.
15 Okay.

16 (5.19 pm)

17

18 Ruling (submitted to the learned judge for approval)

19 (5.20 pm)

20 THE CHAIR: Okay.

21 MS FORD: Sir, we're content with that as a proposal.

22 THE CHAIR: Next one.

23 MS FORD: May I just check one thing? (Pause)

24 THE CHAIR: I agree, but let's see how this is going to be. Ms Ford, we don't have
25 much time with (inaudible).

26 MS FORD: I'll move on.

1 THE CHAIR: Because one option, and I think probably that's what we're going to
2 follow, is everything else is going to be dealt with on paper, and that everyone has
3 until 10.00 on Friday morning to put in a further submission -- not more than 15 pages
4 each -- on what whatever else we haven't dealt with today, because I do want to speak
5 a bit about where we go on from here. I've made some orders on this. You can see
6 the direction of travel. Both sides can see the direction of travel. It may be that other
7 requests can be agreed or not agreed. But when I come in on Friday at 10.00 am.
8 I want to know what do people want me to include in my ruling, and you'll know that
9 you've got up to 15 pages each of additional submission for me to rule on the rest on
10 paper. I'm sorry about that, but there are other people who need to get home and stuff
11 like that. It's not just us. If it was just us, we'd be here all day, and all night. So that's
12 where we are.

13 What remains, as I see it, is claimants' 1(d), which is "further disclosure pursuant to
14 LRS Category 6". Then (e), I think it's (i) -- that's PDC disclosure statement, further
15 information.

16 MR ARMITAGE: That one has fallen away, sir.

17 THE CHAIR: Which one?

18 MR ARMITAGE: (e)(i).

19 THE CHAIR: So I can cross that out?

20 MR ARMITAGE: You can cross that out.

21 THE CHAIR: Yes. (e)(ii) we've done, haven't we?

22 MR ARMITAGE: (e)(iii) There may be -- some of these are dependent on the
23 information received overnight. There may be some short points on 3 and 4 but --

24 THE CHAIR: Exactly. So it's probably not a huge amount of left on yours.

25 MR ARMITAGE: No. Sorry, there are a few points under 1(a) which we didn't address
26 just in relation to information. For example, the remaining Quintus messages that

1 I mentioned that again there's some --

2 THE CHAIR: Well, anything else that you want me to include in the ruling you put in
3 your 15 page submission, cross refer back --

4 MR ARMITAGE: There's not very much --

5 THE CHAIR: I don't think there is. Now, where we are on the next CMC is that we
6 need to agree a date for when the next CMC is going to be. When will you be ready,
7 do you think, to have got your Argus disclosure, your IHS disclosure in sufficient time
8 that you know where you are and position to, if you want to amend your pleadings,
9 have draft amended pleadings ready? When do you think that's going to be?

10 MR ARMITAGE: I think the great uncertainty is the IHS matter which as you say, sir,
11 (inaudible) a piece of string element to that.

12 THE CHAIR: I agree. Sometimes it's done really quickly but there's a number of
13 imponderables. It may be that we shouldn't come back till the very earliest in
14 December. Even that may be optimistic and that perhaps we should be fixing the next
15 CMC at the end of January.

16 MR ARMITAGE: Can I just turn --

17 THE CHAIR: Yes.

18 MS FORD: While instructions are taken, perhaps we can make a slightly different
19 suggestion which is that if the CMC is to be pushed off to January, we would ask the
20 claimants to come back and update the tribunal earlier than that.

21 THE CHAIR: They'll be sending us the material on what they're going to be applying
22 for in the section 1782 application.

23 MS FORD: Yes.

24 THE CHAIR: They will presumably provide you with a copy of the actual application
25 that's taken out. That will be served on the tribunal as well so we can put that as part
26 of the direction. So I direct -- when it comes to finding the section 1782 application

1 | you're provided with a copy and so is the tribunal -- that they update us with the
2 | progress of that application as they go along. I think we do need an update. I don't
3 | want to have silence until next January. They will be taking out an application for
4 | non-party disclosure from Argus, so that's going to be visible because they're going to
5 | have to apply to the tribunal for that.

6 | MS FORD: There are draft directions in this respect because the claimants have
7 | proposed that they come back and update.

8 | THE CHAIR: Let's have a look at the draft direction so we can get that done. Now
9 | let's have a look.

10 | MS FORD: It's in bundle H.

11 | THE CHAIR: I've got it loose. So the draft directions, yes?

12 | MS FORD: Under page 55 "Directions for future conduct of the proceedings" --

13 | THE CHAIR: Yes.

14 | MS FORD: I think the difference between us is largely in terms of the dates for coming
15 | back. We were looking for an update slightly earlier than the claimants are offering,
16 | but their position in red is that they're indicating an update by 9 October in relation to
17 | (i) and its disclosure in relation to liability issues.

18 | THE CHAIR: But look, they've been directed that they should be taking out their
19 | application for non-party disclosure against Argus by the end of this month. So we'll
20 | have that at the end of the month. I now direct that they will give you a copy so you
21 | know it's getting done. I'm not saying you should be at the application (several
22 | inaudible words) need to know what's going on. It's the same thing with the
23 | section 1782 application, they'll be providing us with copies of the application. So
24 | that's updating in itself.

25 | Any further updating as to the progress of both applications -- they just need to update
26 | us as they go along. I don't think I need to give a cut-off date. They just need to do it.

1 They know what needs to be done. So for the section 1782, they serve us with the
2 application. They should notify you and us of how it's progressing. So if, for example,
3 an order has been made, they're going to write and say "an order has been made", or
4 they may say "a hearing date is being fixed". I think they should just be telling us, as
5 these two applications proceed, of the progress. So they should update us as and
6 when the applications are going through. I'm sure that's what (inaudible).

7 MR ARMITAGE: Obviously in relation to Argus, any application would be to this
8 tribunal, and probably to you, sir. In relation to the section 1782 application, I mean of
9 course we're happy to provide whatever updates the tribunal would find useful in terms
10 of any particular landmarks in that application.

11 THE CHAIR: Well, I think that all we need to have is the hearing date as and when,
12 and the result of any hearing.

13 MR ARMITAGE: Well, that's fine. Rather than having a deadline, we'll tell you about
14 those things when they happen.

15 In terms of listing a CMC, we had proposed not listing one today, but insofar as you'd
16 like to do that, we would say with some regret that end of January next year would be
17 better having regard to the various uncertainties.

18 THE CHAIR: Yes. So CMC4 will be fixed for one day in the last week of January 2027
19 at which point the tribunal will consider any application for further disclosure, matters
20 arising out of CMC3, an amendment to the claim, directions to trial. We will also be
21 considering the issue of the CRO, de-designation of documents and timetable for that.
22 There'll be quite an agenda of things to go through. It may be that for that CMC we
23 should fix it for one and a half days rather than a day, so if there's anything that needs
24 to be done we're not in a huge rush. This one is a huge rush, but we needed to go
25 through everything in detail because there's so many issues between the parties.

26 Is there anything else that people want to raise? Okay. I'd like to thank both parties

1 for what they've done. A huge amount of work has been done by both sides. Matters
2 have been dealt with in the way I'd expect constructively. The ideal is not to get the
3 tribunal to rule on everything but most things you should try and resolve yourselves,
4 and it does seem as though as things have gone along many things have been
5 resolved.

6 I may look in a bit more detail about TAR and how satisfactory that's been -- how
7 useful it's been. I've seen what both parties have been saying in their disclosure
8 statements about TAR on the facts of the particular case. This illustrates where TAR
9 has its limitations as well as its use.

10 But I think the lesson probably is that sometimes it's only once you start doing the work
11 that you can see actually what works and what doesn't work. Sometimes you have to
12 leave a designated solicitor to use their judgement as you go along, you sometimes
13 have to change tack. What you envisage may not produce anything or may be too
14 expensive and so you have to adapt. I can see that both solicitors have been adapting
15 as they've (inaudible) useful and constructive way.

16 I'll rise now. I'll deal with everything in writing in the ruling, but I won't start scribbling
17 until 10.00 am Friday, so that gives everyone the opportunity to identify what further
18 issues you want, and to put in a further submission by 10.00 am on Friday. Thank you
19 very much.

20 (5.32 pm)

21 (The court adjourned)

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Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
...	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?