Neutral citation [2026] CAT 66

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1440/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

14 July 2026

Before:

THE HONOURABLE MR JUSTICE RICHARDS
(Chair)

Sitting as a Tribunal in England and Wales

BETWEEN:

CLARE MARY JOAN SPOTTISWOODE CBE

Class Representative

– v –

(1) NEXANS FRANCE SAS
(2) NEXANS SA
(3) NKT A/S (formerly NKT HOLDING A/S)
(4) NKT VERWALTUNGS GMBH (formerly NKT CABLES GmbH)
(5) PRYSMIAN CAVI E SISTEMI SRL
(6) PRYSMIAN SPA

Defendants

Heard on 13 and 14 July 2026

RULING (CASE MANAGEMENT)

APPEARANCES

Gerard Rothschild and Jamie Farmer (instructed by Scott + Scott UK LLP) appeared on behalf of the Class Representative.

Tony Singla KC and Tom Watret (instructed by White & Case LLP) appeared on behalf of Nexans France SAS and Nexans SA.

Helen Davies KC and Fiona Banks (instructed by Macfarlanes LLP) appeared on behalf of Prysmian Cavi E Sistemi S.r.l. and Prysmian S.p.A.

Michael Armitage (instructed by Addleshaw Goddard LLP) appeared on behalf of NKT Verwaltungs GmbH and NKT A/S.

A. INTRODUCTION

1. This is the Tribunal's ruling on a number of the issues that arose for consideration at the case management conference (**CMC**) which took place on 13 and 14 July 2026.

2. I start with some straightforward matters. Yesterday, I granted the Defendants' application for an extension of time for the value of commerce (**VoC**) Excel (defined below at §6), and I granted the Defendants' application for a variation of the order for the provision of expert evidence as to which experts were to deal with which issues.

B. DISCLOSURE

(1) Background

3. As the parties well know, determining the claim is going to involve deciding on matters including: (i) the VoC; (ii) the degree of overcharge, if any, on relevant products affected by the cartel; and (iii) the level of pass through.

4. On VoC, even with the fullest data, the experts are not going to have full financial information on every single sale of a power cable in Great Britain that could have been affected by the cartel. The Defendants are not the only sellers of cables, and so the experts will necessarily be extrapolating VoC from information on the Defendants' own sales together perhaps with other information, including from public sources.

5. Also, on VoC, there may be an overhang effect. The VoC is not limited to projects effected up to the end of the cartel. In addition, power cables are sold to different categories of purchaser: for example, electricity transmission owners, electricity network operators, offshore wind farm developers, and the BritNed connectors. Supplies to all of these categories count towards VoC, but when it comes to calculating overcharge there might not be a single

homogeneous figure and there might be differences between any overcharge present in sales to different groups.

6. The sources of data on VoC include a spreadsheet with information regarding the VoC of cable projects supplied by the Defendants in Great Britain between 1999 and 2012 (the **VoC Excel**). The Defendants are populating that with a good quantity of information on projects that they have completed, consisting of power cable projects from 1999 to 2012. Work is ongoing on the VoC Excel. It is easy to consider that task as simply populating a spreadsheet with a few figures. However, it is an extensive work product that is taking a well-resourced team on the Defendants' side a substantial amount of time to complete. On the first day of the CMC, the Defendants were granted an extension of time to 7 September 2026 (from 23 June 2026) to complete the VoC Excel.

7. Turning to overcharge, the Class Representative's expert, Mr Druce, has said that he is going to be seeking to estimate the overcharge by performing quantitative analysis such as regression analysis and/or a margins analysis. Very broadly, the exercise is going to involve comparing prices or margins on projects unaffected by the cartel with those affected by the cartel. That is going to require a good amount of project-level information on projects that completed during the cartel period and also data on "clean" projects that completed outside the cartel period. Some of that information will be reasonably straightforward to extract, such as date and the name of the supplier, but some will be more difficult to extract, such as commercially sensitive and confidential information on costs incurred in producing the cables.

8. Some information on the overcharge issue will be contained in the completed VoC Excel. The Defendants have also provided what has been called "off the shelf" disclosure. This comprises material that the Defendants disclosed in six sets of concluded direct purchaser proceedings arising out of the same cartel (the **Direct Purchaser Proceedings**). The Direct Purchaser Proceedings were brought by direct purchasers who claimed to have been overcharged on cables that they purchased from the Defendants.

9. As will be seen from this Tribunal's judgment in *London Array v Nexans* [2025] CAT 59, estimating an overcharge in the Direct Purchaser Proceedings would have involved an analysis of comparable projects in the pre- and post-cartel periods. Therefore, in the Direct Purchaser Proceedings, the Defendants would have disclosed financial information on other power cable projects to which they were party, both in pre- and post-cartel periods, with a view to estimating the amount, if any, by which a direct purchaser was overcharged.

10. Therefore, the off the shelf disclosure includes financial information on a good number of power cable projects. However, it does not include everything that the Defendants disclosed in the Direct Purchaser Proceedings. Specifically, it does not include the Defendants' expert reports. All parties agree that it is not straightforward simply to hand this material over as it contains, or may contain, reference to material that the claimants in those proceedings (i.e. the direct purchasers) themselves disclosed, which is covered by restrictions on collateral use.

11. The other point to make about the off the shelf disclosure is it does not include financial data on all relevant projects. On the first day of the CMC, the Prysmian Defendants informed the Tribunal that there are some 165 projects in relation to Prysmian alone that are or will be referenced in the VoC Excel that are not dealt with in the off the shelf disclosure.

12. There is a slight difference of emphasis on the scale of the off the shelf disclosure. The Defendants emphasised that it consists of 40,000 documents and provided information on 350 projects. The Class Representative emphasises that, to date, Mr Druce has been able to extract a good quantity of information on only 222 projects. However, Mr Druce does not say that the difference between 222 and 350 is the main point.

13. Describing this disclosure as "off the shelf" risks giving the impression that the Defendants have metaphorically pulled a few files off the shelf and handed them over. However, that would understate the quality and the quantity of the disclosure that has been given. The second witness statement of Mr Day, on behalf of the Prysmian Defendants, highlights the extent of the off the shelf

disclosure. As one would expect, it contains a large quantity of financial information on both before- and after-cartel projects. It is a very expensive work product that has cost several millions of pounds that has been disclosed in adversarial proceedings designed to capture or estimate an overcharge on multiple supplies of cables, involving highly resourced and sophisticated litigants.

(2) Material from the Direct Purchaser Proceedings

14. With that preamble on the issues and the sources of material on them, I am going to start with the first disclosure item, which is the request for a road map for obtaining material disclosure from direct purchasers. This relates to the following categories of documents from the Direct Purchaser Proceedings that might have some bearing on the present claim:

(1) tender assessments performed by direct purchasers;

(2) witness statements produced by both defendants and claimants;

(3) expert reports served on behalf of the defendants in those proceedings; and

(4) datasets used by the experts when performing their analyses.

15. There is a difference between the parties on how relevant or useful the material will be, but all agree that if the material is to be disclosed, some sort of order for disclosure against third parties would be needed, unless they consent, because of restrictions on collateral use. That is likely to be true of witness statements and expert reports that the Defendants served as they are going to contain and refer to material served by the claimants in the Direct Purchaser Proceedings.

16. The Class Representative requests an order that she should be given a “menu” of the various witness statements and expert reports served in the previous Direct Purchaser Proceedings. (In fact, I understand she has already received a

list of the various witness statements and expert reports.) The Class Representative then seeks the ability to write to the Defendants to identify which items she would like. Having chosen from the menu, the Class Representative requests that, by 3 August 2026, the parties write jointly to solicitors for the claimants in the Direct Purchaser Proceedings to request the items on terms that they are disclosed into the confidentiality ring established in these proceedings. The Class Representative considers it appropriate for the Defendants to bear the costs of the third parties associated with this process.

17. The Defendants do not really dispute the relevance of the tender assessments. They do not suggest that their own witness statements are irrelevant, but they make the point that the claimants' witness statements should be provided too. Nor do the Defendants really object, in principle, to the idea of writing a letter to the claimants' solicitors asking for permission for collateral use of witness statements, expert reports or datasets (although, as I have said, the parties are not agreed on who should bear the costs of that process).

18. However, the Defendants do object to what they see as the "unspoken assumption" in the Class Representative's request, to the effect that the expert reports and datasets will be disclosed at the end of the process. The Defendants suggest that a line should be drawn now as that material would not be relevant. In support of that, the Defendants make the following points:

(1) They refer to the large quantity of material from up to ten experts, each of whom have their own individual perspective on the applicable dataset.

(2) They suggest, in light of that, that the material will not actually be of much use, given that ultimately the Class Representative's own expert, Mr Druce, will have to form his own view on matters such as this.

19. The Class Representative's perspective is different. She argues that disclosure of this material has the capacity to reduce time and effort, and indeed costs, associated with the production of expert reports in these proceedings.

20. A good part of this debate was canvassed at the CMC on 23 March 2026. At that CMC, the Tribunal did not feel able to decide the issue. The Tribunal queried the strength of an analogy that was made by the Class Representative with academic papers, and pointed out the risk that if the material is disclosed, it might open up an undesirable avenue of enquiry as to how the experts' position in these proceedings can be matched with the position taken by, perhaps, different experts in the Direct Purchaser Proceedings. However, the Tribunal said that it would not be possible to express a fuller view on this point until the Class Representative had reviewed the off the shelf disclosure and so was in a position to make fuller and more focused submissions about the potential for the expert reports to save time and expense.

21. The debate at this CMC has not really advanced that much. Mr Druce has already had a large quantity of off the shelf disclosure, and in the next few weeks, will have the VoC Excel material. While there is a dispute about how much of that material, precisely, he has reviewed, it is clear he has not reviewed a large proportion of it. In his letter of 24 June 2026 to the Tribunal, Mr Druce made again the general analogy with academic writings, of which the Tribunal had been sceptical in March 2026.

22. The fact that the debate has not moved on since March 2026 is not a promising start for an assertion that the expert papers and datasets are needed and will indeed save time. If the Tribunal's concerns about opening up undesirable areas of enquiry could have been answered, perhaps it could have been expected that Mr Druce would have done so. However, as matters stand, in the absence of a fuller answer from Mr Druce as to how precisely the other expert reports and datasets will save time, despite the concerns that the Tribunal identified in March 2026, I am not satisfied that there are any material cost and time savings to be had.

23. However, I am not going to shut the door on the provision of this material altogether, because it may be that Mr Druce can provide a rationale. If he does wish to provide that rationale, he should provide it after he has reviewed the VoC, the VoC Excel, and the off the shelf disclosure. Mr Druce should address specifically, and in a more granular fashion, <u>precisely</u> where the cost savings

and time savings he identifies are going to be found. General analogies with academic writings have been advanced twice now and are not enough. The Tribunal will be looking for a clear articulation of where exactly the savings are to be found and why those savings are not counterbalanced by other costs such as: (i) the risk of the proceedings being distracted by satellite enquiries as to why an approach taken now is consistent with an approach taken by a different expert in Direct Purchaser Proceedings; and (ii) the cost involved in securing access to the expert reports given the restrictions on collateral use.

24. Overall on this issue, I am going to make a more limited version of the order than the Class Representative requests. I am going to limit the road map to the witness statements and the tender evaluations. In my judgment, it is too early for the parties to be writing to third parties with a view to obtaining disclosure of expert reports and datasets. That is not on the critical path yet because of the points that I have made.

25. That leaves the question of who should bear the cost of the process that is going forward and there are two different ways of looking at this. On one hand, it could be said that the documents are in the Defendants' possession or power. So really what is being talked about here is the Defendants' own disclosure obligation. Another way of looking at the matter is that the Class Representative wants the documents and should pay the costs associated with obtaining them.

26. There is no single right way to answer that question: they are just two completely different and perhaps plausible ways of looking at the same question. No authority was provided to me to suggest that it needs to be looked at one way or the other.

27. On balance, I am not attracted to the Class Representative's analysis. In some literal sense, of course, the documents are in the Defendants' possession or power. However, they cannot be handed over without some process being performed, and the Defendants cannot control that process on their own. On balance, therefore, I consider that the Class Representative should, in the first instance, bear the third parties' costs associated with getting the documents that she wants but the Defendants cannot straightforwardly supply. Following the

hearing, in the course of discussions on form of order, the Class Representative suggested that on this formulation, she should not have to bear costs associated with securing consent to the disclosure of the witness statements of claimants in the Direct Purchaser Proceedings on the basis that it is the Defendants who want those, rather than her. She therefore suggested that some third parties' costs should be borne by the Defendants. I do not accept this. The Defendants' position is that, if their witness statements in the Direct Purchaser Proceedings are to be disclosed, so should at least some of the claimants' witness statements that give context to witness statements of the Defendants. Overall, the initiative in this process comes from the Class Representative. Moreover, it would be impracticable for the Class Representative to bear some costs and the Defendants others. Third parties can scarcely be expected to itemise their costs into components for which the Defendants and Class Representative respectively are responsible. Ultimately, someone has to bear the costs of third parties in the first instance. In my judgment, the Class Representative should do so and she will be entitled following trial to request that she be reimbursed for those costs. The outcome of any such request will, of course, depend on the result of the trial.

(3) Further disclosure sought by the Class Representative

28. The next item is the Class Representative's requests for additional disclosure. She seeks additional disclosure on the following broad matters:

(1) a fuller analysis about projects covered by the VoC Excel and more outline information on projects from 2012 to 2025;

(2) disclosure of documents relating to the impact of the cartel;

(3) further disclosure about policies and pricing practices in the Defendants' groups; and

(4) known adverse documents.

29. Neither side referred to any authorities on the test that I should apply. I am exercising a case management discretion and therefore the overriding objective is central. Of course, the information and documents requested need to be relevant, but the request for disclosure must be proportionate as well. Proportionality, in my judgment, has to be assessed in the light of the extensive work already being done on the VoC Excel and the extensive disclosure already having been given in the off the shelf disclosure.

30. I also take account of the fact that expert witnesses in fact-heavy cases such as this can always articulate a reasonable and plausible request for more information. Experts thrive on information and it could be said that they often want more than they have.

31. The fact that an expert thinks a particular piece of information is helpful is not of itself determinative because, as I have said, considerations of proportionality have to be taken into account as well. However, I recognise that experts' views are relevant. If an expert can explain a convincing rationale as to why a particular document is needed and will materially help to advance the analysis, of course, that commands respect.

(a) Projects relevant to the overcharge analysis covered by the VoC Excel

32. The Class Representative wants the Defendants to provide fuller specified information on projects falling within the VoC Excel and more outline financial information on projects relating to products and services within the scope of the European Commission Decision from 2012, which is three years after the end of the cartel, to 2025.

33. I begin with the request for information on projects in the VoC Excel. In his letter to the Tribunal dated 24 June 2026, Mr Druce provided a summary at Table 1 of the information that he considers necessary. That has been largely replicated in Annex 1 of the Class Representative's proposed order. Mr Druce seeks that information on all of the projects set out in the VoC Excel.

34. The Defendants' approach to that request is as follows:

(1) To the extent that projects are listed in the VoC Excel and also covered by the off the shelf disclosure, they say that information has been disclosed in high value litigation involving multiple well-advised defendants and well-advised claimants. In that situation, there are only two possibilities: either the information which the Class Representative seeks is already in the off the shelf disclosure or it is not. To the extent that the information is contained in the off the shelf disclosure, then the Class Representative will already have it and the Defendants should not be required to provide it again in the form of additional cells in the VoC Excel. To the extent that it is not in the off the shelf disclosure, the Defendants submit that the Tribunal can have a good degree of assurance that it is not in there for a reason. For example, the fourth witness statement of Mr Day (at §25) explains that Prysmian's financial data does not capture information on costs at the tender stage. That is one of the items on Mr Druce's list. It will not be in the off the shelf disclosure, for the reason that Mr Day identified. That is an example of a situation where the Defendants say that the matter will not be in the off the shelf disclosure for a reason.

(2) Of course, the off the shelf disclosure does not cover all of the projects in the VoC Excel. The Defendants therefore say they will offer a similar kind of level of disclosure in relation to those additional projects in a form substantially similar to that given by the off the shelf disclosure. The Defendants' position is that if, having seen all of that disclosure, including the off the shelf disclosure and the additional disclosure that they offer, Mr Druce wants to produce a table extracting information from the material provided, he is entitled to do so. The Defendants have stated they are prepared to engage with any table that Mr Druce wishes to produce.

35. The Defendants also complain about a widening of the parameters of the VoC Excel. They point out that the request is now effectively for more columns to be

populated in the VoC Excel than has previously been requested. They say this material should have been asked for at the previous CMC.

36. Of course, I recognise that it can be frustrating to have to redo or supplement a task to accommodate new points that could have been realised earlier. However, I agree with Mr Rothschild that this in itself is not a good reason to refuse disclosure altogether. I also tend to agree that the function of the VoC Excel seems to have increased from when it was first canvassed. It is now doing a lot more of the heavy lifting on the overcharge as distinct from VoC and I am prepared to accept that the Class Representative's request for further information is therefore, at least in part, a response to a situation that has evolved since the previous CMC in March 2026.

37. However, I am more persuaded by the Defendants' points on the robustness of the off the shelf disclosure and their offer to provide something equivalent on other projects.

38. I acknowledge that there are some risks in anchoring matters to the off the shelf disclosure. Ms Davies KC convincingly demonstrated that the disclosure in the Direct Purchaser Proceedings was rigorous. However, rigorous or not, something may have been overlooked even though, for example, in the National Grid proceedings, there were three two-day hearings on disclosure. Therefore, conceptually, a different approach might be justified in these proceedings.

39. However, a difficulty I have with the Class Representative's proposed approach is that there is no sufficiently convincing articulation of why the Defendants' proposed approach is insufficient. I understand, of course, the need for multiple data points to perform a robust regression analysis that Mr Rothschild outlined in his submissions. However, it is reasonable to assume that the experts in the Direct Purchaser Proceedings thought that they were getting enough to perform such an analysis and the Defendants have offered to provide something similar in relation to other projects listed in the VoC Excel.

40. Mr Druce has not explained to my satisfaction what is missing from the Defendants' proposed approach. Now, that is not completely his fault: he has

not yet reviewed all the material and the compendious off the shelf disclosure that he has received. He fairly says that he cannot comment on whether the off the shelf disclosure is "representative of the Defendants' wider portfolio of projects". To the extent he proffers a concrete example in §21 of his letter as to why the material supplied as part of the off the shelf disclosure might not be representative, that particular instance appears likely to have been overtaken by the VoC Excel.

41. However, I can only deal with the explanation that I have been given. A statement that Mr Druce "cannot comment" on whether the disclosure received is unrepresentative does not amount to a convincing case that it is unrepresentative and so further disclosure is needed. Overall, therefore, I conclude that I have a relatively weak explanation of why more is needed than the Defendants are offering. Perhaps more targeted requests can be made with fuller justifications once all the VoC Excel information has been provided and the off the shelf disclosure reviewed. However, it is not right, in my judgment, to make a burdensome additional order at this stage. I will not therefore make the order for fuller information that the Class Representative seeks, but I will require the Defendants to make good on their offer to provide broadly similar information on projects that are listed in the VoC Excel but not covered by the off the shelf disclosure.

(b) Further information on projects from 2012 to 2025

42. The Class Representative made a further request for a more limited set of information on projects from 2012 to 2025. I do agree that the information requested is much more limited than that in the period up to 2012 covered by the VoC Excel. However, I do not accept that it is simply a straightforward gathering of information that will be at the Defendants' fingertips. Mr Day's evidence is that for Prysmian's projects alone it would be necessary to interrogate information on over 500 projects.

43. I do not consider that the Class Representative has given a sufficiently good justification for her request.

44. Mr Rothschild submitted that the good reason is so that experts have sufficient data points on clean (i.e. non-cartel) projects. Of course, I understand the need for data points on those projects, but Mr Druce in his letters dated 27 February and 23 June 2026 has not advanced that as a justification for the additional request. The off the shelf disclosure already contains a lot of clean data points and Mr Druce has yet to review a good proportion of them. I agree with the Defendants that Mr Druce has actually said very little about 2012 to 2025 in his letters. I therefore have little justification supported by an expert for the additional disclosure requested.

45. In addition, the disclosure provided to the Class Representative does not stop at 2012, the end of the period covered by the VoC Excel. She is also obtaining information on underground projects until 2015 from Prysmian and further information from Nexans, up until 2022.

46. Overall, I am not persuaded that there is a sufficiently good reason articulated for further disclosure of projects from 2012 to 2025.

(c) Disclosure in relation to the impact of the cartel

47. The Class Representative has also made a request for disclosure of further information about the impact of the cartel. It is a request for disclosure of communications from 1999 to 2009 concerning the cartel. The relevance is said to be that a disclosure of this kind was ordered in the Direct Purchaser Proceedings.

48. I agree that a picture of how the cartel operates would indeed have been important in the Direct Purchaser Proceedings. The example of the *London Array* proceedings explains that. In that case, Nexans was alleging that because Nexans Norway was independent and key individuals there did not know about the cartel, the pricing of cables that Nexans Norway supplied to London Array was unaffected by cartel behaviour. In the event, that argument failed. However, in principle, the operation of the cartel can indeed have some bearing on the magnitude or the presence (or otherwise) of an overcharge on particular projects or cables.

49. It is also clear that not all of this information would have been disclosed in the Direct Purchaser Proceedings. Consider litigation on a particular supply of cable to National Grid. Some information on how the cartel operated in relation to that particular supply would have been ordered. However, the disclosure in that case might well not have covered how the cartel worked in relation to other projects that are not subject to the Direct Purchaser Proceedings. So, I can understand why the Class Representative does not want the Defendants to say at a late stage in proceedings, when a particular regression analysis is being considered, that a particular project included in that analysis is not actually affected by cartel behaviour for bespoke reasons, despite being concluded in the cartel period.

50. Some insurance against this risk comes from the fact that the Class Representative has the Commission file which contains a lot of information on cartel activity. However, that does not address altogether the possibility of a late deployment of a factual case to the effect that a particular project was not actually affected by the cartel.

51. Overall, I consider that the Class Representative's concern is understandable, but the scope of disclosure requested is excessive. As drafted, the Defendants would be required to hunt for internal communications on low value matters unlikely to be affected by cartel behaviour: for example, an order for 500 metres of cable in one of the Defendant's warehouses not linked to any wider project. That request for disclosure risks being disproportionate in relation to particular Defendants. For example, NKT made most of its supplies to National Grid, so much of its disclosure would be picked up in the off the shelf disclosure .

52. I am not prepared to make an order requiring an extensive search for documents at this stage. In principle, I consider a more proportionate way of dealing with the legitimate concern is as follows.

53. First of all, there should be some attempt to focus on the high value projects in the cartel period. In due course, the Defendants will need to say which, if any, of those high value projects are not affected (or are less affected) by the cartel for bespoke reasons, even though they were ostensibly concluded in the cartel

period. If the Defendants identify high value projects that they say are unaffected (or less affected) by the cartel in that way, the Class Representative will have a legitimate request for further disclosure. If the Defendants want to avoid giving further disclosure on these materials, they can guard against that by not arguing that bespoke reasons prevent particular high value projects from being affected by the cartel.

(d) Disclosure about the Defendants' pricing, bidding, supply policies and practices

54. Some disclosure has been given on this in relation to specific projects. The Class Representative says that is insufficient, because it relates to specific projects rather than more generally, and she says that it is significant that only 37 documents on this topic have been provided as part of the off the shelf disclosure.

55. In my judgment, the short answer to this request is that, whether there are lots of documents or few documents, they should be captured by the off the shelf disclosure. I say that because, for example, of the Order of 27 October 2016 of Mrs Justice Rose, as she then was, in the National Grid and Scottish Power proceedings, where she ordered disclosure of all documents on how price terms were constructed, including any cost categories and costs taking into account market considerations, profit margins and any significant company-wide changes in sales or pricing policy from February 1999 to December 2015. As Mr Day explained in §39.2 of his Fourth Witness Statement, equivalent disclosure was ordered in the other Direct Purchaser Proceedings. I therefore agree with the Defendants that the off the shelf disclosure should provide the Class Representative with the information that should proportionately be given.

56. That prompted the Class Representative to ask for a disclosure statement confirming that nothing has changed since the off the shelf disclosure was given.

57. There is some initial attraction to the provision of such a disclosure statement. Whenever disclosure is given, one would expect someone to verify that the job has been done properly. However, the off the shelf disclosure was given several

years ago. It is one thing to give a disclosure confirmation at the time disclosure is given. In that case, the process can be managed and those close to it can satisfy themselves that the process has been conducted properly. However, it is very different to ask someone now to reconfirm the accuracy of disclosure given many years ago. I consider that request to be disproportionate.

58. Overall, I am going to refuse the request for further disclosure as to pricing, bidding and supply policies and practices.

(e) Known adverse documents

59. As is well known, in the Business and Property Courts there is a requirement to disclose known adverse documents. There is an obvious reason for this: it would be quite wrong for a litigant to know of a document adverse to its case and simply choose not to disclose it.

60. I agree with the Class Representative that this obligation should apply here. The Defendants point to some difficulties, including that the off the shelf disclosure exercise was carried out a long time ago and people have left, and they ask how the matter can appropriately be policed. However, in my judgment, those submissions do not give sufficient weight to the fundamental proposition that if the Defendants actually know of a document that is adverse, it should be disclosed.

61. The Defendants will therefore need to make key enquiries of key individuals currently employed to check for known adverse documents. Paragraph 2.9 of Practice Direction 57AD – *Disclosure in the Business and Property Courts* would also by analogy require them to make reasonable enquiries of people who have left. As Mr Rothschild says, the touchstone is reasonableness. The Defendants cannot be expected to track down every employee, show them the disclosure list and ask them if there is anything else. However, just because it is possible to envisage things that are not needed and would not be reasonable, that does not mean that nothing should be done. Known adverse documents should be disclosed.

(4) The Defendants' application in relation to third-party disclosure

62. It seems to be agreed and common ground that some disclosure from third parties is likely to be necessary on questions of, for example, pass-on and other issues. The Class Representative says that she is not yet in a position to seek disclosure from some third parties, although some material has already been obtained from DESNZ and Ofgem. The Class Representative wants to follow a staged approach particularly in relation to tender evaluations, the Competition and Markets Authority's energy market investigation (which might be relevant to pass-on), and disclosure from what had been referred to as the "big six providers".

63. The Defendants say there needs to be a hard deadline for this, given that we are talking about a trial in 2028.

64. Importantly, it is not just the Class Representative who seeks third-party disclosure. The Defendants are concerned that if the Class Representative does not tap the right sources, they may wish to seek third-party disclosure themselves. For example, they are concerned that the Class Representative is relying on a single data point in relation to pass-on and the Defendants themselves might wish to tap other sources to examine the extent of pass-on. Therefore, the Defendants' suggestion is that the Class Representative should make her third-party disclosure applications by 10 August 2026 and once the Defendants know what the Class Representative is asking for, the Defendants can and should make their own applications by 21 September 2026.

65. I agree with the Defendants to this extent: third-party disclosure is not just a matter for the Class Representative. It is not good enough for the Class Representative to say that she will get around to it when the time is right. The Defendants are entitled to know what is being asked for so they can seek information as necessary. This information should not be allowed to drift.

66. However, I also agree with the Class Representative that proportionality should be a watchword. There is no sense in approaching third parties unnecessarily, as that adds to expense.

67. I am not satisfied that this is as urgent as the Defendants suggest and I consider a deadline on the Class Representative imposes urgency that is not warranted. However, some deadline is justified, given that this is an issue that affects both parties. I would suggest pushing out that deadline by ten weeks, with the Defendants to make their own applications six weeks thereafter. The specific detail of these deadlines may need to be finessed should they coincide with the Christmas period.

C. DISTRIBUTION PLAN

68. The Defendants request that by 4pm on 11 September 2026 the Class Representative must file an updated distribution plan. I agree that a distribution plan is important for all the reasons this Tribunal canvassed during the certification process. The importance of the distribution plan has been reaffirmed following the Court of Appeal's judgment in *Gutmann v Apple* [2025] EWCA Civ 459, [2025] 2 All ER (Comm) 934. The funders in this case are obtaining a return calculated as a multiple of the costs that they fund. Following *Gutmann* in principle, that is permissible. Therefore, the funders in this case have the prospect of obtaining a large return indeed given that the costs they are funding are going to be high.

69. That return is to be earned by securing recovery for a class. The logic of the Class Representative's claim is that that recovery is going to be somewhere between £3 per member of the class (if the overcharge is at the lower end of her estimate) and could be £14 if an overcharge is found to be at the higher end.

70. That is not a lot per individual member of the class. It would be highly unattractive for the Tribunal to be confronted with a situation where, because only a bottom-up distribution plan is viable, few class members come forward to claim the low sums owed to them individually, while the litigation funders and lawyers enjoy significant returns. That would cast doubt on the whole point of these proceedings. The distribution plan is therefore fundamental to the utility of these proceedings. Without a plausible distribution plan, these proceedings risk being seen as simply a means of enriching lawyers and litigation funders, with consumers being an afterthought. In fairness, I think that my discussions

with Mr Rothschild reveal that that point is recognised on the Class Representative's side.

71. However, the Class Representative's approach in correspondence risks coming across as dismissive. She said that there was no utility in using her resources to engage with lengthy letters from the Defendants on the topic of distribution. I do not agree with that: it is important to see that there is a viable distribution plan. As matters stand, it is difficult to see how that could comprise anything other than a significant top-down element. It is not enough for the Class Representative to say simply that she "prefers" a top-down approach. She must show that such an approach can be made to work.

72. Certainly, Ofgem have shown a willingness to engage: there is a useful precedent in the form of help given to billpayers in 2022 and 2023. However, the time has come to put some flesh on the bones, especially given Ofgem's indication in their letter of 22 June 2024 that some amendment of existing regulatory arrangements might be needed.

73. 11 September 2026 is probably a little too early to require an amended distribution plan. This item has come back on the agenda after a long hiatus and it is disproportionate, I think, to require the Class Representative to jump immediately. However, it does have to come back. I suggest that the deadline for a revised distribution plan should be moved to a month later, October 2026. However, the price of the further time that is given is that it must be a reasonably worked up distribution plan, and it must give reassurance to the Tribunal that these proceedings are not just a means of remunerating lawyers and litigation funders.

D. EXPERT REPORTS

74. The question is whether expert reports should be exchanged sequentially or on a simultaneous basis.

75. I have reached the clear conclusion that expert reports should be exchanged on a sequential basis. I agree with Mr Armitage that this has the prospect of

reducing overall the volume of expert evidence, as it allows the Defendants' experts to respond to the Class Representative's position. It reduces the risk of ships passing in the night and reduces also the risk of lots of work being devoted to matters that turn out to be common ground. The iterative approach also offers the prospect of getting the most out of the joint expert process as, by the time that process takes place, all experts will have had a full opportunity to reflect on the arguments being made that are contrary to their positions.

76. I am, therefore, going to order sequential exchange of expert evidence, but I do have some observations which are probably best discussed with the parties when we come to settling the trial timetable. It is, I think, definitely important that we should have the joint statement of the experts as to areas in which they agree and disagree. I would also like the experts to try to agree a dataset. Experience from the *London Array* proceedings shows that it can be frustrating for the Tribunal to deal with analysis from the experts that draws on different datasets.

77. I also think that the experts' joint statement needs to have a page limit and it needs to identify quite clearly each issue that is in dispute, an indication of that issue and an outline of each expert's perspective on the issue. I would see that joint statement being available in time for the pre-trial review (**PTR**) to enable the Tribunal to consider at the PTR whether to engage in hot-tubbing of the experts, and if so, what the agenda for hot-tubbing should be.

78. Then, for trial, rather than the parties relying on the compendious expert statements that have already been served, I would like the parties to distil their positions down into what I am going to call "trial expert reports", which will also have a page limit. Those should follow a common structure ordered by reference to the key issues that have been identified in the joint statement and (hopefully) common datasets and should not simply cross-reference to earlier reports. Of course, the experts can cut and paste diagrams if they want, but the point of the trial expert report is that it should be a standalone articulation of each expert's position on the matters that really matter, being those that have been identified in the joint statement. The point of the trial expert reports will therefore be to summarise what has been said in a form that is usable for the

Tribunal and to refine what has previously been said in the light of the joint expert process.

The Hon. Mr Justice Richards
Chair

Charles Dhanowa, CBE, KC (Hon)
Registrar

Date: 14 July 2026