IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1077/5/7/07

Victoria House
Bloomsbury Place
London WC1A.2EB

Thursday, 21 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 TWO

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.

MR. HOSKINS: Madam, I am jumping to my feet because, as you suggested, we had a discussion about timetabling last night and I just wanted to report back on that before Mr. Spitz resumes.

As indicated last night Mr. Spitz, half an hour – 10.30 to 11.00. I have then got from 11.00 to 2.30 and before that occasions a sharp intake of breath that is, if you like, where the flexibility lies in this timetable because hopefully I can be shorter than that and if I can then everything will go faster.

THE CHAIRMAN: So you have 11.00 until?

MR. HOSKINS: 11 until 2.30. The reason why we have done that is everyone else is indented to certain times to take us to 5, so if I finish before 2.30 then hopefully everything will sweep in earlier. Mr. Weiniger would like an hour so that is 2.30 to 3.30. Mr. Beard and I will then share the 3.30 to 4.30 slot, but obvious the predominant time will be Mr. Beard's, it will just be me sweeping up on anything I have on permission at the end of that. Then 4.30 to 5 for Mr. Spitz's reply, and that has been discussed and agreed between all of us, though not signed off in blood – we will do our best.

THE CHAIRMAN: Right. For various reasons and because I think that actually going a whole morning and a whole afternoon is sometimes unproductive we will have a five minute break so if you can find a convenient place to break.

MR. HOSKINS: Well if you would nod at me at an appropriate moment I will take the hint.

MR. SPITZ: Yes, good morning, madam. One of the matters that the Tribunal raised yesterday was in relation to the question of the claimants speaking with the same voice. We went overnight and had a look to see what we could find. We could not find anything that was directly on point in relation to that, but what we did find, and I would like to draw the Tribunal's attention to is Rule 7.3 of the **White Book**, and Rule 19.1 of the **White Book** and it may be worth spending a few minutes just highlighting those provisions and the commentary.

7.3 is dealt with at p.276 of vol. 1. 7.3 deals with the right to use one claim form to start two or more claims. The rule there stipulates that a claimant may use a single claim form to start all claims which can be conveniently disposed of in the same proceeding. There is some commentary under 7.3.1 on p.276. The second sentence of the commentary refers to some more complicated situations and no.4 in the list of four of those situations is a situation where C1 brings a claim against D1, and C2 a claim against D2 in the same claim form. So it does not seem to be a requirement that each claimant must bring a claim against each defendant in a single claim form.

There is a discussion of the approach that is reflected in Rule 7 over the page at 277. The commentary says that:

> "Over the years, the trend has been towards liberalising the rules restraining joinder and encouraging the joinder in the same proceedings of all claims and interested parties. This has had the advantages of (i) avoiding a multiplicity of proceedings (and attendant costs and delays), and (ii) minimising the risk that claims might be defeated on technical grounds. The liberalising trend is continued by Rule 7.3".

THE CHAIRMAN: That is why I kept on saying it was an old principle.

MR. SPITZ: I may be wrong, but it seems to be that if one looks at the commentary next to 7.3.4 further down on the same page, it may be that this is the situation madam Chairman, that you had in mind, where a party may be joined as a defendant, and it is in a situation where two persons are jointly entitled to a remedy, one of those persons does not become a claimant in those circumstances.

THE CHAIRMAN: But it used to be also that if you did not speak with one voice then you had to be joined as a defendant.

MR. SPITZ: Yes, well it appears now that the test is really a test of convenience and that is dealt with in the commentary under the heading "Multiple claims against the same defendant". If one skips the first paragraph and looks at the paragraph beginning "Rule 7.3 provides …"

> "A claimant may use a single claim form 'to start all claims which can be conveniently disposed of in the same proceedings' …"

And then skipping the next sentence and concluding:

> "However, the claimants' freedom to include more than one claim is limited by the test of convenience."

A similar point is then made under the heading "Claims involving multiple Claimants or Defendants", again the second paragraph of that section which begins "Rule 19.1 states, and it sets out the wording of 19.1, and then continues:

> "Under Rule 7.3 the joinder in the one claim form of two or more persons as claimants or as defendants does not require the permission of the court and does not depend on the relationship between the issues raised in the several claims and the rights to relief claimed. However, the joinder of parties is limited by the test of convenience."

THE CHAIRMAN: Does that mean you could have claimants represented by different legal representatives? The old rule was that a claimant has to speak with one voice, therefore the

legal representative has to represent all the claimants. Can you now have claimant 3 being represented by a different team?

MR. SPITZ: I would imagine the answer to that is probably "yes".

THE CHAIRMAN: I had a feeling this had all changed.

MR. SPITZ: What will control it is the convenience of hearing these claims together.

THE CHAIRMAN: Probably the place to find all this – I am not saying we need to do this for this purpose – is in the Access to Justice Reports in the Lord Woolf Reports, because that explains what they were intending to do.

MR. SPITZ: Yes. Then it is not necessary for me to read this out but simply draw the attention of the Tribunal also to the commentary at the bottom of the page under "Claims which can conveniently be disposed of in the same proceedings", the convenience test, the first paragraph of the commentary there.

Then, if one turns to the question of addition of parties and joinder, that is governed by Rule 19.1 and 19.2 at p.441 of the **White Book**. There are two fairly straightforward points to make - the one just referring to the wording of Rule 19.1 – "Any number of claimants or defendants may be joined as parties to a claim". When it comes to changes of parties (which is dealt with in Rule 19.2, 19.2.2(b) would be relevant in those circumstances. It provides,

> "The court may order a person to be added as a new party if ... (b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue".

So, that is the test that would apply under the CPR for joinder. It is not codified in the same way for the purposes of these rules. If the Tribunal was to be guided by this kind of approach when looking at questions of joinder, what it would be asking itself is: Is the new claim that is being brought in the situation that we were discussing yesterday - the Bosch claim -- Is it sufficiently connected to disputes between the parties that are already before the Tribunal?

Yesterday I had made submissions in relation to the first limb of the *Bier* test under Article 5(3) for jurisdiction. The over-arching point to bear in mind here is that if the Tribunal were to follow the order of dealing with matters permission first and jurisdiction after service of the claim form, what one is focusing on in looking at Article 5(3) is the position of Bosch, because the other defendants would be properly before the Tribunal on the basis of 6(1) and the anchor defendant. So, if one followed that sequence of dealing with matters one is really focusing here on the question of Bosch.

I mentioned yesterday that there were two elements of jurisdiction under 5(3) - the place where the damage occurred -- and I made my submissions in relation to that limb yesterday -- and the place of the event giving rise to the damage. One has to look, when considering this question, where the event giving rise to the damage took place and the kind of infringement that one is dealing with here. It is discussed at length in the decision and it is characterised as a single and continuous infringement. The continuity of the infringement seems to be important because it means on every day that this infringement continued, the tort was committed afresh. The harm was caused afresh. That is the meaning to be derived from the fact that the infringement was continuous. That is relevant when one looks at the second limb - the place where the harmful event occurred.

The Commission's reasoning was to say that it was artificial to break down the illegal conduct at issue into separate components so that although a particular set of circumstances, or a particular act could on its own have amounted to an infringement, it was artificial to do that in circumstances where what one had in reality was a continuing harm.

It is our submission that it is a single and continuous infringement that arises out of the cartel activities as a whole that gave rise to the harm in this case. So, the nature of the misconduct that underlies the claimant's claims here is different to the conduct that was at issue in other cases where the courts have considered the second limb of *Bier*. They did so in relation to the question of water pollution - that was *Bier* itself; defamation (that was the *Shevill* decision) and misrepresentation (which was *Domicrest*). Now, in none of those cases is one dealing with a continuous infringement that is committed afresh each day for the duration of the tort.

Nor were these cases dealing with wrongful acts that were committed over an extensive period of time, such as one deals with here - cartel activity lasting for more than eleven years. Here there are multiple conspirators acting in concert across the EEA.

Another point to bear in mind in relation to the infringement is that by definition, under Article 81 the tort is directed at trade between member states within the EEA. That is another distinguishing factor here.

So, to look in these circumstances for a single event that gives rise to the harm, we submit, is not the appropriate way of analysing this tort for the purpose of the second limb of *Bier*, and that a better approach in these circumstances is to consider the wrongdoing as a whole.

In our submissions, and in our replying submissions, we have referred to **Dicey & Morris**. We have referred to **Briggs & Rees**. So, it is not necessary to turn those up. The point **Dicey & Morris** make is that this question of what the place of the event giving rise to the

harm means has received some, but limited, discussion in the cases. **Briggs & Rees** make the point that where one deals with a tort that takes place in a number of jurisdictions it is difficult to determine what the correct place is for the purposes of jurisdiction under 5(3). He suggests that perhaps a centre of gravity approach is a useful one to apply.

In this case, when one looks at the geographical scope of the cartel activities, and the joint liability, we also say - and this is consistent with the policy behind the jurisdictional rules - that the proposed defendants could all quite reasonably predict that they might be sued in any jurisdiction in which the cartel operated, including the United Kingdom where one of the joint wrongdoers is domiciled, and where that was part of the territory at which the cartel activities were directed.

We have set out in paras. 52 to 54 of our submissions of 25th January the activities that took place in the United Kingdom in relation to the cartel.

THE CHAIRMAN: You have to be careful about the United Kingdom because actually it is England and Wales. There would be different considerations in Scotland or Northern Ireland.

MR. SPITZ: I am going to stick with England and Wales. My understanding is that for the purposes of the Tribunal, its jurisdiction extends to Scotland.

THE CHAIRMAN: Of course. Our jurisdiction extends to Scotland and Northern Ireland, but in relation to which jurisdiction we then have to decide in which jurisdiction -- Right? So, where you have something which is cross-border Scotland/England we then have to say which one. Of course, the law which we apply is different if it is a Scottish jurisdiction or an English jurisdiction. The appeal system is different. That is why I am saying that if we are dealing with jurisdiction, it is a question of whether there is jurisdiction in the courts of England and Wales or ---- Or are you saying that it does not matter of it is England, Wales, Scotland or Northern Ireland? I do not know if it is relevant.

MR. SPITZ: I am content to say that we are focusing on England and Wales for these purposes. It is clear that there was substantial and efficacious conduct that took place here in relation to this cartel. It is also clear that there is a close connecting factor between the dispute and these courts which would justify attributing jurisdiction to these courts on the basis of sound administration of justice and the efficacious conduct of proceedings. That standard is taken from the *Dumez France* case at para.17, and we refer to it in our replying submissions at para.36.

In addition to the approach that I have been contending for there are two other bases on which one could find jurisdiction under the second limb of Article 5(3). The first would be

to conclude that the harmful event also occurred where each cartel member was based, not simply because that is where they were domiciled but because that is where the decision was taken by each of the cartel members, to join the cartel.

As an English company, Morgan clearly made the decision to join the cartel in England and that, should one require it, is an event that set the tort in motion in England, and this is so bearing in mind that Morgan had at the time in excess of 20 per cent of the market, and if Morgan had not become party to the cartel its effectiveness would have become radically reduced. So we place reliance on Morgan's decision to join the cartel and if it is appropriate to look for a single event that gives rise to the harm where one deals with a continuous wrongdoing, then we submit that one needs to look at the first summit meeting that took place amongst these cartelists.

If one turns briefly to Article 75 of the Decision which is at tab 5 of submissions bundle 1, p.287.

MR. SCOTT: At tab 5 we have the amended claim form.

MR. SPITZ: It is appended to that, p.287, para.75. This is a discussion of the way in which the cartel was organised and the Commission concludes:

> "The purpose of these meetings [summit meetings] was not to discuss specifics, but to ensure the stability of the cartel to ratify agreed price levels, price increases and other conclusions of preceding Technical Committee meetings, to resolve any outstanding issues from those meetings, to deal with any issues of non-compliance with the cartel's rules and, if necessary, to agree on compensation."

So we submit that if one does require a single event those are the high level meetings at which senior members of the participants in the cartel met for those purposes, and that is where the operation of the cartel was enforced and formally agreed and ratified. The first of these summit meetings during the cartel period took place in November 1989 at Stratford-upon-Avon.

When one looks to the purpose of Article 5(3) and the rationale that is driving it – perhaps it is helpful before making that point to give the Tribunal the appendix which contains the list of meetings.

MR. SCOTT: Yes, 370.

MR. SPITZ: Indeed. The first summit meeting is on 1st November at Stratford-upon-Avon.

What one is looking at when dealing with the purpose of Article 5(3) is one acknowledges, of course, that jurisdiction primarily follows the domicile of the defendants and one accepts that these are derogations, as one must. Nonetheless in providing for alternative jurisdiction

in these States, what is driving the regulation is to ensure that there is a sufficiently close connection to ensure that the defendant is not surprised to find that the defendant is sued in a court outside the domicile. If one looks then at the purpose and gives 5(3) a purpose of interpretation one would conclude that given the events that took place in relation to this cartel, given the conduct that took place in the UK, given the fact that Morgan is domiciled in the UK, all of those factors together would mean that it would not, or ought not to have come as a surprise. It ought to have been foreseeable to the members of the cartel that they may well be sued in the United Kingdom.

Secondly, that there is a sufficiently close connection between the courts – I mentioned the United Kingdom again – the courts of England and Wales, and the tort and the activities of the cartel. So those are the submissions that we make in relation to the second limb under Article 5(3).

Those are the submissions I would like to make in this part and deal with any matters that arise afterwards in reply. I know in particular I have not dealt with Mr. Hoskins' argument in relation to what he referred to previously as "the gift" except for the submissions I made early yesterday morning; I will deal with that further if need be in reply if that is convenient for the Tribunal.

THE CHAIRMAN: Thank you very much.

MR. SPITZ: The last thing I would like to do, madam Chairman, is simply to hand up the clips of correspondence that we discussed yesterday, and also to hand up a copy of the *Provimi* decision that contains the diagrams which were referred to yesterday so that the court has that for completeness. (Documents handed to the Tribunal). The only point to make in relation to the correspondence is that the Tribunal will see that none of the parties offered to provide the documents in response to the request for disclosure. Le Carbone's response is worth looking at. The Letter before action was sent on 17th August 2007 and their most recent response in September 2007 was to say, as they do in the last paragraph as an explanation for not providing the documents that there is no express provision in the CAT Rules for disclosure prior to commencing proceedings, and to make the point that disclosure in the Tribunal is discretionary. So we have not been able to obtain those documents through pre-action correspondence.

MR. SCOTT: One of the points which came up earlier on has all the difficulty about the involvement of Crowell & Moring being resolved?

MR. SPITZ: Yes, it has all been resolved, sir. In fact, that point is made in Schunk's submissions. Perhaps it is worth just giving you the reference. It is in Volume 2 of the submissions at Tab 10, p.410, para. 6.

Thank you very much.

THE CHAIRMAN: Thank you for keeping to the time. Mr. Hoskins?

MR. HOSKINS: Madam, before I begin with jurisdiction, perhaps I can make just one point on the correspondence since it is fresh in our minds? If you could turn through to the Freshfields response, which is dated 9th February, 2007 -- I think it is the only letter in the bundle that has Freshfields Bruckhaus Deringer at the top. (After a pause): The second bit seems to be the Freshfields bit. The first letter there is Crowell & Moring, dated 23rd January to SGL Carbon. You will note from the penultimate paragraph of that letter that it requests a reply within ten working days. I do not have a diary to hand, but January 23rd, but ten working days takes us pretty close to 9th February, which is when the Freshfields reply went in. The Freshfields reply says, "We haven't had time to consider neither the substantive issues, nor the request for documents. We'll get back to you". That was on 9th February. But, of course, on 9th February, that is the day when the claim was issued against Morgan Crucible and the application to bring the proceedings was made against my client. So, the point is that Crowell & Moring did not wait to see if we came back to them; nor did they ask us to come back to them. They began the proceedings, and then in the proceedings they have not come back to us .The issue has only arisen really again today. So, there has been no sense of Crowell & Moring in any sense chasing. That is what the correspondence shows us.

Turning then to jurisdiction, as I have said, I have tried to base my submissions as much as I can on the skeleton argument because I think that is the most efficient way to deal with it. So, it is my skeleton argument at p. 7 at the bottom of the page. (After a pause): The final version we gave you had the references to the bundles put in. That is certainly what I am working on. The paragraph that was removed was 109. Any changes in paragraph numbers will only appear right at the end. That will be after the jurisdiction issues.

It is common ground between the parties, but it came up yesterday and so I will just show you what the burden and standard of proof is. The burden is on the claimants and the standard of proof is a good arguable case. That comes from the *Canada Trust -v- Stolzenberg* case that I have cited at the top of p.8. I have set out some extracts from Lord Justice Waller's judgment which is generally recognised to be the acid test in these cases. He says that,

"Good arguable case' reflects in that context that one side has a much better argument on the material available".

That is the way it is put. Also, at para. 28, a good arguable case is:

"'a threshold below 'proved on a balance of probabilities', because that is the civil burden after a full trial, but higher than 'serious question to be tried'".

It is always very difficult with these civil sliding burdens, but, for what it is worth, that is what Lord Justice Waller said.

Before I move away from that, it is important to understand though that in relation to questions of law relating to the Brussels regulation, it is for the Tribunal to decide who is right on that question of interpretation. It is not sufficient for the claimant to show they have a good arguable case that the regulation should be interpreted in a certain way. 'Good arguable case' only applies particularly to factual issues and factual disputes. It does not apply to the interpretation of the regulation itself. Those are hard-edged questions for the Tribunal to decide.

I can skip over now because Article 2 has disappeared from the frame. I can pick it up at Article 5(3), at p.9 of the skeleton. Issue 3. The first point I need to make in relation to Article 5(3) - and, again, I do not think this will be contested - is that it has to be interpreted restrictively. That is the *Kalfelis* case. I do not know if you would like to see that case, Madam?

THE CHAIRMAN: We can look at it afterwards.

MR. HOSKINS: The reference is there. It says actually, in relation to both Article 5(3) and Article 6(1) that there has to be a restricted interpretation.

MR. SCOTT: That is reflected in the first of the recitals to which you referred yesterday.

MR. HOSKINS: Yes. It is because the general principle is Article 2 - that you should be sued in your domicile. Paragraph 34 is the *Bier* choice - the place where the event occurred or the place which is at the origin of the damage. If I can just quickly go to *Bier* - because there is a point that is going to come up a bit later -- I will just quickly show you two paragraphs in it: Authorities Bundle 1, Tab 15 I think we looked at this yesterday when I was making submissions yesterday morning. The judgment begins at p.255. I took you to *Bier* to show you it as an example of where the court adopted a ... approach to the Brussels Convention. But, what I would like to look at for this purpose now is paras. 24 and 25. Paragraph 24 is where the court comes to the conclusion that 'place where the harmful event occurred, in Article 5(3) must be understood as giving a choice -- or, the place where the damage

occurred and the place of the event giving rise to it. Then, at para. 25 - and this is what I want to focus on –

> "The result is that the defendant may be sued, at the option of the plaintiff, either in the courts for the place where the damage occurred or in the courts for the place of the event which gives rise to and is at the original of that damage".

It is the final words - 'at the origin of the damage' - which are important because we will see they are then picked up on in later judgments in order to identify what is the relevant event under Article 5(3) and, as I will submit, what it actually says is that one is looking for the event which sets the tort in motion. That is the legal test. But, Bier is where one sees the beginning of that approach.

MR. SCOTT: Presumably you will deal with the point made by Mr. Spitz that this is a complex case in which there is continuous, often renewed infringement in which there is a series of events in which a variety of things happen without which there would not be that single and continuous infringement.

MR. HOSKINS: I will because in a sense what I say is the case law is clear at the moment – I am getting ahead of myself – the test is what is the event which sets the tort in motion and that has been applied also in a case where there was a continuous infringement, actually relating to Articles 81 and 82, and that was part of *SanDisk*, so I will show you that the test that has been established has been applied in that sort of case, I will certainly come to that.

The next case is the *Shevill* case, which I do not think you have actually been taken to, so I would like to show it to you – authorities' bundle 2, tab 33. The judgment begins at p.554 of the bundle. There are colourful facts in this case. Miss Shevill was a native of Yorkshire, who was allegedly libelled by, of all things, "France-Soir" newspaper, and therefore the jurisdiction dispute arose because it was obviously a French publication, but as she was a resident of Yorkshire that is where her reputation was such as it may have been good or bad.

One sees the facts set out – I do think I need to go into the detail – paras. 2, 3, 5 and 8. You will see at para.5: "Fiona Shevill was temporarily employed for there months in the summer of 1989 by Chequepoint in Paris."

Then at para.8 there was the article published which suggested that the company she was working for, and indeed she was involved in part of a drug trafficking network for which they had laundered money. Proceedings for libel were brought in the UK, presumably because the libel rules are far more favourable generally in the UK than elsewhere in Europe.

Paragraph 9: "It is common ground that France-Soir is mainly distributed in France and that the newspaper has a very small circulation in the United Kingdom." Then we are told there were 237,000 copies of the relevant issue of France-Soir that were sold in France, approximately 15,500 distributed in other European countries. 230 in England and Wales, and there are five avid readers of France-Soir in Yorkshire.

Then the argument put forward in relation to jurisdiction is at para.15. Obviously the publishers of France-Soir contested jurisdiction and they said that "The English courts did not have jurisdiction under Article 5(3)" and the matter was referred to Luxembourg to determine the proper approach to 5(3).

Paragraph 17 sets out what the Court of Justice understood it was being asked. It was being asked for an interpretation of the concept of the place where the harmful event occurred in Article 5(3) following the distribution of a defamatory newspaper article in several contracting states.

Paragraphs 19 and 20 the ECJ referred to the *Bier* case and its findings there. If I can pick it up at para.24, because what the ECJ did was to look at both limbs of 5(3), both the place where the damage occurred, and the place where the event giving rise to that damage took place.

Paragraph 24:

> "In the case of a libel by a newspaper article distributed in several Contracting States, the place of the event giving rise to the damage, within the meaning of those judgments, can only be the place where the publisher of the newspaper in question is established since that is the place where the harmful event originated …"

- the crucial word is "originated". "… and from which the libel was issued and put into circulation." So the newspaper published, distributed in various Member States, but you are looking at where the libel originated and it was only one place where the newspaper was established.

Then importantly, because there is a distinction, if the court has jurisdiction under either limb of *Bier* there is actually a limitation in relation to one of them on what is jurisdiction to decide. What 25 tells us, if a court has jurisdiction because the place where the harmful event originated was in that country then the court has jurisdiction for all the harm caused by the unlawful act, i.e. not just the harm suffered in this case in the United Kingdom. So if the harmful event occurred in, say, the United Kingdom, the action could be brought in the United Kingdom in respect of harm wherever it was suffered in the European Union.

The situation is different if one looks at the other limb of *Bier*, which is where the damage occurred, and that picks up at para.26 and at 27:

"… the plaintiff must consequently have the option to bring proceedings also in the place where the damage occurred."

Paragraph 28:

> "The place where the damage occurred is the place where the event giving rise to the damage, entailing tortuous delictual or quasi-delictual liability, produced its harmful effects upon the victim."

Then at 29 - in the case of an international libel through the press, the injury occurs in the places where the publication is distributed, when the victim is known in those places. So in relation to damage it may lead to multiple jurisdiction, but crucially there is a limitation on this limb of *Bier*.

> "30 It follows that the courts of each Contracting State in which the defamatory publication was distributed, and in which the victim claims to have suffered injury to his reputation have jurisdiction to rule on the injury caused in that State …"

And that is the limitation. It is only jurisdiction in relation to the harm suffered in that state. One sees the distinction between the two limbs, it comes out strongly at para.33 where the court actually gives its answer to the question. Perhaps I can leave you to read that but you will see the distinction between jurisdiction to award damage for all the harm caused by the defamation where jurisdiction is triggered by the event, and jurisdiction to rule solely in respect of the harm caused in the State of the court seized is based on damage.

So there are two parts which come out of *Shevill*. First, when one is looking at where the harmful event occurred, one is looking hard to *Shevill* for the place where the harmful event originated, and the second part is the one I have just dealt with, that depending upon which limb of *Bier* one comes within, the Tribunal may have jurisdiction either in relation to loss throughout EC or simply loss in the UK. Of course, we say under Article 5(3) neither limb applies, so that only comes up in the alternative.

The next case is *Domicrest*, which is a domestic case which applied these principles (authorities' bundle 1, tab 11). It is a judgment of Mr. Justice Rix – Commercial Court, it might be the Queen's Bench Division, but it does not actually matter. If I can ask you to read the headnote, please on p.548, the facts are set out there, and the facts are simply background, nothing particular is going to turn on them.

You will see the allegation was that a Swiss Bank made a negligent misrepresentation to an English company which caused the English company to suffer loss, and the English

company brought proceedings in London. The Swiss Bank challenged that and said there was not jurisdiction under Article 5(3) so one of the questions was: "Where did the harmful event occur for the purposes of Article 5(3), and you will see what Mr. Justice Rix held. He did stay the proceedings, and said there was no jurisdiction.

> "In a case of negligent mis-statement the place where the harmful event giving rise to the damage occurred was, by analogy with the tort of defamation …"

That is the reference to *Shevill*: "… where the mis-statement was made rather than where it was received;"

But we see the basis upon which he made that finding if one goes into the judgment. If I can ask you to turn through to 566. You will see the old friends are here, there is *Shevill, Bier* and there are some new friends we are going to meet in a minute – *Dumez France* and *Marinari,* but he goes through the ECJ case law. Having analysed the case law he comes to the conclusion at 567:

> "Applying that formula, it seems to me that the place where the harmful event giving rise to the damage occurs in a case of negligent mis-statement is by analogy with the tort of defamation [reference to *Shevill*] where the mis-statement originates."

You will see that what he does is he takes *Shevill* and sees that the test is where it originates and he applies it to negligent mis-statement. Then over the page at 568 I can perhaps ask you to read through from the bottom of 567 to the end of the first paragraph on 568. (After a pause) You will see from that that what the judge identifies as being the important feature for the relevant harmful event for Article 5(3) is the fact which best identifies the harmful event which sets the tort in motion. We will see in the English case that follows that, that that has become the test – it is the event which sets the tort in motion. Then he goes on to deal with the place where the damage occurs, but I do not need to take you to that for these purposes.

One final point before I leave this judgment, at 569 there is a reference to the *Kleinwort Benson* case and the speech of Lord Goff:

> "… 'while disadvantages may arise from different aspects of the same dispute being adjudicated upon by different courts, the plaintiff is always entitled to bring his action in its entirety before the courts of the defendant's domicile'."

So complaints of the sort the claimant makes – "if you do not take jurisdiction under Article 5(3) it might mean we have to go into various Member States", well, I am sorry, that does

not get them anywhere because they have the choice to sue in the country of domicile of one of the defendants. So that is a house of Lords' authority which comments on that.

The next authority I want to refer to again is a domestic case. It is the *Anton Durbeck* case, and this is a Commercial Court judgment. Nigel Teare QC sitting as a Deputy of the Commercial Court. The facts are set out, p.1 of the judgment, at paras. 2, 3, and 5. Basically what happened was a vessel was chartered to carry certain bananas. There was a mortgage over the vessel, which was held by a Norwegian Bank which had a branch in London and the bank decided to arrest the vessel, it was arrested in Panama, and it was arrested on the instructions of the London Branch, having received approval from head office in Oslo – so quite a colourful factual scenario.

The question that the court was considering is at para.8, because the action was actually brought in London and the claimants said they were entitled to sue the Norwegian bank in England pursuant to Article 5(3) or 5(5) of the Convention. Turning over the page, you see at para.12 *Bier* and *Shevill* is the starting point. You will see at para.13 the argument that the claimants put forward was based on the place where the event occurred. They said that the relevant event was the decision of the London branch to enforce the mortgage by arresting the vessel. That is in the middle of para. 13. Of course, you will see echoes of that in Mr. Spitz' submissions - one of his submissions in relation to Morgan Crucible deciding to join the cartel, which he said was one of the factors that would attract the application Article 5(3). We will see in *Durbeck* that that sort of decision is not sufficient. We will come to that in a minute.

At 14 the defendant says the event which gives rise to the damages... the arrest which took place in Panama. At 15, five lines down, just after the reference to Kleinwort Benson, we see the well-known principle which we have looked at, "The court should adopt a restrictive approach to the application of Article 5". Then if I can ask you to read on to the bottom of that paragraph you will see that the judge finds that it is not the place where the decision was taken to arrest which is the relevant event, but rather it is the arrest itself in Panama, because if one looks at the ingredients of the tort the first event which forms part of the ingredients of the tort was the arrest. The decision to arrest was not itself a tortuous act, and was not a necessary ingredient for proving the tort. So, the decision does not set the tort in motion because it is not itself an ingredient of the tort.

The first ingredient of the tort which set it in motion was the arrest. One sees that from the end of para. 15. At para. 16 it was submitted this conclusion is not correct having regard to

Domicrest and to *Shevill*. Then, in para. 17 there is a discussion of *Domicrest*. If I can ask you to look at the last three lines on p.3 ----

> "The tort and negligent mis-statement requires a negligent ... reliance on damage.. A negligent mis-statement is not only an essential component of the tort, but is also the first in time".

That is the point I have just made.

> "If an analogy is to be drawn between the negligent mis-statement and the component of the tort alleged in the present case which occurs first in time, it is in my judgment that the arrest in Panama rather than with the decision to arrest which was taken in London".

That was applying, as you will see from the earlier part of para. 17, the approach in *Domicrest* - what is the event which sets the tort in motion?

MR. SCOTT: It seems to me that the difficulty in trying to interpret this case in the context of Article 81 is that Article 81 involves an agreement which constitutes infringement. Now, what you are saying is that the tort of breach of statutory duty to the claimants. The question then is, "What in this sense initiates that?" because you have got a difference between a situation here where the decision and the arrest are being distinguished and Article 81 where an agreement with the object or effect constitutes the infringement, but where what you are saying to us is that the tortious event may not be at that stage - it may, if we take the arrest point - be the point at which either an offer is made at a non-competitive price or -- and this is back to Mr. Spitz' point which may not be pleaded at the moment ---- an offer is not made at a competitive price. That is quite difficult to handle in relation to the analogy of an actual physical arrest.

MR. HOSKINS: It will depend on the facts of each case. In, for example, a cartel case where one of the competitors - to take a completely random example - says, "Why don't you come to my house and we'll discuss the price?" and the other competitors turn up and at that meeting they agree to price fix. There you have the events which set the tort in motion because the cartel -- the object -- regardless of whether they actually then go on and do it -- regardless of whether there is an effect -- You have the event which sets the tort in motion. So, for each case, what one has to do -- what the claimants have to do is to say, "The event which set this tort in motion was this ----" So, for example, if they could point to a meeting in the United Kingdom which set the tort in motion -- I know that is what Mr. Spitz has tried to do and I will come on to why he has failed to do that -- If they could do that, then, yes, they would be within Article 5(3). But, they have to do that. The fact that it might be

difficult to do that does not mean that you should dis-apply the legal test that has been established in a number of different situations. I will come on to a competition case. If it is simply the case that there is not an obvious event which sets the tort in motion, then on the restricted approach it is quite correct that Article 5(3) should not apply. It does not mean you cannot bring your claim. It just means that you have to bring it, for example, on the basis of Article 2.

THE CHAIRMAN: All you need to do -- I say 'all you need to do -- is to look at the ingredients of the tort: What are the requirements of the tort, or the ingredients of the tort? In the arrest case it is not the decision. That is not the ... of a tort. It is the arrest.

MR. HOSKINS: That is right.

THE CHAIRMAN: In this sort of case it is the agreement.

MR. HOSKINS: That is right. The agreement may be simultaneous as in the example I have given, or it may take place over time. Someone may have the bright idea that it would be really good to start a cartel, but until he gets someone else to agree with him, for example to price fix, there is not a breach.

THE CHAIRMAN: There may be a number of torts. That is the question. You are going to come on to that.

MR. HOSKINS: We are going to come on to single and continuous. Absolutely. Yes.

THE CHAIRMAN: We can then see where that gets us.

MR. SCOTT: One of the issues to which we may have to come is at what point - bearing in mind that this was an illegal act anyway - are the parties (and I am using 'party' in the sense now, not raising the jurisdictional question) -- The corporate parties committed - as distinct from individuals having a chat. That is likely to be the point about the difference between the meeting in Austria and the summit in Stratford-on-Avon. That may be very difficult to ----

MR. HOSKINS: It would be a factual and possibly a legal inquiry as to the scope of authority, because if it was the managing directors -- the chief executive officers meeting, then almost certainly they would have the power to bind the companies. Indeed, what one sees, to be honest, in cartel cases is that an Article 81 or Chapter 1 infringement can arise from discussions and agreements between actually quite low level buyers, for example. One sees that in the *Toys* case. Certainly, the focus of the Tribunal's finding in that case was that it was actually the buyers who were communicating and agreeing with each other. It was not, as in *Football Shirts*, the people who were the heads of the companies meeting and having discussion. So, you are absolutely right. There may be issues of that sort. In a sense, I have the luxury of saying "It's not my problem. It's Mr. Spitz's problem". He has got to

convince you in this case that he has identified the events which set the tort in motion. I have a destructive ... He is the one who has to come up with the goods.

My next case is also a domestic case. It is not one I referred to. It is one that was referred to by Mr. Spitz, but I think it is helpful to look at it. It is *Newsat Holdings* at Tab 26 in Authorities bundle 2. You will see that this was a domestic case and the same principles apply. It was an application to serve, and it was in relation to the equivalent provisions to Article 5(3), which one finds in the domestic CPR rules for jurisdiction, which were actually brought in line with Article 5(3) after Article 5(3) had come into force. So, it is the same approach. The judge in this case recognises that.

If I can ask you to turn through to p.376, you will see from para. 28 that it is a case about whether the acts were committed within the UK, or not. Again, I do not really have to get into the particular details of the claim. Over the page at para. 31 one sees the point I have just made - that the application of the domestic provisions were the same as Article 5(3). Therefore, the judge goes on then to consider the European cases, starting with *Bier*, etc. At para. 37 he deals with *Shevill*. At para. 38 you will see that the judge, having read *Shevill*, focuses on the point that I have emphasised - which is that *Shevill* said that what you have to look for is the place where the harmful event originates. Then, at para. 39 he refers to *Domicrest.* Then, at para. 41 you will see that what the claimants in this case did is to say, bluntly, that *Domicrest* was wrongly decided.

> "However, the reasoning of Rix, J. appeared to Kenneth Rokinson, QC, sitting as a Deputy Judge for the Commercial Court in the Dunhill case. Having analysed the approach of Rix, J. as identifying the place where the harmful event occurred as coincident with the place where the mis-statement originated, he went on ----"

If I can ask you to read that. Then, at para. 42,

> "This view receives considerable additional support from a decision of the Court of Appeal in ABCI -v- BFT".

There is the citation from ABCI. About half-way down,

> "The fact that the present case is not within the scope of the Brussels Convention is by the way."

That is the same point - they can apply *Domicrest*, even though it is a domestic case. Then, five lines up form the foot of the page,

> "Article 5(3) is one of a number of special jurisdictions, which, as exceptions to the general European rule that suit must be brought in the country of the defendant's domicile, are not to be given too extensive a scope".

Over the page.

> "Mr. Justice Rix thus disagreed with the approach of asking where 'in substance the cause of action arises, or what place the tort is most closely connected with', which had been adopted by Mr. Justice Steyn in the earlier authority of *Minster Investment*".

That is important because one of Mr. Spitz's arguments is that this Tribunal should ignore the existing law which is that you must look for the place where the harmful event which was at the origin of the tort occurred - the event which set the tort in motion and should adopt a centre of gravity approach. That is one of Mr. Spitz's submissions. That is squarely considered by the Court of Appeal in this case and it is rejected. The Court of Appeal favours Mr. Justice Rix's reasoning and conclusion over Mr. Justice's Steyn's, i.e. it favours an approach based on the event setting the tort in motion over a centre of gravity approach. Not surprisingly, given the Court of Appeal authority, the judge in this case, Mr. Justice David Steel, also agrees with the *Domicrest* approach (para. 44). I think it is fair to say that the Domicrest test is very well entrenched in domestic law and has been applied in a number of situations. So, if Mr. Spitz is to have any prospect of success he would have to persuade the Tribunal to depart from that existing case law because of something in this particular case. But, in our submission, he cannot do that because of the *SanDisk* case which is when one comes to the application of the *Domicrest* test in the context of the competition rules. *SanDisk* is at Tab 30. You will see from para. 1 of the judgment that, "The claimant complains o breaches of the Chapter I and Chapter II prohibitions of the Competition Act 1998 and/or Articles 81 and/or 82 of the EC Treaty."

The facts are over the page at p.434 of the bundle. To cut things short, the defendants owned a number of patents which they said were essential relating to the production of MP3 players. The claimant, SanDisk, manufactured and distributed MP3 players. SanDisk had not taken a license from any of the patent holders. SanDisk alleged a number of anti-competitive acts against the patent holders and they are set out at para. 15 of the judgment. The first four alleged breaches of the competition laws all related to the licensing practices of the asset holders because, for example, rather than asset holders saying we will licence you individually in relation to our technology. They had appointed a common agent on their behalf, Sisvel. So the only way in which you could take a licence from any of the defendants, Philips, etc., was to go to Sisvel and get a collective licence, and that was an ongoing situation, because that was the only way in which the defendants would do business; it was not simply a one-off act, it was a situation of licences that existed over time

and was complained about by this particular claimant. You will see there were other complaints in relation to the licensing regime which was offered, illegal time practices in 2 and 3, and excessive royalties.

This was an alleged breach of Articles 81 and 82 in relation to acts which persisted over time. So was there a different approach to be adopted? Answer: No. The judge was taken to all the cases we have seen today, not surprisingly because I also acted in that case, so I am afraid he had largely the same submissions.

The conclusion having looked at all the relevant authorities, is at para.25:

> "Basing himself on these authorities, Mr. Hoskins submits on behalf of the Patentees that an order for the English court to possess the exceptional jurisdiction pursuant to Article 5(3) … to adjudicate upon the alleged abuses of a dominant position in the present case, I must be satisfied that either the event setting the tort in motion was in England and Wales, or, alternatively, that the claimant must show that it is the immediate victim …"

And that is the damage limb –

> "… the immediate victim of that abuse suffering direct harm in England and Wales. In my judgment, and on the basis of the authorities which I have endeavoured to summarise above, this submission is entirely justified."

So one has the imprimatur of the *Domicrest* approach where the breach was ongoing. It is not a cartel case but that is a factual distinction which does not have any legal significance for these purposes. So that is how I deal with the continuous and ongoing breach point – you have one in this case. It is a competition case and it is the *Domicrest* approach that applies. So our submission is that the legal test is established beyond doubt, both in the European authorities and in numerous domestic authorities, including a competition case. The test is: did the event which set the tort in motion take place in the United Kingdom in England and Wales, in this particular case?

One only has to think about the implication of Mr. Spitz's alternative approach. He is asking you to throw that authority out, to distinguish it. But if he were right then one has a new tort every day that the breach is ongoing in every Member State in this case, because it is an EEA wide cartel. That gives complete carte blanche as to where you sue, and given that in *Shevill* if you found jurisdiction in the place where the harmful event occurred you can sue for the whole loss throughout Europe, you will quite quickly see that any notion of that being a restrictive interpretation of Article 5(3) is impossible to sustain.

If you would bear with me for a moment? (After a pause) One then turns to ----

THE CHAIRMAN: Are you going on to the next case? That might be a convenient moment?

MR. HOSKINS: Exactly, yes.

THE CHAIRMAN: Shall we say 5 to?

MR. HOSKINS: Certainly.

(Short break)

MR. HOSKINS: Madam, I think I established the legal test and I just want to test the claimants' arguments against that legal test, and on my skeleton argument it is p.11, para.42. We say that the claimants simply fail to identify what the proper legal test is and so not surprisingly when one comes to look at their arguments they do not meet it. There are a number of ways it has been put both in writing and orally. 43A says: "The cartel activities giving rise to the claimants' losses took place in the United Kingdom", and then a bit stronger: "The United Kingdom was central to the operation of the cartel" – that is the centre of gravity type approach.

Madam, as I have established, I hope, the fact that some events, or even some central events took place in the United Kingdom is not the correct legal test. The test is where did the event that set the cartel in motion take place? In relation to that there is reference to a summit meeting. If I can ask you to pick up the Commission Decision again, so that is the submissions bundle, tab 5, exhibit A behind that tab. You have seen the annex, perhaps we could begin there, it is at 370. Mr. Spitz drew attention to the meeting on 1st November 1989, summit meeting in Stratford-upon-Avon. Quite obviously it is not that summit meeting which set the cartel in motion because one has a number of meetings before then, so the cartel must have been set in motion before that summit meeting, that is quiet clear. When one looks at each of these subsequent meetings, including the one in Stratford-upon-Avon, whilst it may well be fair to say that they continued the cartel, they certainly did not set it in motion – that is something that deals with a chronology. Indeed, it is perfectly clear that that summit meeting did not set the cartel in motion, if one looks at recital 73 of the decision – p.286 of the bundle numbering, and this is where the Commission looks at duration:

> "The first cartel meeting taken into account in this Decision is a Technical Committee meeting of 13 and 14 October 1988 held in … Austria. It is clear from the 29 issues on the agenda and the discussion that at that time the cartel had already been in operation for a considerable period of time."

So Mr. Spitz – perhaps not his fault – but he has not been able to identify the event which set the tort in motion and one certainly does not find it in the Commission Decision, and it is certainly not a summit meeting in the United Kingdom which sets the tort in motion.

THE CHAIRMAN: Do you not have to read 72?

MR. HOSKINS: Madam, yes, this is all relevant, but the claimant has to identify the event which they say set the tort in motion in the United Kingdom.

THE CHAIRMAN: If the Commission was not able to identify it because it goes back so long, it is rather unfortunate, is it not, if the law is such that it means that the claimant cannot identify it?

MR. HOSKINS: Madam, with respect, that is the trap that Tribunals should be careful not to fall into. Either the claimant can bring itself within Article 5(3) or it cannot, as a matter of evidence.

THE CHAIRMAN: You say otherwise you go to domicile?

MR. HOSKINS: Exactly, this is an exceptional jurisdiction so it is only where the claimant can point to something. Indeed, Mr. Spitz made much of the fact that people have to be sure about where they are going to be sued. If one cannot identify the place the event occurred, it is not a reason to change the law, it is simply that the claimants must bring their claim on another limb of the Convention.

THE CHAIRMAN: This goes all the way back, if you look at 71, we are back in 1937.

MR. HOSKINS: Absolutely.

MR. SCOTT: We are a bit short on oral evidence on where the original agreement ----

MR. HOSKINS: I think I am quite safe on the oral evidence arguments in relation to that, absolutely. I understand the initial reaction that the legal test seems a bit harsh, but it is not because if it were right the only way in which a claim could be brought would be to come within 5(3), one might see that, but it is not the only way, it is just a facility and the fact the facility is not available because of evidential difficulties does not mean that you change the law.

THE CHAIRMAN: Well the question is whether the law does cover this situation.

MR. HOSKINS: Well, madam, you have my case on that. It does it is just simply the claimant is not able to put up a good arguable case on the evidence.

MR. SCOTT: Do I hear you to be arguing that, in the circumstances of this case, there is nothing in the Commission Decision that brings Article 5(3) in terms of origination into play because even Austria does not count because what they say is the Austrian meeting may be

the one from which the Commission starts its proceedings, but that was not an originating meeting.

MR. HOSKINS: I think that is an interesting debate but we do not have it as … might have to have been in Austria. I would not like to put my money one way or the other, because I think the case law as it stands "sets the tort in motion" would mean not Austria because something happened before then. I do not know what the Austrian system is, for example if it had a similar follow-on action you might get into debates about whether the tort for the purpose of follow-on action is crystallised front and end by the Commission Decision or whether the fact that the Commission might have found that it had gone on longer – I can see the debates both ways, but it is not a question that you have to answer, and if you do not mind it is not a question therefore I need to express a firm view on. But absolutely that is clearly an issue that might arise in Austria.

THE CHAIRMAN: But could you say that the tort we are looking at is actually a tort which starts in para.73 of the Commission Decision. "The first cartel meeting taken into account in this Decision …" so they have looked at that and said: "Is there a tort?"

MR. HOSKINS: That is certainly an argument that could be put insofar as one can decide from the Commission Decision, one might say it is in Austria, but I can see that if I was having to argue against that I could rely on the second part of Article 73: "The cartel had already been in operation for a considerable period of time …" before the Austrian meeting.

MR. SCOTT: I notice that when I originally read this I then marked up para.75, which is about the summit meetings, and what you would say is that they are merely there – to quote the Commission – "… to ensure the stability of the cartel to ratify agreed prices", in other words prices that had already been agreed, and to resolve outstanding issues. So what you are saying is they are merely an ongoing, 'keep the thing running' type meeting.

MR. HOSKINS: We do not know, the cartel might have started with a summit meeting. Sir, you are absolutely correct from 75 that summit meetings were setup after the cartel came into existence in order to keep it running, so absolutely. It is not even clear that it began with a summit meeting at all, and the indication is, as I say, that it probably did not.

THE CHAIRMAN: The main purpose of Technical Committee meetings – 76 – "was to agree on price levels and percentage price increases for the different products in different countries." And also on 'policy' aspects and company strategies. "… harmonisation of prices across Europe, the price levels to be applied in respect of large customers, how to handle competitors, and surcharges …"

MR. HOSKINS: The likelihood is that these formal types of meetings – summit meetings and Technical Committee meetings – will have been put in place after the cartel had begun, because this is the mechanism, so it is unlikely someone would sit down and say: "Let's have a technical meeting; what shall we discuss today, let's set up a cartel", because oddly the summit meeting was a summit meeting of the cartelists, and the technical meeting was a technical meeting of the cartelists. So this is the infrastructure of the cartel, so it was very unlikely that one of these meetings gave rise to it.

THE CHAIRMAN: Well they could have agreed at the meeting not to have the cartel any more.

MR. HOSKINS: They could, yes, absolutely and that would be the end of it rather than the start of it.

THE CHAIRMAN: So on each meeting they actually agreed to continue the cartel?

MR. HOSKINS: Yes, that is what I said, each of these meetings I think you could fairly say continues the cartel. None of them are the meetings which set the tort in motion, because "in motion" – we see the language from *Shevill* and *Bier* – originates the cartel.

THE CHAIRMAN: Could you not say that each of these meetings set the tort in motion, because each of these meetings agreed that from that date the agreement would subsist, and then they have another meeting and they say it again. So each of these meetings could set the tort in motion.

MR. HOSKINS: Madam, you will not be surprised my answer is "no". Two points: that is not the way the Commission has analysed the infringements, and this is a follow-on action. For other purposes the claimants have relied very, very heavily on the fact that the Commission found that this was a single and continuous infringement, and they have to rely on that for joint and several liability, because if they do not rely on that they then have to start unpicking to see who was doing what, when. So they would need single and continuous infringement for their joint liability claim, and if they accept it for that purpose then they cannot say for a different purpose actually, well it is not actually single and continuous. What you must do is look at who was involved at each meeting, each time, and what was agreed. That is my first point, there is a follow-on action.

The second point – I will be quick because it is one I have already made – if you take that approach it blows any restrictive approach to Article 5(3) out of the water. One only has to look at annex one and see the myriad of jurisdictions that one would have. It is not a restrictive approach.

If I can deal with one of the other points that was made, it was made orally this morning and it was also made in the claimants' reply at para.37. Again, I can take this quickly because it

is a point I have already covered when going through the case law, and this is the argument that was put that the relevant harmful event was the decision by Morgan to participate in the cartel and because Morgan is domiciled in England then that decision must have been taken in England.

A number of points in relation to that. It does not logically follow that because Morgan is domiciled in England the decision to enter the cartel was not itself taken in England. It might be taken by the managing director, the CEO, at a meeting with other cartelists in Geneva, so again it is just an evidential vacuum, one cannot assume.

One also cannot assume that the decision by Morgan was the event which set the tort in motion because, as I said before, to have a cartel one needs at least two players, so simply to say "Morgan decided to participate" is not enough, one has to know who else agreed to participate and where did that agreement actually enter into being.

The third point is the one from the *Anton Durbeck* case, that a bare decision in any event is not enough in itself to be the event which sets the tort in motion, you are looking for an ingredient of the tort, so you have to look where Morgan entered into an agreement to participate in the cartel, the prior decision of Morgan, for example, to try and set up a cartel is not enough. So evidentially this point simply does not cut the mustard. Madam, that is all I want to say on the harmful event approach.

In relation to the other limb, I need to hand up -- This was not dealt with in my skeleton. I will explain why. I have dealt with it in a short note. (Handed) I have to say, I think for the first time in my career, I drafted this note before the hearing started, but it reflects very closely the line of questioning that the Tribunal itself put to Mr. Spitz yesterday. So, I hope I can take it quickly.

The reason we did not deal with this in our skeleton is that it was not raised by the claimants in their skeleton. They did not rely on this limb against us. So, it is only when we saw the reply that it became obvious that this was going to become an issue. So, I apologise for this coming late. But, that is the reason.

Looking at the other limb of *Bier* - the place where the damage occurred -- Again, not surprisingly, it is actually a very restrictive approach because you are supposed to take a restrictive approach to Article 5(3). What one is looking for is where the event giving rise to the damage entailing tortuous liability directly produced its harmful effects upon the person who is the immediate victim. That is my analysis of the case law. I will just quickly show you some of the cases, starting with *Dumez France,* Authorities Bundle 1, Tab 12. It is a judgment of the European Court of Justice. It begins at 182 in the bundle numbering.

If I could ask you to look briefly at paras. 2 and 3 you will see the facts are set out there. Briefly, what happened was that there were two French companies which brought proceedings in France against certain German banks. The cause of action was based on the fact that the German banks had cancelled loans to a prime contractor in Germany which brought about the suspension of a property development project by that contractor in Germany, and the French claimants claimed that this caused the insolvency of their German subsidiaries who were involved in a German construction project. The Courts of Justice held that that was not sufficient damage to bring the French banks in Article 5(3) so they could sue in France.

One sees the reasoning of the court at paras. 13 and 14. (After a pause): Indirect consequences are not enough. Being an indirect victim is not enough -- as well as looking for damage as a direct consequence of the harmful event to a direct victim. That is paras. 13 and 14. Then, it would also be useful, I think, to look at para. 20 which is where the court summarises is position. You see the reference to the immediate victim. That is where the notion of an immediate victim comes from. (After a pause): So, indirect harm to indirect victim is not enough. What you are looking for is direct harm to the immediate victim. That is what is necessary to rely on this limb of Article 5(3).

THE CHAIRMAN: I was just looking at para. 22, which is supposed to be the answer to the question that was posed to the court. (After a pause): It does not have 'indirect' in there. Is that a mistake?

MR. HOSKINS: I think it is just a different way of putting the same point.

> "Article 5(3) cannot be interpreted as permitting a plaintiff pleading damage which he claims to be the consequence of the harm suffered by other persons who were direct victims of the harmful act ----"

Exactly. So, if you are not the direct victim you cannot rely on Article 5(3). Put it another way, if you suffer indirect harm as a result of harm caused directly to someone else, that is not sufficient. That is why I put that you have to show that you have suffered direct harm as the immediate victim in order to rely on this limb of Article 5(3).

Madam, the next case I refer to in the note at para. 6 is *Shevill*, which I do not intend to take you back to. What it tells us is that you can have relevant damage, i.e. direct damage to a ... victim in more than one Member State, but if a court in a Member State has jurisdiction on that basis, it only has jurisdiction in that Member State.

The next authority which we have not seen is *Marinari* in Authorities Bundle 2.

MR. SCOTT: Just thinking through the logic of that, does that limit the ability to consolidate other actions if you have once got jurisdiction under that limb?

MR. HOSKINS: In our submission it certainly would because if someone who was seeking to be joined had only suffered damage not in the United Kingdom there would be no purpose in joining them because the court would not have jurisdiction to give them any relief.

Marinari is in Authorities Bundle 2, at Tab 21. Quite colourful facts in this one. Can I ask you to turn to p.326. Again, it is an ECJ judgment. The facts are set out at 2 to 4. Basically, Mr. Marinari, who was an Italian domicile, brought proceedings in Italy against Lloyds Bank, whose registered office is in London. The basis of the claim was that he had lodged with a Manchester branch of Lloyds a bundle of promissory notes, and when he went to get them back the bank staff, believing them to be dubious, refused to return them, and called the police. That led to Mr. Marinari's arrest and sequestration of the promissory notes. He brought an action in Italy, seeking compensation for the damage caused by the conduct of Lloyds' staff. So, here he was the immediate victim, if you like. There was not that interposing as there was in *Dumez France*. But, he still did not come within Article 5(3). The reason for that is set out at paras. 14 and 15 of the ECJ judgment. You will see the preceding paragraphs refer to *Dumez* and *Shevill*. The conclusion is at paras. 14 and 15. (After a pause): One sees it is put in a different way - the notion of the damage having to be direct -- direct harm here with the seizing of the notes in Manchester - not the fact that it left Mr. Marinari out of pocket generally in Italy.

There is one final authority I would like to look at. It is not actually in the note, but I could take it very quickly because we have looked at it before - *SanDisk* - at Tab 30 in the same bundle. *SanDisk* considered both limbs of Article 5(3). Again, consider the cases that we have seen, and, indeed, some other ones. The conclusion that Mr. Justice Pumfrey reached is at para. 25. We have already looked at it for the other limb of *Bier*. Four lines down in para. 25,

> "I must be satisfied that either the vent setting the tort in motion was in England and Wales, or, alternatively, that the claimant must show that it is the immediate victim of that abuse suffering direct harm in England and Wales".

That was the view of Mr. Justice Pumfrey of the effect of the ECJ authorities, including the ones I have shown you, but not limited to the ones that have shown you.

Again, if that is the legal test - the direct harm to the immediate victim - we have to then look at the facts of this case and see whether the claimant satisfies ... Again, not surprising, we say they do not.

If I can look, first of all, at how they put their case -- I know we can find it in the amended claim form, but if we can just pick it up in the application against us -- the application for permission to bring a claim against us in Submissions Bundle 1 at Tab 1 -- This is the application for permission to initiate a claim. It is para. 8 which I would ask you to look at, please. You will see the language:

> "As a direct consequence of infringement by the defendants, the claimants purchased the products in question at prices that were artificially inflated and fixed . . . They paid substantially more for the products which they purchased than they would otherwise have done".

It is very telling that the claimants' own perspective of their case is that the direct loss flows from the purchase of products at allegedly inflated prices.

So, in my submission, even on the claimants' own pleadings, that is what the direct harm is. What the claimants have tried to do now, because they realise that does not help them, is to come up with an alternative way of putting it. One sees it at para. 28 of the reply submissions. But, Mr. Spitz made the point orally, and what they say now is that they suffered harm regardless of whether they purchased products in the United Kingdom because they were unable to purchase products at competitive prices in the United Kingdom as a result of the operation of the cartel in that jurisdiction.

MR. SCOTT: To be fair to him, he does incorporate it in para. 8 - the words 'than they would otherwise have done'. As he said, he is envisaging a counter-factual point.

MR. HOSKINS: Absolutely. I understand. Absolutely. But, the direct harm is not the inability to purchase - it is the fact of having overpaid because of the cartel. That is very natural. If one steps back for a second and says, "Well, there's been a cartel to raise prices. The claimants say they've suffered loss. What's the loss? Well, it's having to pay more" -- It is a different exercise then, when you go down and say, if it is the opposite, "Well, if they hadn't purchased those products there, they might have purchased them somewhere else. Where would they have purchased them? What would the prices have been?" It is just not the natural way to think about it. That is why the claim is put in this way. That is why it is not the direct harm.

THE CHAIRMAN: The other way would be a loss of opportunity claim, would it not?

MR. HOSKINS: Perhaps, yes. Absolutely. Again, it is just not the way it has been put. The oddity is that even if, contrary to what I have just submitted, the claimants were right that the direct harm was the loss of the opportunity, they still have not made out their claim because in order to establish jurisdiction you have to come forward and show a good

arguable case, and you have to provide evidence to establish a good arguable case where there are factual matters in play. That is what happened in *Provimi*, as we saw yesterday. There was evidence. That is what happened in *SanDisk*. There was evidence. It just has not been offered here.

So, we have put in evidence the first witness statement of Branka Koren which says that only Bosch, of all the proposed claimants, made any purchases from SGL, and these purchases all took place in Germany - not in the United Kingdom. So, we have done our job, if you like. We have put in our evidence. Nothing coming back.

The highest, I think, that the claimants get is in their amended claim form at para. 17. Perhaps we can look at that in Submissions Bundle 1 at Tab 5, p.247. Perhaps - because I need to come back to it - we can look at 69 as well. I will come back to that. What 69 tells us is that some of the claimants apparently did not buy in their own name, or may have bought through other entities. So, one sees that at 69.2:

> "The fourth claimant was a direct purchaser of substantial quantities of the products in its own name and trading as Ford Motor Company".

I am not sure what that means, and there is no explanation elsewhere. 69.3:

> "The fifth claimant and its predecessors and interest was a direct purchaser of substantial quantities of the products through its control systems and power systems operating units which include an entity known as Reliance ----"

Again, I just do not know what that means. I do not know if these are subsidiaries or aren't they trading entities? ---- I just do not know. But, it is interesting that a distinction is drawn between the fourth and fifth claimant and the first, second and third claimants when no such qualification is made. I will come back to why that is significant.

Furthermore, at para. 17, we see the high point of evidence on purchasing. What we find out - and this is the way that Mr. Spitz put it orally - is that Emerson, Valeo and Bosch made purchases from Morgan Crucible. But, crucially, we are not actually told whether they made purchases from Morgan Crucible in England and Wales. That is significant because the Commission decision at para. 27 records that Morgan Crucible had seven subsidiaries in the European Community spread over five Member States, one of which was the United Kingdom. That is the Commission decision at para. 27. So, there is actually not even a pleaded case of purchases in England, let alone evidence of purchases in England.

So, that is one insurmountable problem.

The other problem is the one we have just looked at at para. 69. There is no evidence as to the way in which the claimants actually operated in the EC or in the United Kingdom.

None of the claimants are domiciled in the EC or the United Kingdom. One might reasonably expect that it is possible that they might operate, for example, through subsidiaries. I simply do not know. But, it is a perfectly feasible possibility. For example, if they did operate through subsidiaries, we know from *Dumez France* that it would have been the subsidiaries who suffered the direct harm as the immediate victims - not the parent company. So, again, the failure to actually produce proper evidence to establish where the damage occurred, whether it occurred in the UK, is fickle, as the Tribunal in its questions suggested yesterday.

One of the ways in which Mr. Spitz proved his argument yesterday was to rely on a counter-factual. He said that if there had been no cartel in the United Kingdom, but there had been a cartel in the rest of the EEA, then it is fair to assume that purchases would have been made in the United Kingdom. But, with respect, that is a completely false counter-factual. When one is looking at damages claims in tort, the question is: What position would the claimant have been in if the wrong -- if the tort had not occurred? If the wrong in this case had not occurred, there would not have been a cartel in any Member State. Therefore, what Mr. Spitz would have to do is to show a good arguable case on the basis of evidence that in the absence of any cartel his client would have purchased, he says, all their products for the EEA in the United Kingdom. But, it is not even clear that they would have purchased any products in the United Kingdom. Paragraph 16 of the notes sets out the Commission decision at para. 48. What the Commission decision shows is that these were not products that travelled, if you like. What the Commission says is that although most of the producers, subject to the preceding, follow global business strategies, they may produce their products as close as possible to their customers. Then, a description of how it works: "These tooling sites, ideally in the same country as the customer or at least in a neighbouring country". So, the idea that the claimants would have bought all their requirements for the EEA in the United Kingdom absent the cartel is not just not established by evidence, it is, frankly, incredible, given what the Commission has actually found about the local nature of these markets.

THE CHAIRMAN: What happens if you buy it in England for delivery in France?

MR. HOSKINS: There is case law on the question of what is the appropriate -- I think on Lawtel this morning precisely that issue arose in relation to an FOB contract. I cannot remember. I think it was delivery. Absolutely. These issues arise. That shows the problem - without any evidence from the other side, without even any attempt to describe what happens. You

simply cannot even get into these issues, and they have not got anywhere near to satisfying the burden of proof.

THE CHAIRMAN: In this sort of case though, I wonder whether the harm would be suffered where the delivery takes place. I can see in an FOB context that may be a different scenario, but in this sort of thing, the harm is suffered because you are charged a higher price. Therefore if the purchasing department is in England and the company is in England that suffers that harm, then the fact that it is for delivery somewhere else should not actually make a difference.

MR. HOSKINS: That may well be the case, but not necessarily the case. This precisely what happened in *SanDisk*. In *SanDisk* the claimant did provide evidence of how it operated its business actually through the EC. So, for example, it did have two subsidiaries - they were actually in Scotland - but neither of them was involved in, for example, purchasing decisions. But, you need to have that sort of evidence before you can even make the decision. It is the simple lack here that means that the Tribunal cannot decide this in the claimants' favour because the claimants have not enabled the Tribunal to make this decision.

THE CHAIRMAN: I suppose, in a way, what I am saying is that this is a sort of profit centre.

MR. HOSKINS: That is right. In SanDisk actually the decision was that the effective profit centre was actually with the parent companies which were all US-based.

THE CHAIRMAN: Piercing the veil.

MR. HOSKINS: Well, simply because there was no evidence that there were any subsidiaries in the EC which actually themselves suffered loss. Now, of course, if they had suffered loss, they would have to be claimants. That is another of the problems. If, for example, they have got an English subsidiary and it takes the purchasing decisions, well, they would have to be a claimant.

THE CHAIRMAN: Take it out of this case.

MR. HOSKINS: Madam, it was not piercing the veil. I should make that clear.

THE CHAIRMAN: It was not.

MR. HOSKINS: It was not piercing the veil.

THE CHAIRMAN: Because it was who suffered the loss.

MR. HOSKINS: That is right, and it was the parent who actually suffered the direct loss. It was not piercing the veil.

THE CHAIRMAN: If there is no English company that makes a trading profit then one would say that the parent would be indirect if all the profits get transferred.

MR. HOSKINS: Yes

THE CHAIRMAN: But, if there is an English company that makes a profit or loss, it is that which suffers the harm.

MR. HOSKINS: It would have to be a claimant.

THE CHAIRMAN: yes.

MR. HOSKINS: Of course, there are no other claimants, other than the parent companies.

THE CHAIRMAN: You would say that the parent companies, in that sort of situation, would be indirect.

MR. HOSKINS: That is right. Absolutely.

THE CHAIRMAN: Because all the profit then gets transferred out.

MR. HOSKINS: That is right. That is *Dumez France*, in a sense. We know that from *Dumez France*. But, you need to know the facts of how the parent and the subsidiary operate. That is the trouble. So, in a sense, even without any evidence it is a Catch-22 for the claimants. They cannot conjure up the evidence. If they say, "Oh, we had subsidiaries in the UK" -- Well, they have had it because there are no subsidiaries as claimants. If they want to say that the parents somehow operate in the UK, we just do not have the facts.

The final point is one I have made on *Shevill*: even if there were jurisdiction under this limb it is only in relation to the damage suffered in the United Kingdom.

That is all I need to say on Article 5(3), unless you have any questions on those submissions.

I can go back to the main skeleton again, and pick up at p.14. These are all the Article 6(1) issues. I have set out Article 6(1) at para. 52 . We have seen it before. I make the same point at para. 53. It is actually the same authority - *Kalfelis*. It has to be interpreted restrictively. Again, I do not think there is any dispute between us on that.

I can turn then to deal with the position of Bosch. As we know, Bosch is in a different situation because it does not have any claim against Morgan Crucible because it is a settled-back claim. Madam, I agree with Mr. Spitz's analysis. I have got to the same place. You asked us to look overnight at the current state of the law on claims -- I had got to exactly the same place with CPR 7.3 and 19.1.

THE CHAIRMAN: A very good bit of research.

MR. HOSKINS: It is not that that I rely on. What I rely on is a proper interpretation of the Brussels regulation. The way the claimants put it in their skeleton argument (para. 59 of my skeleton) is that they, "-- suggest that Article 6(1) is 'silent as to whether each claimant

must have a claim against the anchor defendant ... it would be inappropriate to reach such a requirement into Article 6(1) where none appears on the face of that provision'".

The starting point, we say, is that the obligation is to interpret restrictively -- and that is the opposite of a restrictive interpretation. Madam, as we canvassed yesterday, the focus in the Brussels regulation is on defendants. Article 2: where is the defendant domiciled? Article 5(3): Can you sue defendants? Our submission is that if the Community legislature had intended to give a broad right to co-claimants to rely on Article 6 where one of the co-claimants does not actually have a claim against an anchor defendant, it would have said so. So, we say the approach just does not chime with the restrictive approach.

THE CHAIRMAN: The whole point of the Brussels Convention is that there is a claim in which some sort of acknowledgement has been put. So, you have to start with the claim. In relation to Bosch, there is no claim.

MR. HOSKINS: Yes. I am going to come back in relation to the other defendants and make that point. But, yes.

I have said in the skeleton that there is no authority which had ever considered whether this point that has now been put had arisen. I will just be clear: the point that is being put is -- You have a number of claimants - let us call them A and B - and B has a claim against the anchor defendant in the United Kingdom, but A does not. Can A nonetheless rely on B's claim under Article 6(1) to ... the United Kingdom. As I say, I could not find any authority on it. Actually it has been considered -- It is rather embarrassing. It is in *Provimi*. Exactly. Actually the diagrams are going to come in useful for this because it is not necessarily easy to follow *Provimi*. I can pick it up in Authorities Bundle 2 at Tab 28 ----

THE CHAIRMAN: Shall we look at the one they handed in this morning?

MR. HOSKINS: I have also produced just copies of the diagrams. It might be helpful if I hand them up because I am going to look at them in conjunction with this judgment. It might just be an easier way to manage it. (Handed)

THE CHAIRMAN: You were both in *Provimi*.

MR. HOSKINS: We do not have to look at all the facts of *Provimi*. It arose out of the vitamins cartel. There were a number of claims. We are interested in the claim which was Folio 476. If I could ask you to turn to p.401 of the bundle? This is where the diagrams come in useful. If I can ask you to pick up Annexe 2? Folio 476. You will see that there were two claimant - there was Trouw (UK) and Trouw (Germany). (After a pause): The ones I have handed up are correct. The ones that are attached to the judgment are not correct. So, I

am operating on these ones. As long as you have got a diagram -- As I have said, it is Folio 476 ----

THE CHAIRMAN: I am looking at the one that you handed up.

MR. HOSKINS: That is perfect.

THE CHAIRMAN: What is incorrect, just so that I know?

MR. HOSKINS: In some of the reports, unfortunately, the annexe headings are different On one of them I think Folio 476 appears as -- The diagrams are exactly the same. They are simply mis-labelled.

THE CHAIRMAN: Mis-labelled to the wrong case, but the diagram is correct.

MR. HOSKINS: Exactly. In some of the ones the final Annexe 4 diagram is said to be Folio 476, but if you check the parties it is clearly not correct. The case was complicated enough without the mis-labelling.

THE CHAIRMAN: Where have you taken yours from, so that I know?

MR. HOSKINS: This is from the UK Competition Law Reports.

So, the claimants are Trouw (UK) and Trouw (Germany). There are a number of defendants. The first defendant is the anchor defendant - it is the only English defendant on the right - Roche Products Ltd. (England). Both of the claimants put forward a claim against Roche Products Ltd. Roche brought a jurisdiction challenge, allied with a strike-out application in relation to the claim by Trouw (Germany) against D1 - Roche (UK). We said it should be struck out as a matter of law because the pleadings were not sufficient.

Now, if we had won that strike-out it would have been possible for Trouw (Germany) nonetheless to say, “Okay. We don’t have a claim against the Roche anchor defendant, but Trouw (UK) still does. Therefore, we are going to rely on Article 6(1) as co-claimants”. Indeed, they did originally put forward that claim in the alternative.

So, if one turns through to p.403 of the bundle, para. 18.3, you will see the reference to the strike-out application which was made in respect of Trouw (Germany). Then, over the page at 404, at para. 4(b) -- Two lines into that it says “Originally Linklaters, solicitors for the Trouw claimants, had argued that Trouw (Germany) was entitled to rely on Article 6(1)of the regulations to assert English jurisdiction against Roche (Germany). That argument was not pursued. The argument was that as one claimant was an English company, then another non-English claimant could find jurisdiction using Article 6(1). That Article broadly permits a person domiciled in a contracting state to be sued in the court of a contracting state where it is one of a number of defendants that is being sued in that court.

This argument that Article 6(1) could be used to join co-claimants is plainly wrong as Mr. Carr, QC for the claimants recognised".

Now, it is slightly different from what we have got here because it was an argument that because one of the co-claimants was an English company it could rely on Article 6(1). But, Mr. Justice Aitkens approach was that ----

(Proceedings suspended due to fire alarm)

THE CHAIRMAN: Madam, we were looking at *Provimi*, authorities' bundle 2, tab 28. We were at p.404, and I had shown you one variation on an argument where it was said that because a co-claimant was himself English he could rely on Article 6(1) – answer: "no". The specific position that we are looking at did come up, there was no decision on it because it was accepted by the claimants what the legal position was, and that is if you turn back over to 403 – it is probably helpful to have the chart handy for this as well. You remember, looking at the chart there was the claim by Trouw UK v Roche, the anchor defendant, there was a claim by Trouw Germany v Roche, the anchor defendants, there was a strike-out application by Roche in relation to the German action, so if that had been successful, the co-claimants (Trouw Germany) would not itself have had a claim against the anchor defendant. So if one goes to the foot of 403:

> "It is accepted by the claimants that if the claim by Trouw Germany against Roche UK is struck out, then the English court has no jurisdiction to hear Trouw Germany's claims against [the other Roche defendants not domiciled in the UK] so that all Trouw Germany's claims in Folio 476 would have to go. This is because the only basis on which Trouw Germany can assert that he English court has jurisdiction to hear its claims against the defendants is that one of them, Roche UK, is domiciled in England. Therefore the other defendants can be sued here on the basis of art 6(1) of the Regulation. But if there is no arguable claim by Trouw Germany against Roche UK, then there is no other basis for Trouw Germany claiming jurisdiction against the other defendants."

So it is not a finding, it is common ground, and the judge accepts without comment that a co-claimant cannot rely on Article 6(1) in the circumstances where the co-claimant itself does not have a claim against the anchor defendant. That is the best I can find in terms of authority, but it is pretty clear what the situation is. I should say the Brussels Convention was adopted in 1968. If this was a real point that had any merit one would have certainly expected it to have come up and be determined, because it would obviously be a very useful ----

THE CHAIRMAN: We were asking ourselves over lunch, in light of the fact we have looked at English authorities, and we have looked at decisions of the ECJ, and we mused about whether courts in other jurisdictions within the European Union might have opined.

MR. HOSKINS: The punch line for me in a sense is that if one takes **Dicey & Morris**, which is an encyclopaedia, you will not even find a suggestion in there that this is arguable, and in **Briggs & Rees**, which is less encyclopaedic, but more creative, so you will find in that that this is a possible argument but it would not work, because we actually think the law is wrong, again – not even a hint that this is arguable, so in a sense I am proving a negative. It is just fanciful to suggest that if this was a really credible argument it would not have been decided, because it was obviously an incredibly useful vehicle for co-claimants. To not find it seen as a possibility in the leading text books with respect that tells you that the common ground in *Provimi* was absolutely right.

THE CHAIRMAN: Though not as ingenious as Mr. Spitz.

MR. HOSKINS: Mr. Spitz was acting for the claimants in *Provimi*! I am sorry to make that point. (Laughter) He may have become more ingenious over time.

Just two tidying up points in relation to *Bosch*. First, one of the ways that Mr. Spitz put the point was well Bosch might come along after the event and asked to be joined, but that does not get rid of the jurisdiction problem, because you cannot avoid having to establish jurisdiction by waiting until someone else goes in and establishes jurisdiction and then appearing …

There is also one point I would like to clarify in relation to Article 28, which came as a result of a question from the Tribunal. Article 28, if we remind ourselves, it is in this authorities' bundle, behind tab 40, p.619. Article 28(1):

> "Where related actions are pending in the courts of different Member States, any court other than the court first seized may stay its proceedings."

The question was asked what effect could that have if Bosch were to go and sue, for example, in Germany? The answer was there would be a stay in Germany. With respect that is not correct. First, Article 28 does not require the court to stay, it has only a power to stay, and it is perfectly clear, because it has happened in relation to previous cartels that one can certainly have a number of actions against the same cartelists by different claimants in different Member States. In the vitamins' cartel there were actions in England, Germany, France, and I think there was some other jurisdiction involved as well. That must be right, because imagine if this Tribunal says to Bosch: "We do not have jurisdiction to hear your claim", Bosch goes to the German court there is absolutely no way the German court is

going to say "We are going to stay this proceeding because there are proceedings against the same cartel as from different claimants in England. You cannot go there, there is no jurisdiction, England, for you, we know that, but we are not going to hear your claim." It is just not a practical suggestion. So, with respect, Article 28 is not a problem for Bosch.

On that basis we say it is quite clear that there is no jurisdiction in relation to Bosch either under 5(3) or under 6(1) and that is a separate category and that is the end of that matter. That is regardless of the points I am going to go on to make about timing, etc. It is a free-standing issue. So whatever, in our submission, the Tribunal decides to do about the *de bene esse* it should deal with Bosch.

The other claimants – Emerson, Valeo, Visteon Rockwell – they each have a claim against Morgan Crucible. At the moment they do not have a claim against us because they have not had permission and I will come on in a minute to look at what that means legally, what status is there in relation to proceedings involving us at the moment. But the submission I want to make at this stage, I want to break Article 6(1) into three sections; this is the first section. The submission I want to make first of all is that Article 6(1) will not apply when proceedings against the anchor defendant have ceased by the time any claim is brought against non-UK domiciled defendants. So it is my disjunction point if you like. There have to be claims at the same time against the anchor defendant as against the defendants domiciled in other Member States. We say that is clear from the wording of Article 6(1). We are still in the same tab – 6(1) is at p. 614. If the claim against the anchor defendant has been determined or settled before the action is brought against the non-UK domiciled defendants, then those defendants will not be one of a number of defendants. It is a simple point.

THE CHAIRMAN: If they did sue them it would be an abuse, because there would definitely be no claim.

MR. HOSKINS: Well, if they sued the original person, yes. I am imagining a situation where anchor defendant has gone, for whatever reason – for example, settlement; for example, determination, or whatever – and a further claim at a later date against non-domicile defendants, 6(1) does not apply, so simply that timing point. Therefore, when one comes to look at the authorities the claimants have relied on they do not meet that point. *Petrotrade* is the first one – we have not seen that yet. It is in this authorities' bundle at tab 27. First of all, perhaps I could ask you to read the headnote.

THE CHAIRMAN: (After a pause) Yes.

MR. HOSKINS: What happened was Mr. Smith was actually domiciled in Switzerland, but when he came to England proceedings are served because he is in the jurisdiction; because he is detained in the jurisdiction there is then a question where he becomes domiciled in England because he is not able to leave. But subsequently there is an application to join the Belgian companies, the Alpina companies, to the same claim, so it is not the situation I am imagining because there is not the disjunction between a claim against the anchor defendant not being in existence at the time when there was a claim against the non-domiciled defendants. In *Petrotrade* they exist at the same time. In fact, as you will see from the headnote what happened was that there was not jurisdiction in that case because one has to look at the time when the original proceedings were commenced, and at the time they were commenced Mr. Smith was not domiciled in England, he just happened to be passing through, so that is an example where it failed. In our submission *Petrotrade* does not actually take the claimants anywhere, because it does not deal with my disjunction point. The other authority they have relied upon is *Reisch*, tab 29, which I do not intend to take you back to unless you wish. You might remember that that is the action against Mr. Gisinger, who is the Austrian national and Kiesel, a German company. The claim against Mr. Gisinger was not admissible because bankruptcy proceedings had been commenced against him, but again it is exactly the same situation. There are claims made at the same time against the anchor defendant and the non-domiciled defendant, so it does not deal with our situation, so that is the first limb of our Article 6(1) argument. If there is disjunction, there is no valid claim – or no existing claim – against Morgan Crucible at the time that proceedings are commenced against us then Article 6(1) will not apply.

The next and the second stage is to say: what is the status of the proceedings against us? Are there existing claims against Morgan Crucible and against us now at this stage as we look at it? The answer, we say, is "no". There are two possibilities as to when proceedings may be said to be instigated against us. This is the skeleton argument at p.18, and it is para.69. It may be that the application for permission to bring the claim against us can be said to have instituted proceedings; we say not. Or it may be that proceedings are not instituted until permission is granted, and we say that is the correct analysis.

THE CHAIRMAN: Well no, not until permission is granted, until permission is granted and the proceedings are served.

MR. HOSKINS: And served, yes, I am using shorthand and I should not, absolutely.

THE CHAIRMAN: It is quite important.

MR. HOSKINS: Yes. There is some assistance in the Brussels Regulation – I say "some assistance" because Article 30 of the Regulations – I have set out the text but we can look at it if you like in the bundle, it is tab 40, or para.70 of my skeleton. You will see the heading – "Lis pendens – related actions" and then one has the rules about what happens where there are the same actions in different courts and obviously the focus is on the court which is first seized because it trumps the other courts. One sees that at Article 27(1). Of course, you then have to be able to tell which is the court first seized for the purposes of the regulation and Article 30 tells us:

> "For the purposes of this Section, a court shall be deemed to be seized:
>
> 1. at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have service effected on the defendant."

The second is where you have to be served, in some Member States you have to be served before the documents are lodged with the court, so that is not our situation, we are an Article 31 situation.

The crucial question then, it looks like the Brussels Regulation, is when are proceedings instituted? In the Brussels Convention one had the equivalent rules on lis pendens, i.e. court first seized trumps, etc., but one did not have an equivalent Article 30. Not surprisingly the Court of Justice had to consider this issue, it was an obvious issue that was going to come up and that is the case of *Zelger v Salinitri*.

THE CHAIRMAN: Can I just go back to Article 30(1), because that is quite interesting, because it is: "… at the time when the document instituting the proceedings … is lodged".

MR. HOSKINS: Yes.

THE CHAIRMAN: Well that must be after permission is given in this case.

MR. HOSKINS: That is my submission.

THE CHAIRMAN: But then "… provided that the plaintiff has not subsequently failed to take the steps he was required to take to have service effected on the defendant." In this case because the defendants are out of the jurisdiction what we have done previously is we have made an order that the claimant must serve out of the jurisdiction. That is what we did in the Vitamins' case.

MR. HOSKINS: I cannot remember.

THE CHAIRMAN: Yes.

MR. HOSKINS: So it is not just instituted proceedings, it is also when the service had been done.

THE CHAIRMAN: Yes. Which is why I said about it, but I have just noticed that it is there.

MR. HOSKINS: You are absolutely correct, madam. You see where my submission is going on this. It is worth looking at the case law because it supports our submission and give us an indication as to what "instituting proceedings" might mean; it is at tab 35 of this bundle. I do not think it is necessary to get into the facts in relation to this, but one sees the court's ruling at paras. 14 to 16 and you will see the finding that a court is seized for the purposes of the Brussels Convention when proceedings have been definitively brought before a court. You will see from para.15 the question of whether a court has been definitively seized is a matter for national law because you did not have an equivalent to Article 30 of the Regulations in the Brussels Convention.

Paragraph 14 tells you when proceedings are definitively brought before a court. 15 tells you for the Brussels Convention you refer to national law, but that has now changed because now you can refer to the Regulations.

Our submission is that when one asks what does "when proceedings are instituted mean" for the purposes of the Regulations?" It means what the Court of Justice said in this case, it means definitively seized, because quite often what one sees particularly in this field is there will be questions which will arise in relation to, for example, the Brussels Convention. The Court of Justice will then consider the issue and give a judgment on it, and then one finds it in a later version of the Convention, the Lugarno Convention or, in this case, the Regulation. Our submission is given that the Court has said this, and given there is no indication that the Community legislature intended to depart from this approach then it is perfectly natural to interpret "instituting proceedings" in light of the fact that you need to have proceedings definitively instituted. But, as I say, I do not need that argument, it is an extra argument, because one has the argument based simply on the language of instituted proceedings in any event, that is an added argument on top.

We turn then again to the application of the law to the facts of this case. We needed therefore to look at the Act and the Tribunal Rules which are in the same authorities' bundle. 47A(4) of the Act (tab 39) at p.606. Section 47A "Monetary claims before the Tribunal". If I can ask you to turn over to p.607, subsection (4):

> "A claim to which this section applies may (subject to the provisions of this Act and Tribunal rules) be made in proceedings brought before the Tribunal/
>
> (5) But no claim may be made in such proceedings …"

And then (b) "otherwise than with the permission of the Tribunal." So clearly it is talking about proceedings being made after the grant of permission. One sees to the same effect in the Tribunal Rules (tab 41), p.636, rule 31(3) – we have looked at this before.

> "The Tribunal may give its permission for a claim to be made before the end of the period referred to in para.(2)(a) after taking into account any observations of a proposed defendant."

Then 32(1):

> "A claim for damages under section 47A of the 1998 Act must be made by sending a claim form to the Registrar."

So if permission is granted then a claim form has to be sent and, madam, as you have pointed out there has to be service in any event. We say it is quite clear from the language of both the Act and the Tribunal rules that at this stage, where there has been an application for permission to bring a claim, or a claim to be made, that proceedings have not been instituted against us or, to put it another way, proceedings have not been "definitively commenced" to use the ECJ's case law.

THE CHAIRMAN: My concern about your other argument that jurisdiction comes first because jurisdiction comes when a claim has been instituted.

MR. HOSKINS: Madam, I hesitate to go back over that.

THE CHAIRMAN: Yes, but that is my concern.

MR. HOSKINS: I understand. I could take it as a chance to start again but I am not going to.

THE CHAIRMAN: It is not an invitation to start again!

MR. HOSKINS: I am certainly not going to. So we say that proceedings have not been instituted against us as things currently stand and therefore one has the disjuncture, potentially, because at the moment there is an extant claim against Morgan Crucible but there is not against us, and obviously the next … I am going to come on to is to say that if the Morgan Crucible settlement is determined before permission is determined in relation to us then the Morgan Crucible claim may fall away at the time when there is no valid claim against us, and that removes Article 6(1).

I should say, and I would refer you to the skeleton argument, that there is also support for this in **Dicey & Morris**. I have given the reference and I have given the quote.

"So far as concerns proceedings to which Judgments Regulation applies, where new parties and new claims are to be added by amendment…" and that would be us being added by permission being granted "… the corresponding date [i.e. the date when the court is seized]

is presumably the date of reissue, rather than the date of application for such permission as may be required."

THE CHAIRMAN: Yes, so at that stage, if the claim against Morgan Crucible had been settled there would have been nothing to hang it on, and if therefore you came along and said that Article 6(1) is the only way they can get us in, and there is nothing there because there has been a settlement, you will have the argument.

MR. HOSKINS: Absolutely.

THE CHAIRMAN: And that argument is open to you, as I see it at the moment, whether we decide jurisdiction before or afterwards.

MR. HOSKINS: Madam, it depends on when you deal with permission, because once you grant permission to bring the claim against us then there is immediately the conterminus claim against Morgan Crucible and against us, and that is why it ----

THE CHAIRMAN: Yes, but if the claim against Morgan Crucible is a bad claim, completely bad, and subject to the way you look at *Reisch*.

MR. HOSKINS: I think this is where I differ from Mr. Weiniger.

THE CHAIRMAN: We do not want to go around in a circle again.

MR. HOSKINS: I do not want to, because we have considered the position. We are not running the argument that the claim against Morgan Crucible is an abuse.

THE CHAIRMAN: You are not.

MR. HOSKINS: No, and that is why it is so important for me to have this now rather than later, because my argument does disappear. Mr. Weiniger's stays alive, mine disappears.

The first stage of this analysis, and it is the $1 million question, is actually a case management for the Tribunal and that is whether to deal with the settlement issue in relation to Morgan Crucible prior to dealing with the permission application in relation to us.

Again, I would like to split this into two stages.

The first stage is, is the Morgan Crucible settlement – the scope of it, the effect of it – suitable to be heard as a preliminary issue? The second issue is, if it is, when should it be heard? Let me deal with the first point: is this fit to be dealt with as a preliminary issue? I am picking this up at p22, para.83 of my skeleton. We say it clearly is suitable for a preliminary issue. I have set out there a quote from the transcript of the previous hearing we had on 13 December, and I appreciate it is purely the Tribunal's intuitive reaction at the start of the proceedings, but what the Tribunal said was:

> "Our intuitive reaction at the moment, and of course subject to any submissions, and those submissions are from Morgan Crucible and the Emerson claimants, is

that the Tribunal should actually decide the settlement agreement as a preliminary issue, because if the claim has been settled then there would be no point in hearing the rest of the case."

THE CHAIRMAN: But did we not deal with this in – whatever the interlocutory judgments are called.

MR. HOSKINS: This was after the interlocutory judgments. This was the first time we made any, I will not use the word "substantive" appearance.

THE CHAIRMAN: Made any observations.

MR. HOSKINS: That is right, I said that at the start, I am not holding you to this at all, madam. But our submission is that the Tribunal's intuitive reaction was obviously correct, because it would not make any sense, forget all the jurisdiction issues, presume it is just a claim against Morgan Crucible, it would not make any sense to go to a full trial of this action and then at the end of the day to decide in the course of that action the claim had actually been settled.

THE CHAIRMAN: I thought that what then happened, it must have been at that hearing then, but we need to go back to the transcript possibly, is that we made an order for the matter to be pleaded, etc. fully and not just in relation to this issue. We must have been satisfied otherwise.

MR. HOSKINS: I think what happened was there was the suggestion there would be mediation and I will come on and deal with that, what effect this has on it.

THE CHAIRMAN: The question of the mediation was something we said we should not take account of.

MR. SCOTT: Yes, we have not sought to put any pressure on the parties to mediate, but we have set down another CMC for 24th June in relation to the first defendant, so as to give an opportunity for them to seek mediation if that is their choice. We did, however, in that hearing reflect upon the implications of doing so because of the very points that you are making before us now.

THE CHAIRMAN: You cannot just rely on this paragraph without looking at what actually finally happened at that hearing.

MR. HOSKINS: I am not trying to bind you. As I said at the start, it is clearly an intuitive reaction, it is clearly the statement made at the start; I am not trying to bind you. Our submission is, and I could make it without that. It is obviously correct that this issue should be dealt with as a preliminary issue.

THE CHAIRMAN: But we decided not to deal with it as a preliminary issue, that is my problem, and that is why I am raising it.

MR. HOSKINS: Well I do not think that is right, madam, with respect. I do not think it has been determined one way or the other.

THE CHAIRMAN: Well not at that stage that it was going to be a preliminary issue but the action was being pleaded ----

MR. HOSKINS: Madam, you can order a preliminary issue at any stage.

THE CHAIRMAN: I know, but it was all done on the basis of the consideration as to whether the pleadings should only be in relation to that preliminary issue, and if we had gone down that line then that is what we would have done, and in fact we made an order which was much wider than that.

MR. HOSKINS: Madam, we can go back to the transcript, but my recollection is that what happened was that Morgan Crucible and the claimant said "We would like to consider mediation", and they also said the claimants pushed for there to be a defence before a mediation. The Tribunal rose and allowed those parties to discuss what they would like to do. My recollection is that Morgan agreed then that it would put in a defence, and the parties would consider mediation. My strong recollection is – I will be proved wrong if I am wrong – is there was no determination as whether it should be dealt with as a preliminary issue or not. It was simply, as Mr. Scott has said, the matter in a sense was put in abeyance to 24th June to see what the parties did.

THE CHAIRMAN: If you put the case as high as you were putting it, then we would not have made the order we made in December in relation to the proceedings because we would have said the first thing to decide is whether there has been a settlement, and that that has to be decided as a preliminary issue, and at that stage we did not go down that line. So although one's opening remarks suggest that we might be going down that line, or that is what we were considering, by the end of the hearing we had moderated the position and had left it open. So I do not think that one can now say that it is our reaction.

MR. HOSKINS: I am sorry if I have got off on the wrong foot. Forget any reliance on intuitive reaction, and the submission remains that this is clearly an issue fit for preliminary determination for the reasons I have described – it would be a colossal waste of time and money for it to go to full trial and then to decide it has all been settled; it is simply that point.

The question then is ----

MR. SCOTT: Just to clarify, this particular point in your argument you are going as to order of events, but I take it that you would also see this as having weight in relation to whether or not we should grant permission at this stage?

MR. HOSKINS: Absolutely. I am going to come on to that, that is the second part, because the timing I am suggesting should be adopted because it is clearly relevant to the question of the grant of permission, that is what I am going to come to.

We have the problem, of course, that Morgan Crucible and the claimants, because they are aware of the jurisdiction point for different reasons, they do not want us out of this jurisdiction, so they are obviously blowing cold on preliminary issues, but the point is the Tribunal has power of its own motion to order a preliminary issue; that is quite clear (Rules 19(1) and 19(2)(a) of the Tribunal Rules. So it is ultimately for the Tribunal to decide the best way to conduct this case.

The second point then is really the nub of the submission, which is the timing point, and we say what should happen is that the application for permission against us should not be determined until after the preliminary issue of the settlement issue; that is our submission. One of the issues that was raised at the last CMC against that happening was: "Is it not unfair to a claimant who comes to court saying 'I want to make this application' not to deal with it immediately?" The point is the Tribunal has already for case management reasons put off hearing that application because it was made in February 2007. What the Tribunal decided was rather than dealing with that at the outset, it was actually appropriate to deal with particular matters relating to the claim against Morgan Crucible. So all we are asking for is an extension of that time. The Tribunal certainly has power to do it and it has done it so far for a year. We are asking you to do it for a bit longer.

The reason we say this timing is appropriate – sir, this is the point you raised – is we say that the outcome of the preliminary issue would be very significant for the Tribunal's consideration of the applications for permission to bring claims against us. There are a number of points to make in relation to that.

First, and this is p.23 of the skeleton, para.89, the existence or absence of a valid claim against Morgan Crucible we say would obviously be a significant factor in deciding whether to grant permission to bring the claims against us. This whole thing started because the claimant said: "We need to bring the claim against Morgan Crucible because we are worried about limitation", and "Oh, well we had better put the application against the others", of course that is not the way it panned out. Clearly, if there is no existing claim

against Morgan Crucible that is a significant factor that goes to permission. I am not saying it is necessarily determinative, but it is clearly going to be significant.

The second point is that we say the presence or absence of an existing claim against an English domiciled defendant would also be a relevant factor in deciding whether to grant permission, because in the absence of Morgan Crucible as a defendant in these proceedings, what we would have are claims brought by US, French and German companies against German companies and a French company. In relation to us the only claimant that actually purchased from SGL was Bosch, a German company.

Again, we say it is clear why the Tribunal should put itself in a position where because of the quirk of the way Article 6(1) works, and the way in which the case management has happened it should find itself sitting with claims that clearly do not belong here, because Morgan Crucible has gone.

The third point is that Article 6(1) – I refer to Article 6(1) because it seems to me it is important when the Tribunal is considering what to do it can have regard to what the aim of Article 6(1) is, because in deciding how to do its own case management it may well say that doing it this way promotes what 6(1) envisages, and doing it in this way may lead to an artificial application of Article 6(1) which does not actually promote the way it should work.

Article 6(1) only applies provided the claims against the co-defendants are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings – we have seen that before.

If there is no existing claim against Morgan Crucible there would be no need for the Tribunal to accept jurisdiction over the other co-defendants in order to avoid the risk of an irreconcilable judgment by the Tribunal in relation to some other court in another Member State in relation to those defendants.

If you approach the matter our way, once Morgan Crucible has gone the risk of the Tribunal making an irreconcilable judgment has gone because without Morgan Crucible and without permission against us the Tribunal does not have anything to do. So that is an important part of 6(1) and the way in which the Tribunal manages the case can actually avoid that being any sort of issue. In fact, the opposite is almost certainly true, i.e. if you follow the way the claimants say the Tribunal should proceed, then it may well create a problem because if you are with us on Bosch, Bosch are going to have to go and sue somewhere else – perhaps Germany, perhaps France depending upon which anchor defendant it goes for. In those circumstances we would have a claim by Bosch in another Member State ----

THE CHAIRMAN: Well unless you get Bosch in and the others on 5(3).

MR. HOSKINS: I am assuming I have won, sorry, against Bosch on 5(3) and 6(1), so I am assuming if you are with me completely on Bosch as that little freestanding package, Bosch will have to go somewhere else. If the Tribunal gives permission for the other four claimants to bring claims against us then you do start rubbing up against the fact that you will have the same courts looking at the same sorts of issues.

I accept it is not a bar because I made the submissions in Article 28, you can have different claimants suing different Member States.

MR. SCOTT: The complication is that if we are first seized, if the reality is that only a court in France and Germany could, in any event, have jurisdiction over all the parties we were first seized with some of the matter ----

MR. HOSKINS: Sorry to interrupt, but you will not be first seized in relation to this matter for the reasons in my previous submissions; there are no extant proceedings against us. That is one of the reasons I took you to Article 30 on the Brussels Regulation ----

MR. SCOTT: Yes.

MR. HOSKINS: -- by definition that is why I showed you in that context, if you are with me you will not be seized of the matter, because proceedings have been definitively ----

THE CHAIRMAN: Yes, but is that the right test, if you look at Article 27? I think the answer is it is not between the same parties.

MR. HOSKINS: Yes. It is actually quite narrow, Article 27.

MR. SCOTT: You will understand I am just trying to conceive of how in a purposive sense the idea of ending up with the closely-connected matters all being before the same court or Tribunal might be effectively achieved, even if it is not us, if you see what I mean.

MR. HOSKINS: That is right.

THE CHAIRMAN: How does Article 29 work? What does that mean?

MR. HOSKINS: (After a pause): There are certain provisions of exclusive jurisdiction ----

THE CHAIRMAN: Yes, it must be different parties because of this exclusive jurisdiction. It must be different claims because you have got exclusive jurisdiction where actions – in plural ----

MR. HOSKINS: I think there is a difference. In Article 27, the court which is not first seized has to stay its proceedings until such time as the jurisdiction of the first seized is established, whereas in Article 29 there are particular rules going to exclusive jurisdiction: "It shall decline jurisdiction in favour of the court ----" So, they actually work in different ways

because the rules and the regulation have different strengths, if you like. The ones we are looking at are not specifically jurisdiction rules.

THE CHAIRMAN: I am just wondering if Article 29 - and I may be completely wrong - would cover the point you are making, that we are seized, and first seized, of an action against Morgan Crucible. You say the exclusive jurisdiction in relation to Bosch is the ----

MR. HOSKINS: No, madam, exclusive jurisdiction does not apply in this case; none of the rules of exclusive jurisdiction are applicable here. For example, Article 6(1) is not exclusive jurisdiction. Article 5(3) is not. Article 2 is not. Article 22 of the regulation (p.617) ----

THE CHAIRMAN: I know what you mean ... property ----

MR. HOSKINS: Exactly. It is a particular rule to deal with that. So, we actually say that our approach is actually the approach which has the least risk of irreconcilable judgments. We are saying to the Tribunal that you should take case management decisions in such a way which limits the risk of irreconcilable judgments. You should take case management decisions which limit the possibility of the Tribunal being left with all these foreign claims and actually no connection, because that is certainly not the way that Article 6(1) is intended to operate.

The final point - two points wrapped in one - is that there is supposed to be a narrow approach to Article 6(1). So, we say that when you are taking case management decisions that will have an impact on jurisdiction you should be careful to adopt a restrictive approach to your own case management decisions.

The final point - and it ties in with what we have just been discussing - is, of course, that what we are not saying is that these claims cannot be brought at all. We are just saying they cannot be brought here. Again, I took you to the quote from the speech of Lord Goff in *Kleinwort Benson*, which effectively made that point: if parties want to go on suing on jurisdiction, it is easy - you just go and sue in the court of domicile. You always have that choice. You do not have to stick your head in the lion's mouth of having to deal with Article 5(3) and Article 6(1). It just so happens that the claimants have chosen to put their heads in the lion's mouth.

THE CHAIRMAN: Except if you are a claimant with a number of defendants, and it is all the sort of same cause of action. One does not want to have to pursue in five jurisdictions.

MR. HOSKINS: I understand. But, that is what Lord Goff says - in a sense, you have got the choice. You can go down the simple jurisdiction route, and sue in domicile, or obviously you have the choice to go down and choose Article 5(3) or Article 6(1). But, you may find yourself in this sort of battle if you do so.

MR. SCOTT: What you seem to be saying to us is that (a) you do not have to decide permission in relation to this application now. You have had the application for a year, and you could continue to sit on it. You would argue there is no prejudice to the claimants, who are now sitting on it, because there are the ongoing CFI proceedings which may go to the ECJ. Then you have the case management decision on whether you move to the settlement issue or to a substantive trial, including the settlement issue. At that case management stage you could reconsider whether the time has come to make a decision on permission or not. That is the essence of your argument.

MR. HOSKINS: The essence. I am not saying that permission goes away for ever.

MR. SCOTT: I understand.

MR. HOSKINS: It is simply adjourned. It is not dealt with now.

I think that is probably all the submissions I need to make at this stage.

THE CHAIRMAN: Can I just raise one point which goes back to something we were dealing with this morning? That is the original harm, or the original tort.

MR. HOSKINS: Is this the event or the damage?

THE CHAIRMAN: The event. (After a pause): There may have been a cartel back in the 1930s. But, this particular tort is a tort that came into being at some point when the European Treaty of Rome was entered into.

MR. HOSKINS: If there was cartel activity at that time. We do not know what happened between 1937 and ----

THE CHAIRMAN: No. So, one cannot say that the original event happened in 1930 because there was no tort then.

MR. HOSKINS: Madam, I understand.

THE CHAIRMAN: Are you with me?

MR. HOSKINS: I understand. Absolutely.

THE CHAIRMAN: So, then the question is: When did it become a tort? If one is looking at it as a tort in England and Wales, or in the UK, it cannot be until the UK joined the European Union. Do you see where I am?

MR. HOSKINS: Yes, Madam. The reason why I am looking reasonably comfortable is because it is not my problem. The burden is on Mr. Spitz to identify the torts, once events set the torts in motion, and to convince you that it is a good arguable case. At the moment, all that he has come up with is a summit agreement which is clearly some way into the cartel.

THE CHAIRMAN: It is 1988.

MR. HOSKINS: 1989, I think -- whenever was the summit meeting in Stratford-on-Avon. In a sense, I do have the comfort. It is odd. Usually, one is looking for the right answer, but it is not that sort of case here. The fact that Mr. Spitz fails to prove it, and the fact that I do not put up an alternative first event, does not matter.

Madam, unless you have any further questions ----

THE CHAIRMAN: We have no criticism at all. We are half an hour behind timetable. Mr. Weiniger, you are going to follow and you are going to be about an hour?

MR. WEINIGER: Yes, Madam. An hour is a maximum. It may be quicker.

THE CHAIRMAN: I think we will have to revise the timetable when we have heard you. We will take a break for ten minutes and then you can start.

(Short break)

MR. SPITZ: Madam, with Mr. Weiniger's permission, I ask that I can simply stand up and see whether we could have a quick discussion to try and make sure that we do manage to accommodate all of us, and still finish in time today. As things stand, I am allocated half an hour at four-thirty to five, which is sufficient. But, I am simply wondering about whether one can look at the timetable again to make sure that we can in fact finish and we do not need to run over on to another day.

THE CHAIRMAN: I think everybody is going to do their best to do that. If we hear Mr. Weiniger, and see how long he takes -- Then I think we can re-assess it then. I do not think we can re-assess it now.

MR. WEINIGER: Madam Chairman, I am going to start very briefly and just try to finish off on jurisdiction. I have only two points on jurisdiction. The first point is that we adopt everything that my learned friend, Mr. Hoskins, has said except where we do not. That has been discussed already. Unless the Tribunal wants me to revert to that, I have no desire.

The second point is that on the evidence Mr. Hoskins took you to a witness statement on behalf of his clients setting out what the state of the marketing activities in the United Kingdom were, when there were none. We have a similar witness statement made on behalf of our client, by Mathias Mohr. It is in the bundle at p.141 We will look at it in a minute for the purpose of permission. There is a point at the end there relating to jurisdiction, saying that to the best of Schunk's knowledge, and the research that it is carried out, there were no sales made in the United Kingdom, or orders made from the United Kingdom. So, when we are assessing what evidence of actual activities that happened in the United Kingdom, the evidence on the Schunk side is, 'Nothing'.

MR. SCOTT: Just to refresh my memory, am I right in thinking that of the seventy-seven companies in the group there is a subsidiary in the United Kingdom, but what you are saying to us is that it was not involved, and the other companies were not involved in the United Kingdom.

MR. WEINIGER: Absolutely correct.

Now turn to the question of permission. I do not know whether, after what we have been over today, this will be a relief or not to the Tribunal, but I can start by saying that this is not a point which requires the consideration of any legal authorities or any case law. This point is to be resolved only by considering the statutory provisions and the facts of this case. Unless the Tribunal wants me to, I will not turn up the statutory provisions. I think we are all very familiar with that. The only point on the statutory provisions is that there is a provision whereby the Tribunal can bring permission for a claim to be brought before the European Court proceedings are finished. There is nothing in the relevant statutory provisions that says whether it is an exceptional or not an exceptional circumstance which gives any guidance to the exercise of the discretion. For the purposes of this application our submission is that nothing at all turns on that because, for reasons I will be developing over the course of this submission, there is nothing at all exceptional about the present case.

The broad point to be made about the claimants' submissions on the question of permission is that they sound like parliamentary lobbying and not really the sort of points that should be developed before this Tribunal. The claimants' submissions have very eloquently and adequately identified the inconvenience that they face in having to wait for the end of the CFI, and perhaps other, appeal proceedings. They have identified the difficulties. But, that is the system. The way this Tribunal has been constituted is that a follow-on claimant has been given the benefit of being allowed to rely upon the Commission decision, but the very sensible corollary is that that decision must be final - otherwise they cannot properly be a follow-on claimant. For Schunk we shall see, when we look at the appeal that is being made to the CFI, the decision is not final and, as a result, the permission application amounts to an attempt to subvert the legislative scheme.

So, for me to develop my points on this we will need to look at the scope of the appeal. I will just mention for the record, for later, that this point is set in its most full way in our December submissions - not the observations that were made for this hearing, but the observations that were made for the December CMC. That is at p.412 of the second submissions bundle at paras. 15 to 25.

The overall submission here is that the claimants all fall within a category of customer where Schunk is challenging the finding that the infringement had any effect on the business sector. Now is perhaps appropriately the time to turn to Mr. Mohr's witness statement which is in the first submissions bundle starting at p.141. The action, so to speak, starts on p.142. At para. 1 Mr. Mohr sets out his role in the Schunk Group, which is as an in-house lawyer. The relevant part for present purposes begins at para. 5 where Mr. Mohr sets out brief details of the businesses for which the five claimants purchase electrical and mechanical carbon and graphite products. He says that the information contained in the witness statement is within his own knowledge while working in the industry, but that it has been supported by documentation taken from the internet for the purposes of this witness statement. The other important point is that the evidence in this witness statement was provided in May 2007, and it has not been challenged. So, I think it can be accepted as being correct.

There is no need now to look at paras. 6 to 11. To summarise, the key point is that all of the claimants fall within the group of original equipment manufacturers - OEMs. That means they are all people that make parts for the automobile industry or in the consumer goods sector. Schunk is challenging the finding -- the assertion that the infringement had any effect on this customer group.

With that introduction we can see how the challenge is developed in the CFI application. This is in the same bundle in both German and English. The English translation starts at p.105. As the Tribunal can see from the notepaper, this is not an official translation. This is a translation performed by Gleiss Lutz, the German law firm that is representing Schunk in the CFI appeal. Again, this has been on the file for several months now, and no comments have been made about the accuracy of the translation. If anybody had wanted to challenge, we have provided the German original. So, we can accept, I think, for present purposes that this translation is accurate.

THE CHAIRMAN: We can assume it is not challenged.

MR. WEINIGER: We can assume it is not challenged, yes. We start, please, at para. 14 on p.112, which is a paragraph that Mr. Spitz discussed with you yesterday. The important part of para.14 is firstly that the plaintiffs - that is, the Schunk Group - have not denied that there was a violation of the Treaty.

> "However, they object that, in addition to establish that a violation has occurred, the Commission reproaches the companies of allegedly having committed an infringement which, in terms of its degree of unlawfulness, far exceeds what is

substantiated by the established facts. Many of the allegations were not supported by evidence in the case file. We will demonstrate that proper assessment of the actual overall circumstances of the alleged offence can only lead to annulment of the decision".

So, as you can see, Schunk's application before the CFI is for the decision on which these proceedings is based to be annulled.

THE CHAIRMAN: You are not taking a confidentiality point?

MR. WEINIGER: No.

THE CHAIRMAN: I just thought I should make that clear.

MR. WEINIGER: It would be a bit late for me to do so now!

THE CHAIRMAN: I did not wake up early enough!

MR. WEINIGER: The key parts for present purposes of this challenge begin on p.132 of the bundle at para. 74. As you can see from (ii) there, this part is characterised as being a challenge regarding the effects on the market. I think we can conveniently pick it up at para. 78 on the next page as to what the challenge on the effects on the market actually is. Just a phrase on para.78, in the fourth line down, "-- the effects of the arrangements was only limited ----" That is the overall submission made - that although the infringement has been accepted, the effects of the arrangement was only limited. Then we can see things in more detail, beginning at para. 79. If I can ask the Tribunal to read para. 79 to itself, please? (Pause for reading): Then, para. 81 where the point is linked into the information in Mr. Mohr's witness statement:

"Contrary to the assumption of the Commission, the products and customers of business areas 5 (automobile suppliers) and 3 (consumer good) were not affected by the arrangements".

The same point is made in para. 82:

"In this way the Baereme ... only referred to industrial and railway customers as well as customers of mechanical carbon products (customers from the sealing, pump and compressor industry). It did not refer to the products that were intended for customers in the areas of automobile technology and the consumer goods industry".

Paragraph 83 is also relevant.

"There are numerous indications in the decision itself as well as in the case file that the arrangements did not concern business areas 3 and 5."

Over the page, p.136, at para. 88, Schunk is referring to evidence:

"The statements on p.49, margin no. 111 also furnish proof that business areas 3 and 5 were not the object of restrictive arrangements".

Similarly, in para. 89:

"Arrangements vis-à-vis the major customers, which also include the customers of business areas 3 and 5, are rightly not mentioned here".

At para. 90 - some evidence that Schunk is relying on Schunk's own internal evidence is set out. The conclusion is over the page at para. 92 where Schunk says in terms:

"Thus the Commission's assertion that the arrangements concerned all product groups is not supported by the case file and is untenable. Taking into account the fact that the arrangements did not concern business areas 3 and 5, the Commission should have disregarded the corresponding turnovers".

There the Tribunal can see the exact nature of the challenge to the Commission decision. Schunk is admitting that there has been an infringement, but it is saying that the infringement has not had an effect on the entire market.

It is worth considering what might happen if the CFI agrees with Schunk's submissions. There are three basic possibilities. The first one is that the CFI may, as has been requested, annul the decision in its entirety. The second one is that it may annul the decision for Schunk ----

THE CHAIRMAN: Annul the decision in its entirety, completely?

MR. WEINIGER: Yes.

THE CHAIRMAN: On what basis?

MR. WEINIGER: For the reasons that have been set out already.

THE CHAIRMAN: I think yesterday the question was that if it annuls the decision, does it annul the decision in relation to parties that are not there?

MR. WEINIGER: This is the *AssiDoman* case, which is mentioned -- the wrong case -- the overall case is mentioned in our submissions, but the reason we have not submitted new submissions is that you can delete the reference to the case, but the submission that we have said that it could have effect on parties who are not there, remains. There are two ways to distinguish *AssiDoman*. This is not a question for today. There are two ways to distinguish *AssiDoman* from the present situation. The first thing is that *AssiDoman* was talking about the effects of the decision vis-à-vis the Commission. Fines had been paid to the Commission by the non-appealing parties. The second way to distinguish it is that the non-appealing parties in *AssiDoman* were the non-appealing parties. Here, all of these parties have appealed.

THE CHAIRMAN: Morgan Crucible has not.
MR. WEINIGER: Apart from Morgan Crucible, yes.
THE CHAIRMAN: Can it annul it against Morgan Crucible? (After a pause): Even though Morgan Crucible are not there?
MR. WEINIGER: Again, it is an interesting question - not necessarily a question for today. Morgan Crucible would have one line -- Perhaps, in a situation of a leniency application, it would be pretty strange for Morgan Crucible to take that point.
MR. SCOTT: But it is a bit difficult to envisage a conspiracy in which only one party is left.
MR. WEINIGER: Indeed. Indeed. But, if I may suggest, with respect, the key point here are the three options that the Commission has: it may annul the decision in part. That would mean that the action would go away. It may annul it for Schunk. Or, it may only annul that part of the decision that says that these claimants - business areas 3 to 5, as the Commission has described to them - were affected by Schunk's behaviour. That is why I say there are three options open to the CFI. Whichever one of those options is taken this Tribunal will be bound to follow. That will be the end of the case. Case closed. There will be no follow-on case against Schunk.
MR. SCOTT: Yes. The question for us is going to be this in some of your scenarios: If the CFI uphold the existence of an infringement, but disturb the finding of the fine ----
THE CHAIRMAN: I think there is something that comes before that, is there not? Does it not disturb certain of the facts found, and then on that basis disturbs the finding of the fine?
MR. SCOTT: Yes. As I understand it, it is the assessment of the facts found; is that correct?
MR. WEINIGER: That is the point that these submissions are driving at.
MR. SCOTT: So, the facts would remain undisturbed . It is the assessment of the facts found; the effects of the arrangements; and therefore the extent of the infringement and the extent of the fine.
THE CHAIRMAN: If that is right, then if the facts found in the decision remain undisturbed, then it is only the question of the amount of the fine. In this translation - and I do not know if it is in the original or not - there is a confusion between object and effect. What you said was that Schunk is challenging whether the arrangements had an effect on the equipment manufacturers' group. Now, the question is whether it had as its object ----
MR. WEINIGER: With respect, that is not the question for now.
THE CHAIRMAN: Right.
MR. WEINIGER: The point I think is made sufficiently, even on the low way that this is put in the translation at para. 92 where it is discussed as an assertion. My understanding of the

Commission's assertion that the arrangements concerned all product groups is not supported by the case file and is untenable. Now, it is not for the Tribunal today to say, "Well, what if the Tribunal looked at that assertion -- or the way that this case is being put by Schunk in the CFI and comes to a decision why". We are not in a position to second-guess what the CFI is going to do there. The role of this Tribunal is not to assess whether the submissions I have shown you are going to be accepted by the CFI in whole or in part.

THE CHAIRMAN: No. But, assume that the submissions are accepted. What does that lead to? Does it lead to the fact that the decision on the facts was wrong, or does it lead to a situation where the calculation of the fine may be different because of the effect of the arrangements?

MR. WEINIGER: In my submission it would lead to saying that the Commission has not understood the facts correctly because the Commission has looked at meetings, and perhaps one way of looking at it is to distinguish between object and effect. It has looked at meetings that concern this market and has decided that the cartel operated in all sectors of this market. The challenge is, "No, the Commission is wrong to have done that". The facts before Commission do not assist the Commission and do not enable them to make that finding.

THE CHAIRMAN: The fact that the Commission may have misinterpreted, or mis-assessed, the facts for the purposes of the fine is irrelevant to us because we have to look at the facts as found. That is the decision.

MR. WEINIGER: Well, the CFI may replace some of the Commission's finding of facts with its own finding of facts. This is why I took the Tribunal to para. 90, because what Schunk has said here is that one of the reasons the Commission has gone so wrong is that it has ignored Schunk's evidence. So, it may be that the CFI judgment agrees with that and says that the Commission should have looked at this evidence and found, as a fact ----

THE CHAIRMAN: Paragraph 90?

MR. WEINIGER: Paragraph 90 on p.136.

THE CHAIRMAN: Margin no. 283?

> "In respect of automobile suppliers and producers of consumer products ... both companies claim, but without providing evidence, that prices to those clients in fact decreased year after year".

Is that not the effect and not the ----

MR. WEINIGER: It is difficult. First of all, it is difficult to disentangle the effect from the object. Secondly, even if it is the effect and the court were to conclude that this had no effect for the claimants' customers' groups that would be a decision binding this Tribunal.

MR. SCOTT: But, if one goes back to para. 59,

> "A large part of the charges raised by the Commission is based on factual information voluntarily made available to the Commission by the undertakings concerned. Logically [your clients] stated in the administrative proceedings that they do not dispute the facts. This did not mean that they recognise the incorrect assessment of the facts of the case as being correct".

So, a distinction is being drawn there between the facts and what you go on to say is mis-interpretations, unfounded assertions and mere allegations. Then, when you get to (g) on p.26, the heading of that section is "The fine assessed against Schunk and SKG is unreasonably high". It looks as though what you are coming to in the subsequent paragraphs - because this is all under (g) - is directed at the assessment of the fine and not at attacking the underlying factual matrix.

MR. WEINIGER: You took me to two paragraphs. Paragraph 59 - my reading of para. 59 is that this is showing how you cannot necessarily disentangle the facts from the assessment of the facts because you did not read on in the next sentence, sir, where it says,

> "This could only relate to facts and not, however, to the way in which they were interpreted and utilised by the Commission".

That is a reference to mis-interpretations, unfounded assertions and mere allegations. So, Schunk here is saying that that then affects and infects the factual findings. The second point is entirely correct, sir, that this is a challenge. The reason why Schunk is making its case on effect as part of the challenge to this decision is to obtain a reduction in the fine. If the cartel was not as widespread as the Commission assessed, then logically the fine should be lower. So, that is the context in which these submissions are made. But, this Tribunal should put itself in the situation of looking at the submission that has now been presented to it, and say, "Well, what if the CFI gives this all a big tick, and this judgment reproduces these submissions?" There will not be a follow-on action.

MR. SCOTT: Let us just consider that for a moment. The follow-on action derives from a finding of infringement. The inquiry by the Commission is not an inquiry into the damage suffered by any party in detail because that is the subject of private action. The Commission's task is to find whether or not there is an infringement and to assess a fine. What is envisaged in the statutory framework here is that then there is a follow-up action in which, through the disclosure of documents and oral evidence an inquiry goes on into the nature of the damage suffered by the relevant claimants. I would be interested in your reaction. How far is a follow-on action circumscribed by those areas into which the

Commission inquired? How far does a finding of infringement open up a wider inquiry, that the Commission did not pursue, into the nature of the damage suffered?

MR. WEINIGER: That question arises, in my experience, in every follow-on action in which I have been involved because the claimant tries to rely on the decision in the way that you are suggesting and the defendant says, in a general case. "Well, there is actually no finding of effect in the decision and therefore we can challenge the effect on the market". It is interesting -- In some Commission decisions - for example, the *Vitamins* decision - there is quite a lot of detail on effect. In other decisions where I have been involved in follow-on actions, there is not discussion of effect and the point is taken. It is there on the pleadings, and then these cases, for whatever reason, do not go all the way and the point is never raised. If this case follows the usual pattern, that is where we will be. When this case actually starts there will be a discussion over: How much is this Tribunal bound by? The only English authority that goes anywhere near this is the House of Lords in the *Courage* case. When you argue for a defendant you say that that adopts the narrow view. But, it is certainly by no means an easy question to answer.

THE CHAIRMAN: The interesting thing is that there seems to be a difference between the Commission decision and the OFT decision because under the Act there are provisions about findings of fact in relation to OFT decisions, but there are not comparable provisions in relation to the Commission decisions.

MR. WEINIGER: Yes, that is entirely correct.

THE CHAIRMAN: There is a bit of a hole there.

MR. WEINIGER: It may be that the Act is in some way following the wording of the modernisation regulation, which does not go as far.

MR. BEARD: I may be able to assist here. My recollection from the introduction of the legislation is that there is no need to have the specific binding effect in relation to Commission material, following on from the *MasterFoods* decision. Therefore that effectively fills the gap and there was not considered any need -- I do not want to re-tell the legislative history, but there was no need, therefore, to make a statutory provision. But, no such rule applies in domestic law in relation to public authorities' domestic decisions. So, you needed that statutory framework.

THE CHAIRMAN: Thank you very much.

MR. WEINIGER: The simple point is that the Tribunal cannot, and should not, assess whether the submissions will be accepted by the CFI. It is simply not its role. To the extent that the claimants have sought to invite the Tribunal to make such findings (where they do at para.

22 of their submissions, p.505 of the bundle) we say that is entirely improper. This Tribunal does not have the benefit of all the submissions. It does not have the benefit of the evidence. The Commission's submissions are confidential and cannot be referred to in these proceedings. There is no way that this Tribunal can make a decision as to whether or not these submissions are well-founded. All it can do is see that they have been made. That should make them be very wary of allowing a follow-on claim to commence, when the follow-on claim may have no legs at all. If Schunk is right on this, we would be left with a situation where the claimants have no basis to proceed against Schunk and it would be a colossal waste of time and costs. There would also be significant practical problems. Putting ourselves in the mind that the Tribunal were minded to allow permission, how would Schunk plead its defence. If it pleaded a defence in line (as it probably would do) with the assessments being made in the CFI appeal, it would be challenging the decision. It would be defending liability on the merits. Again, this would be relevant for disclosure. How would you ever formulate the scope of issues? It would not be a follow-on claim. This Tribunal would be hearing a claim in which it had to decide liability issues. Even if it was resolved at some point before a final hearing in this matter - which may not be the case - it would have to decide a number of interlocutory steps, such as disclosure.

THE CHAIRMAN: Are you going to say what would happen if we came to a different view to the CFI?

MR. WEINIGER: Exactly. That would be, putting it colloquially, a total nightmare and one that the Tribunal is in a position now to say, "Well, we're not going to allow that to occur". That is exactly why the statutory legislation -- the statutory superstructure is built in the way that it is built - to prevent that happening.

MR. SCOTT: Just sticking with your colossal waste of time and costs, if the disclosure were limited to those documents already made available to the Commission and other aspects of the action were stayed wherein would lay the colossal waste of time and costs?

MR. WEINIGER: With respect, sir, that is not the correct question here. This is not a question of weighing up the inconvenience: Should there be a stay or should we allow permission? That is not how the permission step works. If the Tribunal thinks, "Well, it might be a nice idea to allow this claim to start and have a stay" but no other reasons at all pushing it towards making that ruling, it would be denuding the statutory provisions of all effect. There is this permission step. It is not the same as a stay.

MR. SCOTT: The thing you have missed there is that Mr. Spitz is looking for disclosure of documents, and his letter before action made that clear.

MR. WEINIGER: I say that that is not a reason at all. That is where I am coming on to now in my submission. I was going to introduce the point by saying that the issues identified by the claimant, which are the issues you have in mind exactly, sir, are not sufficient to deprive Schunk of its rights. The first issue: it is not enough to complain about the delay. There is no question at all as to delay in the European proceedings being any fault of Schunk. All the delays are built into a statutory scheme and, in fact, existed when the statutory scheme was enacted.

The second point is the prejudice claim. I have distributed to my learned friends some further documents which Mr. Bailey is handing up now. (Same handed) This is the pre-action correspondence in a little more detail. The clip handed up by the claimant this morning was missing one or two items that we believe are relevant. The way this has been arranged is that the latest letter is on the top, but it has been numbered 1 to 12 on the pages, top to bottom, to assist me taking you to them in the course of these submissions.

My first submission here on prejudice is that the prejudice claims are hollow. There is no substance to them at all. This can be tested by thinking, "What does somebody who believes they are about to suffer prejudice do?" Firstly, they do something, and, secondly, they do it quickly. What I am going to show you is that they did nothing. It starts on p.11 of this little clip of correspondence - the Crowell & Moring letter to Schunk - the letter before action. The relevant point for these purposes is on p.12. The second paragraph on the second page of the letter on p.12. The present claimants are threatening Schunk “It is our client's intention to take all necessary steps in the Competition Appeal Tribunal".

All necessary steps. Then we can move on to the next paragraph,

> "In connection with the proceedings that we intend to launch in the CAT we will be entitled to disclosure of documents relevant to the accurate assessment of our client's damages. At a minimum we shall require copies of the following ----"

They set out over six bullet points an enormous shopping list, and then ask - and, remember, this is a letter that has come out of the blue,

> "--for response within ten working days".

However, this way of proceeding completely contradicts the stance now taken by the claimants because if you have a concern that a party is going to destroy documents -- if there is going to be some deterioration in the written evidentiary record, what you do not do is provide a shopping list of the documents that you are particularly concerned about and give a warning, and then do nothing. The present submissions are completely incredible. They do not show any prejudice. It is completely the opposite, because here ----

THE CHAIRMAN: They have not been to your litigation school though!

MR. WEINIGER: I do not think one needs to be a Herbert Smith litigator to work out that point, madam!

THE CHAIRMAN: I was putting it wider than that, I think. (Laughter)

MR. WEINIGER: I was taking it for the benefit I can take!

The next letter in the clip of relevance is the Herbert Smith response at p.9. The relevant part here is the last paragraph, which is the response, among other matters, to the request for pre-action disclosure. The response is that,

> "Schunk is not prepared to address the substance of the issues raised in your letter until the question of your representation has been resolved to its satisfaction".

As you will recall, there have been matters raised which have been resolved now about Crowell & Moring's representation of the claimants. So, the stance taken was that that needed to be resolved. Over time it was, but, again, not with any degree of urgency, until such time as that has been resolved Schunk was refusing to deal with it. That was accepted.

The other letter that is relevant in this clip is a letter sent by Crowell & Moring in the US. The letter begins on p.5 and is dated 9th February, 2007. They are writing to Schunk's US lawyers. The relevant part is on p.6 at the bottom. This is in the context of a discussion of what documents will be used by the claimants in these proceedings. They say,

> "We do not intend to rely on the documents provided as under the protective order in the US litigation to prosecute our claim in the CAT. Your recent claims only underscore the need for full discovery in the CAT proceedings to allow us to prove our client's damages".

So, you see that pretty soon after Crowell & Moring in England had written requesting pre-action disclosure, we are now talking only about full discovery in the CAT proceedings. So, there is no question at all that it will be insufficient, for whatever reason, to await the usual course of proceedings, but disclosure taking place at the time that disclosure is supposed to take place.

We are not in a situation where the claimant has written, requested an undertaking, and either received no answer or received a slippery answer, and then come before the Tribunal, show the correspondence to the Tribunal saying , "We have concerns which we have identified in correspondence which have not been properly addressed. Therefore, we need an undertaking". The ground for such an application has not been made. The ground has not been prepared in correspondence leading up to this hearing.

This can be contrasted with the Morgan position. It is not that these claimants do not know what to do because they have not been to my litigation school when it comes to real issues of prejudice. They know exactly what to do because they did it. When it came to Morgan, they did it. I do not need to take you there, but it is very well set out in the Tribunal's 16th November judgment which can be found at p.389 of the submissions bundle, at para. 8 and following. The exact chain of correspondence. What do these claimants do when they are worried about prejudice? This was not done in relation to the Schunk defendants.

Finally on prejudice, they have now three times - I am counting - changed their position on what the prejudice is. The first submission (p.504) is that the prejudice they faced if permission was not granted was difficulties with witness recollection, oral evidence, and matters of that nature. By the time we get to their second submissions (p.609) it has been dropped in favour of the document retention policies - the possibility that things will be destroyed. The third position, which has raised itself, or has come to the fore, in the course of these two days of hearings is that there is a need for third party disclosure, and it is a good idea to get the case on to get third party disclosure. Again, if you are really worried about the prejudice, the prejudice remains constant and does not change every time you have to make a submission.

Another point made about the need to get documents is that they are needed, we are now told, to enable settlement discussions. Well, if this, again, a real concern then the most constructive way to set this request up is to ask - not to raise it when counsel is on his feet before the Tribunal at a hearing. Plus, the idea that settlement discussions could take place when Schunk and the other defendants have potentially a knock-out blow awaiting them in the CFI -- when the trouble and expense of briefing the point before the CFI has been taken and incurred -- It is largely a question of waiting to see whether or not that is going to be a knock-out blow in these proceedings, and there is no way that any sensible settlement discussions could take place prior to the decision being final. So, giving permission early will make no difference there, and will be of no assistance at all.

Just a couple of other points. There is a point made about the contribution claim. Well, we are told the claimants might proceed all the way against Morgan, and then Morgan will need to bring in these defendants on a contribution claim. There are two answers to that. Firstly, this Tribunal would still need to give permission, and we would be back making exactly the same points. We say it should be refused for exactly the same reason ----

THE CHAIRMAN: What would we be giving permission on?

MR. WEINIGER: A claim being brought. Morgan would be bringing a claim ----

THE CHAIRMAN: -- against you.

MR. WEINIGER: -- for monetary damages. Secondly, that submission - the contribution point - assumes that Schunk has lost before the CFI. It is not appropriate for this Tribunal to proceed on that basis because if Schunk wins, then this prejudice goes away and there is no contribution claim against Schunk. Schunk was not part of this cartel as far as these claimants are concerned.

MR. SCOTT: Just one point on that. If your clients succeed in relation to the effect as between Schunk and particular markets, but are still held to have been party to arrangements and effects as between other co-conspirators and the claimants remain in place, presumably the joint and several liability remains in place because you are parties to an infringing arrangement.

MR. WEINIGER: With respect, sir, I am not sure that that is the position because the damage here is the price which these claimants paid for their products. People in other markets bought very different products.

MR. SCOTT: Yes. But, if there is a single and continuous infringement to which your clients were party, and if there is damage to the claimants in relation to purchases made - or, as we have seen, purchases not made - then presumably your clients are still in there on joint and several liability.

MR. WEINIGER: I think this goes to the scope of the infringement - that if the cartel discussions did not give rise to any cause of action for these claimants, then there is no joint and several liability.

MR. SCOTT: Thank you.

THE CHAIRMAN: If this particular part of it is out, then it is not part of the whole thing.

MR. WEINIGER: The final point. We are told by the claimants that they need to have these defendants in these proceedings because all the proceedings are so closely connected. There is a concern about separate judgments. Well, in reality, their actions are the actions of the classic forum shoppers - they are looking for the jurisdiction that is most convenient to them. They would have been quite prepared to go alone in the US with a claim against Le Carbone. The only reason that Le Carbone has now been brought here is that the claim has been rejected in the United States. If the claimants' real concern -- if their overriding concern, even if it was an important concern was to have all of the claims decided before one Tribunal, they would not have carried on in that manner in the first place. The Tribunal has accepted in its 16th November judgment (para. 16 on p.393) that observations from other defendants are not pertinent in relation to issues of permission vis-à-vis the Morgan

claim, because the Morgan claim is a freestanding entity. That works the other way. The Morgan claim is a freestanding entity and there is no sufficiently closely connected reason to override the permission requirement in the Act.

So, you can see why I started these submissions where I started. This is a claim that is completely within the understanding of the Parliamentary framework - that you cannot bring a follow-on claim if there is not a final decision on which you can follow on. We do not have to think about whether that needs to be revised in exceptional circumstances or in very important circumstances, or in any other test we can think of. There are just no circumstances in this claim that requires us to move away from the statutory framework. It is a complete communal garden attempt by a claimant, with no other factors in their favour, to jump the gun. Allowing it would be tantamount to saying that there is no permission loophole in the Act.

I have managed to catch up some time! For that, if nothing else, the Tribunal may be grateful.

THE CHAIRMAN: Thank you very much. We have no questions. Mr. Beard?

MR. BEARD: Madam, members of the Tribunal, I am conscious of the time. I will try and whirl through this as fast as possible.

THE CHAIRMAN: This is the double-act, is it not?

MR. BEARD: Yes, but in the words of the second rank comedian, "Stop me if you've heard this one before".

I am going to turn and deal with four matters; the nature of the permission test; the nature and the impact of CFI appeals; issues to do with prejudice; and then a sort of general residual sweep-up on one or two things. Before I do that, if I could just deal with one or two background points which I think inform the submissions more generally in some of the debate that has gone on today -- The first thing is, of course, to bear in mind that it is not just in relation to the CFI proceedings that there is a dispute in relation to the interpretation of the Commission decision. That debate is going to occur whether or not there is a quoshing, an amendment modification, or any other further tweaking of the Commission decision by the CFI. The claimants take it all rather simplistically. There is a magic aura that they surround the word 'infringement' with. They say, "There has been an infringement, and therefore there must be a loss to them".

When one actually looks at the decision, one has to look at the assessment made by the Commission. It is recognised that the proposed defendants in relation to certain products in certain industries have done wrong -- have acted unlawfully. Certain customer groups

suffered. But, it is wrong to presume that in relation to all product groups, purchases of those products suffered. You have got electrical products, mechanical products, carbon blocks. Then, within electrical products you have got the different sorts of brushes, industrial, traction and automotive. Here, the claimants are solely concerned with supplies of automotive brushes. Now, that is a big business, but it is worth bearing in mind that there were claims by people in relation to a range of other products. In many cases those have been settled. It should not be assumed that the fact that there have been claims by others in relation to other products naturally means that there is a legitimate claim here and a finding of infringement. Le Carbone does not accept that they were the victim of any wrongdoing. Indeed, the decision itself is remarkable. In fact, it really does not talk about automotive supplies at all, save, interestingly, at para. 120 where it says, "Well, actually the bareme price mechanism clearly did not apply to them".

It is pretty easy in those circumstances to see what some of the genesis of the appeal is going to be by those that are concerned about a finding that pertains to automotive supply customers. It is going to be, "Well, Commission, it is all very well taking these carbon products altogether, but you cannot just do it in that simple, rounded way. You actually have to define your markets; you have to look at impacts; you have to look at the scope of the cartel". It does not matter whether one talks about objects or effect here. We are talking about the scope of the cartel. Now, it clearly does not apply to all carbon products. Which carbon products does it apply to? That is where the argument is going to be going forward in the appeal. We have already seen that in relation to the Schunk appeal. I will come on to why that is the case in relation to the Le Carbone appeal.

So, the first point: the word 'infringement' does not have a particular magic to it. Of course it is the predicate which gives this Tribunal jurisdiction to have a follow-on claim before it, but it is not an easy thing. The fact that there is an infringement found in the Commission decision means that whether or not there is an appeal there is going to be argument about the scope of that infringement and the impact.

The second point - the nature of these claimants. It is important when we are considering the issues that are being raised about the lack of evidence that has been put forward and the terrible prejudice that is being allegedly suffered by them to think about the nature of these claimants. Mr. Weiniger has already referred to some of these issues. These are some of the world's larges companies, these claimants. They actually dwarf the defendants. Valeo has a turnover of 10 billion euros. The idea that these are poor, vulnerable, ill-informed bodies

that come before you not quite knowing what to do is a myth which should be scotched pretty quickly if it is a myth which is in any way being perpetuated.

So, to turn to the four submissions -- The nature of the test under s.47(a). I will ask you, if I may, to turn up s.47(a). I have it in the purple book, but it is in the bundles as well. I do not know which is the easiest way of doing it. It is at Tab 39. Slightly strangely, it is in the form of the Enterprise Act amendment to the Competition Act at p.606. The simple point is the structure of the wording - I am not going to read through it - makes it clear that permission is the exception to the general rule. There is no doubt about it. To some extent, that is the beginning and the end of this submission. But, if I could just amplify in one or two respects -- First of all, it is an exception to a general rule and therefore must be construed narrowly. Secondly, as an exception this Tribunal must consider the particular facts of the case. So, all of the arguments that generally criticise the problems that arise in follow-on cases, those are not valid considerations for the grant of permission here. That is, in fact, it seems, recognised relatively broadly, although the claimants at times protest against it. It is worth noting in the Guide to Proceedings that the CAT itself has published at para. 6.73 there is a reference to permission. It says,

> "It may be appropriate in some cases to permit the claim to be commenced in order that preliminary matters can be dealt with".

That is the only guidance one gets from the Guide to Proceedings on those matters. But, just for reference, there it is. We have done all sorts of digging to see whether or not we could enlighten ourselves as to how one could see this as an exception to a general rule. There is relatively limited other material available. What we have found, and have included in the bundle in Tab 39 is the fact that in the Enterprise Bill, when it came forward, in relation to EC decisions there was no permission provision. Now, one can see that. The Bill is included. The relevant page is 610Y. The numbering goes a bit strange ----

THE CHAIRMAN: This came in separately, did it not?

MR. BEARD: Yes, it came in separately. These were late materials. It matters not a great deal. If the Tribunal wants to look at it -- I can deal with the submission orally ----

THE CHAIRMAN: Just deal with the submission. I saw the document. In the Bill it did not have permission. Then it got in somehow.

MR. BEARD: It got in, and what we have included is the relevant extract from Hansard. What happened was that it trundled through the House of Commons and no-one commented on this. There were other fish to fry in relation to the Enterprise Bill and the debates. They have been fascinating reading, I can assure you. One gets to the point in the Lords, as is

often the case, and the Lords concentrates on whether or not the wording actually stacks up. In relation to these provisions it looks like Lord McIntosh of Haringey - I think probably in close liaison with Parliamentary draftsmen by the look of the nature of the amendments which came forward, which is the standard where these matters are being dealt with - put forward a series of amendments in relation to these matters. What he did, in particular - it was in fact Amendment 87 - was to say, "We've put forward these amendments. They're merely re-worded versions of the current sub-sections 254 and 256", which were the sub-sections including sub-section (4) in the Bill, the EC decision section: "You can deal with the follow-on claims in relation to EC decisions." So, he says they are merely re-wordings. When one actually comes to look at the draft, they are not. In fact, at that moment the permission provision that had previously only applied in relation to English public authority decisions -- or UK public authority decisions – I am sorry, because the OFT will have jurisdiction for Scotland and Northern Ireland – it extended the permission provision over into EC matters. That is how we get the provision in its current form.

Now, in their dispute, of course, that permission does exist, what this shows, we would say, is the general scheme clearly was, "You're bound. No exceptions", and in relation to EC matters it was thought that there was going to be no need for any exceptional permission at all.

Through this amendment process, which is far from clear because when one begins to step behind that sort of parliamentary fiction of intention -----

THE CHAIRMAN: That is why one does not look at it.

MR. BEARD: Actually this is one of those cases where even Benyon, on his strict approach, would allow you to look at it because it is an amendment which may inform the mischief of the provisions that we are dealing with. So, it does not fall foul of the criticisms of piling in Hansard that were made in *Wilson -v- First County Trust* by the House of Lords, and subsequently. This is a rather different situation. What it shows is that clearly the structure was: "You're going to deal with follow-on claims, but you just have to wait".

There was an amendment, but clearly it should be treated as exceptional, especially in circumstances where it was not a matter that was seen as having any reasoned basis for it so far as the amendment process can be seen. So, there were a whole range of reasons; the statutory wording, the structure, the origin -- You are assisted by your own guidance. It is a high threshold which is going to need to be got over. It is a matter which should be construed narrowly. That narrow construction will have an important impact on the way in which one should assess allegations of prejudice in a particular case.

MR. SCOTT: There are occasions when statutes mention exceptional circumstances. It seems to me that there is a distinction which you may not be drawing between something which we do exceptionally and something which we do in consideration of exceptional circumstances.

MR. BEARD: It is terribly difficult. You are right in terms of the statutory wording - a distinction is drawn between exceptional circumstances and the notion of an exception. In our submissions/observations we have very carefully said that this is an exception. This further material reinforces that. It should therefore be construed narrowly. Whether one then goes on and says, "If it's an exception, it is only exceptional circumstances that can therefore justify the exercise the discretions of our permission" ---- Well, as a matter of semantics that is of course right because it is tortologous ----

THE CHAIRMAN: It may be fettering our discretion by saying that when it is not written into the ----

MR. BEARD: Well, no, because on a semantic basis it stands to reason that if something is a discretion that is an exception, and should only be exercised as an exception to a general rule, then in circumstances that you find that must justify it are surely circumstances can be termed 'exceptional circumstances'. But, we recognise that when the term 'exceptional circumstances ' is used in statutory language, somehow people think of that as an even further rarefied level. We are concerned not to make that point because we do not want to get into any unduly tendentious arguments that we think are semantic and unnecessary in these circumstances.

THE CHAIRMAN: If 'exceptional' was in it, then it has to be circumstances which one cannot reasonably foresee. I think there has been some statutory analysis of those sort of sections.

MR. BEARD: Clearly unforeseeable circumstances tend to be exceptional by their nature because one would assume that a normal human being would have the perspicacity to see that which is unexceptional in the future.

THE CHAIRMAN: I would put it slightly differently, I think, because I think there is nothing that says it should be exceptional, or unexceptional ----

MR. BEARD: We recognise that.

THE CHAIRMAN: I am not sure that is where you start. The question is that you start with the principle that you have to wait until all remedies have been exhausted.

MR. BEARD: Agreed.

THE CHAIRMAN: However, the Tribunal has a discretion to grant permission.

MR. BEARD: Yes.

THE CHAIRMAN: In exercising its discretion it will look at all the circumstances of the particular case. One of the circumstances that you are saying we ought to look at is the Brussels Convention, or the Brussels regulation - in a general way.

MR. BEARD: Yes. That is not what I am focusing on now -- I am just focusing on the facts. But, yes.

THE CHAIRMAN: Yes. But I am just saying how wide it could be.

MR. BEARD: Yes. That must be right.

THE CHAIRMAN: It is a question of how wide it could be. What one does is say, "Well, you start off with a level at which you have got to exhaust all your appeal remedies". That level means that there should be no proceedings. But, are there particular circumstances in this case which change the balance? I do not think it assists by saying 'exceptional' or 'an exception to'. It is whether there are circumstances which change the balance.

MR. BEARD: As I say, I am happy not to use the term 'exceptional circumstances' for the reasons I have articulated. To say that permission is not an exception would, I think, not be right. Granting permission -- Discretionary grant of permission is an exception. It must be seen as an exception, because otherwise the structure of the legislation does not make sense. The basis on which it was put forward -- its origin -- that does not really make sense. Therefore it is perfectly reasonable to refer to permission being granted as an exception to the general rule. The point is that this Tribunal, however one cuts the semantics, must be cautious before deciding that sufficient reason has been given by any claimant or claimants that there is a basis on which that discretion should be exercised. The burden is upon them and we say it is a high threshold in these circumstances, given the structure of the legislation. I do not wish to get into any further sort of logic-chopping about it because I am not sure that that is going to be particularly helpful given that we recognise the language of this particular provision is not as precise as might be the case in other statutory provisions. I was going to say 'fulfil a similar function' but we have all striven to see if there is any parallel anywhere and we have all rather struggled. So, it is exceptional at least in that regard.

THE CHAIRMAN: Exceptional provision.

MR. BEARD: Yes. So, we have done our best to try and assist the Tribunal as to what the test could be, and how it should be approached. I hope that encapsulates clearly - or as clearly as possible - what the task is, in our submission, for you. The attendant submissions are that here we have a clear case where the claimants have come forward and essentially say,

"Well, these are follow-on claims. We should be granted permission" without putting forward any real good reason why that should be the case.

Obviously, in amongst the relevant considerations - indeed, perhaps first amongst equals in the considerations - is the simple fact of there being a CFI appeal. Before we turn to the particular facts of this case - the Le Carbone case - the appeal that is being forward by Le Carbone - it might just assist the Tribunal if we consider for a moment actually what can happen in relation to an appeal. Again, apart from the claimants trying to provide the nature of an infringement with some sort of magic aura, they have distinguished, or sought to distinguish, infringement challenges from fine challenges - as if this is a sort of bright line. We are not quite sure where this arises from. We assume that it is driven in part from the fact that in the provisions of the Treaty that allow for applications for annulment of Commission decisions there are bases, effectively, on which a challenge can be brought. The first is pursuant to Article 230, which is the general annulment provision for all Commission decisions. The second is pursuant to Article 229.

Earlier I provided the Tribunal with some copies of those provisions, and, indeed, an extract from a relatively recent book on cartel law which deals with the jurisdiction of the CFI in relation to these matters. If I could deal with these matters relatively swiftly -- The document which includes the Articles -- Article 229 itself is not clear as to what it is providing for in the context of competition challenges. It says,

> "Regulations adopted jointly by the Parliament and by the Council, pursuant to the provisions of this Treaty, may give the Court of Justice unlimited jurisdiction in regard to the penalties provided for in such regulations".

In fact, one has to turn to Article 31 of what is sometimes referred to as the modernisation regulation. I have not provided a copy. It is in the purple book. But, all it says is,

> "The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce, or increase the fine or periodic penalty payment imposed".

So, it is this unlimited jurisdiction which is given in relation to fines. When one turns to Article 230 itself, which is the general annulment provision, of course one colloquially refers to in relation to these sort of appeals to the CFI is that they are in fact reviews, but on a rather broader basis than has generally been thought of as being accorded the Administrative Court in judicial review in this country. Article 230 itself sets out the basis on which the Court of Justice - and in competition cases for reasons of pressure, obviously,

the CFI was set up and given jurisdiction in relation to these matters, and so it becomes the CFI --

> "The CFI, for this purpose, shall have jurisdiction in actions brought by a Member State, the Parliament, Council, Commission on grounds of lack of competence, infringement of an essential procedure or requirement, infringement of this Treaty, or any rule of law relating to its application or mis-use of powers".

There are umpteen treaties and many, many books written across the whole community about what the scope, nature, and application of these relevant tests are. But, they clearly enable challenges to be brought that go to manifest errors of assessment by the Commission in relation to facts found or facts not found. They enable challenges that the Commission has not met the relevant standard of proof -- it has not discharged the relevant burden upon it. It obviously enables criticism to be made about legal analysis that has been undertaken. On the face of it, it does not allow the court to substitute findings of fact. But, that is not in any way surprising. This is a court which is interrogating a challenged decision. Of course, it looks at the relevant factual basis upon which a decision is made. It looks at those bases. It looks at the assessment of facts. It looks at the application of the law that has been undertaken by the Commission, and it can assess and criticise each element of that.

So, there are different dimensions to the application that can be brought. The difference in relation to fines is obviously that this court has more scope to tinker with the fine subsequently. It cannot go round substituting its views on the decision in the same way when it is an Article 230 annulment.

However, matters are slightly more complex than that because it looks like - and many people do think that - Article 229 is a freestanding head of challenge, so you can just go after the fine and you do not have to challenge the underlying legality of the decision. Actually there are authorities that suggest that is impossible and that you do actually have to challenge the underlying legality of the facts and reasons that have been assessed by the Commission that underpin the fine decision. In other words, you have to bring Article 229 and 230 challenges together. That is discussed in the extract from the book which I have provided - in particular, at para. 5.27. I will not read through it. There are relatively recent cases involving *Vitamins* and *French Beef*, such are the exotic matters – I am sorry. There are no page numbers.

THE CHAIRMAN: It is the last but one page.

MR. BEARD: It is. Absolutely. There is an argument about this. There is an argument as to whether or not you can bring freestanding challenges to fines under Article 229 or whether

or not these authorities from *Vitamins* and *French Beef* mean that you have to actually be challenging under one of the heads in Article 230 - the underlying assessment - in order to get a fine challenge off the ground.

So, actually, this distinction that is being drawn between fines and annulment is just not as clear as a basis, as has been suggested by the claimants. That is not really surprising because to cut through all of this, what is going on in all of these appeals, in essence, is that a group of people who have suffered significant fines being imposed upon them are saying, "We do not think, O Commission, you had the right to impose this fine on us. We want the fine reduced because you have got your decision wrong".

THE CHAIRMAN: Can I just make sure that I understand what you are saying? I think what you are saying is that in order to decide whether the fine is wrong, you may have to get into -- or you do have to get into the decision and seeing whether it comes within something in Article 230. We know how that works. But, then, if you have got into that, it is not for the CFI or the court to substitute. It will send it back. It will annul – and this is the next question I am going to ask - the decision and send it back to be re-investigated. Is that right?

MR. BEARD: Yes.

THE CHAIRMAN: Is that what you are saying?

MR. BEARD: Yes. It does not actually need to remit. It just annuls. It can annul in part, depending on the structure of the decision.

THE CHAIRMAN: That is what I was going to ask you. Can it annul in part?

MR. BEARD: Yes. But, it depends on the fault lines in the decision. I mean, it is not as if one can come up with a general rule because, of course, what we are talking about in the power of annulment under Article 230 is not just in relation to competition decisions - it is in relation to the whole gamut of Commission decisions which are wide and wonderful in their range. In those circumstances, what you have is a power to annul. You can chip bits away. You can annul the whole thing. You can annul the whole thing because part of it is wrong. But, how that impacts on the remainder of the decision is unclear. So, there can be a whole range of outcomes. Trying to second guess how a court in those circumstances dealing with rather large and complex decisions is going to deal with those matters is extraordinarily difficult.

MR. SCOTT: I can either refer to the official journal, which does not reveal whether you are going under Article 230 or 229, or to the confidential document ----

MR. BEARD: I do not want to be coy. We are going under both.

MR. SCOTT: That is right. I just wanted to get that on to the record.

MR. BEARD: Yes. We are going under both. We say that is the end of the matter. You do not need to go any further than that. In fact, you would be wrong to go any further than that in these circumstances.

We can go back and look at the appeal, but our primary submission is that we are applying to have this decision annulled. The claimants might want to argue the toss about it. They like the Commission decision. Inevitably they are going to say that our appeal is not right. Well, there is no surprise there.

THE CHAIRMAN: That is a matter for the CFI.

MR. BEARD: That is a matter for the CFI. I do not think it is right that here we should be getting into a discussion of what is in the decision against, and what is in the appeal that can make the difference, and whether or not the Commission had properly made findings on object and effect, and whether or not the scope of object is being adequately challenged here; whether or not it is just the effect and how the pleadings pan out, and what bits are taken where, and whether or not the fine reduction means that here we have a situation covering automobiles, automotive suppliers and/or other brush suppliers and/or traction components. It is just not what this is to do with.

THE CHAIRMAN: What you say is that once you go under Article 230 the CFI may do all sorts of things. Therefore, it is not for us to second guess what it is all about - why they do it, etc. You have got an application which covers Article 230 and therefore we have ----

MR. BEARD: That is the end of it. There might be more of an argument in relation to Article 229, but even there, because of the issues that I have raised already, we are not saying, "Well, if it's am Article 229 application only, then, you know, you should press on". Not at all. We are saying, "If it's an Article 230 application, well, there's just no way you should be looking at this any further". If you want me to go through the Le Carbone decision in the translation -- I have already referred you to relevant paragraphs -- Again, I do not wish to be coy. The challenge is ----

MR. SCOTT: Paragraph 34 makes it clear.

MR. BEARD: I am grateful. In this context there should not be permission in circumstances where we do not know what the CFI is going to do. We are not saying that you cannot grant permission. But, you are going to have to have particularly compelling evidence as to why it is that you should grant permission in the face of this application. The truth is that you just do not have it here. You do not have any real evidence of prejudice. You have just got speculation. I am not going to repeat the submissions that Mr. Weiniger made. He made

very clear submissions that these are experienced claimants who should know what they are doing. They have not taken sufficient steps to ensure that any prejudice they allege might be suffered could be allayed.

There is one point on prejudice I would raise. It is important to stress that because the general rule is that you should not bring a claim -- or, you are not permitted to bring a claim until after the exhaustion of the appeal process, until you have got a definitive decision, that the relevant comparator as against that is not, "Could I bring a claim sooner? Would it not be nice if I could get some more information?" There is an analogy, I suppose, with teenagers arguing about a party. You have an enormous argument with a teenager who wants to go to a party - comes in; moans. You have the discussion. Finally, you say, yes, they can go, "-- but you're going to be home at eleven o'clock. Those are the rules. That's the condition on which you are going". So be it. As the party approaches of course, the campaign then begins, saying, "Well, eleven o'clock is just so unfair. My friends are going to be staying later. You're ruining my evening ----"

THE CHAIRMAN: You have experience of this.

MR. BEARD: "I must be able to stay out till midnight." Of course, the claimants are much more refined than any sort of stroppy Kevin, but, nonetheless, broadly the complaint is the same. They are being given a liberty by the statutory provisions, and they are trying to take further liberties. In those circumstances the idea that those further liberties that they are seeking are a manifestation of terrible prejudice is simply wrong. It is starting from the wrong starting point. In any event, it has just not got the evidential underpinnings. When we look at oral evidence it is not really a matter for permission anyway. But, they are quite wrong. There is no basis on which they should be able to obtain witness evidence. They can go and get their own witness evidence if they want, but they should not be forcing anyone else on these points to be engaging in witness evidence production. The same is true of written material. It is not a matter for today, but it is quite wrong to suggest that they should get any sort of premature disclosure. If there are real concerns about document preservation, they have never raised it with us. They have discussed it with Morgan. They have never even asked us. If they did, we would consider what they were asking us about. We could tell them what our document retention policy was. But, those matters have never been raised with us. Then to turn round and say they have suffered terrible prejudice is, frankly, bootstraps.

In those circumstances there is no prejudice on any of the bases that have been put forward. Unless you wish me to, I will not go back to these issues about third party disclosure on the rather entertaining hypothetical about how the Morgan Crucible case proceeds, or, indeed,

the even more remarkable suggestions about contribution. I am happy to deal with them if that would assist, but otherwise I will move on.

In those circumstances I will just pick up one or two final matters. In relation to jurisdiction I adopt the submissions of Mr. Hoskins in relation to these matters. The simple point is that it accords broadly. It is a factor that one can take into account - that if you do not grant permission at this stage, it leaves open the possibility that that settlement matter could be dealt with, and therefore these jurisdiction issues will fall away.

In slight defence of Mr. Hoskins in relation to what happened in relation to the service of the defence, it was actually a matter of agreement between Morgan Crucible and the claimants that the defence should be served. In fact, there is no suggestion in the transcript that they would use the CAT -- The Tribunal have changed in the interim. It matters not. Mr. Hoskins stressed that his submission on that was freestanding, but I thought it only right to take this opportunity to mention that.

Another matter that has been raised is that it would be jolly good to encourage settlement. Well, we all know, particularly since Lord Woolf told us, in putting forward the CPRs, how important alternative dispute resolution encouraging settlement is. We take that point, albeit as I stress we do not actually think they have a case against us, but it would be plainly wrong to use the permission provisions here as a tool for encouraging settlement where these sorts of appeals are continuing because that could fall into precisely the trap that the US system of class action litigation in antitrust has come in for significant criticism that by ramping up costs early on you actually provide favourable circumstances for unjustly large settlements in circumstances where they would not otherwise be reached if it was not for the threat of those costs being imposed. So encouraging settlement, yes, generally a very good thing, but there is a limit to that, and that limit is way past when it comes to this sort of application.

So in those circumstances, barring two very minor matters that I notice I have not covered, one is in relation to Article 30 of the Brussels Regulation reference was made to the fact that the relevant time could be the time when one assessing when proceedings had been instituted it would be service, and reference was made to the fact of ----

THE CHAIRMAN: It is not quite that, it is ----

MR. BEARD: I simply wanted to clarify that. It is not necessarily in relation to service.

Petrotrade is the relevant authority. If you issue and then do not properly serve then there is effectively a retrospective assessment that you have not instituted proceedings.

The only other matter to pick up is in relation to 5(3) where one has talked about the "damage limb" rather than the "originating event" limb, there is a suggestion that you can have a multiplicity of actions – well, yes and no. Clearly one can only have an action in one place in relation to a particular piece of damage. It might be that you can have all sorts of serial pieces of damage, but *Bier* does not allow you to have a multiplicity of jurisdictions in relation to any particular piece of damage.

THE CHAIRMAN: If I buy in 1990 and I buy in 1995 and I buy in 2000 is that three different ----

MR. BEARD: It might be, I am not trying to make the call because it depends how one can characterise damage. I recognise that there could be a whole range of issues, but the idea that there is just residually this vast range of jurisdictions to be chosen from, which seems to underpin some of what the claimants are saying about this and other jurisdictional issues is not right. The Brussels Regulation is there (a) with its primary focus on suing in the domicile of the defendant; and (b) with its exceptions, but its exceptions trying to give you if not quite an algorithm at least a very clear structure so you can see in which jurisdictions you may sue or you may be vulnerable to being sued. Of course, the case law we have looked at shows that there can be all sorts of issues arise in the interpretation of those matters which is complicated. But that is often the case with legal structures, even when they are intended to engender a degree of clarity. It is just that the extent of multiplicity should really not be overplayed in these circumstances.

Unless I can assist the Tribunal further.

THE CHAIRMAN: (After a pause) No, thank you very much.

MR. BEARD: I am most grateful.

MR. HOSKINS: I will be very brief. First, in relation to documents the question was raised: "What about the Commission documents? Would it not be appropriate to rustle those up?" With respect we say that is the wrong way to look at it, because there is no real risk, of all the documents that are out there the Commission ones are the ones that really are not going to cause a problem because of the passage of time.

THE CHAIRMAN: No, there is no problem with those.

MR. HOSKINS: When one looks at potentially wasted costs in relation to documents this creeps forward every time the claimants stand up. Of course, disclosure would normally only come after the close of pleadings, so unless the Tribunal was prepared to invert to the system we are going to have to have the cost of everyone doing pleadings, defence and potentially replies before we even get to disclosure because there are no particular

documents that have been identified. When one comes to standard disclosure we are talking about a cartel that ran from 1988 to 1999 throughout the EEA. I do not know what the position is but I think it is fair to assume that would be a fairly substantial exercise, so we cannot under estimate what is actually being suggested: "Oh, go on, give permission just so we can have some documents", it is not as simple as that.

If one does not get to the stage of documents almost certainly one is not going to get to the stage of permission to get oral evidence because by definition you think it is not worth it. I think oral evidence, with respect, was driven into the sand when Mr. Spitz was on his feet. The truth is there is not really likely to be any actual trial in the Tribunal until after the CFI appeals have been determined, so the reality is that live witnesses are not going to become an issue until that stage, so there is no practical difference between doing something early for witnesses now or not, because they are going to be giving evidence X years down the line.

There is another point, the cartel ran from 1988 to 1999, if there has been memory deterioration it has happened. We are already eight years down and the idea that you should give permission just because it might get worse is incremental; the damage is already done if indeed oral evidence is going to be an issue.

In relation to the scope of the appeals, I absolutely agree with Mr. Weiniger and Mr. Beard, it is vital to distinguish the fact of an infringement, and the scope of the infringement. It is perfectly clear that the CFI may reach findings in its judgment that will effectively overturn the Commission's findings on the scope of the infringement. How that will then play out in a follow-on action is not entirely clear. It is clearly a very difficult issue, and clearly potentially very important in terms of scope of liability, etc.

THE CHAIRMAN: From what Mr. Beard was saying I wonder whether what the CFI does is to say that the particular findings are not sound, but to go on and say – unless it was very clear – that the findings should have been X is much more doubtful, especially since it may require more evidence.

MR. HOSKINS: I was trying to be as careful as possible, but I am only envisaging the former situation, i.e. the CFI says the Commission was wrong to find that the scope of this infringement included automotive and consumer products. That in itself would have serious implications in the follow-on action – query: exactly how they work out.

The final point is just to deal with the fact that the SGL appeal is not in exactly the same form as the Schunk and Le Carbone appeals, but we do seek the same orders as Schunk and Le Carbone, i.e. annulment of the decision or a reduction of the fine. It is the confidential

version, I have put it in at SB2, tab 7. I will give you the references: it is p.2, which is where we set out the orders we seek, paras. 5 and 125. We also rely on Article 230 EC, you will see that from the references I have given you. But it is fair to say that the SGL appeal does not raise the specific issue about the scope of the cartel which Schunk and Le Carbone raise, but we say that does not put us in a weaker position in relation to the permission consideration for two reasons. First, if the CFI finds for Schunk and/or Le Carbone on this issue then we say it is open to it also to find on that basis for SGL. Indeed, we say it would be artificial for the CFI not to do so, and the *Assi Doman* v *Kraft* case in the ECJ (case C3/19/97P) does not deal with that situation, because *Assi Doman v Kraft* say someone who does not challenge the decision is stuck with the findings with the decision. *Assi Doman v Kraft* does not deal with the situation where you have a number of appellants, but there are different points. We say it is certainly legally arguable that the CFI will have the power if it adopts these judgments on the same day it would be pretty extraordinary to find it saying one thing on one and not the other. I am not saying it is not possible, but I am saying it is a legal possibility.

THE CHAIRMAN: Do they have a system of consolidating like we do?

MR. HOSKINS: They do yes.

THE CHAIRMAN: And has this been consolidated?

MR. HOSKINS: What they have done is listed them for hearing consecutively, so there are two on one day and one on the following day, so they are obviously going through the same process. I imagine they have the same rapporteur though I have not checked that – they are being heard consecutively.

THE CHAIRMAN: Are they not public hearings?

MR. HOSKINS: Yes.

THE CHAIRMAN: So you will be able to go in and hear everything ----

MR. HOSKINS: Absolutely.

THE CHAIRMAN: Surely then you will be ----

MR. HOSKINS: You can hear the oral argument, absolutely.

THE CHAIRMAN: And is there not a paper, there is a summary is there not?

MR. HOSKINS: Well the report for the hearing is not a public document.

THE CHAIRMAN: Oh, that is not a public document?

MR. HOSKINS: I am trying to remember because I did work at the court but my recollection is that it is sent to the parties. In the old days I think it used to be available outside the hearing room when you went in. I think nowadays it is not available, but maybe if you ask the

Registry you can obtain it, but it is certainly not distributed in the way that it used to be; it used to be publicly available outside. The point about confidentiality comes from a specific CIF decision which we dealt with last time, the Swedish Journalist case, and that still remains the case for the pleadings - it seems very odd ----

THE CHAIRMAN: I am just wondering how confidential these pleadings are actually, especially since the point has not been taken by one of you.

MR. HOSKINS: I gave you the reference to the case last time, but that case is still good law. The position for some confidential reporting I do not think has changed, but that case is still good law.

The final point is even if the CFI finds for Schunk and/or Le Carbone on the scope of the infringement but does not do it for us, we say that does not actually make any practical difference, because we are all being sued on a joint and several basis then clearly the scope of the infringement as found in relation to some of the parties will also potentially impact on our liability, for example – and this is just an example of the way it might work – if Schunk and Le Carbone are not going to be liable for any sales they made it would have to be argued out but that is a possibility, then obviously we are not going to be liable for sales they have made. So even if we do not get a judgment in the same terms the fact that they have got judgments will still play in ----

THE CHAIRMAN: It plays in to joint liability.

MR. HOSKINS: Absolutely. Madam, those are the submissions I have to make.

THE CHAIRMAN: Thank you very much.

MR. HOSKINS: I should have said I adopt my learned friend's submissions, but I hope that goes without saying.

THE CHAIRMAN: Mr. Spitz, now how long are you going to be?

MR. SPITZ: I think probably 30 minutes.

THE CHAIRMAN: Fine, thank you.

MR. SPITZ: I am going to focus on certain selected issues and not try and cover all the material that has been dealt with already. One of the main issues that I would like to cover is the question of the second limb of *Bier*, Article 5(3), and the proper approach to defining the place of the harmful event in relation to this particular tort. The Tribunal will recall when Mr. Hoskins took you through the various cases he looked at *Shevill*, which was the defamation case, and then he moved on to *Domicrest* which was the case in relation to mis-statement, and the debate there was whether one looked to where the statement was made or where it was received and relied on. That case, and we need not turn it up, but if I can give

you the reference to tab 11, p.159 that case goes off by referring specifically to it being done by analogy with the tort of defamation, so it treats the approach to the tort of defamation as analogous to what it is doing in defining the place where the harm originated for the purposes of the mis-statement.

If the analogy does not work acceptably or sufficiently for the tort that the tort is considering, then the approach needs to be an appropriately different approach when one focuses on the infringement of Article 81. The various elements of the tort are set out as follows, as prohibitive and incompatible – I am reading now from Article 81(1):

> "The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerned practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition with in the common market ..."

and then there is the well known list of practices. So this is a tort that in its very definition is directed towards preventing conduct that infringes or impacts on competition between the Member States.

It already has at the very least a Europe wide component to it. It is conduct that affects trade between Member States, and that is a significant difference when one compares it with torts like defamation and mis-statement; this is a European-wide tort.

In addition to that, as we have discussed, the characterisation that the Commission gives this tort is not only that it is a single infringement, but it is a single and continuous infringement, and this is a point that I need not over elaborate because it is a point that the Tribunal has raised but the continuity element is very important. It means two things: one is there are a large number of mini-torts, as it were, built into and included within the single continuous infringement, and the other point is that the fact of its continuity means it is committed afresh every day. What does that mean in practice? Well some of what it means in practice is that the agreements are made afresh over the life of the tort, and we have seen a number of the meetings that are referred to in the annex to the decision that lists those meetings. The price fixing arrangements are reviewed frequently and regularly throughout the life of the tort and then they are implemented, and reviewed again and implemented again, and so it goes on this continuous basis, and the submission is that the Tribunal ought to give proper weight to that aspect of the tort as well.

THE CHAIRMAN: I think I might know your answer to this but I want to hear it from you, in a defamation action there is the original publication in France in that case, and there is the

distribution all over Europe – in a number of countries. Now both of those are separate torts of defamation and yet they said that the only tort that was relevant was the original publication, in printing – in publication – and not the distribution.

MR. SPITZ: But they are dealing with a different kind of tort. They are not dealing with a tort that involves the continuity, the repeated level of infringement.

THE CHAIRMAN: Well there is because assume I write a book and the book is printed in Germany, and it is published in a number of countries over a number of years. Every single time it is published – assuming it has a libel in it – there is a new libel.

MR. SPITZ: But that goes to the question of damages for the publication. It is not described and understood as a continuous and ongoing tort in the way that the infringement of Article 81 has been characterised.

THE CHAIRMAN: Separate torts?

MR. SPITZ: Well one can claim damages for the publication wherever it occurred, but it is on the basis of the same tort.

THE CHAIRMAN: No, the tort is that I had published the libel in France, or that I had published the libel in Italy or whatever, it is the particular publication that causes the tort.

MR. SPITZ: Well in that case the original publication took place at the publisher's place of establishment and then it was distributed.

THE CHAIRMAN: But each time it is distributed there is a separate tort.

MR. SPITZ: Well I am not certain that that is the correct way of characterising it, because the extent of the publication goes to the damages one claims. One does not re-plead when one pleads a defamation claim, one pleads the original publication and then the extent of damages based on the range of publication, but one does not plead a separate tort for every single publication that took place.

THE CHAIRMAN: In England you would have pleaded that the magazine was distributed in Yorkshire and that affected my reputation.

MR. SCOTT: I think the point being made is not your analogy of your publishing a single book in Germany, but you are publishing the first edition of Simmons – defamation of various people ----

THE CHAIRMAN: Defamation of Scott! (laughter)

MR. SCOTT: The second edition revised and improved, and the third edition and in a number of translations in a number of different Member States. I think that is more the analogy that Mr. Spitz is trying to get us towards. Because, as I understand it, what is happening in the

case of the five pieces of France-Soir distributed in Yorkshire is that the action is not against the distributor in Yorkshire, it is against the original perpetrator of the tort.

THE CHAIRMAN: Yes, because he has implemented, he is the perpetrator, so you would have the action against him. I am not convinced about this.

MR. SPITZ: Well there are two kinds of infringements that are relevant: there are the agreements and there are the concerted practices. The agreements can be both the agreements themselves and their implementation because the definition includes both, and this is what is going on over the life of the cartel for the entire 11 years, and damages caused afresh each time, and it is damage in each jurisdiction where the cartel is implemented and operates. Because it is described as "continuous" one ought to be able to say that the harmful event is caused afresh on each occasion; the harmful event occurs afresh on each occasion.

The other significant distinction of course is that the very definition of the tort under Article 81 involves a cross-border aspect, and that is unlike the common law torts that one is familiar with.

What we are told in Mr. Hoskins' submissions is that *Domicrest* establishes the test and we cannot escape that test because of *SanDisk*, because *SanDisk* deals with the context of a competition case, so it is worth looking at that and considering it briefly.

There is only one paragraph that I would like to refer the Tribunal to, but if the Tribunal would not mind turning up that decision once more (authorities' bundle 3, tab 30). Mr. Hoskins is quite correct that the complaint is framed also in relation to Article 81 and Article 82 in the way that it is set out, but what I would ask the Tribunal to do in looking at the decision is to consider very carefully precisely what role Articles 81 and 82 actually play in this case. As Mr. Hoskins also made clear this is not about a cartel operating Europe-wide, this is about licensing, but beyond that when it comes to the nub of what this case was about, it was really about enforcement action that took place in Germany and Italy in relation to equipment that was owned by the claimants and that is at para.42, that is where ----

THE CHAIRMAN: You have referred us to that before.

MR. SPITZ: Yes, I have referred to it before, and I have referred to it to make this point: one cannot rely on *SanDisk* and say that *SanDisk* is the barrier to the arguments that we have sought to advance, because *SanDisk* was also a competition case. One needs to go beyond that and one needs to look at the facts of the decision and then it will become clear that one was not dealing with the same kind of tort described as a single and continuous

infringement. One was not dealing with the cartel activities that were Europe-wide. There was an effort to characterise the tort in that kind of Europe-wide or global way. As I mentioned in relation to para.42 the Judge said that was an attractive way of characterising the tort, the problem was it did not fit the facts of that case. We say that that characterisation is exactly the facts of that case, and *SanDisk* is not a barrier to us because *SanDisk* was not dealing with this kind of tort.

Ms. Wessel points out that it is worth simply quoting a portion of the paragraph where the court summarises counsel's position and he says:

> "Mr Sharpe QC maintains, however, that the analysis which I have set out fails to assemble the strands of abusive behaviour complained of in the Particulars of Claim into a proper picture, which is, he says, a sustained campaign of abusive and anti-competitive activity throughout Europe, including the UK. Since, he says, the campaign is pursued throughout Europe, so too loss is suffered by SanDisk throughout the EU and immediate damage is suffered in every country, and thus the English court has jurisdiction. It is attractive to view the activities of the Defendants globally, but shorn of the complaints about the form of the licence on offer, the substance of this action, as Mr Sharpe freely admitted, lies in the enforcement steps that have been invoked by Sisvel in the various Member States, in particular the seizures in Germany and Italy."

and I would just ask that the Tribunal approaches *SanDisk* from that perspective. It is worlds apart from the cartel activities and the infringement of Article 81that we are dealing with here and so we submit the door is not closed to us. One is entitled to have a look at whether the analogies to defamation and mis-statement work for this kind of tort for the purposes of deciding where the harmful event occurred.

One reference also to the *Bier* decision that we had a look at, and we need not turn up but if I could refer the Tribunal to p.256 of that decision (tab 15). The purpose of the reference is that when one goes back to the first attempt to clarify the meaning of these terms what one is looking at is a consideration of the closeness of the connection between the forum and the dispute. Focus on the connection is also operative in the recitals to the Regulation, and again the reference there is to Recital 12 – tab 40, p.612 of authorities' bundle vol.2. Reading that out:

> "In addition to the defendant's domicile there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice."

- just emphasising the approaches, the closeness of the connection.

Moving on to another point now – a small point – Mr. Beard made the point in relation to Article 31 that the commencement of proceedings does not require the service of those proceedings, the commencement is when the document is lodged and we agree with that. Under Article 31 of the Regulation the service is not required.

THE CHAIRMAN: But they are not instituted if you do not serve?

MR. SPITZ: If you delay in serving, yes; as the Tribunal said one looks retrospectively. Another point of clarification in relation to the submissions that Mr. Beard made, if I understood him correctly he suggested that the claimants here were all purchasers of automotive brushes. I think that that is not completely correct and I would refer the Tribunal to paras. 7, 8 and 9 of the Le Carbone appeal, which shows that there are other products that members of the claimant groups purchased.

Turning from the jurisdiction issues to the prejudice issues in relation to permission. The response to the letters before action seeking disclosure was to say that from each of the proposed defendants to say that they would revert and then simply to ignore the issue.

In relation to the documents that are before the Commission, those documents have already been requested by the claimants and that request has already been refused. So yes it is quite so that the documents are at the Commission, and it is also so that for the purposes of concern about the destruction of documents that does not apply, but when exactly the claimants might be in a position to see those documents is not determined. We have asked, and we have not been able to obtain, and it would be a simple matter at very little cost for those documents to be made available to the claimants for all the purposes that I described in the original submissions and arguments.

MR. SCOTT: And so you are arguing there is no need for the pleadings to have been completed before we reached that ----

MR. SPITZ: Quite so. With respect to the first limb of *Bier* I am not going to rework the arguments or make extensive submissions. That was the place where the damage occurred, and in relation to that issue our primary submission is that sufficient has been done in the claim form to set out the argument that I advanced but if that is not the case it is possible for us to add the allegations in relation to not having purchased and where one would have purchased but for the activities of the cartel, and to provide the necessary evidence. It m ay well be that if the Commission follows the order that has been suggested in dealing with permission first and then dealing with jurisdiction after the proposed defendants are made

parties that that is where the opportunity will be taken, if need be, to amend the particulars of claim and to provide that evidence.

I simply flag up one other point now so that we are not criticised later should it arise. There is a further basis of jurisdiction which we are considering making, and that is under Article 5(5) of the Regulation. It is clearly not one that we have advanced so far and we are investigating the position. That is in relation to branches, establishments of companies that are domiciled outside the United Kingdom, and it may be that that provides a further basis for jurisdiction which we would invoke, if appropriate, when a full jurisdiction hearing takes place.

THE CHAIRMAN: I suppose if you want to amend, if we give permission on the claim form as it is now, if you want to amend that claim form you are going to need permission from us.

MR. SPITZ: That is so.

THE CHAIRMAN: And one of the questions that will arise then is whether the same circumstances or whatever those circumstances are, which we need to take account of in giving the initial permission to bring the claim ought to arise at that stage as well so that that widens the circumstances which one would consider.

MR. SPITZ: Yes, indeed, and I want to flag it up now, so that just as we know there may be something further coming from Schunk in relation to exclusive jurisdiction clauses, there may be something further that we will seek to advance as well.

MR. SCOTT: Just to be clear, that is the point which goes as to whether there is a contractual ouster of the jurisdiction in relation to a tortuous act?

MR. SPITZ: The Schunk point?

MR. SCOTT: Yes.

MR. SPITZ: Yes, my understanding of the Schunk point is that they seek to investigate whether there are exclusive jurisdiction clauses in the sales' contract that would trump Article 5(3) or Article 6(1) bases for jurisdiction.

On the question of the scope for the appeals, the point to make here is that it is a mis-characterisation of the claimant's case to say that what we are arguing is if there was an infringement there was damage and that is the end of the matter. The reason why we focused on the infringement question and look at that and compare that with the question of arguments that challenge the fine only is the obvious one, and that is it is the very grounding for any follow-on action. So we are not saying that if there is an infringement it follows that this is the damage that it has suffered. We are saying that if there is an infringement, and that finding is safe from being overturned, then the follow-on claim can be pursued and

the follow on claim will deal with questions of how one quantifies the damage. So that if it turns out that the cartel was implemented differently or in to a different extent in relation to the segments of the market where products were searched by the claimants, that will go to the question of quantum. The way that these appeals have been framed, Schunk's and Le Carbone, is to direct the complaint at the way in which the fine has been assessed and to get there by saying: "Look at the way the market needs to be analysed and properly segmented, but no one has a basis on which to dispute the facts that have been found by the Commission and none of these appellants do that.

Finally, none of them take the posit ion that there has not been a finding of infringement.

If the Tribunal bears with me for a moment. Ms. Wessel also highlights one other miscellaneous point that I should emphasise in relation to the question of evidence on jurisdiction. What the Tribunal received from the proposed defendants was observations and some witness statements with evidence. Now, the rule does not provide for observations and evidence, so that is one point. But the other point, more importantly, is that we would need the opportunity in a full jurisdiction debate to provide our own evidence and that is exactly why the permission stage ought to come first before a full blown hearing on jurisdiction. It would be inconceivable to have an evidentiary hearing against non-parties, whose only entitlement, as it were, was to make observations.

Again, I have kept within the time and have nothing further, unless there are questions.

THE CHAIRMAN: (After a pause) Can I thank everybody for the submissions that have been made today – and for finishing today as well –and the observations that we have received in writing which have been very useful, and in due course you will receive our decision.

Thank you very much.

MR. SPITZ: Thank you very much.

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