IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1077/5/7/07

Victoria House
Bloomsbury Place
London WC1A.2EB

Wednesday, 20 February 2008

Before:
MARION SIMMONS QC
(Chairman)

ADAM SCOTT TD
VINDELYN SMITH-HILLMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) EMERSON ELECTRIC CO.
(2) VALEO SA
(3) ROBERT BOSCH GmbH
(4) VISTEON CORPORATION
(5) ROCKWELL AUTOMATION, INC — Proposed Claimants

And

(1) SCHUNK GmBH
(2) SCHUNK KOHLENSTOFFTECHNIK GmBH
(3) SGL CARBON AG
(4) LE CARBONE LORRAINE SA — Proposed Defendants

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HEARING DAY ONE

APPEARANCES

Mr. Derek Spitz (instructed by Crowell & Moring) and Ms. Jane Wessel of Crowell & Moring appeared for the Proposed Claimants.

Mr. Matthew Weiniger of Herbert Smith appeared for the Proposed Defendants Schunk GmBH and Schunk Kohlenstofftechnik.

Mr. Mark Hoskins (instructed by Freshfields Bruckhaus Deringer) appeared for the Proposed Defendant SGL Carbon AG.

Mr. Daniel Beard (instructed by Ross & Co.) appeared for the Proposed Defendant Le Carbone Lorraine SA.

THE CHAIRMAN: Good morning. The Tribunal hopes it will be useful to make a few comments arising from the various observations which have been placed before us. Can I thank the parties for those observations which we have found very useful?

The first matter which arises is whether the claimant should be permitted to add Le Carbone to its claim. It does not seem to us appropriate in the present circumstances for the Tribunal to grant permission to join Le Carbone to the proceedings under Rule 35. It seems to us that the claimants are in fact requesting permission under Rule 31. We note that in any event Le Carbone do not object to being included as a proposed defendant on the claim form. So, subject to any further submissions, it seems to us that we can proceed without making any order on that issue. The order will come when we decide whether or not permission is granted to make the claim.

The second matter, which it seems to the Tribunal needs to be resolved is as to the order in which the issues are to be determined. What I am about to say is, of course, subject to any further oral submissions today, so if I forget to keep saying that can you take it as read? Provisionally it seems to the Tribunal that it is important to appreciate that para. 31(3) arises before any claim is, or can be made and that the claimant requires permission of the Tribunal for the claim to be made. There is at that stage no claim against the proposed defendants and accordingly the proposed defendants are not a party to any proceedings. However, Rule 31(3) gives the proposed defendant an opportunity to make any observations, and the status of those observations – or the status of the person making those observations – is as a non-party. So in making the observations the proposed defendants are not parties to the proceedings.

The principal issue which is relevant to the Tribunal's exercise of discretion under Rule 31(3) is whether the follow-on action should be commenced prior to the European Proceedings being determined. It seems to us at present that it follows from this that issues that are to be decided once a claim has been made are separate from issues which relate to whether or not to grant permission to grant the claim. The question of the Brussels' Regulation seems to us to arise once a claim has been made, and accordingly it presently appears to us that the question of permission to make the claim must be decided first. If the Tribunal grants permission to make the claim then the claim may be served on the defendant, and we would in relation to service refer to the Guide to Proceedings at para.7.16 to 7.21. Once the claim has been served and the defendants are parties to the proceedings – and that is subject to the question of permission of course – then the defendant has an opportunity to challenge jurisdiction under the Brussels' Regulation or, of course, for any

other jurisdictional reason. So at present it seems to the Tribunal that the appropriate order of hearing the issues is: first, permission under Rule 31(3), which is what is before us today. Then the next step would be service of the claim if permission is granted, and then the third step would be any challenge by any of the defendants to the claim in relation to jurisdictional challenges.

So subject to any further submissions today the Tribunal's present approach would be to decide whether it grants permission under Rule 31(3) and in doing so it will need to be persuaded by the claimants that there are particular reasons in the present case to do so. For example in granting against Morgan Crucible the Tribunal took into consideration that Morgan Crucible had not appealed had not appealed, and also the history of destruction of destruction of documents and the unsatisfactory position with regard to the undertaking to preserve documents. So, subject to any further observations from the defendants - or, the proposed defendants - as to the appropriateness of that approach the Tribunal would proceed today to decide whether it exercises its discretion to grant permission for the claim to be made against the second to fifth proposed defendants and will not be deciding today any jurisdictional issues which the defendants may wish to make if permission were granted, the claims were served, and the proposed defendants had become defendants.

I hope that is helpful. The next matter that I would just like to mention is that this morning the three of us have received some further documents from Le Carbone which we understand were faxed at about seven o'clock last night. Of course, that is very unsatisfactory.

MR. BEARD: Madam, if I might first of all apologise for that. The documents fall into two categories - the first are confidential to the Tribunal and the claimants. Those are matters which I would rather not discuss at this stage ----

THE CHAIRMAN: I was going to come on to that.

MR. BEARD: The other documents are simply products of continuing researches. They may, or may not, be of assistance to the Tribunal. They have been provided. It was thought helpful to have them. We tried to get them to people as soon as we could. I am sorry that our researches were not more thorough, and earlier. But, these are slightly obscure matters, and we were trying to be of assistance. I can only apologise that they were not available sooner.

THE CHAIRMAN: Now, you have just mentioned issues of confidentiality. That is the point I was going to mention next. There are issues of confidentiality in relation to certain materials which individual proposed defendants wish to place before us. Now, I am not sure how those proposed defendants think we are going to deal today with the issue of

confidentiality and how, as a matter of practice today, that is going to be sensibly approached. We are going to have people walking in and out of the room ----

MR. BEARD: If I might deal with it fairly briefly -- I think for the purposes of today, it is highly unlikely that any issue is going to need to be dealt with in relation to these matters. I understand from the claimant's point of view that they have got the documents. They were not intending to refer to them. This is a matter that can be parked and dealt with on another occasion. Unless the claimants consider that there is some need to be dealing with these matters it is not seen why those should trouble the Tribunal today.

MR. SPITZ: Good morning, Madam Chairman. We also received the documents between 7.00 and 7.20 last night. We have had a brief look at them, and I am obviously not going to make specific reference to them. However, it seems to me that one of the issues that will become relevant for the purposes of considering whether or not to grant permission will relate to one of the documents that Le Carbone has provided, and the same will probably apply in relation to Schunk's documentation which is public, and SGL's which is also subject to confidentiality. So, if it is necessary to look at those documents, then we do need to develop some sort of **modus operandi** to do that. It may be that the most appropriate way is to make the submissions in relation to the question of the scope of the appeals, and then perhaps to go into those documents in relation to each of the proposed defendants. Of necessity that will involve the other parties who are not involved being outside the room when one does that. The other way of doing it would be to highlight the particular paragraphs to which we would direct the Tribunal's attention, and then, if need be, the Tribunal can read those paragraphs and that may be a way of saving ----

THE CHAIRMAN: This does not just arise in relation to Le Carbone. It arises in relation to the others ----

MR. SPITZ: Indeed.

THE CHAIRMAN: You should have discussed this before and sorted it out as to how you were going to manage this. Has there been any arrangement between you?

MR. SPITZ: No, there has not. The way we have taken it thus far is to refer, in relation to SGL, to particular paragraphs and direct the Tribunal's attention to those. We could not do that in relation to Le Carbone ----

THE CHAIRMAN: No, because you did not know until last night.

MR. SPITZ: Yes. The issue does not arise in relation to Schunk.

MR. BEARD: Madam, if I might assist? I am not trying to be too enigmatic. The documents we are talking about relate to translations of the application to the CFI by Carbone Lorraine.

Those are documents which are clearly confidential to the particular appeal. We do not see any need for those to be passed to the other proposed defendants or defendants. The reason that the document was provided to the claimants was because they took issue with the general summary -- or, they were taking issue with what it was that was being appealed. We have provided a general summary in our submissions as to what was being appealed. The original document is, in fact, in French. So, the Tribunal and the claimants do not have the original document. This is an unofficial translation, and it is only extracts. What we have tried to do is to be helpful in showing that the material that has been submitted on the application tallies with what we have said in our submissions. That is the only reason we have provided it. Otherwise, we do not see any need for it to be there, because we have actually set out what is at issue. It is for that reason that we see it as rather difficult to understand why it is going to be necessary to deal with the underlying confidential documentation at all, because we have put, in relation to material that all the proposed defendants and defendant have seen an outline of our position in that appeal so far as it is germane as we see it to the permission application. Now, of course, if the claimants want to take issue we do not want to stop them, but they have not indicated to us obviously what those sorts of problems might be. We recognise they have not had long to do it. But, it must be borne in mind that we have gone to the trouble of translating this in order to assist the Tribunal. I think in those circumstances, to be criticised by the claimants for trying to assist, and trying to deal with criticisms that they are raising would be a little rich, madam.

MR. HOSKINS: (After a pause): Madam, may I say something about our position? It is not quite accurate to say that Mr. Spitz and I have not had any discussions about how we were going to deal certainly with the SGL document because we did have discussions prior to the last hearing. What we agreed was - on the confidential treatment for the documents - that we would deal with it in the way that the Tribunal often deals with these sorts of confidential documents which is, insofar as possible, to simply invite the Tribunal ----

THE CHAIRMAN: To look at the relevant paragraphs.

MR. HOSKINS: Exactly, but not to read it out loud. That is what I had agreed with Mr. Spitz. Unless that causes a problem -- That is the way I had certainly understood that he was happy to deal with it. I am happy for it to be dealt with in that way.

MR. BEARD: I should say that there is no difficulty for Le Carbone on the same basis.

THE CHAIRMAN: Let us just see how we get on.

MR. SPITZ: My learned friend, Mr. Hoskins, is quite correct. That is the way that we agreed that we would refer to them. It may be that I would want to make certain concluding

submissions once the Tribunal has seen those paragraphs. In relation to the document that Le Carbone has provided, it is a partial translation of selected extracts, rather than an entire translation. We will be in a position to highlight paragraphs to the Tribunal to look at, but there I do think that I would seek the opportunity to make submissions as to where those paragraphs in fact go. There is a summary in the submissions about how the grounds advanced relate to matters that the Commission will be considering. That will be, in my submission, a matter for some discussion. I do not want to put it any more specifically than that.

THE CHAIRMAN: Let us just see where we get to.

MR. HOSKINS: Madam, I am not sure whether there were three Tribunal observations, or whether there are more.

THE CHAIRMAN: No. There were three Tribunal observations.

MR. HOSKINS: In relation to the first one on permission, I would like to make submissions on the order. If you will permit me, I would like to have ten or fifteen minutes to take instructions from those behind me as to how they would like me to deal with it.

THE CHAIRMAN: It seems to me actually quite important because you are not here as parties. There is the question that if you start making submissions in a formalised way that you ought to be joined as parties for the purposes of a cost order against you, and I do not want to do that because you may be submitting to the jurisdiction, because effectively you are asking us to do that. I did not say just now but that is one of the reasons why it seems to me that one has to be very careful that you are only here making observations which are invited by us but do not go any further.

MR. HOSKINS: Madam, that is one of the points I will probably be making to you when I come to respond to the order in which they should be dealt with; precisely so.

THE CHAIRMAN: Yes and therefore we should not be muddling what may arise at a later stage when you are a party and you do not submit to the jurisdiction by making jurisdictional points.

MR. HOSKINS: I understand that. I would simply like to be able to make submissions in relation to whether or not it is correct that permission should be dealt with before jurisdiction. You will see from the skeleton arguments, and we canvassed it last time, that we would come today to argue about the order, and obviously we are prepared to do so and also about jurisdiction; we say that jurisdiction should come first, so I would like to make submissions because it does have a fairly significant practical impact; again we are giving

nothing away, because we canvassed it last time, on what will happen in relation to jurisdiction.

THE CHAIRMAN: To argue about jurisdiction, that is a matter which someone who has become a party has the opportunity to argue. You are not a party yet and if you start doing that then I think consideration will have to be made as to whether we ought to join you, and then that has other consequences.

MR. HOSKINS: Madam, the submission I would like to make is as to whether or not that is a correct analysis of the status, and that may have good or bad implications, depending whether we are looking at costs, jurisdiction or whatever. The submission I would like to make is about the nature of the observations that can be made by a party under Rule 31(3) and also whether it is appropriate to deal with permission and jurisdiction first. I am going to be very careful – I hope – I am sure those behind me will shout if I overstep the mark, not to make substantive submissions for obvious reasons because -----

THE CHAIRMAN: Well what concerns me is that even if you make submissions concerning jurisdiction at this stage it could have consequences which you may not want.

MR. HOSKINS: Madam, this is one of the reasons why I have asked for 10 or 15 minutes rather than me leaping up to my feet. It is sensible for us to think about what the Tribunal has said and for me to take instructions on it.

THE CHAIRMAN: All right, what do you want – 10 or 15 minutes?

MR. HOSKINS: Can we come back at 10 past?

THE CHAIRMAN: Yes.

MR. HOSKINS: That is very kind, thank you.

(Short break)

MR. HOSKINS: Thank you, madam. I am instructed to argue that the Tribunal's initial reaction of permission before jurisdiction is not the correct one. The reason we say that that is not the correct approach is as follows: First, we say that issues of jurisdiction are issues which we say the Tribunal should certainly hear submissions on and in our submission decide ----

THE CHAIRMAN: I am not sure that we should hear submissions. I think one has to be very careful. We have asked you whether you wish to make any observations. We have indulged in that we have allowed you to make oral observations, but you are not parties to these proceedings.

MR. HOSKINS: Madam, in relation to our status, submissions in relation to jurisdiction cannot constitute submission to jurisdiction, so there is no danger on my part in making submissions on jurisdiction if I am allowed to do so. It will not constitute submission. I say

that because it is clear from Article 24 of the Brussels' Regulation that that is the position. If I could ask you to perhaps look at that, it is the authorities' bundle 2 at tab 40, p.618. This is the rule on submissions which one finds in the Brussels' Regulations:

> "Apart from jurisdiction derived from other provisions of this Regulation, a Court of a Member State before which a defendant enters an appearance shall have jurisdiction."

So that is submission to jurisdiction.

> "This Rule shall not apply where an appearance was entered to contest the jurisdiction."

THE CHAIRMAN: Yes, but at that stage you are a party to the proceedings. My concern is that you are not a party to the proceedings at the moment.

MR. HOSKINS: Madam, we are certainly – I would submit – at least a party to an application.

THE CHAIRMAN: You are not a party to an application. It is an *ex parte* application under Rule 31(3). You have been asked if you want to make any observation, so it is rather like a without notice application on notice.

MR. HOSKINS: Madam, that has not been my reading of Rule 31(3). My reading of 31(3) is that the Tribunal is obliged to hear us before it takes a decision on permission. I appreciate the way you have put it now there is a certain ambiguity in the fact that the "may" comes at the start of 31(3).

THE CHAIRMAN: "After taking into account any observations of a proposed defendant." If you choose not to make any observations ----

MR. HOSKINS: That is right, but if we choose to make them we have a right to make them. So we are not here, with respect, madam, simply because the Tribunal has decided in the Tribunal's discretion to invite us along to see if we have anything to say. We are here because we have a right to make these observations.

THE CHAIRMAN: Yes, but you are not a party to the application.

MR. HOSKINS: Well madam we must be by definition. If we have a right to make observations in relation to the application to join us as proposed defendants.

THE CHAIRMAN: So are you liable for costs?

MR. HOSKINS: I was going to say we would be liable for costs any way, that is not a point I am going to take.

THE CHAIRMAN: You are not a party and non-parties are not liable for costs.

MR. HOSKINS: Madam, if one thinks of a normal jurisdiction situation in the High Court ----

THE CHAIRMAN: No, no, because then you are a party. In the High Court what happens is that a claim is made against you, you are a party to the proceedings, and you can then challenge jurisdiction, and that is also clear from the Article 24 that you have just cited, because you have entered an appearance.

MR. HOSKINS: Well no, because we are allowed to enter an appearance purely to contest jurisdiction.

THE CHAIRMAN: That is right, so therefore you have become a party to the proceedings, but at the moment you are not a party to the proceedings.

MR. HOSKINS: Well madam, my submission is that if Rule 31(3) gives us a right to appear ----

THE CHAIRMAN: No, it does not give you a right to appear, it gives you a right to make observations.

MR. HOSKINS: Well that is what we are doing; that is what we have done and it does not make any difference whether ----

THE CHAIRMAN: Well it gives you an entitlement to make observations.

MR. HOSKINS: Yes, and it does not matter whether they are written or oral.

THE CHAIRMAN: No, it gives you an entitlement to make observations.

MR. HOSKINS: It makes us a party to that application; we are not here out of the Tribunal's discretion, we are here as of right.

THE CHAIRMAN: I do not understand why it then means that you are a party to these proceedings.

MR. HOSKINS: Well, madam, we must be at least a party to that application; we must be a party before the Tribunal for that application.

THE CHAIRMAN: No, because for example, if you just think abut these cases where various organisations were invited in the public law, family law, medical ethics' cases, to make observations, and they come along and make observations; they are not a party to those proceedings and there can be no costs' order against them.

MR. HOSKINS: Madam, they do not have any right; they are invited along by the court that is the difference here. We have a right to appear before this Tribunal to make these submissions.

THE CHAIRMAN: If they are invited they also have the right.

MR. HOSKINS: They do not have the right, for example in those sorts of situations if ----

THE CHAIRMAN: If the court did not invite them they would not have a right.

MR. HOSKINS: Absolutely, whereas here, with respect, if we were to come along and you were to say "no" to us, then obviously we would have the ability to go to the Court of Appeal and

say: "What is the proper legal interpretation of 31(3)?" I appreciate our status is not obvious from the Rules, I think that is probably, with respect, because the particular situation we are perhaps in now was not foreseen by the rule maker, but I think it is certainly clear that we have a right to be here, with all that entails – it may be good things for us, it may be bad things for us if we are thinking of costs' etc., but we have a right to be here.

Madam, the way we put it, and the way we put it in our skeleton argument is that it would not be right for permission to come first as a matter of principle in these sorts of cases because of the risk of submission to jurisdiction. What we say here is that in dealing with the question of permission the Tribunal can (and should) consider the situation in relation to jurisdiction. As I have said, the fact that we make submissions on jurisdiction does not equal submission to jurisdiction, so that is perfectly possible. Let me give you an extreme example of why we say jurisdiction should – we say – be considered at the same time.

MR. SCOTT: Pausing for a moment back on Article 24, Article 24 is envisaging a defendant entering an appearance. This is the first sentence. It then says,

"The rule shall not apply where appearance was entered to contest the jurisdiction".

Now, subject to what you may say about the interpretation of that, that appears to be a qualification of the first sentence. The first sentence envisages that the person being qualified is a defendant - not somebody who is not a defendant.

MR. HOSKINS: I think you anticipated the point I am going to make.

MR. SCOTT: As I said, 'subject to what you argue'. But, you can imagine that we have spent some time looking through the written submissions and trying to reach a sensible proposal to explain where our thinking is so that you can react to it - which is what we are doing now. But, in reading this article you may be able to help us in understanding what it means, and whether it says something in other languages which might illuminate that.

MR. HOSKINS: 'Entering an appearance -' I am trying to remember the case off the top of my head. But, generally, because there is regulation one starts an approach that most things have an autonomous Community meaning. Now, that's not always the case. That's why I am caveating it because I cannot quite remember off the top of my head whether this is one of the situations in the Brussels regulation where 'enters an appearance' has a Community meaning, or a national meaning.

However, what one sees in, for example, the *Kurz -v- Stella* case that we have referred to -- I appreciate that that is a case where proceedings were issued against a defendant, and then the court considered what steps a defendant could take in proceedings without

submitting to jurisdiction. So, for example, it was acceptable for a defendant to ask for disclosure in relation to documents that might be relevant to jurisdiction.

THE CHAIRMAN: But you are not a defendant. That is my problem. You are assuming something. The first question in relation to jurisdiction is that you need to be a defendant. You are not a defendant. The question we are going to consider today is whether a claim should be made against you, having regard to the fact that the normal basis is that a claim should not be brought before European proceedings have been exhausted.

Now, the first layer is that you are saying that we need to take something into consideration other than the question about whether a claim should be brought against you otherwise than when proceedings are exhausted. At the moment it seems to me that you are jumping in somewhere else and you are not actually addressing the problem that I see.

MR. HOSKINS: I understand. Can I put it this way: the test is not: Are we a defendant? The test is: Have we entered an appearance - whether that is an appearance on the substance or an appearance to contest jurisdiction? Our submission is that we have got a right to make submissions under Rule 31(3), but it is quite clear that the submissions that we will want to make in relation to Rule 31(3) will have to go to matters of substance. That is quite clear because one of the issues, as Mr. Spitz has said this morning, is the issue of the likelihood of us being liable or not because of the CFI appeals. Those are submissions that go beyond merely contesting jurisdiction. They go beyond asking for disclosure that might be relevant to jurisdiction.

THE CHAIRMAN: They only go to the question of what is in issue in the CFI appeals. They do not go to a question of us deciding any matter of substance.

MR. HOSKINS: Madam, when we come to look at the CFI appeals, you will have to look at what is in the Commission decision to a certain extent. You will have to look at what the substantive appeal arguments are, and probably, in deciding on permission, you will have to, at least in your mind, consider those sorts of substantive issues.

THE CHAIRMAN: It would be quite wrong for us to second-guess ----

MR. HOSKINS: Madam, you took the words right out of my mouth! Obviously I am going to have to be careful of that, but you are going to have to consider the nature of the appeals because the way that the claimants put it is that when you look at the nature of the appeals, they say they only relate to fines. That is the mantra one sees. We do not accept that, but that is what they say. So, you are going to have to look at the appeals and decide whether in fact they also go to substance -- whether they go to liability.

My submission is that if a party were to come before the Tribunal and to make submissions going to those sorts of substantive matters without the protection of jurisdiction being considered at the same time, the risk is that we sell the past. We fall foul of Article 24 because we have turned up on the permission hearing, as is our right, not just to contest jurisdiction, but to make submissions that go to substance -- that go beyond simply contesting jurisdiction -- That is probably the better way to put it. We know what we can do, and the rest we cannot do.

THE CHAIRMAN: Maybe the better course would be for you not to have made any observations, but to have kept quiet, to have had permission dealt with on an **ex parte** application. If permission is given you then become a party and then you argue the points.

MR. HOSKINS: Madam, as you know, on the facts of this case if we do that, jurisdiction is a done deal on Article 6(1) because you have seen from our submissions on jurisdiction that the Article 6(1) point is only alive if permission is dealt with after jurisdiction, or at the same time as jurisdiction. If permission come first, we do not have that argument. That is why we are making these submissions. I make no bones about it. I was perfectly clear about that last time. No slight of hand on my part.

MR. SCOTT: Just sticking with the regulation, the regulation is quite capable of distinguishing in its language between the occasions when it uses the word 'defendant' and the occasions when it uses the word 'party' or 'legal person'. In Article 24 the only sort of legal person mentioned is a defendant. Are you saying that we need to read 'defendant' in a sense that is broader than a party against whom a claim has been made?

MR. HOSKINS: Sir, I do say that. I have to say that.

MR. SCOTT: Yes, you do have to say that. I understand that. But, can you persuade us of that?

MR. HOSKINS: Absolutely, yes. The submission I would make is that -- I would just make the point that perhaps understandably those who drafted Rule 31(3) could not envisage all the situations on which it would apply, but, equally - and this is probably a better money bet - those who drafted Article 24 of the Brussels regulation almost certainly did not have in mind the sort of national procedure we have here with the sort of substantive permission hearing -- and I use the word 'substantive' on purpose -- as to whether a claim should be brought. So, my submission would certainly be - and this accords with Community law and the purposive approach - not a strict literal approach - that in order to make Article 24 work, then 'defendant' there should be seen as a party against whom a claim, or a proposed claim, has been brought. So, another way of putting it is that it should be 'defendant/proposed defendant' for the purposes of our case. But, certainly I would say that. I would say that

that would be the purpose of application of Article 24 to a case such as this. Otherwise, we find ourselves between a rock and a hard place. It is difficult to see that that was the intention of either the domestic rule maker or the European legislator, i.e. that by permission being dealt with first, somehow we would find ourselves not being able to take an argument on jurisdiction, simply because one comes before the other.

THE CHAIRMAN: If this case had been brought in the High Court and therefore there was not this provision, you would not be able to make these submissions. It is only because of this provision ----

MR. HOSKINS: That is right. It is the particularity of the Tribunal rules that gives us the possibility of making the submission we do on Article 6(1).

THE CHAIRMAN: The particularity of the Tribunal rules goes to the question of whether you can bring an action in this Tribunal before you have exhausted the appeals in Europe. Therefore, the question of whether this Tribunal should grant permission goes to the question of whether proceedings ought to be permitted here before exhaustion of European proceedings. It does not go to the question of jurisdiction.

MR. HOSKINS: With respect, madam, the question of jurisdiction arises in every court in every form of action by definition.

THE CHAIRMAN: No. But, that is the next stage. The claim is brought and then we are at the same stage as you would be in the High Court, and you can argue jurisdiction.

MR. HOSKINS: Madam, I do not think it is safe, as you have seen from the various skeletons -- Various parties occasionally glimpse towards the White Book and quickly look away again. The ... regulation is an odd creature because whilst domestically we are all used to a **non conveniens** approach, the Brussels regulation, because it is intended to apply across all the Member States, is very much an algebraic formula if like, if you have A + B + C, then D follows, and it can lead to odd situations. In the bulk of cases it will work perfectly well and come up with a sensible result. In some cases, because it needs to be applicable in all the Member States it will come up with odd results.

The fact that in this particular case when one takes the Brussels' Regulation and one takes the Tribunal Rules, it means that that throws up an argument on Article 6(1) which we would not have in the High Court; it does not reflect on whether that is a good or a bad argument, it is simply that is the way you have to do it. You have to take the Tribunal Rules and you have to take the Brussels' Regulation.

Our submission is that this presumption that one has to deal with permission first and then jurisdiction we say is not correct because of the need – we say this case is one example, but

it may well come up in different ways in other cases, whether to grant permission may require the court to even dig deeper into questions of substance, but that is the problem, that is the log jam here. If we have a right to turn up, or if it is likely or even possible that we will want or have to make questions that go to substance, and if that means that we are doing more than Article 24 allows, then that trap should not be set for us and we say that the way to avoid that trap at the very least is to deal with permission and jurisdiction at the same time as the list of issues sets up this hearing to do, and then having heard all the arguments in the round depending on the Tribunal decides to deal with it, you might deal with it in one particular way in your Judgment or not. But what we would encourage you to do is to at least hear the arguments on jurisdiction and permission and then decide how to deal with it at the end of the day in your judgment, because at the very least what that will avoid is us having a trap that we might stagger into before ----

THE CHAIRMAN: Say we give permission and the claim is served, can you reargue all this?

MR. HOSKINS: No.

THE CHAIRMAN: You cannot reargue it? What stops you rearguing it?

MR. HOSKINS: Because we have had jurisdiction arguments and we will be bound by the Tribunal's findings.

THE CHAIRMAN: And you say you are liable for costs on this action? So if we decide against you, you will pay the claimant's costs?

MR. HOSKINS: Can I just take instructions on that one before I answer? (After a pause) We are not going to contest that the Tribunal has power; we might have arguments about whether they should or should not be granted, but you have power to make a costs order.

THE CHAIRMAN: Where does our power come from?

MR. HOSKINS: Madam, one of the situations I was thinking of and again I cannot quite remember how it worked, was in the "Football shirts" case where Sportsworld actually were a non-party but they assisted the OFT and they sat in throughout the hearing.

THE CHAIRMAN: But there was not any question of costs was there?

MR. HOSKINS: There was, at the end of the day they made an application for costs. This is the opposite situation because that was a non-party applying for costs against the parties, and I cannot remember the mechanism by which it was done, but costs were awarded in that circumstance.

THE CHAIRMAN: Yes, they were joined as parties ----

MR. HOSKINS: At the end.

THE CHAIRMAN: The first thing we would have to do on that basis would be to join you as a party?

MR. HOSKINS: No, madam, you could join us as a party at the time of the question of costs; you do not have to do it now. You can make your judgment and then if Mr. Spitz wins, and if he makes an application for costs, you can join us as a party at that stage, that is what happened ----

THE CHAIRMAN: But you would not want that, would you?

MR. HOSKINS: Madam, on instructions I have indicated we are not going to take the point that you do not have power to grant costs against us. We might have submissions about whether, as a matter of discretion you should award them, or all of them, but my instructions here are that we will not take the point.

THE CHAIRMAN: No, but you would not want us to join you as a party?

MR. HOSKINS: Madam, if we have lost on jurisdiction but win on permission, and you join us as a party purely for the purposes of costs, and then you refuse – well ----

MR. SCOTT: You see the problem?

MR. HOSKINS: Absolutely. You have seen from our various skeleton arguments we have all been wrestling with the problem. My concern is I do not want my client to be prejudiced by finding a shortcut through this that stops us from making arguments and stops the Tribunal from considering arguments, you might not be with us at the end of the day, but if cost is the only issue we are not going to take the point as a matter of principle and you can join us as parties at that appropriate stage.

THE CHAIRMAN: Yes, but I do not think it is a question of whether you concede for the purposes of this hearing, it is whether we actually would have power if you did not concede to order costs against you.

MR. HOSKINS: The oddity is of course is that a substantial part of the costs have already been incurred, we have put in all these written observations.

THE CHAIRMAN: Well you have chosen to do so.

MR. HOSKINS: And Mr. Spitz has responded to them, yes. That was always going to be the problem with the hearing today. Again, I will not repeat the mantra, that is one of the issues I was trying to flesh out last time, it is a very odd situation. But what should not happen is we should not be prevented from making arguments because of the oddity of the situation.

THE CHAIRMAN: I find all sorts of difficulties because Rule 31 on an application by the claimant and so they have the burden of persuading us.

MR. HOSKINS: Yes.

THE CHAIRMAN: On a jurisdiction issue it is effectively the defendant's application and they have the burden.

MR. HOSKINS: That is not correct, madam.

THE CHAIRMAN: That is not correct?

MR. HOSKINS: The test is "good arguable test", it is for the person who claims jurisdiction to make good the case.

THE CHAIRMAN: So they start, do they?

MR. HOSKINS: They start, yes, absolutely. I am just looking at the costs' rule, madam, Rule 55(2):

> "The Tribunal may at its discretion … at any stage of the proceedings make any order it thinks fit in relation to the payment of costs by one party to another in respect of whole or part of the proceedings ...."

So there is not the ability, if you like, to split the status of a party there, but there is the ability to join someone as a party purely to deal with the costs in relation to a part of the proceedings.

THE CHAIRMAN: Yes, but there have to be proceedings, there are no proceedings at the moment. All there is argument under 31(3) but we give permission.

MR. HOSKINS: Another oddity is, if it is not possible ever to grant costs under Rule 31(3), then if I am right that the proposed defendants have a right to appear it means every time there is a Rule 31(3) hearing there would be no power to award costs against proposed defendants in relation to that hearing, which I find somewhat surprising for claimants in Mr. Spitz's position.

MR. SCOTT: We are quite used to situations in which proposed interveners come, make statements, but are not then necessarily given permission to become interveners.

THE CHAIRMAN: And that is all without costs.

MR. HOSKINS: Madam, there is a difference between whether, generally speaking, one would think it might be appropriate to grant costs, and where the Tribunal never has the power to grant costs. If, for example, a proposed defendant were to take advantage of Rule 31(3) and were to behave in an inappropriate manner in terms of the procedure, then it would be surprising if the Tribunal had no costs' sanction whatsoever.

THE CHAIRMAN: Well you could join them as a party.

MR. HOSKINS: That is my point, madam.

THE CHAIRMAN: All right, well we will join you as a party to the proceedings now, and you can make your submissions, but you would not want that.

MR. HOSKINS: You have my submission on that which is to adopt the approach that was adopted in the "Football Shirts" case, which is to hear the matters and if, at the end of the day – depending on what you decide on jurisdiction or permission ----

THE CHAIRMAN: I think that is a very unfair way – I think that probably happened because nobody really thought of it. I think a person who comes here ought to know whether or not he may be subject to an order for costs before he starts. I do not think it is right that you let everybody go on and then at the end you say: "Wait a minute, now that what you have done has caused you to be subject to …"

MR. HOSKINS: Madam, if we look at the position of my clients, I have said we are prepared not to take the point of principle, so we know. The other thing is, of course, there may not be an application for costs because if we win on jurisdiction and our permission ----

THE CHAIRMAN: Well then you may want your costs.

MR. HOSKINS: Exactly, and then we will be exactly in the "Football Shirts" case, we are a non-party asking for our costs, and at that stage I might ask to be made a party purely for the purpose of asking for my costs against the claimants. I am sorry, can I just take instructions? (After a pause) Mr. Lawrence has just pointed out to me that that is what happens in the High Court where a costs' order is made in relation to a non-party, they are then joined as a party for the purpose of that costs' order. So that is simply what I am suggesting should happen here – no more and no less. But it does seem unfair, in a sense, to say "You are going to be a party from the outset" if that is going to impact on jurisdiction issues, for example, and it will because of the nature of our argument. Again, I say it is unfair to shut us out of an argument when it is not necessary to do so.

THE CHAIRMAN: Well normally in the High Court you do not get anybody appearing unless it is sorted out before, because in what circumstances will a person have a right to make any submissions unless they are a party or they have been invited by the court to do so, and normally if they are invited by the court to do so then the question of costs is actually sorted out at an earlier stage. The reason for a non-party is normally where there is somebody who actually has not made representations but has somehow interfered in the representations that have been made. Can you think of an example? I may be wrong, and your solicitor, Mr. Lawrence, is shaking his head behind, and so I must be wrong. Can you think of an example where somebody in your situation in the High Court ----

MR. HOSKINS: The closest example I can think of would be a heavily expedited Judicial Review where the claimant and the defendant are, by definition, established. Let us say it happened in relation to some of the BSE cases, foot and mouth cases, you would literally fix

an application for Judicial Review and be heard on the same day. In relation to those – I was involved and I cannot remember whether it happened, although it certainly could happen – on the very day that the application is lodged it comes before the court and someone else, a third party comes along and says: "I am an interested party, I want to be heard", and there an argument before the court for, say, two hours about whether that person should be an interested party or not. They lose. One of the parties asks for the costs against the interested party because it has taken up two hours of the court's time, two hours of their solicitors' time sitting behind, and the courts in that circumstance may decide to make a costs' order against a non-party ----

THE CHAIRMAN: By joining them as a party.

MR. HOSKINS: -- the mechanism, ironically, would be joining them as a party for that limited purpose only. So it can happen, and it does happen. I am sorry, can I just take instructions? (After a pause) I do have copies of the White Book. CPR Rule 48.2. It is at p.2195 If you can read 48.2(1) and obviously it is the final words of (A) that I draw your attention to.

THE CHAIRMAN: (After a pause) It is interesting, when you go down to the comment:

> "Even if the applicant can provide a good reason for not joining the non-party against whom he had a valid cause of action, he should warn the non-party at the earliest opportunity of the possibility they might seek to apply for costs against him."

MR. HOSKINS: -- I would think it was slightly odd if the Tribunal had no power under Rule 31(3) because I would not think it would be a common occurrence. But, you may find your own procedures being abused on Rule 31(3).

THE CHAIRMAN: That is a slightly different point. The point that is in my mind is that in order to make a costs order, one has to join you as a party. Whether we join you as a party for the purposes only of costs, or whether we are joining you as a party in any event -- You are in a slightly different position to what is contemplated under Part 48 because the application is for you to be made a party. So, we start off with an application for you to be made a party, and then you are saying that at the end we can join you only for the purposes of ----

MR. HOSKINS: -- making a costs order. That suits me. Let us assume we have lost on jurisdiction. We have won on permission. If, at the end of the day, that is the finding the Tribunal makes, then simply -- Well, actually, query, there might be a costs application then in relation to the jurisdiction argument - not in relation to permission. The Tribunal would have the power - yes - to say, "You're a party purely for the purposes of that costs issue relating to jurisdiction". There would be no problem going back to Article 24 of the

Brussels regulation because by making submissions on jurisdiction, if we have to pay costs in relation to the jurisdiction arguments, that is not going to be a submission for the purposes of Article 24. So, that is not a problem.

The drafter of the CPR has envisaged not this particular problem, but I have seen that way of dealing with things.

THE CHAIRMAN: I do not think the CPR envisaged this problem.

MR. HOSKINS: Not this particular one, no. But, the situation of joining someone as a party purely for the purposes of costs. That is the point I wanted to make.

THE CHAIRMAN: What it is envisaging is somebody who would not otherwise be a party.

MR. HOSKINS: If we have won on permission, then we are in that situation.

THE CHAIRMAN: But it is envisaging that somebody turns up to the court, or it does something in an action when they are not, and were never intended to be a party. Here we are in a situation where the whole application is to make you a party.

MR. HOSKINS: Absolutely, madam. With respect, that is a distinction without any substance for what we are actually looking at. It is absolutely right that what we are looking at the White Book for is to see that there is this very focused power. In our submission, the Tribunal has it as well. We are fully on notice that there may be a costs application against us. We are under no illusions coming here. I have made clear on instructions what our position is now. So, you do not need to protect us in that regard.

MR. SCOTT: Essentially what you are saying is that we can do this under Rule 35 without making you a defendant to the claim.

THE CHAIRMAN: Rule 35 - the addition of a party? No.

MR. HOSKINS: Sorry. If we get to the costs stage, yes. I need to check if that was the way it was done in *Football Shirts*. In the *Football Shirts* case that is what happened - a non-party was joined. I am almost certain it would have been Rule 35, because that is the power to join parties. I expect that is correct. The joinder would be for a limited ----

MR. SCOTT: I understand.

THE CHAIRMAN: I know what you say on Part 48. You join before you decide. It is in order to consider. The reason for that is that you would not hear the person unless they were a party.

MR. HOSKINS: I am sorry, Madam. I missed the start of your question. It is my fault.

THE CHAIRMAN: Part 48(2) - "Where the court is considering whether to exercise its power ---" So, you join somebody before you decide whether or not you are going to. The reason for that is that you cannot hear them unless they are a party.

MR. HOSKINS: Madam, that is no problem. If Mr. Spitz makes a costs application against me, and it is in writing, or it is done orally -- That is fine. You join us as a party for the purposes of taking part in the costs hearing. But, with respect, it is not a legal problem. It is a practical one that is easily managed.

THE CHAIRMAN: I was using this by analogy. My problem is as to whether we can hear you on observations in relation to permission because we have been asked by Rule 31 to take those into account. But, to hear you on observations in relation to jurisdiction may require that you become a party for that purpose as well. It is not the claimant saying -- It is you bringing this point. You are saying "We want you to consider jurisdiction now". I say, "Well, if you want us to consider jurisdiction now, you have to have a right to be heard on jurisdiction, and in order to have a right to be heard on jurisdiction you must be a party.

MR. HOSKINS: Madam, I would say that we have a right to be heard in relation to jurisdiction under Rule 31(3) because the way I put it is that in considering the question of permission - and, indeed, the question of which should come first, which we must have the right to make these submissions ----

THE CHAIRMAN: What must come first is the question of permission.

MR. HOSKINS: I am sorry, Madam?

THE CHAIRMAN: What must come first is the question of permission. What you, I think, are saying is that in considering the question of permission we need to also consider whether there is jurisdiction. It is all part of the permission application.

MR. HOSKINS: My submission is that it should be dealt with as part of the permission application, but my submission is that permission should not be dealt with first. I have to keep making that clear - because otherwise my Article 6(1) argument goes.

THE CHAIRMAN: I appreciate that. But, once you start saying that we have to hear you in relation to the jurisdiction application, and the jurisdiction application you must be a party. We could not deal with this -- Are you going to accept service of the claim?

MR. HOSKINS: Madam, I cannot whilst my Article 6(1) argument is outstanding. I cannot do that.

THE CHAIRMAN: Why not?

MR. HOSKINS: Because the Article 6(1) argument, as put in the skeleton, will disappear.

MR. SCOTT: The difficulty you are in takes us back to the recitals, and the need for clarity of where claims are heard. What you are saying is that once it is clear that we are seized of it, your room for manoeuvre has been circumscribed.

MR. HOSKINS: That is right. But, my submission is that when ----

THE CHAIRMAN: I am not sure I quite understand that.

MR. HOSKINS: I need to develop the Article 6 point to show you the way that works, and I am not sure you are encouraging me to do that. My submission is that under Rule 31(3) and the way I put it, we have a right to come and make submissions in relation to an application to join us as a proposed defendant. One of the submissions I would like to make is that you should not join us as a proposed defendant because you do not have jurisdiction ... the claim against us. That is the way I put it. Now, if one looks at it like that, with respect, I do not think one has to look for another hook. The hook is there. We declare it in our status - whatever that may be technically - as Rule 31(3) defendants. In coming in that guise we should be allowed to make all relevant submissions. We say all relevant submissions include arguments relating to jurisdiction.

I am sorry if I am repeating, but what I am coming back to is that I am just asking not to be shut out from anything -- from an ability to make an argument on behalf of my clients. That is what I am concerned about.

MR. SCOTT: You will seek to persuade us of why the Article 24 exception should apply to you by persuading us that the word 'defendant' in the context of Article 24, taking into account the whole of the regulation, should extend to you as a proposed defendant arguing Rule 31(3).

THE CHAIRMAN: Article 24 cannot do that because it is the defendant who enters an appearance. There cannot be a proposed defendant.

MR. SCOTT: That is my concern, as you understand. I think what you are saying is that you feel that the words 'a defendant who enters an appearance' there has a different meaning to the meaning that we would normally expect in English law.

MR. HOSKINS: I am saying that it must encompass where proposed -- Let me put it this way: if it is correct - and I am assuming a lot here -- Let us assume you are with me on the question of whether jurisdiction should be heard now as part of this Rule 31(3) hearing -- Assume that you are with me on that. If that is correct, then my appearance as a proposed defendant cannot be a submission to jurisdiction because that would neuter the effect of Article 24, which is clearly intended to allow parties to appear before a national court and argue about jurisdiction. So, if I am correct that I am entitled to do that under Rule 31(3), then one must read Article 24 to give me that protection, because it is unthinkable that it would be applied in any other way.

MR. SCOTT: Let us look at it the other way for a moment. What you are saying is that if it means what an English lawyer would expect it to mean - that a claim has been made,

served, and an appearance has been entered - then if you take the preliminary approach that we have taken, we would then proceed to consider your arguments on jurisdiction.

MR. HOSKINS: Yes.

MR. SCOTT: What you are saying is that because of the way the regulation is framed, the number of arguments that you can then put before us has been reduced by one in this case.

MR. HOSKINS: That is right.

MR. SCOTT: What then you have to convince us is the case is that given the desire of those framing the regulation put in the recitals that there be certainty about the application of the Brussels regulations -- that those framing it would want it interpreted in a way that did not remove your Article 6 argument.

MR. HOSKINS: Sir, I put it like this: the shining light in all the previous interpretation is the purposive interpretation. I have put forward why I say the purposive interpretation here must include proposed defendants because if I am right I can make jurisdiction submissions in a Rule 31(3) context. In my submission it would be extraordinary if the Brussels regulation would be applied to mean that if I turned up and did that, which is my right on this assumption, I would be submitting to jurisdiction.

In relation to the certainty of the Brussels regulation, perhaps the best example to show how the purposive interpretation is more important than literal certainty is the Article 5(3) point. I am not going to start submissions on jurisdiction, but purely for this purpose, can I take you to *Bier* at Authorities Bundle 1, Tab 15. The judgment begins at p.255 of the bundle. If I could ask you to look at para. 7, that is where it sets out the text of Article 5(3):

> "Article 5 of the Convention provides:
>
> > 'A person domiciled in a contracting state may, in another contracting state, be sued: ... (3) in maters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred".

To an English lawyer what that means is what it says - 'where the event occurs' - not so for the purposes of the Convention ... regulation. If I can pick it up at para. 12 -- You will see that the court goes through a series of reasoning. The purposive reasoning as to how this should be interpreted. Then, one sees the conclusion reached at para. 19 on the basis of the purposive approach, how do we make the Convention work in the way it is intended to:

> "… 'place where the harmful event occurred' … must be established in such a way to acknowledge that the plaintiff has an option to commence proceedings either at the place where the damage occurred or the place of the event giving rise to it."

And that is a classic example of purposive interpretation in Community law, let alone in the context of the Convention and the Regulation, which shows that the most important thing is making the provision work, not simply applying the literal meaning of the words. With all due respect to the ECJ I think the interpretation I am asking you to take in relation to 24 is perhaps less of a quantum leap than the court itself took in relation to Article 5(3).

THE CHAIRMAN: Are you going to address Article 26(1)?

MR. HOSKINS: I am sorry – of the Brussels' Regulations?

THE CHAIRMAN: Yes.

MR. HOSKINS: I am not quite sure I see how that impinges on this case. That is the provision that leads to ----

THE CHAIRMAN: Yes, Article 25 as well, when the court has to look at it of its own motion, and it is where a court of a Member State is seized of the claim, and where a defendant domiciled in one Member State is sued in the court of another Member State. At the moment we are not seized of a claim and you are not sued.

MR. HOSKINS: That is one of the submissions I would make later on in relation to Article 6(1). But one of the questions you can certainly look at at this stage in Rule 31(3) is whether you would have jurisdiction if you were to grant permission, because there is no point in granting permission if you would not have jurisdiction.

THE CHAIRMAN: It is putting the cart before the horse.

MR. HOSKINS: Not for the reasons I have submitted, we say absolutely not.

THE CHAIRMAN: No, no, you say otherwise.

MR. HOSKINS: Absolutely. As I say, to put it at its simplest there is no point in granting permission if you do not have jurisdiction in relation to the claim and therefore you should consider jurisdiction as part of at the very least the application for permission.

MR. SCOTT: And should we consider it substantively, which is I think what you were suggesting earlier on so there is then issue estoppel – you cannot argue it again; or should we consider it on the basis that there is at least a good arguable case that there is jurisdiction. So in other words it is to the claimants to show that there is a good arguable case that there is jurisdiction which may be challenged by your good selves. Which are you suggesting is the proper course?

MR. HOSKINS: Sir, I am suggesting that you determine whether the Tribunal would have jurisdiction in relation to the proposed claims, and one of the tests that the claimants must overcome for that to be the case is to put much the better argument, which is the way it was put in *Canada Trust v Stolzenberg*. So if the claimant shows that in relation to their

proposed claims they have much the better of the argument that the court does have jurisdiction, they could have jurisdiction. So the fact that the test is phrased in that way does not mean that there is some doubt as to whether there is jurisdiction or not ----

THE CHAIRMAN: Yes, but that is because you can never quite tell at the end of the day, so unless it is absolutely clear you are always in this grey area, and as long as the court decides that the claimant has the better argument then the court can seize itself of jurisdiction.

MR. HOSKINS: Only in the most exceptional case, for example, oral evidence in jurisdiction cases, it is possible but it is a very rare exception, so that is why because evidence is not ----

THE CHAIRMAN: You are not actually going to determine whether you have jurisdiction possibly until the end of the case.

MR. HOSKINS: Well you have it as soon as you decide there is a ----

THE CHAIRMAN: I know, but ----

MR. HOSKINS: Yes, but you might get ----

THE CHAIRMAN: And they say "Ooops! Actually I don't have jurisdiction in this case unless …" Yes.

MR. SCOTT: The reason for that is the practicalities, particularly in a complex case like this, where the event is itself a rather complex and controversial topic.

MR. HOSKINS: The test for the Tribunal would not be decided definitively where certain events took place, but to look at the strengths of the relevant parties' arguments, we do not put it any higher than that, and that is *Canada Trust v Stolzenberg*. You have probably heard enough from me on this. Unless you have any other questions, those are my submissions on that particular issue.

THE CHAIRMAN: Thank you. How are we going to deal with this?

MR. WEINIGER: Madam Chairman, we also have submissions on this point to make, if I may be permitted to make them before the claimants. In large part, madam Chairman, we are happy to adopt the result for which Mr. Hoskins is arguing, however we are not in a position to accept all of the logic pursuant to which he gets there. The reason for this is that we are in a slightly different position as far as I understand it to the other defendants in that not all of our jurisdiction arguments are before the Tribunal today. We have another jurisdiction point, which is the Article 23 exclusive jurisdiction point which we have reserved for a further occasion, so when I heard Mr. Hoskins conceding that this is his only stab at jurisdiction ----

THE CHAIRMAN: You are going to try again.

MR. WEINIGER: We will try again.

THE CHAIRMAN: But are you going to try again on the whole lot, or just on Article 23.

MR. WEINIGER: Well we analysed this situation slightly differently from the way that my learned friend has put it before you today. I do not know whether it would be confusing or helpful to say ----

THE CHAIRMAN: It would be helpful.

MR. WEINIGER: The Tribunal is in a situation where it can consider issues of permission before jurisdiction, and in the usual circumstances that would be appropriate for all of the reasons that are apparent in the skeletons, and have been discussed this morning. In this particular circumstance, in the circumstances of this particular case, with these defendants, the Tribunal should not take that step. The reason for that is that if the Tribunal deals with permission before jurisdiction they have completely swept away one of the defendants' jurisdictional objections. They have, in their case management decision over what point to take first, undermined the defendants' jurisdictional position. This is part of the reasoning of the European Court of Justice in the *Reisch Montage* case. It might be worth going to the paragraph: authorities bundle 2, tab 29, p.431. We rely here on para.32 of the judgment where the court is saying:

> "However, the special rule on jurisdiction … cannot be interpreted in such a way as to allow a plaintiff to make a claim against a number of defendants for the sole purpose of removing them from the jurisdiction of the courts of the Member State in which that defendant is domiciled."

At the moment this Tribunal does now know whether the sole purpose of relying on Morgan as the anchor defendant is to sweep away our jurisdictional position. It will not know that until the Morgan preliminary issue point has been determined.

THE CHAIRMAN: Well we do not have a Morgan preliminary issue point at the moment.

MR. WEINIGER: Well the Tribunal, as a matter of case management, should be of its own accord be taking that for the reasons that we developed in our skeletons and if necessary will be developing now, because to allow the Tribunal to proceed to consider permission and then only to consider jurisdiction will be extremely unfair to these defendants, because if we are right and the claimants have jumped the gun, they have brought a follow-on action when there is actually no decision to follow on from, then they will get a reward – an enormous reward - because by having brought this case far too early in the proceedings as envisaged in the CAT Rules and by Parliament in the relevant statutory legislation, they have created a situation whereby they have been able to have the permission decision determined and that way the Tribunal gets jurisdiction, when otherwise it would not do so.

MR. SCOTT: A statutory scheme clearly envisages a situation where we can give permission, it is a very neutral expression, it is a "may", it is not loaded either way, but it seems to me that you are putting a spin on the way the statute puts it that is simply not there in the statutory language.

MR. WEINIGER: No, with respect, sir, there is no attempt to put any spin on the language. I started by saying that I agree with you, this Tribunal can decide permission without looking at issues of jurisdiction, but here when it is deciding this question of permission it needs to bear in mind the nuclear effect that its decision on permission will have on the jurisdictional position of these defendants, and therefore it should bear in mind the jurisdictional arguments that have been raised in deciding on permission.

If you follow this logic, then the difficulties that have been discussed do not arise, because we are not parties – here I am speaking only for the Schunk defendants. If you follow this logic we are not parties and we are not asking the Tribunal to make a decision on jurisdiction, we are asking you to consider this difficulty that has been very clearly identified as part of your decision on permission.

MR. SCOTT: But if what you are arguing is that there is a significant prejudice to the proposed defendants then there is presumably a concomitant prejudice to the claimants where we to decide it in favour of the proposed defendants. You are suggesting to us that there is a significant prejudice here that the proposed defendants would suffer were the claim adjudicated in the United Kingdom rather than in another Member State, and logically there must be a concomitant disadvantage to the claimants of it being adjudicated in another Member State rather than in the United Kingdom.

MR. WEINIGER: That is why you have to consider all of these questions at the same time, and only if you are against us on the points we made on jurisdiction and you are against us on permission, which means you feel that the claimants have not jumped the gun, then you will make us parties in the usual way. But the prejudice only arises if you are against us on permission and with us on jurisdiction and then we have been joined as parties in a way that has taken away our jurisdiction argument.

MR. SCOTT: We try to seek to avoid that.

THE CHAIRMAN: If one looks at para.32 that you referred us to, does it help if we look at *Kalfelis* or *Union European* to see what they had in mind.

MR. WEINIGER: Well *Union European* I know is not in the bundle. *Kalfelis* is.

THE CHAIRMAN: *Kalfelis* is at 16 I think. I do not know where this is going to lead us, so it is not a trick question.

MR. WEINIGER: I am looking at *Kalfelis*, it is paras. 8 and 9, p.261 of the first authorities' bundle. If anything is relevant it would be para.8.

THE CHAIRMAN: I think it is 9 as well.

MR. SCOTT: Yes, it is.

THE CHAIRMAN: It is 8 and 9. It looks to me as if you need to look and see whether there is a connection between the claims made against each of the defendants. If there was no connection ----

MR. WEINIGER: That is why I say that 9 is irrelevant because it is talking about a situation which ----

THE CHAIRMAN: No. Paragraph 9 is an example of 8.

MR. WEINIGER: Yes. But there are other examples, we would say, and one of the examples is here where there is a gateway permission before making somebody a party. Para. 9 is merely an example. 9 is saying, "If you bring a claim against lots of defendants and really you have got no real argument that these other defendants have any connection to the rest of the claim, then you can't say, 'Oh, well, I've started proceedings against them. Therefore I have jurisdiction anyway'".

THE CHAIRMAN: Yes. But, here what you are saying is that in any case the claimant may lose against the anchor defendant.

MR. WEINIGER: Yes.

THE CHAIRMAN: And may win against the other defendants who are necessary and proper parties or have Article 6(1), or however one wants to put it.

MR. WEINIGER: Yes.

THE CHAIRMAN: The other defendants might have been joined only because it is an anchor defendant. So, you have always got the situation that the substantive claim may fail against the first defendant - the anchor defendant - and yet succeed against the other defendants.

MR. WEINIGER: With respect, Madam Chairman, in this case. In the situation you have outlined there is a valid claim against all of the defendants at the same time because that is the way the court usually operates. In this situation we are only here today because the claimants have, we say, jumped the gun.

THE CHAIRMAN: They have not jumped the gun. They have asked for our permission. It is question of whether we jump the gun.

MR. WEINIGER: Obviously I am arguing, Madam Chairman, on the basis that our submissions are correct. If our submissions are correct, then they have jumped the gun by asking for permission. We say that that should be refused.

THE CHAIRMAN: They are entitled to ask for permission. We can refuse it. They have not jumped the gun. They would have jumped the gun if they had not asked for permission.

MR. WEINIGER: That is why I say that these things should all be considered at the same time. If we are successful on permission, and permission is denied, then the situation is preserved because, as I say, we are not parties. So, they would not later on -- If, let us say, when the European proceedings are finished, whenever that will be, and we were unsuccessful in the European appeals -- If they later on try to bring us as defendants in these proceedings, presuming they are ongoing against Morgan -- If the Morgan proceedings had been dismissed by then, we would be able to come in and say, "Well, there is no anchor defendant". The point could not be taken, "Oh, actually, we made you parties earlier" because on my analysis we are not parties now. So, if Morgan is dismissed at a later stage, and you do not give permission, then this danger, this prejudice does not arise.

THE CHAIRMAN: It depends where you start, does it not?

MR. WEINIGER: That is right. We need to consider all the points at the same time, which I think the Tribunal does have power to do, and can be done under the *chapeau*, if you like, of us all not being parties today. The one question that raises of principle is: let us say we do consider all the matters under one *chapeau* -- we consider all of the Article 5(3) points, all of the Article 6(1) points --Am I going to come back, on the assumption that we lose on permission, and raise 5(3) and 6(1) as part of my jurisdictional objections when I am a party? My answer to that would be that that would be resolved more as a case management issue because I would be entitled, as a party who raised those objections, and having had two days of hearings on the point and not being successful, to say there would be very little point in me raising the same objections ----

THE CHAIRMAN: You may think of different arguments next time, having seen how ----

MR. WEINIGER: If I did, I would be entitled to make them. Anyway, we would have Article 23 ----

THE CHAIRMAN: So, the biggest issue estoppel is between parties, and of course you are not a party.

MR. WEINIGER: Exactly, Madam Chairman. Exactly.

THE CHAIRMAN: So, on what basis could we stop you raising them?

MR. WEINIGER: Merely on a case management basis. If I started to raise these points and you said, "Well, we had a very interesting discussion over a day and a half just a few months ago, and we haven't changed our minds since" ----

THE CHAIRMAN: I could not stop you raising them, could I?

MR. WEINIGER: I think as a case management issue on proportionality and the like you could encourage us to make the arguments very briefly if they have not changed at all. But, yes, as a matter of principle, if we were to wax lyrical in our written submissions at that stage we would not have done anything wrong. That is the appropriate way in any event because we are not parties. We are entitled to take jurisdiction at the usual stage once proceedings are served . But, because of the unusual, perhaps unique circumstances of this case and the crucial role on behalf of the claimants played by the anchor defendant, we need to have these issues in the Tribunal's mind at the time when it determines permission so that it can see exactly what is at stake on all fronts. It does make it excessively complicated. I am aware of that. But, that is where we are. This is something that needs to be borne in mind. We need to have jurisdiction as something that is considered in considering permission.

THE CHAIRMAN: So, my understanding of your position is that we ought to take this all into account now, but you can raise it all again later?

MR. WEINIGER: Yes.

MR. SCOTT: So, what is the point at which it is proper for you to argue your Article 23 point, bearing in mind that you do not have to be a defendant, as I understand it, to argue Article 23?

MR. WEINIGER: The proceedings would need to be served upon us, which they cannot be at the moment. The claimants are not allowed to serve proceedings upon us because of Rule 31. They need permission. Once they have that permission and they serve the proceedings upon us we have the choice between defending as to the substance or challenging the jurisdiction. If we challenge the jurisdiction we are free to raise any arguments that we like, and at that point we will raise the Article 23 point.

THE CHAIRMAN: You will raise all the other points - the Article 6 point and the Article 5(3) point.

MR. WEINIGER: I think we would be entitled to, but the Tribunal has certain powers - not least costs - at that stage, to prevent arguments -- As a matter of principle, we would be entitled, because we are not parties now ----

THE CHAIRMAN: You would be entitled to raise it.

MR. WEINIGER: There is no issue estoppel.

THE CHAIRMAN: If we stopped you raising them, you could go to the Court of Appeal and say, "Actually this is completely wrong. We wanted to raise them. They have not been properly considered. They didn't consider the following in the previous round. We want to do it all again".

MR. WEINIGER: Madam Chairman, that is a very important point. At what stage can we go to the Court of Appeal on these jurisdictional issues?

THE CHAIRMAN: If you are not a party, how do you appeal this?

MR. WEINIGER: Precisely. It would be at that point that we went to the Court of Appeal on these issues.

THE CHAIRMAN: If we make the decision now on Articles 5(3) and 6(1) how do you appeal it?

MR. WEINIGER: We would not. It would not be a decision on those. It would be a decision on permission.

THE CHAIRMAN: That is right. And everything else we say would be **obiter**.

MR. WEINIGER: Well, it is not **obiter**. We are just not parties, and so it is not a decision to which we are a party .Once permission is given we will be joined as a party and we will raise the point. (After a pause): Madam, can I be of any further assistance?

THE CHAIRMAN: I do not think so. Thank you.

MR. BEARD: I hope I am going to be brief. I think there is one thing that all involved in this will probably agree with - that the structure of these particular rules, their interaction, and how this works is not straightforward. Now, the Tribunal has heard the eloquent submissions on why it is that jurisdiction should be dealt with first as a whole; why it should be dealt with, alternatively, as part of the permission exercise, but fully dealt with; and then alternatively that it could be dealt with partially as part of the permission exercise. I am not going to repeat those submissions. The Tribunal has them.

The only points, I think that Le Carbone can add at this stage are these: the permission argument under 31(3) will involve a discussion of what the relevant test is -- what relevant factors there are to be taken into account. The Tribunal has already indicated, of course, that the fact and nature of the appeals to the CFI are going to be extraordinarily important in that. Quite to what extent it is necessary to analyse those is a matter for further submission. In addition, the Tribunal has already adverted to the fact that there may be other concerns that may be material to whether or not granting permission as the exception to the general rule is appropriate. In doing that it is perhaps worth bearing in mind that in this case there is clearly an argument in relation to jurisdiction on Article 2 and Article 5(3). Those discussions really do not need to be re-articulated. They are well set out in the various skeleton arguments.

There is also an argument as to the application of 6(1). That is a slightly odd argument because one of the things it depends on is the position of Morgan, and whether or not a particular settlement agreement -- It is the sort of love that dare not speak its name in these

discussions so far, if you will forgive me. The settlement agreement with Morgan is something that might effectively remove that anchor defendant - to use the language of Article 6)1 jurisprudence and comment.

In those circumstances, for the Tribunal to say, "We are not going to have any regard to the fact that the proceedings involving Morgan could deal with that matter and, as such, have a significant impact on jurisdiction issues should they further arise" is a matter that is material to whether or not permission should be granted.

THE CHAIRMAN: So, you put it in a slightly different way because what you say is that when we are considering the question of permission and whether there should be -- We should take account of the fact that you are being joined in one respect as an anchor defendant, and that there is an issue as to whether there is a settlement agreement, and that is a factor that we ought to take into account. Of course, then there is the other factor which is that maybe they do not need the anchor defendant because of Article 5(3).

MR. BEARD: I understand that. That would draw one back towards having a fuller discussion as to the extent to which those jurisdiction arguments have substance on either side. I understand that. I understand the difficulty. I think the concern would be if the Tribunal were to be saying, "No, we won't have any of this in mind" -- That is the real concern here because, of course, the timing of permission is really crucial in relation to that 6(1) issue. It is not being said here that this is the first -- the primary consideration that this Tribunal should have in mind in relation to permission. Of course, I do not what to spoil the surprise, but we are going to say that it should not be granted.

THE CHAIRMAN: For other reasons, besides this one.

MR. BEARD: For other reasons, some of which have been trailed in our skeleton argument rather fully. But, nonetheless, it is a factor which should be taken into account. Therefore, for this Tribunal to say, "No. No. We're going to have no regard to that matter. Jurisdiction, whatever that might entail, must be entirely excluded from this" may be to narrow the Tribunal's focus unduly when coming to consider these matters.

My concern is in relation to a recognition that there is an issue out there which may turn on whether or not permission is granted. That, in itself, becomes a factor in whether or not permission should be granted. It is not being said it is the key factor -- the only factor. But, it is a material factor.

Sir, you said at one point that there was a sort of symmetry in the sense of prejudice about where claims should be brought. It is important to bear in mind that that is not a fair reflection, with respect, of the structure of the Brussels Convention and the Brussels

regulation that succeeded it. It is plain that the primary rule is the defendants are to be sued in their domicile. Therefore that is an asymmetric prejudice, if prejudice at all is the right word. I make no further observation.

MR. SCOTT: I did not mean it in relation to that issue so much as to the pros and cons of permission under the United Kingdom structure.

MR. BEARD: I think the discussion about what constitutes prejudice for the purposes of permission, if you will forgive me, are parked, because those are matters upon which we will want to make submissions. But, all I was meaning was that if these issues to do with what has come to be discussed as Brussels regulation jurisdiction issues are ones that suggest that non-domiciled defendants are going to be drawn in, then within the general framework structure of the Brussels regulation -- Again, this Tribunal should be rather slow to be saying, "No. No. No. We will let this thing roll on anyway and effectively deprive the proposed defendants from raising that issue" in circumstances there is not otherwise good reason to grant permission. So, I am not undercutting the submissions of my learned friends, but, in the alternative, this is another way in which this Tribunal should, it is suggested, deal with these matters -- deal with the crucial matter that does depend on whether or not we are parties. With respect to my learned friend, Mr. Hoskins, there is one issue that I do think I have to say we may differ on. It has two parts: (1) we do not think we are a party. We made that clear in our skeleton, and it is reflect in the way I think the Tribunal is dealing with our introduction as a proposed defendant in the amended claim. We entirely agree it is not a Rule 35-type matter. (2) In relation to costs, you are a statutory Tribunal and we do not think you have these powers to award costs. If we need to get into arguments about when it is appropriate to join people for the purposes of costs, we can deal with that, but given the submissions that I have made I do not consider that is salient. If it is necessary and the Tribunal wants to hear from me further on that matter, I am happy to develop it. But, it seems that that has, to some extent, been dealt with.

THE CHAIRMAN: At the moment you do not go with Mr. Hoskins' clients -- or, your clients do not go with Mr. Hoskins' clients. But, of course, we can order ----

MR. BEARD: On volunteering to self-flagellate on the costs issue -- Tempting though it is, no, I can just about resist it ----

THE CHAIRMAN: It is not very tempting at all!

MR. BEARD: We do not go that far.

THE CHAIRMAN: I can see that the question of 5(3) and 6(1), or anything under jurisdiction, may be a consideration when you are looking at permission. If the situation is that it is clear,

for example, that the claims being brought against the proposed defendants are not related to the claim being brought against the first defendant -- Then that would be a consideration.

MR. BEARD: Clearly.

THE CHAIRMAN: Right. If it was clear that the claim against the first defendant was an abuse of process ----

MR. BEARD: Yes, although that is actually quite difficult to capture because, of course, someone could pole up before this Tribunal, saying, "Well, there's been a Europe-wide cartel involving people in Spain, France and Italy. We're Italian purchasers. We therefore want to be able to bring a claim for damages. We like the courtroom atmosphere that's engendered in the UK particularly, and we'd like to come here and litigate these matters". Indeed, if they ran some of the arguments that are being attempted by the claimants - whether, for instance, the cartel affects the whole of Europe and therefore the prices in the UK that we didn't actually buy at, but we might've been able to buy at, and they should have been lower if the cartel hadn't operated, and therefore it appears that we do have a connection with the UK, and all our damages are suffered in the UK -- In fact, we have never travelled there. We have never done any business there. That's beside the point" ----

THE CHAIRMAN: They could have.

MR. BEARD: They could have, so they say, yes, of course. That is of course true. I would not want to demur on that. But, nonetheless, one can see why it might be difficult simply to assume that something was an abuse of process, which is why it may be suggested that these sorts of factors are material to the way in which you come to deal with these issues on permission. It is less of a sharp-edged approach to these matters, but nonetheless ----

THE CHAIRMAN: But it does mean that there are sort of two bites of the cherry, does it not?

MR. BEARD: Yes, there would be. That is undoubtedly right.

THE CHAIRMAN: I did not ask you whether your clients are saying that they would have another chance -- if we gave permission that they would have another chance again.

MR. BEARD: Well, theoretically that must be right after service. Practically it seems rather unlikely.

THE CHAIRMAN: They may want to appeal it, and you cannot appeal this round. So, there would have to be something that says, "Well, you make the same submissions as you made before. We give the same judgment as we gave before so that you can appeal it".

MR. BEARD: I am not sure that that would necessarily work, as is being suggested. One would have to deal with these matters separately because undoubtedly the appeal would be in relation to permission being granted, if it so existed. You would have the question whether

or not the proposed defendants had locus to bring an appeal against permission, which is not something that I am in a position to make submissions on. But, that is a separate issue from whether, if jurisdiction was challengeable and no challenge was brought following, for instance, service of the claim, in those circumstances it would be a matter that could then be subsequently appealed upwards. One would assume that probably it could. So, to that extent there would be scope for there being a second bite of the cherry, but it would depend on issues to do with the nature of any appeal against permission. It is not really right to say it is two bites of the cherry in those circumstances, because although it is similar issues they are being raised in relation to different matters. So, although they do get replicated, it is an incident of the structure that exists here. There may be simply nothing that can be done. The interposition of this permission stage, as I think we would all agree, does create some difficulties and dilemmas because you have this situation where non-parties are involved, and are given a right to be involved by the structure of the rules.

THE CHAIRMAN: How do you bring an appeal against ----

MR. BEARD: I am sorry. I was not presuming whether or not we could. I am saying that that might be material as to whether this interpretation of two bites of the cherry existed.

THE CHAIRMAN: I may be on a different point .How do you bring an appeal against us granting permission under para. 31(3)?

MR. BEARD: It is not straightforward. The question though would arise, would it not, that you would have a situation where a decision had been taken by a Tribunal that affected people. The idea that a court which has an inherent jurisdiction could not supervise or scrutinise that decision seems to me to be a rather difficult one.

THE CHAIRMAN: It is a question of whether you can go for judicial review ----

MR. BEARD: I am sorry. I was meaning a further challenge . I was not meaning ‘appeal’ in a technical sense in those circumstances.

MR. SCOTT: Presumably there is an inherent jurisdiction in the Administrative Court judicially to review ----

THE CHAIRMAN: There may be, or there may not.

MR. BEARD: This is why I am hedging here. I can see that there might well be scope for bringing these things further up. It does not seem to me that this is crucial to the analysis of the ----

THE CHAIRMAN: It is actually. I think it may well be crucial because if we decide the 6(1) and the 5(3), or anything, under the Brussels Convention, the jurisdiction points which if you are main parties would be questions which would be decided and would be appealable --

The question that would be appealable is whether we are right or wrong on the interpretation of 5(3) or 6(1), etc. If the situation is that it is only a question of whether our decision on whether we have exercised our discretion appropriately, and therefore our decision can be judicially reviewed ---- Has Mark Hoskins got the answer to this?

MR. BEARD: Mr. Hoskins may do. I am loathe to make comments in relation to s.49 in relation to further appeals in the Competition Act. Just dealing with that issue ----

THE CHAIRMAN: You see what I mean? The only question would be whether we have exercised our ----

MR. BEARD: -- discretion correctly.

THE CHAIRMAN: And whether we have taken it into account ---- It would not be as to whether our decision was correct.

MR. BEARD: With respect, Madam, it is not clear to me that if you bring a judicial review against an exercise of discretion by a public body and the public body has taken a particular legal view, that the public body can thereby say, "Well it was only discretionary and we may have got the law wrong, but, hey, it was only a discretionary exercise". That is not going to go very far in the Administrative Court. The Administrative Court is rightly going to say, "Well, if the underlying legal analysis that you took into account in reaching your discretionary decision or judgment was wrong, then you are going to have to look at it again". That would be the standard way in which those matters were dealt with unless there were alternative bases on which you would reach your judgment and this could be sidelined. But, in those circumstances, it does not seem to me that there is any problem whichever way the matter goes up - whether it is by way of judicial review or by way of appeal. What is clear is that if you have got a discretion, but you had a full merits appeal, then there might be greater scrutiny of the exercise actually of your discretion, but it does not go to these issues to do with the law on jurisdiction. Whichever way you deal with those matters, there is going to be the scope for a legal challenge one way or another.

MR. SCOTT: Just going back for a moment to the interaction of the regulation and the way in which we take our decision -- The recitals in the regulation have got two rather different themes going on. In Recital 11 you have got,

> "... save in a few well-defined situations in which the subject matter of the litigation or the autonomy of the parties [the Article 23 point] warrants a different linking factor …"

That is the very narrow, restrictive one. But, then, in Recital 12 you have got,

"There should be alternative grounds of jurisdiction placed on a close link between the court and the action, or in order to facilitate the sound administration of justice"

Presumably, in taking a composite construction both to the regulation and to what we should do in the context of the regulation, we should have regard to Recital 12. Now, that then brings me to the issue of joint and several liability between those addressed by the Commission's decision -- let us put it in that way so that we do not describe you as defendants -- and whether, bearing in mind for the purpose of Recital 12 -- We need to bear in mind the possibility of claims for contribution as between your various clients ----

MR. BEARD: This is taking one or two big leaps further down the track.

MR. SCOTT: It is, but ----

MR. BEARD: These issues have been vaguely mooted by the claimants in their first skeleton where they conjure a wonderfully Alice In Wonderland-ish world in which if the decisions against the proposed defendants are quashed or non-operative in relation to them, nonetheless, they can go against Morgan for joint and several liability in relation to all of the supposed co-defendants and then leave Morgan to seek contribution claims in relation to ... what we will call the four proposed defendants here. With respect, that is simply a non-sensical approach to this analysis because it cannot possibly be right that you can be jointly and severally liable with parties who are not themselves in any way liable.

MR. SCOTT: I think their argument would be this - and it may be that people would argue that we did not have jurisdiction because our jurisdiction is founded on a decision on infringement made in Europe after the relevant appeal processes -- What they are entitled to say is that the quashing of an infringement decision made by the Commission against any particular party does not mean that that party is not liable, it merely means that the decision by the Commission on liability has been quashed.

MR. BEARD: That is absolutely right but they would be in the wrong place.

MR. SCOTT: I think that is certainly arguable under our existing framework.

MR. BEARD: Well it is not just arguable, it is plainly right. The very fact that provisions are made within the Act which enable by secondary legislation this Tribunal to deal with such matters if the secondary legislation is made; no such secondary legislation has been made under s.16.

MR. SCOTT: That is right.

MR. BEARD: You do not have the power to deal with these matters. It is in many people's view a bizarre idiosyncrasy of the way in which these parallel jurisdictions have been laid out. It has been commented that that idiosyncrasy is strangely not engaged with by the recent OFT

paper in relation to private enforcement, notwithstanding that that is one of the things that cries out for comment. Nevertheless, that is the way the law is. Parliament, as they say "in its wisdom" has left these matters as they are, that is effectively the end of this matter. They will not be able to deal with these matters by a side wind. The idea that they could do would simply end up with a bizarre situation which would be quite contrary to the legislative structure and plainly cannot have been envisaged, or cannot be seen as acceptable in circumstances ----

MR. SCOTT: Until the regulations under s.16 ----

MR. BEARD: You would have to have certain specific regulations under s.16 because s.16 is facilitative, and then you would need to ensure that none follow-on cases could be dealt with before this Tribunal in relation to the sort of matters where effectively the infringement had to be proved, *ex ante* and that is clearly not the function of this Tribunal. As I say, it is a matter that many have commented on the oddity that the specialist Tribunal is not in a position jurisdictionally to deal with matters of finding of competition law infringement, but then can deal with issues, for instance, to do with quantum, which might be the meat and drink of the Commercial Court, for example.

MR. SCOTT: Pursuing that for a moment, what is your position on what happens if the decision in relation to liability – leave penalty on one side for a moment – is upheld either by the CFI or the ECJ in due course, do you then envisage that questions of contribution can be tackled by us or are questions of contribution something that must be sorted out before it came to the court of inherent jurisdiction.

MR. BEARD: I think again, with respect, this is moving a very long way down the line. The idea that this Tribunal could impose a decision on joint and several liability fairly in circumstances where it has, let us say for the sake of argument, proposed defendants, but equally if permission were granted that it had defendants in relation to which no steps could properly be taken because of pending appeals, that you do, by a side wind, impose a finding on them that can sound in contribution is one that simply cannot be correct; it cannot be that you can do that. It would plainly be unfair, and would be entirely contrary to the structure of s.47A. So it may be that these matters have repercussions on the extent to which this Tribunal can actually proceed with the Morgan Crucible case; that is a matter for discussion there, but it can rest assured that if any repercussions of the Morgan Crucible case were to sound contrary to the interests of the proposed defendants then in due course those are matters which will no doubt reappear before this Tribunal in some fairly fulsome form one might imagine.

MR. SCOTT: You can understand why in the context of what has been said we have raised these matters?

MR. BEARD: Of course, I quite understand and I am not trying to be obstructive, but on the other hand there are a range of issues here that are far too complex to be dealt with *ex ante* in these circumstances. One cannot solve all of these problems, and one just has to recognise that there are fundamental principles to do with fairness that will plainly be undermined, quite apart from the disregard that was effectively being had to the statutory structure and the jurisdictional division that exists here.

Unless I can assist the Tribunal further in relation to these matters.

THE CHAIRMAN: Mr. Spitz.

MR. SPITZ: None of the proposed defendants in this matter have taken issue with the contention that these claims are all very closely related ones. Against that background any suggestion that the anchor defendant domiciled in the United Kingdom is sued here for the sole purpose of bringing the others here should not carry any weight. Clearly the proper procedure has been followed in bringing the claim against the anchor defendant, and in bringing the other defendants on the back of that defendant as 6(1) entitles one to do. But what the Tribunal is told is do not give permission now; do not deal with permission at all in relation to these claims, direct a separate issue in relation to Morgan and the claimants as far as the scope of the release is concerned. Then, if you resolve that separated issue in Morgan's favour, these proposed defendants do not belong before this Tribunal. It is a remarkably speculative and hypothetical scenario that they sketch. And, one asks, why stop there? Why stop at this question of the separated issue? At the last case management conference, what the Tribunal was told was to hold off on permission until such time as the mediation took place, and it then became clear what the impact of that sort of approach might be on the mediation. Now we are told "Well do it in relation to the separated issue". Well, why not, one says, deal with the claim against Morgan in its entirety and then if there is anything left there will be an argument for the use of the anchor defendant to file jurisdiction in relation to the proposed defendants but not otherwise. It is that point, that is the only reason why the Tribunal is being asked to delve into this very complicated set of different positions in relation to what regard should be had to arguments pertaining to jurisdiction in circumstances where it is quite plain what the ordinary way of dealing with matters would be. After service of the claim, when these proposed defendants are parties (on the assumption that permission is granted) that is the time when they raise their objections to jurisdiction. But they say to you that that is somehow committing an gross unfairness on

them, because if you have decided permission at that stage well then Morgan is properly there before the court and they are properly there too. It is very difficult, madam Chairman, to see what the prejudice is and what the butt of the complaint is, save that the proposed defendants want to have their cake and eat it too in these circumstances.

That is nicely illustrated by my learned friend, Mr. Hoskins' argument, and it is clear that that is not the only position that has been taken. There is a tortology in his jurisdiction argument. He says: "Make us a party so that we can object to jurisdiction, but we want to object to jurisdiction and the basis of our objection is that we are not a party and that we should not be a party until the Morgan issue is resolved." That is clearly a case of having one's cake and eating it too.

In these circumstances, as the Tribunal has already recognised, what would be the situation in relation to an appeal on a decision of permission, not only if the decision went in the claimant's favour, but if the decision went against the claimants who is on the other side of the appeal, which is a matter that we raised in the last case management conference?

THE CHAIRMAN: I do not know if this is what Mr. Hoskins was going to refer us to, but if you look at 49(2)(a).

MR. HOSKINS: Yes.

THE CHAIRMAN: It was what Mr. Hoskins was going to refer us to. "… by a person who has a sufficient interest". So his submission would have been, probably, that because they have argued the point here they have a sufficient interest to appeal it. Is that the sort of ----

MR. HOSKINS: Along those lines.

THE CHAIRMAN: Along those lines, yes, right.

MR. SPITZ: What they have, of course, is the right to make their observations, and having done that that is the extent of that right.

The point about it, madam, is that all of these arguments in relation to 6(1) and 5(3) are available and will be made in the ordinary course of the appropriate time. The only one that will not be available is that, assuming permission is granted, it will not be open to the defendants to say "Deal with the Morgan claim first, dispatch that claim, and if you deal with it and Morgan succeeds then there is no jurisdiction."

THE CHAIRMAN: Also, if the situation was that you did not have to apply for permission you would have started the claim.

MR. SPITZ: Indeed.

THE CHAIRMAN: They would still have been able to run that argument, but it would come at that stage.

MR. SPITZ: That is correct, that would be the time that they would raise it in the ordinary way.

THE CHAIRMAN: So why should it make any difference that there is this 31(3) ----

MR. SPITZ: Well they need to persuade you that you need to direct that the separated issue be determined. There are a number of steps and, as I have said, in any litigation that relates to an anchor defendant there may be a series of issues that arise that could dispose of the claim in relation to the anchor defendant, but one does not hear the arguments well that is a reason to hold off on bringing us to this party until you have determined those issues.

THE CHAIRMAN: I suppose if you were hearing an application – we raise 6(1) normally – and the contesting defendant said: "Look, actually that was not a proper anchor defendant, because I can point to this and there was a settlement, and therefore that is out. If they could persuade us of that then that would not be a proper anchor defendant, and therefore you would not be able to rely on 6(1) to bring them in. Do you see what I mean?

MR. SPITZ: Yes, madam Chairman, but at this stage we are not relying on 6(1) to bring anyone in, we are only relying on that when the jurisdiction ----

THE CHAIRMAN: Absolutely, but I am talking about at the normal stage where they are contesting jurisdiction and they say – let us just assume – "The only basis for jurisdiction here would be 6(1) and in fact they are trying to hook this claim to 6(1) to this anchor defendant, but actually there is no claim against that anchor defendant in substance.

MR. SPITZ: Indeed, and that would be an argument that the anchor defendant is brought here solely for the purposes of providing a vehicle improperly to bring the others, and that is something that they would be able to raise after service once they are parties. It does not, of course, apply in this case because here the Tribunal has already determined that there is a serious issue to be tried in relation to the anchor …

So we submit that the Tribunal's original thinking at the commencement this morning as to the order in which to deal with these issues is appropriate and correct. Before a full blown argument on jurisdiction should be held the proposed defendants should first become parties and they do that in the event that the Tribunal decides to grant permission. Up until that time it is inappropriate to deal with the jurisdiction arguments, and no injustice whatsoever is caused by not dealing with those issues in considering permission where, after all, the real question is given that the claimants have come early are there good reasons for the claim to be allowed to proceed to one extent or another?

THE CHAIRMAN: Do you say we should not take into account jurisdiction at all, or do you say that we should only take it into account to a certain level?

MR. SPITZ: I say that it is not necessary and you should not take it into account because you will not be prejudicing the proposed defendants by adopting that approach and the arguments will still be available to them in relation to 6(1) and 5(3) afterwards.

THE CHAIRMAN: What about if it was clear that there was no jurisdiction. Shall we take it into account then, or should we leave it open?

MR. SPITZ: Well if the Tribunal on its own motion forms a view that there is no jurisdiction, then we would have to say that is something the Tribunal can have regard to. Those are our submissions on this point.

THE CHAIRMAN: Well that is very convenient, it is 1 o'clock.

MR. HOSKINS: I just wonder, I do not have very much to say, I do not know whether it would be helpful for me to say it and then you can consider it over lunch, but equally I am happy to let everyone go to lunch and come back and say it after lunch. I am in your hands.

THE CHAIRMAN: Well if you want to say something for five minutes I think we are happy to listen to you.

MR. HOSKINS: I will be as brief as I can. Mr. Spitz's submissions show exactly the dilemma we are in because in making his submissions he had to start going into some of the issues that we want the Tribunal to determine, e.g. should the scope of the settlement agreement between the claimants and Morgan Crucible be settled as a preliminary issue? You have seen from our skeleton that that is very much tied in with our jurisdiction arguments. What Mr. Spitz wants the Tribunal to do is he wants to wrap this all up into one big ball so that we cannot make the arguments we want to make, and that is all this morning has been about; it has not been about are we right or not, and that is certainly what I have tried to show this morning. I am simply saying we have arguments we want to make and we should be entitled to make them.

Mr. Spitz says that it does not matter because if you deal with permission first and if there is service we are not going to be prejudiced we can take jurisdiction then. That is simply not correct. If the Tribunal adopts that course we do not have the Article 6(1) argument any more. It may be a good argument, or it may be a bad argument ----

THE CHAIRMAN: It is not that you do not have the argument, it is that time may have gone by.

MR. HOSKINS: If permission is given the Article 6(1) argument falls away. The way it is put it simply falls away. That is one of the central issues. So it is simply not correct, and the Tribunal should not proceed on the basis that to give permission and then to allow us to challenge jurisdiction we will suffer no prejudice; it will take away one of the arguments that we want to make. We may lose that argument, we may win that argument, I simply ask

that we be allowed to make the argument over the course of this hearing; that is all we are asking for and that is what this morning has been about.

You asked, if I may respectfully say, a very searching question of Mr. Spitz: "What if it is clear that there is not jurisdiction, shall we take account of that? Answer: "Yes, you should take account of it." Well, I am sorry, if you take account of jurisdiction when it is clear there is no jurisdiction then you should certainly hear our arguments about whether there is jurisdiction or not, because the difficulty of the arguments should not have any bearing on whether they are heard or not.

Madam, I am afraid in relation to Mr. Spitz there is one other point I must make. He said that my argument was that I had said that make us a party so we can object to jurisdiction. Ii hope that was not my submission. The only suggestion I made as to us being a party ----

THE CHAIRMAN: Is make you a party in relation to costs ----

MR. HOSKINS: At the end, exactly. So that simply was not correct.

In relation to Mr. Weiniger, there was an exchange with the Tribunal which would suggest there was no issue estoppel here because issue estoppel is just between parties. With respect, I do not accept that. Where we are here in a rule 31(3) capacity, whatever that is properly called, and there have been full submissions to the Tribunal on jurisdiction and the Tribunal makes findings on jurisdiction, the idea that a party can come back and say that they are not bound is simply not credible. Even if there was not an issue estoppel issue, whereas the general principle of abuse of procedure, one sees it in *Henderson v Henderson* and there is a more recent House of Lords judgment from eight years ago – the name escapes me, but well established – where you have had full argument between the parties that simply is not credible.

In relation to the appeal point, madam, you pointed out s.49. I think the remedy probably is Judicial Review, because the appeal in s.49 in relation to s.47A actions relates to the award of damages and we are not at that stage yet, so it would be Judicial Review. If there were a Judicial Review I entirely agree with what Mr. Beard said that insofar as the Tribunal had made findings on jurisdiction those would be hard edged questions and that the Administrative Court could decide one way or the other, and it would not be bound by, for example, *Wednesbury* irrationality-type sensitivities, there would simply be hard-edge questions that the JR ----

THE CHAIRMAN: It depends how we had formulated our decision.

MR. HOSKINS: Well with respect, given the test you would find a good arguable case and you would apply the lot to it, I think it is very difficult to see how that would be a *Wednesbury*-type issue, but I do not doubt the Tribunal's ingenuity if needs be.

Madam, that is all I wanted to say in relation to the matters, thank you.

THE CHAIRMAN: Thank you very much. Shall we say five past two?

(Adjourned for a short time)

THE CHAIRMAN: Mr. Hoskins, can I just raise a point with you? You say that you will be precluded from arguing this point again if you are joined.

MR. HOSKINS: I will be excluded from arguing 6(1).

THE CHAIRMAN: In the *Reisch* case it was a settlement issue.

MR. HOSKINS: In *Reisch* it was. The claim against the anchor defendant was inadmissible.

THE CHAIRMAN: It was inadmissible.

MR. HOSKINS: Yes.

THE CHAIRMAN: Why was it inadmissible?

MR. HOSKINS: Under the national legal provisions. We can have a look at the judgment in Bundle 2 at Tab 29. Page 429 of the bundle, para. 8 of the judgment. You will see the national rule is set out at para. 8. (After a pause): One sees in the facts in para. 9 onwards. What happened was that the claimant brought the claim in Austria against Mr. Gisinger, an Austrian domicile, and against Kiesel, the German company. The proceedings were dismissed against Mr. Gisinger on the ground that bankruptcy proceedings concerning his assets had been instituted.

THE CHAIRMAN: On 23rd July. That was before these proceedings were brought.

MR. HOSKINS: That is right. So, because the bankruptcy proceedings had been instituted -----

THE CHAIRMAN: They were not completed at the time that action was brought.

MR. HOSKINS: He was the anchor defendant. Under national law the claim could not be brought against him. On those particular facts the Courts of Justice held there was Article 6(1) jurisdiction. The court's judgment begins at para. 23 and down to para. 32.

THE CHAIRMAN: We will need to look at the question which is in para. 15.

MR. HOSKINS: I will come to make the submission perhaps, but I would draw attention to the fact now in paras. 10 and 15 that time is referred to. So, at para. 10 it says, "-- and were not completed at the time that action was brought" which suggests that the result might have been different otherwise. Equally at para 15. So, timing is important. Timing works one way in *Reisch*. We say it works the other way in our case - or potentially works the other way in our case.

THE CHAIRMAN: The court's reply. (After a pause): "… whether a national rule introducing an objection of lack of jurisdiction may stand …" Paragraph 28.

MR. HOSKINS: I am not quite sure whether that jurisdiction there refers to domestic jurisdiction rather than international jurisdiction. It may be the former rather than the latter, I think.

THE CHAIRMAN: No. I think it means that the rule is a national rule. (After a pause): You see, para. 27 is talking about national law.

MR. HOSKINS: Paragraph 27 is talking about the scope of Article 6(1) and national law.

THE CHAIRMAN: Yes. I am not sure where the first comes. We have got the second – "That provision does not include …" that provision being Article 6(1).

MR. HOSKINS: Article 6(1), yes.

THE CHAIRMAN:

> "-- does not include any express reference to the application of domestic rules or any requirement that an action brought against a number of defendants should be admissible by the time it is brought in relation to each of those defendants under national law" ----

MR. HOSKINS: That is right.

THE CHAIRMAN: Then, secondly, independently of that first finding the question referred seeks to determine whether a national rule introducing an objection of lack of jurisdiction may stand in the way of an application under Article 6(1). (After a pause): So, this case is really dealing with some national rule, like a limitation rule. It is not dealing with the situation that we are dealing with, which is a question of whether there is a cause of action at all.

MR. HOSKINS: That is correct. Obviously, my submission is going to distinguish Reisch.

THE CHAIRMAN: I have just distinguished it for you.

MR. HOSKINS: That is one of the ways in which we distinguish it, yes.

THE CHAIRMAN: If that is right, then if the situation is that there is no cause of action at all ----

MR. HOSKINS: -- against Morgan Crucible ----

THE CHAIRMAN: -- then surely ---- Just assume there was not this permission stage, and it was just an ordinary thing which you had been served, and that you came along here and contested jurisdiction. You were saying, "There is no anchor defendant here because the claim has been settled. The claim was settled before the action was brought". Surely, you would be submitting that we could take that into account in looking at Article 6(1) and in saying that the anchor defendant in respect of which they were trying to get jurisdiction was

not a proper anchor defendant because there was no cause of action. Now, that is different from a situation where we do not know whether there is.

MR. HOSKINS: Yes. Madam, I think this is where Mr. Weiniger and me actually have a difference in view, because certainly our analysis of the situation is that we know from the *Petrotrade* case that when one is looking at the question of whether the Tribunal has jurisdiction, one looks to the time at which the anchor defendant was served - so when they were served. In relation to Article 6(1) the claimants will have to show that there is a good arguable case that there is a claim against Morgan Crucible. In one of this Tribunal's previous judgments you have decided that it is not possible to determine on a summary basis whether there is or is not. That is why our argument on Article 6(1) has a different ingredient. Our Article 6(1) argument is based on the fact that for Article 6(1) to apply there must be a relevant claim up and running against the anchor defendant at the same time as there is a claim up and running against us.

THE CHAIRMAN: But there surely cannot be a different test to apply now than there would be in the situation where permission was not needed. Surely the test must be the same.

MR. HOSKINS: Madam, if permission were not needed our argument would never arise.

THE CHAIRMAN: I am suggesting to you that maybe that submission is not necessarily correct because if the situation was that it was clear, the argument would, or could, arise because if there was no claim because there had been a settlement, then you would not say, "Well, just because you've been joined after the anchor defendant, the fact that there is no claim and we can show there is no claim ----

MR. HOSKINS: Madam, I would love to bolt through this door, but, having analysed it, it does not help us. I cannot make that submission to you, because we do not believe it is legally correct.

THE CHAIRMAN: It cannot be that the factors we take into account in relation to jurisdiction today in the question about permission are different from the factors that we would take into account if we were deciding it on a contested application for jurisdiction after service. It must be the same test.

MR. HOSKINS: Madam, with respect, that is not correct, because our Article 6(1) argument depends on there being a dis-function. There is obviously a dichotomy between when there are live claims against the anchor defendant and live claims against us. If permission is granted today and jurisdiction is not dealt with, there will be a live claim against Morgan Crucible and there will be a live claim against us. Our view of the law is that we do not have an argument on Article 6(1) jurisdiction. I can take you through that.

If, however, before the Tribunal comes to consider what to do with us in terms of permission and jurisdiction, it decides that the settlement issue should be determined as between Morgan Crucible and the claimants, and if it finds that the claim has been settled, then by the time the Tribunal comes on to consider jurisdiction and permission in relation to us, there will be no live claim against Morgan Crucible and therefore we say there can be no live claim against us and no jurisdiction.

THE CHAIRMAN: This is the same submission as you made in relation to a future settlement.

MR. HOSKINS: It would depend on the happenstance of timing.

MR. SCOTT: It can either be a decision by us or a mediated settlement.

MR. HOSKINS: Yes. If there is no live claim against Morgan Crucible -- if the claim against Morgan Crucible has been determined because it has been settled, or it has been decided before the claim is started against us, then there would be no ----

THE CHAIRMAN: That is very helpful. So, what you are saying is that we ought to stay any question of whether permission ought to be granted against you until we have decided in the main action, i.e. the action now on foot, whether or not there is a good claim.

MR. HOSKINS: That is right. That is why I have tried to unpack the points in the way I have, because one needs to understand how all these things fit together.

THE CHAIRMAN: Yes.

MR. HOSKINS: That is the way it fits together.

THE CHAIRMAN: Thank you. (After a pause): I think it has been a very useful discussion that we have had, although it has taken us half a day to deal with it. Having regard to all the submissions, we think the best way forward is that we hear all the submissions effectively *de bene esse* and we will then decide which order it ought to have been, in other words whether we decide permission first, with, without or partly with or partly without when we consider our judgment on the application for permission.

MR. HOSKINS: I am grateful, madam.

MR. SCOTT: Which logically will include your point on stay.

MR. HOSKINS: Absolutely, yes.

THE CHAIRMAN: So I think the way we ought to deal with this is that the claimants need to address us on why we ought to grant permission and insofar as they are answering points that we know about it is up to you whether you want to bring those points in now or whether you want to wait until a reply. It may be useful just to bring the whole thing in because we have all read the material and it may be a shorter way of doing it.

MR. HOSKINS: He should deal then with permission and jurisdiction because the burden is on him in relation to both those matters.

THE CHAIRMAN: Well may or may not be, but we are going to listen to it.

MR. HOSKINS: I am assuming ----

THE CHAIRMAN: Yes.

MR. SPITZ: Thank you, madam Chairman. There are two main areas that I would like to cover in relation to the question of permission. The first focuses on the question of prejudice, and the second will focus on the scope of the appeals that have been brought. I have had discussions with my colleagues in relation to those appeals that are confidential. In relation to SGL's appeal we have agreed between us what I can comfortably say once the Tribunal has looked at the paragraphs, and in relation to Le Carbone we have not quite got there. I will indicate the paragraphs that are relevant and then if my learned friend, Mr. Beard, feels that I am trespassing too far into a domain that is of concern he will stand up.

THE CHAIRMAN: He has ….

MR. BEARD: Yes, "metaphorical red flag" I think are the words of Mr. Justice Ferris, but yes, I do not want to cause any difficulties with these matters. I think Mr. Spitz understands that we do not want the details of our appeal disclosed, and therefore he is going to refer to paragraphs, but if he has general points to be made on the interpretation of the appeal we imagine he can make those without needing to trespass on what would be treated as confidential; we really want to avoid having a bilateral confidential matter, because we cannot see it is that crucial.

THE CHAIRMAN: Could we deal with it hypothetically – if the situation was X ----

MR. BEARD: I think that might be difficult but I do not want to underplay the wit and guile of Mr. Spitz in these matters, he may well find a way round dealing with these things hypothetically, or whatever, but I will make sure I have red flags ready.

MR. SPITZ: All right, well we will come to that as the second issue that I would like to make submissions on.

So I will start with the first, and without repeating the written submissions which deal with these matters. When one looks at a follow-on action from the claimant's point of view there would be three possible areas that will be relevant, and those will be: the question of liability, the question of causation; and the question of quantum. The question of liability will largely fall out of the picture on the basis of reliance on the Commission's decision which he establishes the infringement. But it will still be necessary and the claimant will

have to demonstrate causation and then establish quantum. So it is in relation to those two areas that one ought to be focusing.

The submission in relation to prejudice is really this: There has already been a long period of delay. As the Commission recognises in its earlier judgment in this matter, delay is inevitable in these follow-on actions, but the fact of that delay still has an impact on the state of the evidence and this is the primary point in relation to permission. It is both the documentary evidence and the oral evidence of witnesses.

If one were to wait until the exhaustion of the appeals' process in these matters, that realistically could be another three, four perhaps even five years and the question is what will be the state of the evidence after the elapse of that further period of time? In Schunk's submissions they have alerted us all to the fact that on 27th and I believe 28th February the appeals will be argued in the CFI and if that was the full extent of matters one may be able to say that if those appeals are about to be argued perhaps one can await the judgment and then one will not have to deal with this matter, and that would be so were there not further appeal rights that could be mobilised and exercised after the appeal to the CFI, to the ECJ, for example. So one is still faced with a substantial period of time before that appeal process will be exhausted.

The evidence itself goes to various matters in relation to causation and quantum and I would like to illustrate with reference to one particular example. There are indications in the skeleton arguments from the proposed defendants that one of the issues that will relate both to quantum and to causation is the question of the extent of cartel activities in a market in which the claimants operated. How far were the agreements implemented? What was the nature of the agreements? How was the pricing mechanism fixed? If the Baereme pricing did not apply in the particular sector in which the claimants operate then how was the mechanism fixed? Those are issues where one would require the disclosure of documents, and one would require witness evidence. The disclosure of documents is not going to be sufficient to protect the position. There is the obvious point that as far as oral evidence is concerned witnesses' memories decrease over the passage of time, but there is the other point in relation to documentary evidence where one deals with a secret cartel, and the question arises how extensive and how sufficient will that documentary evidence be? There is evidence in the Commission's decision that notes were not always kept to the extent that one might have expected, for example, by the Cartelists. It is not unreasonable to assume that a full conspectus of all the relevant documents may not be available and may require supplementation with oral evidence, so one is dealing with both categories. One deals with

it in relation to both of these elements, the causation element and the quantum element. So the claimants need the assistance of the Commission, and happily Rule 31(3) makes provision and caters for a situation where the claimants can use the rule to minimise the prejudice caused by further passage of time while waiting for the appeals' process to be exhausted and that is a point that the Tribunal has made in the previous judgment in the Emerson matter. So that is a key area on which the claimants focus.

THE CHAIRMAN: But that is just the ordinary passage of time that arises in all cases – the longer you get away from the event you always have more difficulty about documents, you always have more difficulty about oral evidence.

MR. SPITZ: That is quite so.

THE CHAIRMAN: So it is just the usual problems. Is there something special in this case? There was something special in the Morgan Crucible case.

MR. SPITZ: There was a history in relation to the failure to retain the documents.

THE CHAIRMAN: And there was the correspondence in relation to the ----

MR. SPITZ: The undertaking. In these circumstances we do not know what the document retention policy is at the various proposed defendants are. We have not had any suggestion or offer of undertakings.

THE CHAIRMAN: Have you asked for them?

MR. SPITZ: We have not asked for them. Although there has not been the same history in relation to the proposed defendants as there had been in relation to Morgan, nevertheless, because of the secretive nature of the cartel we simply do not know the extent to which those documents have been retained and are available to make disclosure.

THE CHAIRMAN: But the problem is that if they have already been destroyed, or if the witnesses have already disappeared you are in no worse position now than you would have been in whenever that happened, and you are certainly in no worse position in the future, so that would not be a reason for granting permission.

MR. SPITZ: Yes, but if we had the protection of permission being granted and the ability to get disclosure at this stage then we would be protected against the loss or destruction of further documents.

THE CHAIRMAN: But you do not know if there is anything there to be protected against.

MR. SPITZ: What we know is that there are documents that have been made available to the Commission.

THE CHAIRMAN: And the Commission will have copies of those so subject to them ----

MR. SPITZ: But we do not know what else there is. We have no mechanism of finding that out and without permission and directions we have no mechanism.

THE CHAIRMAN: Well you did have a mechanism in Morgan Crucible, because you asked them and you then had the correspondence in relation to disclosure, or preservation, and that gave evidence to us of the position of how you could be prejudiced in the future, but you do not have that evidence here; or that material here to rely on.

MR. SPITZ: No, we have not. We have not engaged in correspondence with them for the purposes of that.

THE CHAIRMAN: But of course in the way that the courts now approach actions is to have pre-action letters and those letters request the documents, and under most of the protocols they are supposed to supply all documents before the action is started. Has there been no pre-action letter in this case?

MR. SPITZ: That was a step that we did take; pre-action letters were sent. We have not received anything in response to those pre-action letters either by way of disclosure or indeed, I think, a response explaining why.

THE CHAIRMAN: Do we have the pre-action letters?

MR. SPITZ: I am not sure that those are in the bundle.

THE CHAIRMAN: Apparently they are mentioned in the claim form. I do not know whether it is worth looking at the claim form.

MR. SPITZ: Yes.

THE CHAIRMAN: But I am just wondering whether the pre-action letter said anything about documents?

MR. SPITZ: Yes, it did. We will look at the claim form.

MR. HOSKINS: I would have to see a copy of that. I do not want to be difficult but we do not have copies with us either and I just put down a marker that we would need to see them again to remind ourselves what was in them.

MR. SPITZ: We can have copies of those faxed over. (After a pause): In Tab 5 of Volume 1 of the submissions bundle, in the claim form ----

THE CHAIRMAN: It says that you sent a letter and that you have not received a reply. It does not say what was in the letter.

MR. SPITZ: That is right. There was a request for a number of categories of documents in each of those letters.

THE CHAIRMAN: But we have not got the letters - unless they were submitted by everybody.

MR. SPITZ: May we come back to that point? In the meantime we can arrange to have those letters faxed through to the Tribunal.

MR. SCOTT: In relation to oral evidence is there any difference from your perspective in us giving permission now, but then staying the substantive proceedings pending the exhaustion of the European appeal rounds, or not giving permission now pending the exhaustion of the European appeal rounds with the effect that any oral examination is likely to take place at the same time in either event?

MR. SPITZ: On either of those two scenarios there is no difference because we would not be able to make a start in relation to the oral evidence until that time.

THE CHAIRMAN: Normally if one is trying to say that one is prejudiced one says (a) that, "There is a threat of destruction of documents. We've got to do something about it before those documents get destroyed. I can show you that they have not been destroyed up until now"; and (b) "In relation to oral evidence, that X and Y are going to die -- they are about to disappear -- they are about to emigrate [although that probably is not a good reason anymore because we are so used to global communication]. Therefore it's important that we get on now while they are still around and while we can still take a statement from them", or something of that sort. But, just an amorphous sort of, "Oh well, there may be some oral evidence around and we don't know if that oral evidence is going to be there -- We don't know if it's there anyway" -- You cannot show that you will be prejudiced in the future, which is what you are trying to show.

MR. SPITZ: We cannot show that because of the secret nature of the cartel.

THE CHAIRMAN: That is true in every case. Nothing to do with cartel cases. In all civil cases you have that problem.

MR. SPITZ: What we can say is that a period of some eighteen years have elapsed during which the cartel has been operating, and following which proceedings have been taking place. In that time the quality of oral evidence will have declined, and it will decline further with the further passage of time. We need to look at the documents ----

THE CHAIRMAN: Taking Mr. Scott's point, it will decline further in any event if this case does not come on. The fact that you start the proceedings might not mean that it will come on any earlier than if you started the proceedings after the European proceedings have been extinguished.

MR. SPITZ: That is a matter of directions rather than a question of whether or not to grant permission. Whether one deals with the question of oral evidence through directions to allow that preparatory work to take place is a question of directions rather than permission.

THE CHAIRMAN: Differently from Morgan Crucible, we have got the problem here, which you are going to come on and address, as to the subject matter of the appeals and whether that has any reflection on what we are going to have to recite. Therefore, the nature of the evidence. You are going to come on to that.

MR. SPITZ: I am going to come on to the nature of the appeals and the scope of the appeals, yes.

THE CHAIRMAN: And whether that adds any consequences for the scope and nature of what we have to decide in our damages action.

MR. SPITZ: Yes. (After a pause): The other way in which access to the documents will be helpful is in establishing - and this is a similar point to the point that was made in relation to Morgan - the extent of the cartel pricing and the extent of the sales, and so the extent of the damages that have been suffered. That will be relevant both from the point of view of encouraging and promoting a possible settlement and from the point of view of establishing the amount at stake in these various claims.

THE CHAIRMAN: One of the reasons in Morgan Crucible that that became significant was because there was a dispute between you and Morgan Crucible as to the amount of sales. They were saying that it was *de minimis* and it was so *de minimis* that there probably was not a proportionate case against them. Does that apply here at all with these defendants or proposed defendants?

MR. SPITZ: They have not said what the status is of the purchases. Morgan Crucible did not make those contentions in their defence. It was something that they said in submissions. The 1 percent defendant. But, that did not bear on the way the Tribunal decided whether or not to grant permission because of the joint and several liability point. (After a pause): If one looks at concerns to preserve the written evidence and the oral evidence on the one hand, and any countervailing prejudice to the claimants on the other hand -- to the proposed defendants on the other hand, our submission is that appropriate case management directions can deal with matters so that unnecessary costs are not incurred after permission has been given. The disclosure exercise in relation to the documents that are available before the Commission already is unlikely to be a large and significant exercise. Those documents could be provided without the proposed defendants incurring substantial costs.

THE CHAIRMAN: Yes, because either the Commission can produce them, or we can order that they produce all the documents they provided to the Commission, which is the same thing.

MR. SPITZ: Indeed. That would then enable a more complete sense of the quantum at issue here, and, as I said, the question of encouraging a settlement. So, proportionality can be achieved and fine-tuned through the use of directions.

THE CHAIRMAN: What you are saying is that permission ought to be granted because if we grant permission then there is a claim on foot, and that will encourage early settlement.

MR. SPITZ: That is not the sum of the submission. That will make it possible to then deal with the question of directions, obtain some disclosure, have a sense of the extent of the quantum of damages, and that could encourage settlement.

The second issue is in relation to the fact that permission has been granted to commence the claim against Morgan. In relation to that, these are claims which, in the claimants' submission, belong together. They are clearly very, very closely connected claims. The foundation is the same. The nature of the infringement is substantially the same. There is joint and several liability. It is efficient from the point of view of the use of judicial resources to also grant permission in relation to the proposed defendants so that all of the defendants are before the Tribunal.

MR. SCOTT: In relation to that efficiency, are we understanding you to say that even if the proposed defendants were not joined at this stage you might be seeking disclosure of documents from them in order to complete your case against Morgan?

MR. SPITZ: Indeed, and then one would have to be attempting to do it by means of third party disclosure.

Another relevant consideration is the question of the nature and scope of the appeals. SGL's appeal is at Tab 7 of the Tribunal's bundle. It is not in the bundle of the other participants in these proceedings. It is at the back of Tab 7 of the submissions bundle, Volume 2.

THE CHAIRMAN: It has not been included. (After a pause): We have it at 103.

MR. SPITZ: If the Tribunal begins by looking at para. 15 and then works through. I will indicate the paragraphs that we believe are relevant. Paragraphs 15 and then 19.

THE CHAIRMAN: If you look at the top right-hand corner, is there an 8 there?

MR. SPITZ: Yes, there is.

THE CHAIRMAN: At the bottom of the page it says Exhibit 8.

MR. SPITZ: That is correct.

MR. SCOTT: (After a pause): Talking purely hypothetically about what happens when you appeal a decision like this and you go to the CFI, if you are challenging part of the decision, is it normal to seek the annulment of the whole of the decision as a matter of course, or do you only seek annulment of that part that relates to you as a party and to the particular part that you contest? Do you see what I am saying? This is on a purely hypothetical basis.

MR. SPITZ: My understanding is that each of these appeals are considered separately, and that the grounds advanced by one of the parties to the appeal are the grounds on which the court will rule in relation to that point.

MR. SCOTT: No . My point is rather different. Imagine that you are appealing on behalf of Party A against a decision which involves Parties A., B, C, and D. You may take particular objection to the fact that you, Party A, were embraced in this, and you may take particular objection to an aspect of the decision taken by the Commission. Nonetheless, would you conventionally ask that it be quashed against all four parties - in other words, totally annulled - or simply ask that it be annulled in relation to the involvement of Party A? Secondly, would you conventionally ask for total annulment even though you were actually only addressing part of the decision in the specific arguments that you were making? Do you understand what I am saying.

MR. SPITZ: I do indeed. In relation to the first part of the question I am simply not in a position to answer that. In relation to the second part, my understanding is that it is standard to recite a request for annulment when one makes the appeal. I am subject to correction, and no doubt will be corrected if I am wrong. So, even where the grounds are directed at particular issues such as the fine, it is standard to also ask for an annulment.

MR. SCOTT: Thank you.

THE CHAIRMAN: Can I give an answer to the first part of the question and we will see if everybody agrees? My understanding is that an appellant only obtains relief in respect of themselves. So, if the situation is that the CFI decision, or the European Court decision would actually affect a party who has not appealed on that point, or relates to something in relation to them as well, the decision of the appeal body only relates to the party who has appealed. So, the Commission decision in this case will stand in relation to people who are not appellants.

MR. SPITZ: Yes. If that is the question -- if that was what the question was directed at, that is correct, and I think that the authority is the AssiDoman case. Yes, indeed.

THE CHAIRMAN: We are now at para. 15.

MR. SPITZ: The next paragraph of relevance is para. 19 at p.10.

THE CHAIRMAN: This is rehearsing what happened previously, is it not?

MR. SPITZ: The first part is doing that, and the last sentence of paragraph 19.

THE CHAIRMAN: Ah, right. But, para. 15 is rehearsing. So then I go to para.19. (After a pause):

MR. SCOTT: Again, as we understand it, appellants may challenge, or not challenge, facts. They may also challenge, or not challenge, assessments. A distinction may be drawn as one looks at different appeals.

MR. SPITZ: Yes, that is quite so. (After a pause): So, in para. 19 the elements of the decision are set out. Then the attitude of the plaintiff in the appeal is set out in the last sentence of para. 19. (After a pause): In each of these paragraphs, what becomes clear is that although there is a formal request for an annulment, substantive arguments are not advanced towards overturning the finding of the infringement. Infringement itself is not attacked on substantive grounds in the appeal.

The Le Carbone appeal. If I could refer the Tribunal to the following paragraphs: para. 3 -- What we have been provided with, and what the Tribunal has, is a translation from the French of certain excerpts of the document. One part of the appeal that it would be helpful to see is referred to, but not provided in translation, in the table of contents. It is referred to under s.2 in the table of contents. On my document in the bottom right-hand corner it is numbered p.4. Table of Contents. Paragraph 1.3 of s.2 would be useful to see, but we have not been provided with a copy of a translation of that paragraph - or the original French document.

At para. 33 (in the bottom right-hand corner of my document it is numbered p.11), certain grounds of appeal are summarised. If the Tribunal would read those grounds -- (Pause whilst read): The complaints that are made there are directed towards the way in which the fine was calculated in each of those cases. So, again, the arguments are directed at the fine that was assessed.

Paragraph 39.

MR. SCOTT: We probably ought to look at para. 34, the first bullet, as we go by.

MR. SPITZ: Yes, indeed. (After a pause): What the Tribunal will see from the appeal is that here too there is no substantive argument advanced to establish that there was no infringement of Article 81(1). So the complaints in relation to products and market identification and operation are complaints that are advanced to support a conclusion that relates to fines that were assessed.

THE CHAIRMAN: Does that mean that what is being said is “We admit we are liable, or we were a party to it, but we were a party to it in a narrower way than has been found, and therefore the fine should be less” ----

MR. SPITZ: Yes, that is one of the arguments.

THE CHAIRMAN: -- which means that the finding of fact may be being attacked.

MR. SPITZ: Well they say in para.3 that they are not attacking the findings of fact.

THE CHAIRMAN: I know.

MR. SPITZ: But they are arguing that the product market and the allocation, the activities of the Cartel need to be looked at for the purposes of assessing what the appropriate fine is, how severe those activities were in different segments.

THE CHAIRMAN: I am looking at it hypothetically but I suppose the argument could be that there are not sufficient findings, that there should have been other findings in order to justify a fine of that amount.

MR. SPITZ: Yes, there could be an argument like that.

MR. BEARD: If it helps, yes.

MR. SCOTT: Turning to Le Carbone's written observations, I note that at para.23 ----

THE CHAIRMAN: Be careful.

MR. SCOTT: Yes, I am being careful – it says what it says ----

MR. BEARD: I am sorry, sir, was that para.23 of the application.

MR. SCOTT: Paragraph 23 of your written observations.

MR. BEARD: Those are open, that was the only question I had. I am very grateful to the Tribunal for madam Chairman's caution on confidentiality, but in this case I think everyone has seen those so it does not come any surprise.

THE CHAIRMAN: So what does that say.

MR. SCOTT: What it says is that:

> "The decision failed properly to define the products affected by the infringement. The decision therefore failed to take account of the fact that conduct engaged in by Le Carbone Lorraine and the effect of that conduct was different in relation to each category."

That is the category argument, but if you go back – "…discussions occurred which could not have an effect on competition in respect of those customers …" which takes you back to the customers of the product segments in dispute, as it were, so you can see how that then flows on into the argument.

MR. BEARD: Yes, as I say, we have tried to set out the broad relevant thrust in our observations so that we avoided any problems relating to confidentiality.

MR. SPITZ: Yes, and I am sure when my learned friend has the opportunity to address you he will be able to show you from the appeal the link between the arguments that are set out in the appeal and the attack on Article 81(1) and the basis on which it is argued – if indeed it is argued – that there was no infringement of Article 81(1)(4) for these reasons. In other

words, he will make good, I am sure on the contents of para.23 with reference to the relevant paragraphs of the appeal. It seems to us that those arguments are addressed to the inappropriate or excessive calculation of the fine, but that there is not a full frontal attack on 81(1).

MR. SCOTT: I imagine what you would say is that if there was an agreement that had, as its object – and they were party to that agreement – then ----

MR. SPITZ: Then the infringement is established, in fact that is something that Schunk in their submissions concede. Actual effect is not necessary in order to establish the infringement – the demonstration of actual effect. That is a question in relation to fines, and that is a question that would arise in relation to quantum of damages in a follow-on action.

May I also refer to paras.77 and 108 in order to illustrate a similar point.

MR. BEARD: It need not detain the Tribunal now, but at leisure it might be worth at least the Tribunal casting an eye over paras. 92 through to 98 as well.

MR. SPITZ: Schunk's appeal in translation is at tab 3, submissions bundle 1, and at p.109 of the papers there is a brief statement of the grounds for the claim. I am moving on to Schunk's appeal now.

THE CHAIRMAN: Yes.

MR. SPITZ: Paragraph 2 relates to the complaint in relation to joint and several liability, the liability of the parent for the subsidiary. Paragraphs 3, 4, and 5 deal with the extent of the fine. At paragraph 74, on p.132.

MR. SCOTT: You have whizzed by, for example, para.56.

MR. WEINIGER: In order to be of assistance, if we are talking about whizzing by para.14 on p.8 is also of relevance.

MR. SPITZ: Yes, one sees in para.14 that there is not an attack on the existence of the infringement under 81(1) but grounds are advanced in that paragraph in relation to the extent of the infringement for the purposes of the magnitude of the fine.

I am not purporting to be providing an exhaustive tour through this document. Paragraph 74 makes it clear that the question of the actual effects on the market is not a relevant consideration in relation to whether there has been an infringement or not under 81(1). The analysis which follows dealing with the relevant product market and the extent of cartel activity in the product markets again is directed not at a challenge to the finding of an infringement but towards the question of whether or not the fine was appropriately assessed.

So in relation to each of these appeals we submit that there is not a danger that the finding of an infringement will be set aside on appeal and that these appeals raise issues that go towards the extent of the fine that has been assessed.

THE CHAIRMAN: Do they go to the extent of the damage that might have been suffered?

MR. SPITZ: They do go to the question of the extent to which the cartel was implemented in particular product markets and that is a question that will be relevant for quantification of damages.

THE CHAIRMAN: So there is an issue in one or more of these appeals which may have some relevance to the quantification of damages?

MR. SPITZ: Yes, and it would be open to the proposed defendants to raise those issues in a defence to the quantum of the claim, to advance those arguments.

THE CHAIRMAN: But if you look, and you are going to have to remind me of the provision, but I think when we look at a damages' claim, a follow-on action do we not look at the facts found in the decision?

MR. SPITZ: Well one bases the claim on the finding of an infringement. (After a pause) Yes, madam, the quantum of the damages claimed will be a matter for determination and there will be factual inquiries to be made in relation to that in the follow-on action. The question of the fine is a separate matter; the question of the fine is the issue that is subject to appeal on the grounds that are advanced.

MR. SCOTT: (After a pause) I think the question to which we are addressing our minds at the moment is that we may be in a situation where the CFI or ECJ might qualify the nature of the findings that underlie a finding of infringement. In other words, they might substantiate a finding of infringement, but do so on a basis that differed from the basis that the Commission found.

MR. SPITZ: Yes, and we say that those issues would be relevant for the purpose of quantification of damages in the claim.

THE CHAIRMAN: So if there was a difference between the findings of fact in the Commission decision and in the CFI or European Court decision then we are only bound by the latter, which ever is the last?

MR. SPITZ: Yes, quite so. The concern here is that the finding of infringement should be in tact because that is the platform on which the follow-on action starts off. The actual quantification of that loss will take into account factual matters that are not necessarily canvassed and determined in the Commission's decision. But what is necessary is to have a situation where that Commission decision will not be set aside, in other words a finding of

infringement will not be overturned because that would deprive the follow-on action of its foundation.

What s.47A(9) says:

> "In determining a claim to which this section applies the Tribunal is bound by any decision mentioned in subsection (6) which establishes that the prohibition in question has been infringed."

So one is bound by that decision.

THE CHAIRMAN: But it is infringed because ----

MR. HOSKINS: Again, I am sorry to interrupt, it might be useful to look at s.58A of the Act as well, it goes a bit broader in terms of how the Tribunal is bound.

THE CHAIRMAN: That may not apply to us, 58A.

MR. HOSKINS: I appreciate … I was going to say to complete the picture there is also the European Communities Act which requires courts in this country to follow rulings, because this is an EC matter so it is not simply "have regard to" under the Competition Act, it is bound by the CFI. So I think that is the whole picture if one takes s.59A although that might not be directly relevant here of the European Communities Act, that is where – as Mr. Spitz has rightly said – the findings of the CFI will be relevant.

THE CHAIRMAN: I know what I am thinking of. I was thinking of s.58 which is findings of fact by OFT. What I have been looking for is that I remembered that there was something about findings of fact and the OFT ----

MR. SPITZ: In relation to the OFT, yes. So that then is the extent of the appeals and the nature of the appeals, and we say that that does not undermine the decision and that the decision will stand so there is no obstacle from the point of view of the stability of the decision to the follow-on action and so permission can be granted in this situation without a concern that the basis for the follow-on action could disappear.

In the course of looking at the question of the scope of the appeals I think the Tribunal was handed some faxes that were referred to earlier, and so perhaps I can turn to those. There are two letters before action: 17th August 2007.

THE CHAIRMAN: You have not sent one to ----

MR. SPITZ: We have but they have not been faxed through. All the defendants have received letters before action in substantially the same terms, they have not all been faxed through. 17th August 2007 ----

MR. WEINIGER: Madam, the only issue is going to be the date because I think there will be a point taken later on how much time has elapsed since these letters were sent. I do not recall what date the Schunk letter was sent.

MR. SPITZ: 23rd January 2007 I believe was when it was sent to Schunk.

THE CHAIRMAN: So Schunk was sent first, was it?

MR. SPITZ: Yes, Schunk and SGL were sent on 23rd January 2007 and Le Carbone was sent a letter on 23rd August 2007.

THE CHAIRMAN: So you asked for the documents?

MR. SPITZ: Yes.

THE CHAIRMAN: And you have received no reply from this letter?

MR. SPITZ: We have received no reply addressing the request. We have received an acknowledgement of receipt, but we have not received a reply that either provides the documents or indicates why they were not ----

THE CHAIRMAN: And did you follow it up because this letter is 23rd January 2007?

MR. SPITZ: It was followed by the issue of the claim form in February 2007. (After a pause) Madam, what we can do if it assists is overnight we can put together the full picture so that the Tribunal has these letters and the replies in relation to each of the proposed defendants, because at this point one is dealing with fragmentary bits and pieces and it is incomplete, so we will do that and make that available tomorrow morning.

THE CHAIRMAN: Are you now going to turn to the other points?

MR. SPITZ: Yes, I am.

THE CHAIRMAN: Shall we have a break until a quarter to?

MR. SPITZ: That is fine.

(Short break)

MR. SPITZ: The next issue - jurisdiction in relation to Article 6. Here the point is a short one in relation to the position of Bosch because subject to the discussion on the order dealing with permission versus jurisdiction, the proposed defendant seemed to accept that there is a valid claim against the anchor defendant and that but for the point that Mr. Hoskins has raised there would be jurisdiction under Article 6(1) over the other defendants. I say subject to the position of Bosch there is a debate in relation to Bosch's position, and that is because Bosch had a claim against Morgan and settled the claim against Morgan, and advances claims against the other proposed defendants. It advances those claims on the basis of product that it purchased in relation to some, and on the basis of joint liability in relation to others. The question that arises is whether a claimant, in order to bring proceedings before the Tribunal

requires its own claims against an anchor defendant on the basis of which to then pursue claims against the other defendants if it satisfies the requirement that the claims are sufficiently closely related. That is the question in relation to Bosch.

The claimant's submission is that it is not a requirement. Bosch is able to bring its claim against the proposed defendants even though it has settled its claim against the anchor defendant, Morgan. It can do that because the requirements of Article 6(1) are satisfied in relation to Bosch's claim.

The defendants will be one of a number of defendants in the courts for the place where any one of them is domiciled, and the claims are sufficiently closely connected. Those are the requirements stipulated in Article 6(1). What the proposed defendants say is that this is to give an over-expansive interpretation to Article 6(1) and that each claimant requires a claim against an anchor defendant in order to bring claims against the other defendants.

One can test that on the basis of looking at the situation here where already, on the assumption, for the purposes of this argument, that permission is granted, the Tribunal has jurisdiction over the anchor defendant and the other proposed defendants in relation to the claims brought by all of the claimants, save for the claim brought by Bosch. Those defendants are already before the Tribunal on the basis of Article 6(1).

THE CHAIRMAN: (No microphone) You have got a number of claimants ... and certainly ... because it has been settled. By putting your heading in the way that you have, you have fudged the real issue.

MR. SPITZ: No, not at all. Not at all. One is entitled to join any number of claimants and any number of defendants in the claim.

THE CHAIRMAN: (No microphone) But in relation to different claims? The claimants were supposed to speak with one voice. You cannot speak with one voice if one of them has not got ...

MR. SPITZ: Well, tested on the basis of looking at it from the point of view of joinder of a claimant, if these proceedings commenced and Bosch then sought to join these proceedings on the basis that it had claims against some of the proposed defendants but not Morgan, the question would revolve around how closely connected Bosch's claims are to the claims that are already before the Tribunal. The Tribunal would have the discretion ----

THE CHAIRMAN: (No microphone) That would mean a question of consolidating the claims. Where the court hears the claims at the same time ----

MR. SPITZ: Under the joinder provisions, the test under the CPR is the connection between the claims that are already there and the claims which ----

THE CHAIRMAN: (No microphone) There is no connection. I think my starting point is that the claimants speak with one voice. So, you cannot speak with one voice against Morgan Crucible. So there can be no claim by Bosch against ----

MR. SPITZ: There is no claim by Bosch against Morgan Crucible.

THE CHAIRMAN: So, there is no claim by Bosch against Morgan Crucible. Therefore the claimants are not speaking with one voice in relation to this claim because Bosch is not a claimant vis-à-vis Morgan Crucible. That is why I suggested that you may, by the way you have formulated the title to this action, have confused -- not intentionally -- the analysis. What you would normally have is all claimants speaking with one voice against all defendants. So, if you brought actions against the second to fifth defendants, then all the claimants speak with one voice. If you exclude Bosch from your claimant list, then all the claimants speak with one voice. But, if you include Bosch then all the claimants are not speaking with one voice. Once you have a situation where they are not speaking with one voice, then I thought they had to be joined as a defendant and not a claimant.

MR. SPITZ: In relation to some of the proposed defendants the claimants all speak with one voice, but not in relation to others.

THE CHAIRMAN: Absolutely. Therefore, that is what ought to have been set out in the title to the action.

MR. SPITZ: But each of them, save for Bosch, have a claim against the anchor defendant, and then have claims against the other proposed defendants.

THE CHAIRMAN: Yes.

MR. SPITZ: For Bosch to be able to bring its claim our submission is that the requirements of Article 6 have to be satisfied. That means that the proposed defendant must be one of a number of defendants in the court for the place where any one of them is domiciled ----

THE CHAIRMAN: This is looking at a particular claim. The claim that you are looking at is a claim by everybody but Bosch.

MR. SPITZ: Yes. So, the question is, "Well, can Bosch join because it has claims against the other defendants, but not against the anchor defendant? Can it join in these proceedings?"

THE CHAIRMAN: Can it be included in?

MR. SPITZ: Can it be included in? Does Article 6 prohibit that? There is nothing in the language of Article 6 that does prohibit that. What Article 6(1) does is in order to avoid a floodgates kind of scenario in order to ensure that the claims are properly where they should be is it requires that the claims are so closely connected that it is expedient to hear and determine them together.

THE CHAIRMAN: I think you are certainly missing a stage. You are starting in the middle of a line. My problem is whether Bosch can be one of the claimants at all in relation to a claim made by all claimants against Morgan Crucible.

MR. SPITZ: Bosch does not have a claim against Morgan Crucible and does not advance one.

THE CHAIRMAN: No. Therefore, should it be included in a claim? It is included in a claim, on the claim form. If you look at the claim form it looks as if all the claimants against all the defendants. So, if you just look at the title to the action you would assume that there was a claim by Bosch against the defendants.

MR. SPITZ: I think it is made clear in the claim form itself that Bosch has settled its claim before.

THE CHAIRMAN: Therefore, I am questioning - and I am not saying which is right or which is wrong - whether it is appropriate for Bosch to have been named as a joint claimant on that claim form. Where I start from is the principle that all claimants must speak with one voice. Bosch cannot speak with one voice because it does not have the claim.

MR. SCOTT: Put it another way, Mr. Spitz: upon what statutory basis, embracing the regulation, do you say that Bosch can be before us at all?

MR. SPITZ: On the basis that it has a follow-on action against these proposed defendants, flowing from the decision of the Commission.

MR. SCOTT: Yes. We understand that. That takes you to the regulation, and the regulation focuses on the people being sued. What founds Bosch's ability in a free-standing way to bring an action where the only defendants that Bosch can sue are defendants none of whom are domiciled in the United Kingdom?

MR. SPITZ: Article 5(3) would if that Article applied, but we put that to one side.

THE CHAIRMAN: You are jumping ahead. I am still on the question: How do the claimants, including Bosch, bring an action against Morgan Crucible if Bosch has no action against Morgan Crucible? Logically, if that is right, then Bosch should not be included in the claims against Morgan Crucible, and it is a different claim that is being brought against the other defendants? There could be all the claimants, including Bosch, bringing an action against the second to fifth proposed defendants because there has been no settlement. It may be that there are effectively two separate actions. When one is looking at Article 6(1) one has to look at which claim you are looking at. Now, the fact that maybe we have wrapped it all together in the way that the proceedings have been started -- One still has to analyse what the claim is. It does not seem to me at the moment that -- I do not quite understand how Bosch is a claimant in an action against Morgan Crucible.

MR. SPITZ: Perhaps one can refer very briefly to the *Provimi* decision because in that decision there were a number of claimants and a number of defendants, and not all of the claimants had claims against all of the defendants. It seems to me that there is not an immediate barrier against a number of claimants bringing claims against a number of defendants where not every single claimant has claims against each of those defendants. It does not seem to me that there is a defect in the procedure to have done that.

THE CHAIRMAN: Let us look at *Provimi*. I have done it myself. You say you have a claim against the sixth and seventh defendants in relation to this, or the fifth and fourth in relation to that. (After a pause): The difference may be that everybody does have claims against everybody, but they are different relief. But, you are going to tell me that is wrong, are you not?

MR. SPITZ: Tab 28 in authorities' bundle 2.

THE CHAIRMAN: (After a pause): This is where different claimants had different relief against different defendants.

MR. SPITZ: Yes, that is right.

THE CHAIRMAN: Not that it was a claim against different defendants. Do you see what I mean?

MR. SPITZ: Yes, that is correct. (After a pause): If one looks at p.400 the actions and the jurisdictional framework, (near the bottom of that page) from para. 7 there is a discussion of the groups of proceedings.

THE CHAIRMAN: So, there are a number of proceedings. There is one action Provimi and another action by two companies in the Trouw group. There are two separate actions.

MR. SPITZ: Yes. He divides them in the Roche actions and the Aventis actions.

THE CHAIRMAN: Yes.

MR. SPITZ: The Roche actions are then described from para. 14.

THE CHAIRMAN: There is only one claimant in the Roche actions which is Provimi. So, we do not have the same problem.

MR. SPITZ: Then one looks at 14(c) on p.401 in relation to Trouw

THE CHAIRMAN: That is the other action.

MR. SPITZ: Yes. Sub-paragraph (4): "Trouw (UK) and Trouw (Germany) have both sued Roche UK. Trouw (UK) and (Germany) have also sued Roche - Roche Switzerland and Roche Germany.

THE CHAIRMAN: The claimant is Trouw (UK). The third claimant is Trouw (Germany). The second claimants have been discontinued. So, it is both claimants who have sued the various defendants.

MR. SPITZ: Yes.

THE CHAIRMAN: So, it is not the same as here.

MR. SPITZ: Yes, that looks to be the case.

THE CHAIRMAN: I may be wrong, but I need to be convinced. I thought the claimants had to speak with one voice. Therefore, if there is a claim -- If one of them cannot make a claim against a particular defendant then they are not speaking with one voice. The claimant themselves may have different claims against different defendants, but they have to have jointly have different claims against different defendants.

MR. SPITZ: I am going to look at the *Provimi* decision and confirm whether ----

THE CHAIRMAN: Yes, well it does not look like that is going to help you.

MR. SPITZ: If Bosch sought to join these proceedings, if Bosch was not a claimant in the original proceedings and the proceedings all commenced with claims against Morgan as the anchor claimant and claims against the other proposed defendants, and Bosch then brought an application to become a claimant in these proceedings ----

THE CHAIRMAN: It could not do that; this is my question. If it does not have a claim against Morgan Crucible then it could not join, and the old rule was that it would have to be joined as a defendant, rather oddly it would be a claimant joined as a defendant, if we thought it was a necessary and proper party to the proceedings, but it would not be making a particular claim.

MR. SPITZ: But if that is correct that is not a function of Article 6(1).

THE CHAIRMAN: Well why I think that it is important is that what Article 6(1) is looking at is a claim – this is why I say you are half way down rather than at the first stage – what you are doing is looking at a claim that you have presented, but I am not sure that the claim that you had presented is in proper form. Therefore, if you start by saying: "There they are, they are claimants" you are jumping because the question is: should they have been claimants? They have no claim against Morgan Crucible, so I think in colloquial terms it might be said to be a "boot strap argument", that is what I am concerned about.

MR. SPITZ: Yes, I see the concern, madam chairman. But if one took Bosch out of this scenario and then Bosch arrived to try and become party to this my submission is that Article 6(1) does not preclude Bosch from becoming a party. What one needs to do is to look at the requirements of Article 6(1) and see whether those are satisfied.

MR. SCOTT: If we were in a situation where we had given permission then presumably if we gave permission in relation to all the claimants with the exception of Bosch, to make a claim against, let us say, all the proposed defendants, am I right in thinking that were Bosch to initiate an action somewhere else, then Article 28 would cause that action to be stayed on the grounds that we were seized of it and you would then make an application presumably under Rule 35 to have Bosch joined into this action on the grounds that would then obviate ----

THE CHAIRMAN: I do not see how Article 6(1) assists you because that is looking at … "a person domiciled in a Member State may also be sued where he is …" so it is looking at the defendants, it is not looking at the claimants.

MR. SPITZ: Quite so, it is looking at the defendants.

THE CHAIRMAN: But the question is whether you can start the action at all. Bosch could start a separate action against those defendants, but it would not start an action against Morgan Crucible, it would only start an action against the second to fifth defendant. If it started an action against Morgan Crucible, Morgan Crucible would say that is an abuse of process because that action has been settled.

MR. SPITZ: Quite so, I am not suggesting that Bosch would start an action against Morgan Crucible, but the scenario that I am suggesting is this: proceedings are in process against Morgan Crucible and the proposed defendants and Bosch is out of the picture. Bosch then arrives with its claims, not against Morgan Crucible but against the other defendants, who are already subject to the jurisdiction of the Tribunal and they are subject to that jurisdiction under 6(1). Morgan is the anchor and they come in on the back of that.

The question then arises is Bosch entitled to pursue its claims against the defendants other than Morgan in these proceedings before the Tribunal? Our submission is that Article 6 does not prohibit Morgan from doing that.

THE CHAIRMAN: It will not be in these proceedings because it was not a party to those proceedings.

MR. SPITZ: But it would then be applying to be joined as a party.

THE CHAIRMAN: And what I am saying is it cannot be joined as a party to those proceedings, this is my problem. Until you have sorted that problem out we cannot get very much further because it is not speaking with one voice in relation to all defendants. What I think you would do is you would have two actions. You would have an action against the second to fifth defendants in which Bosch was the claimant and you would have an action against the first to fifth defendants in which Bosch was not one of the claimants and then you would be

coming here and saying either we consolidate these actions or that they should be heard together.

MR. SCOTT: Article 28(2) then comes into play because I assume our law permits consolidation.

THE CHAIRMAN: Yes. But it could not come along and say: "Guess what, I want to join in the action against 1 to 5, but I am only pursuing 2 to 5."

MR. SPITZ: As it stands now each of the claimants, apart from Bosch, pursues a claim against that defendant from whom it purchased products, and it pursues a claim of joint and several liability against the rest. Bosch has the claims for joint and several liability and the claims in relation to purchasers against the proposed defendants, but what it does not have is the claim in relation to Morgan. Question: Can it then come into these proceedings? 6(1) is not a barrier to it coming in, that is the submission.

MR. SCOTT: It has to come in by way of related action.

MR. SPITZ: Indeed.

THE CHAIRMAN: But 6(1) is not dealing with joining a claim ----

MR. SPITZ: No, it is not.

THE CHAIRMAN: -- it is dealing with a defendant, and when we are considering whether there should be a joinder we would be saying "You do not have an action against Bosch, and the claimants will speak with one voice so you cannot be joined."

MR. SPITZ: All the Tribunal would be saying is the joint and several liability claims, and the claims against the defendants from whom you made purchases are clearly claims that are related to the claims that are already within our jurisdiction and you are entitled to pursue those claims in these proceedings and indeed it is expedient to do so.

THE CHAIRMAN: No, you are entitled to pursue those claims, full stop. The question is: in what proceedings? Why should we say that you are entitled to pursue those claims in these proceedings?

MR. SPITZ: Well because manifestly one would then avoid the need to have evidence in two separate proceedings.

THE CHAIRMAN: No, you would have consolidation all being heard together.

MR. SPITZ: Well one could consolidate.

THE CHAIRMAN: But if you consolidated you would not be in the situation where you were getting jurisdiction against the second to fifth defendants on the basis that you joined the first defendant because the first defendant is not there. So you would have an action against the second to fifth defendant which was within our jurisdiction and we would then

consolidate both actions, or hear them together. So the problems that you alluded to would not arise.

MR. SPITZ: The Tribunal would already have jurisdiction over the proposed defendants on the basis of the claim that excluded Bosch, the Tribunal would have jurisdiction on the basis of Morgan being the anchor.

THE CHAIRMAN: In relation to a claim by the claimants other than Bosch.

MR. SPITZ: Yes, and in relation to a variety of claims, in relation to claims relating to purchasers and in relation to joint liability claims, and they would be properly before you, and Bosch would not be saying to you establish an additional basis of jurisdiction that does not already exist, and you the Tribunal already have jurisdiction over these defendants. "I, Bosch, as a victim of the cartel simply want to bring my claim in the same proceedings."

MR. SCOTT: So what we need to do then is take the steps of your clients, with the exception of Bosch, making their claim against the proposed defendants, possibly arguing jurisdiction, but let us leave jurisdiction out of it. Let us assume that the proposed defendants are now defendants. You then ask us for permission for Bosch to make a claim, which would be separate and then you ask us to consolidate the proceedings in accordance with the regulation. It seems to me that you need to go through those distinct steps in order to get Bosch in place.

MR. SPITZ: But without the need to establish a separate basis of jurisdiction because the Tribunal already has jurisdiction over those.

THE CHAIRMAN: I think where the confusion arises is as to whether once the Tribunal happens to have jurisdiction over some defendants the result is that anybody (insofar as they have a claim) can make claims and seize or have the benefit of that jurisdiction, or whether the jurisdiction is in relation to particular claims.

MR. SPITZ: That captures it and our argument is either right or wrong.

THE CHAIRMAN: And you are saying that there is a general jurisdiction. Once we have jurisdiction over particular defendants then any claimant can come along.

MR. SPITZ: No, provided that the requirements of Article 6 are satisfied and the control mechanism that made sure that there is not an open season is that the claims must be sufficiently closely connected so that it is expedient ----

THE CHAIRMAN: Let us look at Article 6.

MR. SPITZ: Tab 40 of the authorities' bundle vol.2.

THE CHAIRMAN: Yes, p.614.

MR. SPITZ: And one asks the question when Bosch comes along to participate in these proceedings, whether these requirements are satisfied.

THE CHAIRMAN: You see what I do not understand, the whole way that the Brussels' Regulation works is that an action is started and then you can test jurisdiction. You are pre-supposing there is not an action started by Bosch.

MR. SPITZ: I am saying that that is a way of testing whether Bosch is entitled to be on this claim form; test it by saying that if Bosch was not on the claim form and if these proceedings were up and running and Bosch then came along and wanted to participate, would the Tribunal permit it to do so and I am saying that depends, are the requirements of 6(1) stipulated here satisfied? Would Bosch be suing one of a number of defendants in the courts for the place where any one of them is domiciled? The answer is "yes", it would be. Are the claims so closely connected – and this is the control mechanism – that it is expedient to hear and determine them together, and that is what prevents any Tom, Dick or Harry arriving and seeking to bring a claim.

THE CHAIRMAN: So who are you saying may be sued?

MR. SPITZ: The proposed defendants.

THE CHAIRMAN: But if we are looking at this on the basis that Bosch is being joined as the claimant the claims – I just find it very difficult to see it in this context.

MR. SCOTT: I think the difficulty I have is that none of the proposed defendants, as I understand you would agree, is domiciled in the United Kingdom?

MR. SPITZ: Yes, that is correct.

MR. SCOTT: So that when on reads this you have to say: "a person domiciled in a Member State", "Yes". "…where he is one of a number of defendants in the courts for the place where nay one of them is domiciled" But if in the action by Bosch there is not a defendant domiciled in the United Kingdom then you have to find some other way of joining Bosch.

MR. SPITZ: It relates to the same question that the chairman ----

THE CHAIRMAN: It is the same point, yes.

MR. SPITZ: And the point is does each claimant require an anchor defendant on the basis of which to advance its claim against the foreign defendants.

MR. SCOTT: That is the nub of it.

MR. SPITZ: Our submission is that Article 6 does not stipulate that each claimant requires a separate claim against the anchor defendant.

THE CHAIRMAN: But I think you are starting again. I keep repeating, because it comes up in a different context but it is the same point, you are starting in the middle because can you make that claim to start with?

MR. SPITZ: In this claim the claimants are not all speaking with one voice in relation to each of the proposed defendants.

THE CHAIRMAN: All the claimants are speaking with one voice.

MR. SPITZ: Well they have individual and different claims against different defendants insofar as the purchases they made are concerned, and then they have joint liability claims.

THE CHAIRMAN: They are all speaking with one voice in relation to the infringement.

MR. SPITZ: Yes, and so would Bosh be speaking with one voice in relation to the infringement. The difference ----

THE CHAIRMAN: But it does not have a claim against one defendant.

MR. SPITZ: Yes. I am not sure that I can put the argument any better than that.

THE CHAIRMAN: I think the point that I am trying to make is that you are standing there representing all the claimants. When you are standing there and pleading in relation to Morgan Crucible you have to say "Actually, I am only standing here in relation to the claimants other than Bosch". So you are not, in that sense, speaking with one voice, because you are going to have to say: "Wait a minute, this does not apply".

MR. SPITZ: We say that Bosch does not advance a claim against Morgan Crucible because it has been settled. Another claimant advances its claims against two but not the rest of the proposed defendants because of purchases that it made. There is already a disaggregation that happens here and that is dependent on claims that are based on individual purchasers. Then there is the claim for joint liability.

THE CHAIRMAN: Well I do not think we are particularly going to get any further. We know what the problem is we are going to have to think about it.

MR. SCOTT: Were we to give permission either at this stage or at a subsequent stage, or to find ourselves after the exhaustion of the European actions admitting a claim by all the claimants except Bosch, against all the proposed defendants, what action do you think you could then take to bring Bosch into the proceedings?

MR. SPITZ: An application to be joined as a party in these proceedings – that would be one. The other would be an set of proceedings that are then consolidated but that would require a basis of jurisdiction under 5(3) or some other ground.

MR. SCOTT: I understand.

THE CHAIRMAN: Do you want to go on?

MR. SPITZ: Well that is the claimants' point in relation to Article 6(1) insofar as it concerns Bosch.

Article 5(3) then ----

MR. BEARD: Madam, just so perhaps we can all understand, what time this evening was it intended that the Tribunal would be sitting until?

THE CHAIRMAN: Not too late.

MR. BEARD: That is a wonderfully enigmatic response. Thank you, madam.

THE CHAIRMAN: How long have you got to go?

MR. SPITZ: Well it depends what "not too late" means. I think that it is probably unlikely that I will finish in the next or so minutes.

THE CHAIRMAN: Half an hour – will you finish in half an hour? I do not want to push you.

MR. SPITZ: Frankly since we have time set aside tomorrow, perhaps it is preferable ----

THE CHAIRMAN: To stop. I am only concerned tomorrow we have quite a lot to do, possibly, so how are we going to timetable it? I do not want to spend half an hour discussing timetable when we could have had half an hour submissions.

MR. BEARD: Would it be best to start at 10 o'clock tomorrow morning.

THE CHAIRMAN: I prefer to go half an hour later today than 10 o'clock tomorrow morning.

MR. BEARD: Certainly, madam.

MR. SPITZ: Well perhaps let me ----

THE CHAIRMAN: Let us see what you can do until about five to five.

MR. SPITZ: Yes. On the question of Article 5(3) there is a good deal that is common ground between the claimants and the proposed defendants. It is accepted that the claimants have a choice to sue in the place where the damage occurred, or in the place of the event giving rise to the damage. I think it is also common ground that there can be a multiplicity of jurisdictions and jurisdiction in several states. The *Shevill* case is an illustration of that where defamatory statements were published and distributed in a number of Member States. The decision was that the event giving rise to the damage took place in the place where the publisher was established, and then damage arose in each place where the defamatory statements were then distributed or reproduced.

The focus behind Article 5(3) is ensuring that there is a sufficiently close connection between the disputes and the courts other than those of the defendants' domicile; that is what is driving Article 5(3). I think that it is common ground that a reasonably well informed defendant should be able to predict where he or she will be sued.

In relation to 5(3) the choice then between the event giving rise to the damage on the one hand, and the place where the damage occurred on the other, where these are not co-extensive then the claimant has a choice between these two. These claimants submit that they satisfy both legs, both the first limb – and this is derived from the *Bier* decision - the place where the damage occurred and the second limb in relation to the place of the event giving rise to the damage.

The Tribunal will probably recall that in relation to the first limb, the place where the damage occurred, a concern motivating the courts in the case law is that the place where the damage occurred should not ordinarily be identical with the place of the claimant's domicile, so that the claimant should not be able to bring proceedings where the claimant is domiciled because that drives too big a wedge through the ordinary structure of the regulation which is based on domicile of the defendant's domicile. So that is the concern that drives the courts when they are looking at the meaning of the place where the damage occurred. That is not a concern in this case because none of the claimants are domiciled in the UK. The test that is to be satisfied is whether the activities of the cartel in the United Kingdom produce harmful effects on the person who is the immediate victim of the event, and the claimants say that the answer to this must be "yes."

In relation to Emerson and Valeo, those claimants purchased products from Morgan in the UK. I think there can be little debate that the UK is the place where the damage occurred in relation to those entities who made purchases in the UK. The claimants submit that the place where the damage occurred is not limited and restricted to the place where claimants made purchases.

THE CHAIRMAN: When you say "UK", do you mean England and Wales?

MR. SPITZ: England and Wales. What the cartel did was to make sure that across Europe in all the EEA countries one could not purchase these carbon products at a competitive price. The Commission decision makes that point and recognises that in effect there was not an alternative source of supply. So none of the members of the cartel offered products for sale at a competitive price precisely because of the cartel activities of the agreements and of the implementation of those agreements. The very purpose of the cartel was to ensure that you could not buy these products at competitive prices in the jurisdictions in which the cartel operated.

MR. SCOTT: So what you are saying is an effective refusal to supply at a competitive price in England and Wales -----

THE CHAIRMAN: An implicit ----

MR. SCOTT: Implicit, yes.

MR. SPITZ: Gives rise to the damage in England and Wales. Had there been product available at a competitive price in England and Wales then there would have been no need for the purchase of that product in any other jurisdiction. So it is not simply that England and Wales is the place where the damage occurred for those claimants who purchased here, it applies for all of the claimants who were, because of the cartel, unable to purchase product at a competitive price in England and Wales.

So the damage then occurred in every jurisdiction in which the cartel operated. In the *SanDisk* decision, which is in vol.2 of the authorities, tab 30, at para.42 the court there deals with and rejects on the facts of this case an argument that was advanced before it. It is on p.445 of the bundle. Perhaps the Tribunal could read that paragraph and it will not be necessary for me to read it out.

(After a pause) The court there finds that as attractive as this characterisation of the tort as a global tort is, it simply does not fit the facts at issue in *SanDisk* and the reason it does not fit the facts is primarily because the heart of the issue was the enforcement steps that had been invoked in Germany and Italy and that is referred to on p.446 a third of the way down that first paragraph, and that is what distinguishes it. So in this case one is not really dealing with a continuous tort that was directed at trade between Member States and that was implemented across the EEA. What was attractive about the characterisation of this tort as a global tort in *SanDisk* fits the facts of these claims. The tort, by definition in terms of Article 81(1) is directed at trade between Member States – it is part of the definition of the infringement, it is the effect on trade between Member States. It is carried out so as to make sure that it affects all of those Member States, and it affects it in ways that I have described, so it is on that basis that we submit that under the first limb of *Bier* the damage occurred in each jurisdiction in which the cartel operated including England and Wales. In this jurisdiction it is sufficient for one of the proposed defendants to have offered the product at cartel prices in a context where one could not purchase those products at competitive prices here or anywhere else, because of the joint liability of the other proposed defendants in this matter.

The next question in relation to the first limb of *Bier* is the extent of that damage.

MR. SCOTT: Just to clarify what you are saying. What you are saying is that in relation to the UK – leaving Bosch aside – Emerson and Valeo get in because they actually purchased at an anti-competitive price, and in relation to Visteon and Rockwell you are saying that they

could not have purchased in this country at a competitive price, so that it is not material that they did not purchase at an anti-competitive price?

MR. SPITZ: Yes, that is right. Emerson purchased at the cartel price. The others could not purchase at competitive prices in this jurisdiction and were harmed because of that inability. Had there been no cartel, then they would have been able to purchase in this jurisdiction and at a competitive price. They would have done so. So, it is on that basis that this is the place where the damage occurred. Sir, you said to me a moment ago, 'Putting Bosch aside for these purposes'. Of course, one bears in mind that we have now moved away from Article 6(1). Bosch is very much in the picture for 5(3). If there is jurisdiction on the basis of 5(3), then Bosch is safely and properly in the right forum and part of this claim.

MR. SCOTT: You mean because Bosch could not purchase from Schunk as Le Carbone in the United Kingdom at a competitive price.

MR. SPITZ: That is correct.

THE CHAIRMAN: Do you not have to show that the relevant claimants would have purchased within the United Kingdom, or within England and Wales? In other words, do you not have to effectively show a refusal to supply? Otherwise, how do you get your causation and damage?

MR. SPITZ: The refusal to supply is there in the very organisation and implementation of the cartel. That is its purpose - to make sure that product is not ----

THE CHAIRMAN: If you would not have tried to do it within this jurisdiction ----

MR. SPITZ: If the cartel operated in every other jurisdiction but for this jurisdiction, then it is a reasonable assumption ----

THE CHAIRMAN: I understand that the cartel operates in all the jurisdictions, but when you are looking at damages action one is looking at loss suffered by you, and therefore do you have to show that you would have purchased within this jurisdiction in order to show that you suffered a loss in this jurisdiction? If you need to show that you would have purchased, how do you do that? The first way of doing it is to show that you actually tried. If there is nothing there, then how do you prove that you suffered a loss within this jurisdiction?

MR. SPITZ: It is reasonable to assume that if products were offered at competitive prices in this jurisdiction, and not in any other jurisdiction, then they would have been purchased in this jurisdiction.

THE CHAIRMAN: Why should you assume that? Where were you going to use these products? (After a pause): Do they normally purchase within this jurisdiction?

MR. SCOTT: Put another way, if one looks at other purchase that Visteon and Rockwell make, do they customarily consider purchasing from the United Kingdom in competitive global markets?

MR. SPITZ: That is a question in relation to the facts that we do not have before the Tribunal and that is why the Tribunal is raising the point. One needs to be in a position to say that these are multi-nationals. They are purchasing from suppliers in Europe. One ought to be able to draw an inference that if the products were offered competitively in England and Wales that that is where these multi-nationals would ----

THE CHAIRMAN: Would you not need to show that as multi-nationals they purchase from whichever jurisdiction gives them the cheapest price, or whatever -- or the best terms, and it does not matter where they purchase -- It is all delivery to X country. So, it does not matter where they purchase from. Therefore, they would have purchased here. But, without that evidence, and without that part in the claim, how do you get it off the ground, except asking us to assume that that is what would happen?

MR. SPITZ: It has to be arguable that that is what would have transpired. If there was one European country in which the cartel was not operating, and all of the claimants were purchasing product and looking for a low price, they would have gravitated towards ----

THE CHAIRMAN: Where is this in your claim form?

MR. SPITZ: It is not. It is not articulated in this way. What is articulated is the offer of the products at a cartel price.

THE CHAIRMAN: But you have to show in your claim form causation and damage. So, your claim form should show what you are relying on for those features.

MR. SPITZ: We are relying on the purchase of products at cartel prices, and we are relying on joint liability for the conduct of the ----

THE CHAIRMAN: What you are relying on is purchase of product at cartel prices outside England and Wales.

MR. SPITZ: What is being relied on is the place where these products were purchased.

THE CHAIRMAN: Yes - so, outside England and Wales. The way you have put your claim is not this way.

MR. SPITZ: Some of them were purchased in England and Wales. We have dealt with those.

THE CHAIRMAN: We are talking about the two that were not. We are talking about the ones that were not.

MR. SCOTT: Your parties have very different purchasing patterns. On the matrix derived from the material before us you have got a difference between Emerson and Valeo who, we

understand, to be purchasing from three of the different groups; Bosch, likewise, purchasing broadly but Visteon and Rockwell are characterised by rather narrow purchase behaviour on the basis of what we have been told. So, there is a behavioural difference in the material before us.

MR. SPITZ: That may indeed be so. I come back to the point that in a context where a competitive price was available it is not an unreasonable or a great leap to come to the conclusion that the products would have been purchased by these claimants in the jurisdiction where they could obtain the competitive price. No-one, until the cartel was investigated and exposed, knew of its operations and of the fact that what was being made available was a cartel price.

THE CHAIRMAN: But if you want to make your claim like that, surely that should be in the claim form because that is the damage ----

MR. SPITZ: One is testing where the harm actually is for these purposes.

THE CHAIRMAN: Yes. But the point is that we have to look at your claim form, look at the cause of action in your claim form, what facts you rely on, and where the harm is in accordance with your claim form - not in accordance with some hypothetical situation which you seek to raise here. I am not saying whether or not it is a good point. I am just saying: Is it in your claim form? Otherwise, it is not part of your cause of action.

MR. SPITZ: Perhaps one turns to the claim form. Tab 5, p.259. Paragraph 99 begins dealing with the question of jurisdiction. Paragraph 99.2 makes the allegation that the UK is the place where the harmful event occurred. Paragraph 100 sets out the facts relied on. One of those facts appears at para. 100.6 on p.261, which is the offer for sale at artificially inflated prices.

THE CHAIRMAN: In the United Kingdom.

MR. SPITZ: Yes. 100.7 deals with the actual sale. It is in offering these products for sale at the cartel prices - the artificially inflated prices, rather than offering them for sale at competitive prices, that the harm arises.

THE CHAIRMAN: But they did not offer for sale to these claimants. That is the question. I understand for the purposes of looking at it from competition law and from infringement purposes, but if you are looking at it for damages purposes and a private action one has to show that these claimants suffered this loss, which was caused by these defendants. If your claimants would not have purchased -- or, there is no evidence that they would have purchased in the UK, then I do not know where your causation comes in. (After a pause): It is not really on the jurisdiction point. It is on the substantive claim.

MR. SPITZ: On the causation issue. That is a separate matter. But, in relation to jurisdiction, the question is: Where did the harm take place?

THE CHAIRMAN: Yes. The harm is the question of harm in the action that you are bringing.

MR. SPITZ: Absolutely.

THE CHAIRMAN: Yes. So, one needs to look at how you have pleaded your claim.

MR. SPITZ: None of these claimants could have purchased at a competitive price anywhere in Europe.

THE CHAIRMAN: I appreciate that. I understand that. The question is: Have they got evidence that they suffered loss here because effectively they would have purchased here and there was no point in having any negotiations because of the cartel.

MR. SCOTT: What you said in para. 100.6 is: "One or all of the defendants and/or companies affiliated with them offered for sale in the United Kingdom …" Now, what you have not put there is 'agreed not to offer for sale'.

MR. SPITZ: What comes across explicitly in the Commission's decision is that there was no alternative source of supply because of the operation of the cartel. So, it seems to me a necessary inference that the way this cartel operated was to make sure that competitively priced products were not offered anywhere in any of these member states.

MR. SCOTT: In relation to Visteon and Rockwell, to get them into the United Kingdom you have either got to do it on the basis of the joint and several responsibility for the actions of Morgan or you have got to find some other basis upon which to found it in the UK - unless you are saying that there was a refusal to supply.

MR. SPITZ: What we are saying is that it is sufficient that one or more of the defendants did two things: offered at cartel prices and failed to offer at competitive prices. That is sufficient because joint and several liability comes to our assistance. So, it does not matter if the others did not do the same thing in the jurisdiction.

MR. SCOTT: That works for Visteon and Rockwell, and not just for Emerson and Valeo.

MR. SPITZ: That's correct.

MR. SCOTT: On the basis that Visteon and Rockwell could have, but did not purchase in the United Kingdom because there was not a competitive market.

MR. SPITZ: Yes. Could have and, we say that one is in a position to infer, would have.

MR. SCOTT: But you feel you have not necessarily spelt that out in your claim form.

MR. SPITZ: My solicitor points me to certain other paragraphs of the claim form. Perhaps it is worth drawing the Tribunal's attention to those. Paragraph 73, for example, at p.248.

THE CHAIRMAN: (After a pause): You see, this is a straightforward pleading. "We purchase product at the cartel price. Therefore, we have suffered loss." But, what has to be added for jurisdiction is that the harm, however one interprets that, has to be suffered within this jurisdiction.

MR. SPITZ: Yes, on the first limb.

THE CHAIRMAN: Therefore, if you purchased elsewhere, that particular harm was not suffered within the jurisdiction. You are putting your case in a very different way, and a different way to the way that I think it is pleaded in here. Therefore, the cause of action that we are looking at, for which we are, or are not, giving permission and/or would say was within the jurisdiction or was not within the jurisdiction - whether we had jurisdiction over it or not - must be the cause of action that is pleaded. Therefore, if you are saying that the claimants, or the relevant claimants, suffered loss by reason of the fact that they were not able to purchase within England and Wales because there was the cartel and they could only purchase at the cartel price, it seems to me at the moment - but you might persuade me otherwise - that you need to say that if everything else was equal they would have purchased here. Of course, the first line of evidence is against you because they purchased elsewhere.

MR. SPITZ: Well, no. They had no idea. There was no competitively priced product.

THE CHAIRMAN: No. But they did purchase elsewhere.

MR. SPITZ: They did purchase elsewhere, but that ----

THE CHAIRMAN: What you would say is that it did not matter where they purchased because the price was the same or similar wherever they purchased - they would have been paying too much. But, you would have to show that they would -- or, that there was reason why they would have purchased here. Otherwise, they have not suffered anything here if you do not show that. That is what it seems at the moment to be to me - that you have not got causation.

I think we are going to have to stop unfortunately.

MR. SPITZ: Perhaps we can pick it up tomorrow.

THE CHAIRMAN: Mr. Spitz, what is being pointed out to me is that in the *Provimi* case this line of argument we are taking was pleaded in the *Provimi* case. So, in that case it is all dealt with on what the issues are on the pleadings. So, perhaps you should look overnight at the *Provimi* case. What is actually being pointed out to me is p.17.

MR. SPITZ: Thank you very much.

MR. HOSKINS: I should say that I acted in the *Provimi* case, and not only was it pleaded, but there was specific evidence that purchases would have taken place in certain places absent the cartel. So, I would like to point that out.

MR. WEINIGER: Madam, while we are sorting out the homework, I think the other useful reference in the pleading is para. 82, which we can take up tomorrow. That is something to look at as relevant in this discussion.

THE CHAIRMAN: On the other point about the claimants which we were exploring before, I think that in the *Provimi* case there are some diagrams which have not been reproduced in our bundle, and which were annexed to the judgment. I do not know if they help, or not.

MR. SPITZ: We will obtain copies of those.

THE CHAIRMAN: Perhaps you could explore my phrase 'the claimants have to speak with one voice' and see how far that goes as to what that actually means. It may be that I am interpreting it too widely.

MR. SPITZ: Thank you.

THE CHAIRMAN: How long do you think you are going to be in the morning?

MR. SPITZ: I would say twenty minutes.

THE CHAIRMAN: That is eleven o'clock, say. How are we going to divide the time?

MR. HOSKINS: We have discussed it between ourselves and our agreement, if it is satisfactory, is that I was going to lead off on the jurisdiction issues. I was not going to deal with permission; I was going to leave that to Mr. Weiniger, so, he will stand up after me. He will say anything else he wants to say on jurisdiction. He will take the lead on permission. Mr. Beard will then do whatever he would like to do on jurisdiction and permission, and, if I may, I will just say anything I have to add on permission at the end. It is not so that we can say extra things - it is just how we divide the time.

THE CHAIRMAN: So, you have agreed that we are not having any repetition.

MR. HOSKINS: Yes, that is certainly understood.

THE CHAIRMAN: Good. You are going to explain to us where you differ.

MR. HOSKINS: I am sure in relation to jurisdiction those who come after me will say where I have got it wrong. Absolutely, yes.

THE CHAIRMAN: How long do you think that is going to take?

MR. HOSKINS: I must admit, I think we may well not finish tomorrow, speaking frankly, because the jurisdiction issues are not particularly easy. I will take them as quickly as I can. I will just say to you now, Madam, that I will try and take them as quickly as possible, but I am sure you will slow me down ----

THE CHAIRMAN: It depends on our questions. It is a very complicated issue.

MR. HOSKINS: Exactly. If the Tribunal is going to look at it and potentially write a judgment on it, I want to make sure that I have put our case fully. It is just not the sort of thing one can look at quickly. That is the difficulty.

THE CHAIRMAN: I would like to try and finish tomorrow.

MR. HOSKINS: I will absolutely do my best. If I will put it on the basis that I will go as quickly as I can and you will stop me whenever I need to be stopped, hopefully we will work through it that way.

THE CHAIRMAN: The actual questions -- I think what we were discussing this morning is much more -- We are probably much more au fait with the jurisdiction issue as such. There is a lot of material that you have given us.

MR. HOSKINS: I understand that.

THE CHAIRMAN: So, most of that does not need to be repeated.

MR. HOSKINS: I tend to base it on the skeleton, rather than coming out with new ideas, because all the logic is there. I will take you to the cases as quickly as possible. The facts are there. If you say to me, "We have got that point. Thank you ----"

THE CHAIRMAN: That is right. You will see where we need help because where we need help is when we ask you questions.

MR. HOSKINS: Absolutely.

THE CHAIRMAN: If we could try and timetable it in some way -- I will not hold you to the timetable, but it would be nice, at the beginning of the day, to have a timetable to fit on the basis that we would finish at five o'clock or whatever. We should try to do that; if we miss it, well, we miss it.

MR. HOSKINS: I understand that. The anticipation is that I would start around eleven o'clock. That is a fair assumption. We will work something out around that.

THE CHAIRMAN: Yes. If you start at eleven, I have given Mr. Spitz longer than he wanted.

MR. HOSKINS: Exactly. Thank you very much.

(Adjourned until 10.30 a.m. on Thursday, 21st February, 2008)