IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1077/5/7/07

Victoria House
Bloomsbury Place
London WC1A.2EB

Wednesday, 26th September 2007

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 — Claimants

and

MORGAN CRUCIBLE COMPANY PLC — Defendant

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

Mr. Robert Osgood of Sullivan & Cromwell and Mr. Ben Rayment (instructed by Sullivan & Cromwell) appeared for the Respondents.

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HEARING

THE CHAIRMAN: Before we start the hearing this morning we have one or two matters that we would like to mention.

First of all, can we express our thanks to the parties for the written submissions we have received which have been very full. Both the claimants' and the defendant's submissions have set out in considerable detail what the submissions are. In light of that, we thought it might be useful if we gave some indication as to how we see the way forward for today's hearing.

Before I do that, I would just say that we have been assisted very much by the chronologies of the US litigation prepared by the parties. We found the claimants' chronology to give a particularly clear and concise outline of the dates and events and hopefully in an uncontentious way. You may tell us if there are certain points which are contentious, but it looks to us it is nice, clear and uncontentious.

However it appears that there is missing from the claimants' chronology the date of the pleadings filed with the District Court in the *Carbone* litigation, which is mentioned in the defendant's skeleton of the 31st August 2007.

Also, and possibly more importantly, the date on which the Morgan Settlement Agreement was entered into is missing from the claimants' chronology. From the Morgan Crucible reply of the 24th September, it appears that the date the Morgan Settlement Agreement was entered into was the 21st February 2006. We note that in their chronology of US litigation the claimants' record the date of the Agreement to be the 3rd February 2005. But it seems to us from the information that we have been given, that the 3rd February 2005 is the date from which the agreement is to be effective, not the date when it was "entered into" by the parties who are now before us. That may become relevant as to background matters when one is construing agreements.

In light of the very full written submissions, we doubt that there is any need for further oral submissions this morning on the issues relating to the Tolling Agreement or on the question of whether time has begun to run under Rule 31 of the Tribunal's Rules.

Of course, we have not yet decided the Rule 31 question, but if we decide the time has not yet begun to run, then the next question will be whether the Tribunal should grant permission for a claim to be made pursuant to section 47A(5)(b) of the Competition Act and Rule 31(3) of the Rules. That is an issue on which we would like to her oral submissions from the parties this morning; that is an issue that was not addressed I think at the last hearing.

In regard to that we note that the written submission are rather general as to the reasons why the claimants will suffer prejudice if permission I not given. On our reading of material that has been provided, no particularisation of the prejudice has been provided in any evidence. We do not know which witnesses or what evidence is going to be prejudiced by further delay in getting on with this action. So we are slightly concerned that we do not have material before us on which we can decide the question of permission.

On the issue of settlement, we provisionally indicated at the last hearing that we were not persuaded on what we had then read that the claimants' case was bound to fail. That remains our view on what we have read on this occasion. The submissions of the parties raise various issues and rely on evidence beyond the Agreement. That appears clearly to be a dispute between the parties which needs to be resolved. It would be premature for this to be done before any defence was filed if permission was granted or if the action does not require permission and perhaps before disclosure of any documents relevant to the settlement issue.

If the settlement issue remains a live issue, then it seems to us that it could be dealt with more properly as a preliminary issue in the case, if the case proceeds or at a time when it does proceed. When that hearing could take place, will, as I have just said, depend on our judgment in relation to the other matters which are presently before us as to whether the Tribunal does have jurisdiction to hear the claim now. From what we have seen and the submissions, there clearly is a dispute and therefore it is not bound to fail; and from what we have seen we are really wondering whether it is worth proceeding with that part of your application. That is a matter for you.

Those are our opening remarks. I hope they were helpful.

MR. OSGOOD: Thank you, madam Chairman, and Members of the Panel for that guidance. That is most helpful indeed. With the permission of the Panel, taking into account your remarks, perhaps I should address the issue of permission. If we put to one side ----

THE CHAIRMAN: If it is the issue of permission, should you be going first?

MR. OSGOOD: As you please.

THE CHAIRMAN: Because it is the claimants that are asking for permission. You think I am wrong?

MR. RAYMENT: No, I was not saying anything to that. I was just saying their application is not in the trial bundle.

MR. OSGOOD: Thank you, madam Chairman.

THE CHAIRMAN: Just hold on a minute. (After a pause): Yes.

MR. SPITZ: Thank you, madam Chairman. Perhaps it would be helpful then to address the two issues that appear to be directed at the Claimants. The first relates to the timing of the entry into the Morgan Class Settlement Agreement and the second relates to the prejudice if permission is not granted. The quickest way of doing this in relation to the timing of the Morgan Settlement I think would be to turn ----

THE CHAIRMAN: What date do you say it is?

MR. SPITZ: We say it is the 3rd February because at that time ----

THE CHAIRMAN: That was the date of the settlement.

MR. SPITZ: Indeed, and that is also the time when the class of which the Emerson plaintiffs were members were bound by that Agreement and the class is included as a settling party in that Agreement.

THE CHAIRMAN: You did not enter into that Agreement.

MR. SPITZ: Well, we were a party; yes, we did opt out, exercising rights to opt out that are created under the Agreement so we could not have exercised any opt out rights were we not a party to the Agreement in the first place. We were a party and it is relatively straight forward to show the Tribunal that. It is at Tab 5, p.151 of trial bundle 2; this is the Morgan Class Settlement Agreement. I am sorry, we have a different numbering system.

THE CHAIRMAN: That is always the problem.

MR. SPITZ: This is the chronological bundle of documents.

> "(a) the proposed class representative plaintiffs, on behalf of themselves and on behalf of the Class they seek to represent …."

One then goes to the definition of the class, which is on p.153 next to clause 2 there is a definition of "Class" or "Plaintiffs". It means "all Persons", and I am omitting the information in parentheses,

> "…who purchased Electrical Carbon Products in the United States, or from a facility located in the United States, directly from the Defendants, their affiliates, subsidiaries or co-conspirators, during the period January 1, 1990 through December 31, 1999."

Now all of the Emerson plaintiffs are within that class and that class is a settling party by virtue of the words that I drew attention to a moment ago, they are represented by the class representative plaintiffs who act on behalf of the class. It could not be any other way, madam Chairman, because when those Emerson plaintiffs exercise their opt-out rights they are doing so in terms of this very agreement.

THE CHAIRMAN: When did you sign this agreement

MR. SPITZ: Well the agreement was signed on 3rd February. Emerson plaintiffs did not sign the agreement but they did not have to sign the agreement because they were party to it by reference to the class representative plaintiffs signing.

THE CHAIRMAN: Well why did everybody else sign it

MR. SPITZ: Well I do not believe that it is everybody else signing it, I believe that it is the members of the representative class on behalf of themselves and on behalf of all the other members of the class.

THE CHAIRMAN: Then you opt out

MR. SPITZ: Yes, exactly, and we opt out exercising rights provided in terms of the contract and those rights are provided in clause 29 and that provision is at pp. 163 to 164 and it does two things. It confers on all the members of the class the right to opt out and if a sufficient number of those members opt out so that the aggregate amount in question crosses the 10 per cent threshold, then that triggers walk away rights that can be exercised by the defendants. What then happens is the defendants suggest that they do intend to walk away, further negotiations take place between the Class Committee, the Emerson plaintiffs and the defendants and that is what leads to the Emerson plaintiffs opting back into the agreement, and that opt in is confirmed in 2006, but that does not mean that until that time the agreement was neither effective nor binding on the Emerson plaintiffs, and one simply has to test that to see that it must be right. If it was not one would be in a situation where, depending on what time a particular class member entered into this agreement, the agreement may mean different things, different evidence may be taken into account and that cannot possibly be right, so it means what it means on 3rd February when all of the class members are there, and the evidence one takes into account is evidence leading up to 3rd February 2005, not evidence that arises subsequently because if one took that view and did look at that evidence then the Emerson plaintiffs entered into an agreement that means something different to those members of the class who stayed in the agreement from the very beginning and did not opt out.

THE CHAIRMAN: That is a very nice way of putting it but when the Judge in America looks to see whether he approves the settlement agreement, he looks at everything including the negotiations that you had to opt in again, so he is looking to see whether the settlement agreement is fair having regard to what has happened between the time, the 05 date, and when he looks at it

MR. SPITZ: Yes, that is quite correct from the point of view of one of his functions is to make sure that the Emerson plaintiffs do not achieve any undue benefit from the exercise of their

opt out right to try and raise the price of settlement to the prejudice of some of the original class members; he certainly looks at it from that point of view. What he does not do is look at the Emerson complaint that raised purchases that were outside the United States. What he does is look at the original – what is referred to as the "third amended class complaint" and that is the action that is being settled, and that is where he goes to measure the adequacy and reasonableness of the settlement against the terms of the class complaint, what claims were profit there, what were advanced, and when he calculates the damages again for assessing fairness and reasonableness he is doing it off the back of the original class complaint. So it is not that the class settlement agreement comes to mean different things, and it is also not that it only becomes binding on the Emerson plaintiffs in 2006, it remains bindng.

THE CHAIRMAN: It clearly was effective of 2005, the question is when you entered into it

MR. SPITZ: Well, as I say, we entered into it in February 2005. So if there are further questions for me to address on that I will gladly do it, but that in a nutshell is the submission and of course it is very important as the Tribunal suggests because it determines what sorts of evidence one will take into account in construing the agreement, but the final submission is that it cannot mean different things for one set of class members versus another. A useful analogy perhaps is with assignment where you have a contract concluded between two original parties, assigned at some later stage to a third party, the third party is bound by the original agreement and whatever that original agreement meant on the basis of ----

THE CHAIRMAN: This is one of the reasons why our view is that this is not appropriate for the application to be made today in relation to the settlement agreement, and that this all would need to be sorted out if it cannot be done on the pleadings as they stand, and therefore the right answer is that if this action continues at the moment it can be done as a preliminary issue, and be properly pleaded and proper solutions made, so I do not think we need to go into this if that is the approach we are going to take, Mr. Osgood has not yet said what approach he is going to take. So let us leave that for the time being

MR. SPITZ: Thank you very much. The second issue relates to the particularity in relation to the prejudice and in particular which witnesses may become available and what evidence. This is not a matter that is easy to stipulate in advance but what one can say, at least in relation to a portion of the claimants' claim for damages, which involves punitive damages, there is an entire inquiry that would have to take place in relation to punitive damages to assess whether the defendants in this case actually made a commercial decision that it was worth assuming the risk of fines for contravening the relevant competition prohibitions. If they

did that then they would fall into one of the categories that the law provides for punitive damages to become available, and there is an enormous amount of witness evidence that one can imagine, and cross-examination, that may have to take place in relation to that question. Was it simply treated as a cost of doing business, the risk of being found liable for the infringement of the competition law. That is one area in which oral evidence is likely to be necessary.

In relation to quantum----

THE CHAIRMAN: And you say that you will want to cross-examine the other side's witnesses

MR. SPITZ: Yes, indeed.

THE CHAIRMAN: You know or do not know but have not said who they are and delay is going to cause a problem with that cross-examination, but we have already had delay over what, 15 years, so is another few years going to make any difference.

MR. SPITZ: One does not know how many years it is likely to be, one really does not. The Tribunal has endeavoured to obtain information from the CFI and we have and we cannot predict whether it is two years or five years or perhaps even more. Yes, there has been a substantial delay and, to that extent, there has already been prejudice that has been suffered, and there is no need to compound that prejudice by waiting for any further substantial period of time.

My colleague points out that there is one possible witness that we can identify at this stage and that is Mr. Norris, who I believe, and I speak under correction, was the CEO of Morgan, and he is ----

THE CHAIRMAN: Is he the gentleman who is under an extradition order

MR. SPITZ: Under extradition, indeed.

THE CHAIRMAN: But he is still in this country

MR. SPITZ: I believe so, yes. We believe that the extradition appeal is before the House of Lords at the moment. As far as other witnesses are concerned ----

THE CHAIRMAN: It has been heard, has it?

MR. OSGOOD: I believe it is to be heard January 28th.

MR. SPITZ: Again, in relation to quantum what one is looking for in terms of assessing what the likely damages will be is that differential between the cartel price and the price that would have prevailed had ordinary market conditions prevailed. Now, clearly that is in part a matter for expert economists to give evidence, but it is impossible to say in advance that there will not be issues of live evidence and in fact one can identify one particular relevant question. We need to know what the so called bareme price is. There are indications in the

Commission's decision of what that is, but that is the premium that was charged over what might have prevailed under ordinary market conditions. That bareme price we expect will emerge from the disclosure of documents, but it is also likely to form the subject matter of witness evidence. So that is a substantial area which is affected by the same concern.

THE CHAIRMAN: Are you saying Mr. Norris?

MR. SPITZ: No, no. I am not in a position to identify without seeing the documents and at this stage. I think Mr. Norris would clearly be able to give evidence in relation to whether a commercial decision was taken that it was worth pursuing the risk of a contravention.

THE CHAIRMAN: He will either be here or he will be in prison in America or be available in America, or something.

MR. SPITZ: But the longer it takes before one is in a position to obtain proofs of evidence, file their statements and move on with that part of the proceeding, the greater the risk is of not being able to obtain that evidence and also the simple fact that one's memory is affected by the delay that takes place.

As far as the documents are concerned, it is quite so that we have had an assurance that documents will be preserved but that assurance is off the back of events that led to complaints about previous destruction of documents. So we are already in a situation where we cannot be certain as to whether a full set of disclosure materials are going to be available and produced and thereto the sooner it is possible to obtain that disclosure, the more protected the claimants are going to be; the more reliable or the more easily they can rely on the fact that they have as full a disclosure as is possibly available.

MR. SCOTT: Mr. Spitz, one of the matters to which we have been giving some consideration is whether you have received to back up the assurance Mr. Osgood has given, any documentary evidence of the compliance processes that are in place amongst the defendants in relation to documentation. I appreciate that we only have before us part of your prospective list of defendants, but in relation to Mr. Osgood's assurance it would help us if we knew there had been any further discussions or documentation between the two of you.

MR. SPITZ: We received a letter in February or March 2007 that gave us an assurance that said that procedures were being put in place. I believe, and Mr. Osgood will correct me if I am wrong, that we have not seen anything beyond that; we do not know what those measures might be and how they may function.

MR. SCOTT: We will come back to Mr. Osgood in due course.

THE CHAIRMAN: The assurance you have been given, how binding is that? I was not sure if on the last occasion some sort of undertaking is being given to the court or not.

MR. SPITZ: Well, it may be appropriate to find that letter and put that before the Tribunal.

THE CHAIRMAN: Because if there is effectively a solicitor's undertaking, then that puts a slightly different complexion on the question of construction of documents.

MR. SPITZ: Yes, it would. There would remain some reasons why it would, nonetheless, be appropriate to commence with the process of disclosure and those reasons would involve the fact that one can then be in a position to determine. This is substantial litigation if it in fact runs. One will be able to make an assessment of what the likely recovery would be and one simply cannot do that and that has been a consistent theme from the claimants. One cannot do that without having access to those documents, so we simply do not know how the terrain lies in relation to that sort of claim. It goes not only to the extent of purchasers from a particular defendant, the Morgan defendants have said from time to time that their sales were rather small, but it also goes to the wider issue of joint and several liability that is in the complaint. That would require beginning to assess what the bareme price is which will come from the disclosure because that will enable us to determine not only Morgan's liability, but get a wider sense of the entire field in relation to a claim of join and several liability against Morgan too.

THE CHAIRMAN: But the joint and several liability means that you need to know the evidence from the other members of the cartel. It is not evidence that is necessary from Morgan Crucible's disclosure.

MR. SPITZ: I think it may not be, but I think that there is likely to be an overlap and it goes to the documents and information that will help us establish what the cartel price is. That price, of course, will apply to all the defendants. What one can do with that information is line it up against the extent of purchases that the claimants have made from the other defendants to the extent that the plaintiffs are in a position to do so and that will give an indication of the entire field. It will not be sufficient and that is why the claimants' position has always been that we need the other defendants before this matter can proceed to judgment.

THE CHAIRMAN: Of course, it is not clear at the moment what points are being taken in the CFI by the others?

MR. SPITZ: Quite.

THE CHAIRMAN: There is some indication that they are saying that it ought to be annulled for substantive reasons.

MR. SPITZ: In relation to the parent company of Schunk there is an agreement that they should not be held liable. In relation to the subsidiaries it seems to me that it goes only to the question of fine.

THE CHAIRMAN: Of penalty. But if it goes any further in relation to any of the parties, then of course that affects the joint and several liability.

MR. SPITZ: Yes, indeed.

THE CHAIRMAN: And you would not want to proceed against Morgan just in relation to Morgan's. You want it on the basis of joint and several liability.

MR. SPITZ: Indeed, that is part of our complaint and an important part of our complaint. If it turns out when the Tribunal considers the application for permission in relation to the other proposed defendants that it is not inclined to allow proceedings to commence either because liability may still be in issue or for any other reason because the appeals are pending, then we will seriously consider proceeding against Morgan alone and consider how matters would be likely to develop there. But from Morgan's point of view the liability question is closed from Morgan's point of view.

THE CHAIRMAN: If you are proceeding against Morgan in relation to joint liability, then one has the difficulty that until we either understand what part of the appeal is substantive and which appellants in the CFI proceedings are taking substantive points rather than fine points ("fine" being the financial penalty imposed by the European Commission) even if one wanted that information for the purposes of working out how much is owed one does not know because one does not know on the substantive point the … so I am not sure how far that gets you

MR. SPITZ: Well it would enable us to get a far clearer sense of what the joint and several liability quantum is likely to be, it would certainly enable us to do that.

In relation to documents that Morgan may have had in its possession or made available that would go to the conduct and the quantum in relation to the other cartel members we believe that the documentation that Morgan made available, since it was co-operating with the Commission, may well cover a good deal of that information too and that is why there is likely to be an overlap between what relates solely to Morgan and what relates to the others as well. Again, we believe that Morgan will have sales' information, not just in relation to its own sales to us, but the sales of other cartel members. We obviously cannot establish that definitively but that would be a matter that would come out in the process of disclosure.

Madam Chairman, the only other point to refer to is an email that Miss Wessel has handed to me from Morgan's solicitors of 27th March 2007, which deals with the question of the

preservation of materials. We will make a copy available to the Tribunal. Reading the first full paragraph of that email of 27th March, it is from a Mr. Dunleavy

from Sullivan & Cromwell to Miss Wessel – he is a solicitor at Sullivan and Cromwell?

THE CHAIRMAN: An English solicitor

MR. SPITZ: I cannot confirm that. I see my friends nodding. He says as follows:

> "First, as Bob said at the CMC on 13th March S&C has preserved all materials that were provided by Morgan to the European Commission as part of its investigation and which formed the basis of the Commission's decision. We have all of these documents at Sullivan & Cromwell and rest assured that they will continue to be preserved."

It is not clear whether there are other documents that were not part of those made available to the Commission and what sorts of preservation directions or measures have been put in place in relation to the others, but that is the undertaking.

THE CHAIRMAN: The question is whether that is some sort of binding undertaking, I am sure Mr. Osgood will tell us

MR. SPITZ: Yes, indeed. So in relation to witnesses and documents those are the submissions as far as prejudice is concerned.

Then there are the more general submissions which the Tribunal has already seen in our written submissions. The cartel has been operative for a long time, a great deal of further time has passed. Through no fault of the claimant's own we are in a position that we cannot simply take this matter to trial but there are steps that can be taken in the meantime with no prejudice to the Morgan defendant if those steps were taken. The reason that there is no prejudice is that that exercise of putting in a defence and commencing the disclosure exercise will have to be done, it is not as if the costs of that process are going to be wasted; it is a question of when the defence will be put in and when disclosure will commence, so it is not as if there is a costs' prejudice and it is difficult to think of any other prejudice to Morgan since liability is no longer in issue.

THE CHAIRMAN: Is there any prejudice in the sense of doing it prematurely and then a period of time elapses during whatever period the action is stayed

MR. SPITZ: I would submit not because as good or bad as it is the defence is based on the previous existing facts and that defence will be pleaded and there is no reason that they should not put their defence now. There is nothing that is likely to change what that defence is and, of course, if something does arise there is always the capacity to bring an

amendment, and in relation to the documents a good deal of those documents are already bundled and with the CFI.

THE CHAIRMAN: The question of the settlement agreement, is that a reason why we ought to allow the action to commence, because if that was decided and if that was decided against you then that is really the end of it and then we should not go into all this disclosure, etc.

MR. SPITZ: I can see some efficiency in doing that as a preliminary issue, one then does not need to wait on those issues for the other proposed defendants. But again I would suggest that it is not necessary to elect between those options it is possible to deal with that preliminary issue and go ahead with that and, at the same time, commence the process of disclosure for the reasons that I have already set out to know whether the gain is in fact worth the candle.

Those then are our submissions on the question of permission.

THE CHAIRMAN: Mr. Osgood.

MR. OSGOOD: Madam Chairman, members of the Tribunal. My learned friend says that a defence is inevitable, that it will come sooner or later. He is overlooking our arguments on rule 31. I have not lost hope that the panel may agree with us that rule 31 and the two year time limit is mandatory and that that rule is jurisdictional.

THE CHAIRMAN: We appreciate that, this is depending on how we rule on rule 31. If we rule on rule 31 that the action is premature but that we can give permission then what are the arguments about permission?

MR. OSGOOD: Yes, but equally we have not of course conceded our arguments on the tolling agreement, that it is ineffective and that time has run and they are a year too late coming to this Tribunal.

THE CHAIRMAN: All of that would have been dealt with so clearly in all the written submissions that unless you thought there was anything you could say in addition to the written submissions it appears to us at the moment that we have all the submissions that can be made. You dealt with it on the last occasion.

MR. OSGOOD: I did not want to assume away two of our arguments, as my friend seemed to be doing.

THE CHAIRMAN: No, we are quite aware of that.

MR. OSGOOD: Now, let me address this question of permission and prejudice. We have said from the very beginning at the first case management conference in March, that if there is to be a proceeding at all it should be all or nothing, it should be all defendants or no

defendants. Any other scenario would be severely prejudicial to Morgan for, may I suggest, six different reasons.

First, Morgan is a 1 per cent defendant.

THE CHAIRMAN: It was a 2 per cent – has it become a 1 per cent?

MR. OSGOOD: It is now a 1 per cent defendant because we have information from the other side that suggests that they have documentation for only €2 million of sales for Morgan out of a claim of €291 million – that is something like six tenths of 1 per cent of this claim is attributable to sales by Morgan. That means the other 99 per cent are not in this room.

MR. SCOTT: Mr. Osgood, just before you go on, you are not denying joint and several liability as I understand it, you are just saying that when it comes to resolving between the defendants you would expect contributions of approximately 99 per cent from the co-conspirators.

MR. OSGOOD: We are saying that they have injected an issue of joint liability ----

MR. SCOTT: And several liability.

MR. OSGOOD: But that is separate issue, because I agree with madam Chairman that one cannot treat the issue of joint liability without all the parties in the case. What I am pointing out initially is there is an issue of proportionality. Why would one proceed against a 1 per cent defendant knowing that 99 per cent of the claim is not before the Tribunal. It simply is not a proportionate result.

Secondly, there is the issue of joint liability. The other parties are necessary to determine any issues of joint liability. Those parties have suggested that there may be contribution issues and we would certainly suggest there would be contribution issues as among the defendants.

THE CHAIRMAN: That is a separate matter; that is a sort of "next day". Once the court determines the amount you either will settle between yourselves or the court has to distribute it on an application for contribution.

MR. OSGOOD: This is the position Morgan would be in potentially. The others are appealing the liability decision. It may be they are successful ----

THE CHAIRMAN: Some of the others are appealing.

MR. OSGOOD: Now the claimants are suggesting that Morgan could be jointly liable for 291 million in sales to the claimants. That puts Morgan in an untenable position.

THE CHAIRMAN: They are not suggesting that we proceed to a hearing of the substantive issue; they are only suggesting that we allow permission in order for disclosure, possibly defence and possibly the settlement issue to be determined at this stage.

MR. OSGOOD: My answer to that is the third reason, and that is there are joint issues of causation and there are joint issues of quantum. Those issues cannot properly be determined without all the parties in the case. Let us take the example of causation. Presumably they would want to adduce evidence of meetings and discussions and precise agreements and whether those precise agreements had any impact whatsoever on the claimants. Those issues cannot be treated in isolation.

THE CHAIRMAN: Are you saying it goes to disclosure, that you do not know what to disclose because you do not know what is going to be decided by the CFI?

MR. OSGOOD: I am saying from a commonsense position it makes little sense to proceed to a common issue of causation without all the parties in the case.

THE CHAIRMAN: But that is if you had a hearing, all they are saying is that they want disclosure from you in order to protect their position on the documents.

MR. OSGOOD: And it would be partial disclosure, it would not present the entire picture, because it would be only disclosure from one of several parties, it would only be a piece of the puzzle which is of very little utility. So one would wonder why proceed with a very small part of the puzzle when the larger parties with their evidence are now before the Tribunal?

THE CHAIRMAN: Well they say in order to preserve the documents, to make sure that the documentation is preserved, because your client has a history of not being completely open about that.

MR. OSGOOD: And I hesitate to add that that all occurred before Sullivan & Cromwell was in the case.

THE CHAIRMAN: But your undertaking is only in relation to documents disclosed to the Commission and of course a follow-on action is dealing with certainly some issues which the Commission may not have been interested in, and you have not given an undertaking and we have to go into what undertaking you have given, but according to that letter it is very limited.

MR. OSGOOD: Well shall I address that now?

THE CHAIRMAN: Well is this the time that you want to address it?

MR. OSGOOD: I would be happy to. We have, as counsel suggested, preserved all documents given to the European Commission. To my knowledge all relevant documents requested by the Commission were given over and those are the ones that exist.

THE CHAIRMAN: Yes, but they are relevant to the Commission decision not relevant to a follow-on action – or may not be relevant – so there may be other documents.

MR. OSGOOD: Of course we have not seen any document request but I do not know what other documents there would be.

THE CHAIRMAN: That is the difficulty. You have not given an undertaking, or your clients have not, that all documents relating to the sale, the price and all of that, and anything to do with this cartel will be preserved.

MR. OSGOOD: We have given counsel for the other side a copy of our document retention memo which we have sent to the client, which is very broad indeed, and we can produce that for the Tribunal. So in fact there was a document retention memo sent.

THE CHAIRMAN: On the first CMC we recorded in the order that you had indicated to the Tribunal that it had taken all necessary steps to ensure that any internal documents which may be relevant to these proceedings will be preserved and will not be destroyed, including in particular all of the documents submitted by the first defendant to the European Commission for the purposes of its decision of 3rd December. That is wider than the email that was read to us, so I think we need to be clear as to what undertaking is being given and what sort of undertaking is being given, because if you gave an undertaking to the court – a solicitor's undertaking – then that has contempt consequences which are therefore very important.

MR. OSGOOD: I appreciate that, madam Chairman, and I have no hesitation in repeating that undertaking.

THE CHAIRMAN: And is that an undertaking to the court? Is that saying ----

MR. OSGOOD: It is indeed. If I may, on the question of prejudice, it is possible that we may have yet another party who is absent added to this case eventually, who is a major party, and that is the Le Lorraine Carbone defendant. The Lorraine Carbone defendant is an interesting one because Carbone Lorraine accounts for 43 per cent of the sales that are claimed by the claimants in this proceeding. If one recalls para.90 of the claim form they list Carbone as a seller of electrical carbon products, and they show that its sales to the claimants amounted to something in the order of €124 million which, according to my mathematics is about 43 per cent of the sales. Incidentally, I believe Schunk had a roughly 47 per cent of the claimed sales. So we have Carbone, whom I expect will be added with 43, not before the court, Schunk with 47 per cent not before the court, SGL with a minor proportion and the only party here as a defendant has less than 1 per cent – out of the total claim of €291 million in sales.

As we know, rule 31 provides a two year time period within which to bring a damages' claim with reference to the relevant date being the determination of any appeals from the

European Commission's decision. Why is that? Because the European Commission's decision is the foundation for a liability in a damages' claim. It makes perfect sense that a claim for damages should not proceed until liability is certain. You have before you an unusual case. In this case some of the parties are appealing the liability decision and it is within the realm of possibility that they will succeed. The request to proceed against Morgan could result in liability in damages for Morgan as to which there was no underlying liability with respect to the others. A strange result. To avoid that somewhat awkward result the sensible thing we submit here is to stay the proceedings, or not grant permission until the issue of liability for all the defendants has been resolved.

THE CHAIRMAN: So what you are saying is that even though under European principles the decision is against you and that is not upset by any decision of the European Court. If it turned out that the decision was annulled against everybody else on liability – let us assume that – then you would be able to run an argument in a follow-on action that even if it is against you, you have no co-conspirators effectively.

MR. OSGOOD: That is right, and beyond that, I would argue that the decisions cited by my friends on the other side do not stand for the proposition that Morgan would be inevitably stuck with liability under the European Commission's decision because those two decisions, the *Kraft* decision that followed the *Wood Pulp* case, and the *TW* decision both went to the direct application of the European Judgment. One was a State aid case, and the question came up on the recovery of State aid that the Commission had said should not have been granted. So it was the direct implementation of the European Commission's decision which could not be circumvented.

In the other case it was a matter of fines, in the *Kraft* case, and there because some of the Swedish defendants had not appealed, and they had been assessed fines of between €50,000 and €500,000, others had appealed and had reductions or eliminations, the court said: "No, the Swedish companies who had not appealed and were fined still had to pay their fine to the European Commission. That is different; both cases are quite different than the situation that we have in a private damages action brought in this jurisdiction under a completely different regime. We are not talking about the direct implication of orders of the European Commission. So those cases are opposite and I would some day like the opportunity if necessary to argue this point, but I do not think it can be merely assumed that Morgan will be liable if the others succeed. That is an open question.

THE CHAIRMAN: But of course you do not at the moment know how many of the others are dealing with liability rather than penalty.

MR. OSGOOD: We do not know. I would simply say there is no court decision anywhere that I am aware of that has ever held that if the others succeed in diminishing or eliminating the underlying liability, that a company in the position of Morgan cannot benefit from that. There is no such ruling anywhere.

MR. SCOTT: Is the implication of what you are saying, and I know this takes us back, the logic of what you are saying is that Morgan despite not being an appellant before the CFI as a potential beneficiary of a CFI decision, that the logic there seems to be to be saying that time should have begun to run?. If you think that Morgan are entitled to the benefit of those proceedings before the CFI, I find it difficult to see how you argue that it can at the same time try to take the benefit of time having run and a limit having been reached. Do you understand the logical predicament in which we find ourselves?

MR. OSGOOD: I do indeed and that may be a logical result. There are essentially four ways through to decision here, I think. One is Rule 31; two, the Tolling Agreement was ineffective three, a stay; or four, the time has not begun to run.

MR. SCOTT: Just sticking with the time not having begun to run – we are not deciding, we are just making an assumption – part of what you are saying is that you would be prejudiced if we continued with you alone. Now, at the moment in initiating proceedings the claimants have listed some of the co-conspirators, not all of the co-conspirators. What you are saying to us is that because Carbone Lorraine are responsible for, let us say, 43 per cent. of sales, that you would be prejudiced if they were not in the group before us as well as the proposed defendants that are already on the list here, that is Schunk in its two forms and SGL. Would we be right in assuming that if we were to decide to proceed in terms of the claimants and yourselves, you would then be supporting the claimants in asking not only that the other three defendants be joined at once, but also Carbone? Now, we are conscious, of course, that Carbone is in proceedings in the United States. Or would you be saying to us that the proceedings should only proceed insofar as it is convenient for them to go whilst you are alone and otherwise stayed until the other parties have completed in Luxembourg and then we see whether they should be joined?

MR. OSGOOD: That is a very interesting question and I have not actually – let me say, I think I would rather see the Tribunal's decision first before announcing a position.

MR. SCOTT: It really goes as to prejudice. It is not entirely clear that you would be prejudiced if we made a little way forward whilst recognising your arguments about the need to have the other parties here. In other words, you have already got the bundle for the CFI, so that in terms of the cost and expense of assembling documents there is little more than

photocopying. There is the issue of whether it is timely for you to file a defence, but we are really trying to understand what is the real prejudice of going on a stage further even if we cannot go to substantive hearing without having the whole group here?

MR. OSGOOD: As I was saying, we are a minor defendant, extremely minor. Another point is I think the Tribunal can take note of the fact that we were a leniency applicant before the European Commission.

THE CHAIRMAN: Well, that, of course, is a question which if one looks at all the consultation papers on follow on actions is a very mute point. It is going to have to be decided.

MR. OSGOOD: It is a point that I think can be taken into account. I do not suggest for a moment that it is dispositive, but I think there is a policy issue here that if one is trying to encourage leniency applicants to go into Regulators to confess violations of competition law ----

THE CHAIRMAN: These are all submissions that you will make at some other point. We do not need to listen to them now.

MR. OSGOOD: No, but it has to do with who is it you are prejudicing by pushing forward. You would be putting a leniency applicant in a position of no fine before the European Commission therefore no reason to appeal. But whenever that leniency applicant had connections with the United Kingdom, that leniency applicant could be first brought before (before anyone else) this Tribunal in a damages action with the argument that it must proceed against the leniency applicant for damages straight away with all the complications there are on joint liability.

THE CHAIRMAN: Except they are not trying to proceed beyond defence of disclosure. They are saying that everybody will have to be before the court.

MR. OSGOOD: Well, I am not sure they have made that clear.

THE CHAIRMAN: That is my understanding.

MR. OSGOOD: That is an interesting limitation. I know that they have said ----

THE CHAIRMAN: They have already said that this morning again.

MR. OSGOOD: My friends representing the claimants have said that efficiency would be served by I think all parties before the court. They can make the argument themselves and I agree with that, that it is inefficient to proceed against one of several parties, particularly a minor party. I think in fact they said in their application for permission to initiate the claim against the other parties, paras.24 and 25 and I quote:

> "24. It would be contrary to the interests of justice and to the principles of the overriding objective if the claimants were to proceed with their monetary claims

against Morgan alone without the participation of the other major addressees in the cartel, namely, Schunk and SGL."

THE CHAIRMAN: So they specifically have said that they are not going to proceed beyond disclosure in the defence.

MR. OSGOOD: Then they say in para.25, if I may continue:

"Subsequent separate proceedings against those defendants would not be an efficient use of the Tribunal's time and resources and would be inconsistent with the need for the claimants to bring all their claims before it in a single proceeding …."

THE CHAIRMAN: We can read it.

MR. OSGOOD: "…. and would run the risk of irreconcilable findings of fact …." etc. I do not think there is any assurance that if start down this track and we call it simply discovery that there is not going to be the kind of inconsistency that they themselves foresaw unless all parties were in the case. It seems to me the commonsense solution here is because of the pendency of the appeals, the fact that most of the major parties are not before the Tribunal, the fact that we could reach inconsistent results, is for permission either to be granted that everyone be brought in or that a stay be granted as we requested some time ago in the alternative.

MR. SCOTT: Just to be clear, in relation to "all" would you be arguing that Carbone should be included in that "all" or would you because of what is going on in the United States say that Carbone should not be included?

MR. OSGOOD: I understand the claim against Carbone for European purchases has been dismissed.

THE CHAIRMAN: Is there an appeal?

MR. MURPHY: There is not an appeal currently.

MR. OSGOOD: I do not know whether time has run? Time has run.

THE CHAIRMAN: There is going to be no appeal.

MR. SPITZ: It is our intention not to appeal on an interlocutory basis. The courts are ruling in the United States.

MR. SCOTT: So both from the claimants' point of view, I mean, the claimants may want to reconsider their application, but from your point of view would you be looking either in terms of a simple defendant or in terms of contributor to be including Carbone?

MR. SPITZ: Yes.

MR. SCOTT: That accords with our expectation of what you would say, thank you.

MR. OSGOOD: So simply to recapitulate, I think I said there were six reasons.

THE CHAIRMAN: Yes, I was going to back to what the six were.

MR. OSGOOD: One is that we are a one per cent. defendant.

THE CHAIRMAN: One per cent. Two was joint liability.

MR. OSGOOD: Yes.

THE CHAIRMAN: Three was joint issues of causation and quantum.

MR. OSGOOD: Yes.

THE CHAIRMAN: Four, was the Carbone defendant.

MR. OSGOOD: Yes. Five, really was the claimants had conceded the need for other parties to be in the case from paras.24 and 25 of their earlier submission; and six is the leniency applicant issue; it is a policy issue that I submit should be taken into account so that one does not put a leniency applicant that is encouraged to go to the European Commission in a prejudicial position in a private damages action. Those are my six reasons why it should be all or none.

THE CHAIRMAN: You say they are the six reasons for being all or none. The question is whether we give permission in relation to you and what you are saying is, no, we should not give permission in relation to you unless we give permission in relation to everybody else which is not part of the hearing today.

MR. OSGOOD: That is exactly our position.

THE CHAIRMAN: So what you say is only give permission if permission is given in respect of other defendants.

MR. OSGOOD: Yes. Of course I say that before you ever get to the permission there is some threshold issues.

THE CHAIRMAN: We understand that. That is all taken. We understand that. You can go and get permission if they are out of time if the Tolling Agreement is effective.

MR. OSGOOD: May I also make one comment about chronology because that is a subject that came up earlier. I noticed that there is something else missing from the claimants' chronology that I would like to note. January 11th 2007, Mr. Murphy's draft settlement agreement to Morgan Crucible ----

THE CHAIRMAN: 2007 or 2006?

MR. OSGOOD: I am sorry, 2006, in which Mr. Murphy suggested a carve out from the release that said, "This release will not affect my ability to bring European claims." We say that that is a very relevant fact that the Tribunal can take into consideration in interpreting the release.

THE CHAIRMAN: That goes to the settlement appeal which we are not dealing with.

MR. OSGOOD: It does, but the Panel noted some gaps in the chronology.

THE CHAIRMAN: No, no, but it goes to the settlement agreement problem; it does not go to what we are discussing at the moment.

MR. OSGOOD: It does indeed. I just wanted to point out that is a missing item of information.

THE CHAIRMAN: That is one of the reasons why it does not seem to us at the moment that this is a case which ought to be struck out on the pleading because there is all this other evidence that we have to decide whether it goes in or out and that is not something that one does on a strike out of a pleading under the Rule.

MR. OSGOOD: Yes, except, madam Chairman, I would simply add, if I may, it is a question of law, purely a question of law, whether Rule 31 is jurisdictional.

THE CHAIRMAN: No, that is a different point. The point I am addressing is whether we ought to be addressing the second agreement as a strike out point or whether it ought to be dealt with on a proper hearing where all the evidence is before us.

MR. OSGOOD: I understand.

THE CHAIRMAN: What you are addressing is that part of the evidence; whether that evidence should or should not be before us is a side issue, rather an important issue but a side issue because they are saying that nothing after 2005 can go in. So that shows that that is something which needs to be decided in relation to that which is more than just to be decided on the strike out.

MR. SCOTT: While you are on your feet, Mr. Osgood, imagine for a moment that we reached the point of deciding that time has not run and the point at which we thought it appropriate to give permission for the claim to proceed in some way, what would you then regard as a sensible way to proceed given the six items that you have mentioned and your concern in particular about having others here in relation to causation and to quantum? What would you then be suggesting as a way of managing the case?

MR. OSGOOD: Sorry? If time had not run and all parties were before the Tribunal?

MR. SCOTT: We have not reached that stage because we cannot give permission in relation to any other party without hearing them. So we have only heard from you two so far. But imagine we were minded to give permission in relation to you bearing in mind your arguments about other parties needing to be present before we proceed in a substantive way, what steps would you be suggesting should be taken in the case management to move forward at that point?

MR. OSGOOD: I hesitate to be definitive. So long as documents had been preserved and indeed produced, I think that may be the limit of the preliminary proceedings.

THE CHAIRMAN: What about the settlement issue because if that is decided then that will be the end of it if we decided in your favour.

MR. OSGOOD: Madam Chairman, I do not believe that we need a mini trial on the settlement issue if there is a more clear cut issue of law that can be decided first and of course, I refer to the issue of the interpretation of Rule 31.

THE CHAIRMAN: Of course, that is right. Assuming that you lose on Rule 31 and the situation is that the Tribunal decides that the proceedings were premature, in that event the question arises, which is what we are discussing this morning, as to whether or not we would grant permission to proceed. Now you are saying that in order for this case to be properly heard you need all the parties there and I can see your argument as to that. I think the claimants also say that for efficiency all the parties have to be there and if all the parties were not there, then they would have to consider whether they go against you only. But for the time being, they would want to say that all the parties should be there.

Now, if we were persuaded by what the claimants are saying, what they are saying is, well, they need protection of the documents and they would like a defence and at that point there would probably be a stay; they would be applying to stay until the CFI proceedings had resolved themselves. What you were asked is what you think in those circumstances our order ought to be and you said the documents need to be preserved and produced. I think that there is probably very little difference between both of you on that.

The next question is would you say that we ought to have a mini trial in relation to the settlement issue because if the settlement issue was decided then that would be the end of it for you if you won and you would know where you stood if you lost.

MR. OSGOOD: Madam Chairman, the settlement issue implicates many, many parties. It implicates class members in the United States of which there were 400; it implicates Schunk; it implicates Carbone; it implicates SGL; and the release language in the MDL settlement, the Multi District Litigation settlement, was the same for each of the parties. There were variations among the parties later on, but whatever decision ----

THE CHAIRMAN: Yes, but the question is what your agreement means, not what any other agreement means.

MR. OSGOOD: But our agreement was the same release language as every other party negotiated and had in their settlement agreements. There were changes defendant by defendant. We never changed, but I am suggesting to you that the question of the interpretation of the release is not simply a Morgan question, it is a much broader question and were I representing another party I would ----

THE CHAIRMAN: Are you saying that the other defendants are going to take the same point of view and therefore it all ought to be decided in one go?

MR. OSGOOD: I do not know what the other defendants' position will be. All I know is that I think they have an interest in the issue and would want to be heard while evidence was being presented and minds were being made up.

THE CHAIRMAN: Is that not a matter for the claimants, the claimants can choose who to go against? If they just started an action against you and you raised the settlement issue, it is decided between you and the claimants and then it is nothing to do with any of the other parties, you do not bring in anybody else ----

MR. OSGOOD: To me the question is whether ----

THE CHAIRMAN: ---- unless you decide that they are a necessary and proper party

MR. OSGOOD: The question is in this hypothetical situation: do we go beyond production of documents into the issues.

THE CHAIRMAN: You say that.

MR. OSGOOD: I am saying that the settlement agreement is also a common issue that has implications for other parties and it is inefficient to treat that issue in isolation with a one per cent. defendant. It would be my submission that that issue should be adjourned until either all the parties are before the court or ----

THE CHAIRMAN: You do not need to decide it as a preliminary issue, you think it should just be an issue in the trial.

MR. OSGOOD: Sorry?

THE CHAIRMAN: You do not think it should be decided as a preliminary issue, you think – I do not want to put words I your mouth – that it should be an issue in the trial?

MR. OSGOOD: It may need to be, in fact I think it probably is a preliminary issue but while all parties are before the Tribunal because it has meaning across the board.

MR. SCOTT: One of the things that is not entirely clear to us is that the settlement agreement have been subject to the jurisdiction of the District Court and (I have not got the words in front of me at the moment) as we understand it, the District Court approves and oversees the implementation of such agreements. What is not entirely clear to us is whether as between the parties, or as between the parties and the District Court, the District Court sees itself as seised of interpreting what those agreements mean and whether, you, the party should be looking to the District Court to interpret what they mean or whether the parties should be looking to us to interpret what they mean. What we are conscious of is that the district judge appears to have taken a view of what the release meant; it maybe at odds with what

one or other party may believe it means. We are also conscious of arguments that some think it is utterly clear and others, or maybe sometimes the same people, think the District Court has not been utterly clear. You will understand the difficulty in which we find ourselves looking at an arrangement for which another court feels responsible.

MR. OSGOOD: Yes, sir. Two points. One, the issue of the release and its interpretation was never put before the District Court ever; so there is no estoppel. I say that without any hesitation. Two, in its final order approving the settlement, the District Court retained jurisdiction over the parties and this matter.

THE CHAIRMAN: Not exclusive jurisdiction. That I think is clear.

MR. OSGOOD: It is not exclusive jurisdiction, agreed, but did retain jurisdiction so it is theoretically possible to go back to the District Court and put to the District Court this issue.

THE CHAIRMAN: But it is equally possible to come here and put the issue here. That is what you are doing.

MR. OSGOOD: Is it possible to ask the District Court to come here?

THE CHAIRMAN: No, no, you can put the point here. It is either we decide it or the District Court decides it. There is nothing exclusive about it.

MR. OSGOOD: No, that is correct, quite right. We say it should be decided on the plain language of the instrument.

THE CHAIRMAN: Yes.

MR. OSGOOD: Yes.

THE CHAIRMAN: I think for my part, anyway, the provision in the agreement that the District Court retain jurisdiction is interesting but not necessarily relevant. That does not go on the transcript, your hand signal. So I think you need to say something.

MR. OSGOOD: (After a pause) I agree that it is not exclusive jurisdiction vested in the District Court.

THE CHAIRMAN: Before you sit down, I am concerned about this undertaking because if the undertaking that Sullivan & Cromwell are giving is an undertaking in the form set out in our order, then I think that needs to be dealt with properly because it needs to be a proper solicitors' undertaking, or counsel's undertaking. If you are giving an undertaking I think that needs to be sorted out; I do not know how you are doing that because that is a significant feature that we need to consider in relation to disclosure, and whether there is any pressure and if it is backed by a proper solicitors' undertaking which therefore is backed by a risk of contempt of court, that is one thing.

MR. OSGOOD: May I take the Tribunal's comments under advisement and confer with Mr. Rayment.

THE CHAIRMAN: Absolutely.

MR. OSGOOD: Not on the spot.

THE CHAIRMAN: No.

MR. OSGOOD: Thank you.

THE CHAIRMAN: And we may need submissions from both sides when you have worked out how you do that. It says "Any internal documents which may be relevant to reading will be preserved", and you say that you have given the document which you sent to your client saying this is how you deal with it, which is I assume the standard document that you send out to clients, it is not special to this case. If you are giving a solicitors' undertaking it probably goes a bit further because one needs to make sure that they have preserved the documents.

MR. OSGOOD: I understand.

THE CHAIRMAN: So I think if you are saying "Oh well there is no risk because we have made sure" and if that is set out properly in a solicitors' undertaking it is a feature that we need to take into account.

MR. OSGOOD: Yes, I will confer with Mr. Rayment.

THE CHAIRMAN: Can I suggest, it might be that if I gave you five or ten minutes now and you conferred that would also give you an opportunity to consider the submissions that have been made and your response, and also possibly there could be some communication once you had conferred as to the result of those discussions to see whether it is satisfactory, so they know what is being said so that they can respond.

The other question is whether there are any other submissions other than those in writing and/or made last time in relation to the other matters in relation to rule 31, etc. that you would want to make. We have said that we think that everything that could be said has been said but of course we are not in your shoes.

MR. OSGOOD: There was a fairly thorough treatment ----

THE CHAIRMAN: That is what we thought.

MR. OSGOOD: -- of that subject in all of our skeletons.

THE CHAIRMAN: And in the previous hearing and so really we decided on the basis of all that material. You are happy with that.

MR. OSGOOD: Yes, unless the claimants put in something else and we would not want to ----

THE CHAIRMAN: Oh absolutely, but as it stands today you are happy with that?

MR. OSGOOD: We rest on our submissions.

THE CHAIRMAN: And you are happy with that

MR. SPITZ: Yes, we are.

THE CHAIRMAN: Shall we rise until quarter past and that gives you an opportunity to have your discussion there for you to think about and respond, and possibly some communication between you about the undertaking to see where we get to on that.

MR. OSGOOD: Thank you.

(Short break)

MR. OSGOOD: Yes, thank you, it has been helpful. We have conferred together and the proposal is that we submit to the other side some draft language, hopefully in the next couple of days, that we confer to see whether that is agreeable to the claimants, and that we aim to submit an agreed version to the Tribunal by a week from today – next Wednesday

MR. SPITZ: Madam Chairman, unless there are questions I do not propose to make any further submissions that have been raised.

MR. SCOTT: Simply the question that I put to Mr. Osgood on the assumption that we were minded to give permission in relation to your simple application in relation to them, we are conscious that you started with some other defendants but left out Carbone, what would you be looking for us to do? As we understand it, Mr. Osgood was conceding the provision of the documentation that they have already assembled, but what further steps would you be expecting at that stage

MR. SPITZ: Sir, is that in relation to Carbone?

MR. SCOTT: If we reached the stage where there was permission in relation to Morgan, where Morgan provided you with the documentation they have already assembled and are preserving, what further steps would you expect us to take in relation to case management at that point, in relation to any prospective defendant named in the proceedings to date, or Carbone as a party not yet named at that stage, short of the CFI hearing reaching any decision

MR. SPITZ: In relation to Morgan our position is that we say that it is appropriate for them to submit a defence. In relation to Carbone we do intend to seek the Tribunal's permission to make them a defendant too. That process has been initiated to the extent that a letter before action has been sent to Carbone, and what will follow that will be an application for them to be joined as a defendant .

MR. SCOTT: In other words, what you would expect as a next step? Again, it would be convenient to hear all the prospective defendants rather than two goes at that, the ones

already named and Carbone, so you would expect to make an application in relation to Carbone, and for us then to hear submissions from all parties including prospective defendants in relation to permission in relation to them

MR. SPITZ: That is correct.

MR. SCOTT: Thank you.

THE CHAIRMAN: Can I follow on from that? The question we have today is if we decide that rule 31 means that the claim is premature, whether we give permission for it to continue – that is what we are concentrating on.

MR. SPITZ: Yes, indeed.

THE CHAIRMAN: That is what we are concentrating on the assumption that that is the way we go – we do not know which way we are going to go, but just on the assumption that we deal with it. One of the reasons that you say that permission should be given is because of disclosure. Now, until the question of the undertaking is sorted out we do not know where we are at that point, because it must affect the question of whether we need to give permission in order that the action starts in order to protect your position on disclosure

MR. SPITZ: Yes, the disclosure issue, part of it was in relation to adequate protection and preservation of documents, there were other arguments ----

THE CHAIRMAN: The other question is whether you should have disclosure of those documents, but there was a suggestion that you might get disclosure anyway

MR. SPITZ: Yes, there was that suggestion, I am not certain ----

THE CHAIRMAN: I do not know where that is going to get, but there is the question of whether you should at this stage be able to assess the merits of the claim from the perspective of having had disclosure

MR. SPITZ: Yes.

THE CHAIRMAN: Now assuming that you get disclosure outside starting, or you get protect ion in relation to the documents and let us assume that you get disclosure outside – in other words, you get pre-action disclosure, the equivalent of pre-action disclosure – and there is some justification for that in the ways that the protocols have been written in other areas because you have to produce all the documents in your answer to the pre-action letter, so there is some justification for having them producing the documents before we start the application

MR. SPITZ: In fact the documents were requested in pre-action correspondence on that basis.

THE CHAIRMAN: Right. Well I think Mr. Osgood said he was not sure as they had not been precisely set out and one may need to look at that. Assuming that you get all that, then the

question is whether we still need to give permission for this case to proceed, or whether you have everything you need to protect the position. Now, one of the things you said was "there are the witnesses", but of course you are not going to go as far as that anyway – or you want the opportunity to go as far as that

MR. SPITZ: To obtain witness statements.

THE CHAIRMAN: To obtain witness statements.

MR. SPITZ: That of course would serve the protective function because the evidence would then be in a written form and there would be some safety against the passage of further time.

THE CHAIRMAN: So you would want us to order witness statements

MR. SPITZ: That is correct.

THE CHAIRMAN: What else would you want?

MR. SPITZ: It is the defence disclosure which we have already discussed and witness statements, and that would probably put the matter in the position where at that point it makes sense to put it in.

THE CHAIRMAN: All right, what about the settlement agreement and whether that ought to be dealt with as a preliminary issue or not?

MR. SPITZ: We are quite content to deal with it as a preliminary issue if that is a matter that our friends raise in a defence and take that point, we will then reply to it, we will make the rectification case in our reply and we are quite content to deal with that as a preliminary issue.

THE CHAIRMAN: Content is one thing, do you want to deal with it as a preliminary issue?

MR. SPITZ: Well on the assumption that Morgan is persisting with that argument, and with that case then yes, we would like to deal with it as a preliminary issue.

THE CHAIRMAN: And what do you say about the submissions that have been made this morning that you cannot deal with it as a preliminary issue without the other parties here?

MR. SPITZ: It is a curious submission, madam Chair, because it was brought as a rule 40 strike out application without anyone else. Those parties have had the opportunity to look at the submissions and none of them thought it advisable to take the point so they are fully alive to it. The door would not be shut on them, but it seems to us that there is no force in that argument.

THE CHAIRMAN: Right, the question now is how do we proceed at this point, because we have to reserve in order to see what happens in relation to, if I call it the undertaking on disclosure, and how far that goes and whether the documents are going to be produced. You would say that you need to go for witness statements anyway, so we cannot decide it

today. Either you will accept what the other side are saying or you will say it is not sufficient. That will need some submissions – are we happy to do that in writing?

MR. SPITZ: From our point of view we are quite happy to do that in writing, yes.

THE CHAIRMAN: The submission of Morgan Crucible is that we should not give permission without everybody else there and decide it in the round. You say, "No, no, no, we can choose which defendant we go against and we should start and see whether Morgan Crucible come in", I think that is your position.

MR. SPITZ: Quite so.

THE CHAIRMAN: We are going to have to decide that. If we decide that it should be all in the round then we will have to have another hearing, is that the way forward?

MR. OSGOOD: Yes, madam Chairman, I expect at that point there are other parties that would wish to be heard?

THE CHAIRMAN: Yes, so either we do not accept your submission and we can decide permission between the parties that are here, or we come to a conclusion that it is an all or nothing question and then we would have to have another hearing where we get everybody else in.

MR. OSGOOD: Indeed.

MR. SPITZ: Yes, madam Chairman.

THE CHAIRMAN: Or give them the opportunity to come anyway.

MR. SPITZ: I think simply in relation to that I believe the Tribunal already has the point that none of the six reasons that were advanced by my learned friend went to showing prejudice in relation to the steps that are under consideration, they were all addressed to moving to final determination, and of course it has never been our position that that would be appropriate.

THE CHAIRMAN: Yes.

MR. SCOTT: Just one small point in relation to witness statements. My recollection is that some of those who may have pertinent evidence to give are the subject of criminal proceedings in the United States; I am just thinking of the implications of that?

THE CHAIRMAN: The position, as I understand it here, is that civil procedures it just cannot be used in the criminal proceedings but that does not prevent the civil proceedings – that will have to be sorted out, there is quite a lot of case law on that.

MR. OSGOOD: If I may make one comment. According to the comments that I have heard in the dialogue about how to proceed we were talking about possibly witness statements,

putting in a defence at the same time there is a preliminary issue which my learned friend says should be treated at the outset and that is the settlement agreement.

THE CHAIRMAN: And which you said should not be treated at the outset.

MR. OSGOOD: It should be treated with everyone in the room at the outset if it is to be treated at all. But my point is this, in terms of going forward, why should Morgan be put to the burden of putting in a defence and talking about witness statements and producing documents when there is this preliminary issue that could be dispositive of the entire case.

THE CHAIRMAN: That is what I was saying before.

MR. OSGOOD: I think we have gone down this path of talking about what else? What else? What else could be done?

THE CHAIRMAN: The way that one could deal with that is that if it was decided that there should be a preliminary issue on the settlement agreement then one could deal with the settlement agreement first and have effectively a defence in relation to that and then move on once that is decided if it is not decided in your favour.

MR. SCOTT: Yes, and I think, Mr. Osgood, the reason we have done the exploration that we have done is that in order to assess relative prejudice it is necessary for us to think through what is likely to happen, and therefore the expectations of the parties before us at this stage as to what is likely to happen, because it is not unless one does that that one can assess the relative prejudice that your clients, or the claimants may suffer.

THE CHAIRMAN: In relation to the settlement agreement if that is something which is determinative at the outset then the question is whether the matter should hang over everybody's heads for four years, five years, two years or however long it takes, when that could be decided and therefore whether we want to grant permission in order that that can be decided between you, and then we have the question of can it be decided between you or should it be decided between all? We will have to think about that.

MR. OSGOOD: Yes, and part of the prejudice that we would submit my client may suffer unless this is done in an efficient way is the prejudice of expending unnecessary legal cost for treating issues that might not have been treated such as putting in a defence.

THE CHAIRMAN: Yes, but if what happened was – I am not saying it will – but if what happened was that one gave permission, one then directed that the settlement issue would be decided as a preliminary issue, and that for that purpose a defence should be put in so it went to that preliminary issue, and we decided that preliminary issue up front as a foundation for then; if it goes against the case can go on to the next stage, which is the defence of the full case – assuming that disclosure has been sorted out as a pre-action

disclosure, otherwise full disclosure. If it goes in your favour then the case stops at that point subject to an appeal.

MR. OSGOOD: That is a well defined and more efficient process as you outline it.

THE CHAIRMAN: That is where I was trying to get to before. (After a pause) Is that all right? Anything else for today?

MR. SPITZ: From the claimant's point of view only in relation to the question of a limited defence we would simply make the argument ----

THE CHAIRMAN: That you would not be happy with that, but I think we would have to come back and look at the directions. The question of the settlement agreement is a factor which we should take into account in deciding whether or not we give permission.

MR. SPITZ: Yes.

THE CHAIRMAN: And the fact that that could be dealt with as a preliminary issue, then what directions we give after that we can come back and discuss.

MR. SPITZ: Yes, thank you.

THE CHAIRMAN: Is that all right?

MR. SPITZ: Yes, it is.

THE CHAIRMAN: So what we are going to do now is to decide the rule 31 point, decide the tolling agreement point, decide the rule 19 point and if we decide that the action was premature and the tolling agreement does not apply or whatever, then we will decide whether we give permission and if we come to the conclusion that we cannot do that without all the parties here then we will have to have another hearing. Is that where we have got to?

MR. SPITZ: Yes, in relation to the rule 40 application as far as it concerns the settlement agreement, if the Tribunal's view is that the claim is not bound to fail – it is not certain to fail – then that application would fall to be dismissed.

THE CHAIRMAN: Yes, now where have we got on that point? Are you proceeding with that application? Thank you for reminding me.

MR. OSGOOD: Yes, we are.

THE CHAIRMAN: We ought also to deal with why we think it is bound to fail.

MR. OSGOOD: Under rule 40?

THE CHAIRMAN: Yes.

MR. SCOTT: Just one other small point, Mr. Spitz, timing in relation to Carbone?

MR. SPITZ: (After a pause) I am told it is likely that there will be a further round of correspondence between the parties so one would imagine three weeks for that. Following

that we would need to make application to the Tribunal to bring them into the application for permission in relation to the other proposed offenders. My colleague says that unless the Tribunal is in a position to permit us to join them to that application now, although perhaps that is a matter that the Tribunal has not considered ----

THE CHAIRMAN: We have not thought about it. Mr. Osgood, I ask you before – and Mr. Spitz – whether you were happy that we dealt with the rule 31 point and the tolling agreement on the oral submissions of last time and the written submissions. On the rule 40 point, whether the settlement agreement point is bound to fail or not, are you happy that you have provided us with all your submissions?

MR. OSGOOD: (After a pause) There is an alternative, of course, to deciding the rule 40 motion, and that is to decide that the Tribunal is not in a position not decide it on the basis of the disputed record, i.e. no decision need be taken at this time on that motion for summary Judgment, if you will, under rule 40.

THE CHAIRMAN: Why not?

MR. OSGOOD: Because, as members of the Panel have said earlier today, there are different views as to the relevant facts.

THE CHAIRMAN: Well on that basis we have to dismiss the application.

MR. OSGOOD: This will be a continuing issue as we have recognised.

THE CHAIRMAN: But you have to make an application. If the proceedings start, or have commenced or whatever – if there are proceedings on foot – then you can make an application for the preliminary issue to be decided on the settlement agreement. The application you have got is the rule 40, that we have to strike this out.

MR. OSGOOD: I submit that madam Chairman was correct when she said, "You will decide Rule 31, the Tolling Agreement and Rule 19 and then face the issue of permission." I am simply saying I am not from my perspective persuaded, but it is up to you, of course, that you need to make a decision on Rule 40 in our application because it has been recognised that it is something that is unsettled and continuing.

THE CHAIRMAN: No, I think you are confusing American procedure with English procedure because you have an application under Rule 40 and you are saying that we should reject the claim for damages because there are no reasonable grounds for making the claim. We are saying, and it was accepted last time, that means it has to effectively be bound to fail. On the material we have seen and heard and because of the evidential difficulties, we do not think that it is bound to fail and, therefore, it is arguable. Therefore under Rule 40 we cannot reject the claim.

The next issue is if the claim continues you can make an application that this is a preliminary issue, that it is determinative proceedings, if you win, and therefore we ought to hear it as an issue to determine the point properly as if it was determined at the final hearing. Now, that is a different application; it is not an application under Rule 40 because under Rule 40 you would still not succeed if this Panel continues in its view because it is not a case that it is bound to fail. It is a different application.

Now, I think there is a difference between the way the American procedure is and the way the English procedure is, so we cannot just continue it. You have got an application.

MR. OSGOOD: Yes.

THE CHAIRMAN: Unless you are asking us to adjourn it on the basis that you were going to make further submissions on this application, but the question is whether it is this application or some other application.

MR. OSGOOD: Depending upon how the Tribunal rules concerning the way forward, we would like to be in a position to persuade you on further proceedings that it is bound to fail.

THE CHAIRMAN: I am very happy for you to try and persuade us, but on the basis of Rule 40 you have really got to do it on their claim, on what they have written in their claim is hopeless. You are putting in other evidence; you are putting in all sorts of things. That is not a Rule 40 question, that is an issue in the proceedings question.

MR. OSGOOD: Could we have one week to put in a very short submission on this point, that is whether the decision might be held in abeyance?

THE CHAIRMAN: You are asking us to adjourn your application for what reason?

MR. OSGOOD: Yes, I would appreciate just an opportunity of one week to submit in writing our thoughts on this issue.

THE CHAIRMAN: That is going to be complicated because if you do that then Mr. Spitz has to answer. If we rise now and you come back at 2 o'clock or five past two you can confirm whether you do want to continue this Rule 40 application. If the proceedings are on foot, there is nothing to stop you saying you want it as a preliminary issue to be heard properly.

MR. OSGOOD: We understand that, yes.

THE CHAIRMAN: And I suppose you say the proceedings are not on foot and therefore we cannot decide Rule 40 at the moment. If we come to the conclusion and we give permission, then we could decide Rule 40.

MR. OSGOOD: Could I have just one moment now?

THE CHAIRMAN: Yes.

MR. OSGOOD: (After a pause): We will be guided by the Tribunal.

THE CHAIRMAN: You cannot be guided by the Tribunal because it is a matter for you and not a matter for us.

MR. OSGOOD: In terms of putting in further papers, we have conferred and think our papers are quite complete and therefore we need not put in anything further. No more trees will be sacrificed.

THE CHAIRMAN: So you want us to make a decision. You want us to give our reasons. If we continue to be of the view that this is not what I call "strike-outable", that there are arguments on both sides, then you want us to give our reasons for that?

MR. OSGOOD: "Want" is maybe not a word I would have used, but it is up to the Tribunal, of course.

THE CHAIRMAN: So we have to decide it. I am happy to decide it and in deciding it we will set out our reasons. Anything else? Thank you both for your submissions today and for the written submissions and the submissions last time. We will produce a decision in due course - hopefully not too long, but I cannot guarantee that. We will have to wait a week anyway, so we cannot do anything until that is resolved. If the situation is not resolved satisfactorily, then it may be that we will need another hearing because that will have to be sorted out.

MR. SPITZ: I think if there is no agreement, the first step would be to put in written submissions and ask the Tribunal to decide it on the basis of the written submissions.

THE CHAIRMAN: Would you like us to rule on everything but permission so that you knew where we stood?

MR. SPITZ: Yes, that would be helpful.

THE CHAIRMAN: Because we might be able to do that much more quickly.

MR. SPITZ: That would be helpful.

THE CHAIRMAN: If we gave the ruling on everything but permission. What we will do is we will not deal with Rule 40. We will deal with Rule 31, the Tolling Agreement and Rule 19. That gets us to the question of whether we give permission. We will not deal with the permission and then you will have some idea where we are going.

MR. SPITZ: I think that it is clear, but for my sake, rather than anyone else's, the intention on the Rule 40 application is to make a decision in light of whether or not on the materials before the Tribunal this hearing and the last the threshold test has been satisfied or not.

THE CHAIRMAN: Yes.

MR. SPITZ: If the Tribunal is not convinced that the claim is bound to fail, then it will dismiss the Rule 40 application.

THE CHAIRMAN: Absolutely. Yes. And you are happy to do it on all the submissions that have been provided to us so far?

MR. SPITZ: Yes, indeed. I am not sure there is anything we can add.

THE CHAIRMAN: Was your light on when you said that?

MR. SPITZ: I said I am not sure there is anything we can add.

THE CHAIRMAN: Thank you. I am not sure we can add anything now either. We will see where we go. We will do a decision just on those three points. Thank you very much.

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