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Case No. : 1284/5/7/18 (T) ; 1290/5/7/18 (T) ; 1291/5/7/18 (T) ; 1292/5/7/18 (T) ; 1293/5/7/18 (T) ; 1294/5/7/18 (T) ; 1295/5/7/18 (T)

IN THE COMPETITION
APPEAL TRIBUNAL

Rolls Building,
7 Rolls Building
Fetter Lane
London EC4Y 1NL

5 December 2019

Before:

The Honourable Mr Justice Roth, The Honourable Mr Justice Fancourt, Hodge Malek QC

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Trucks Proceedings (Preliminary Issue Hearing – December 2019)

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PIH – Day 2

Thursday, 5 December 2019

(10.00 am)

(Proceedings delayed)

(10.09 am)

Submissions by MR BEARD

PRESIDENT: Yes, Mr Beard?

MR BEARD: Mr Chairman, members of the Tribunal, good

morning. I will try to speed the plough and I will attempt to conclude my submissions by a quarter to 11.

I want to conclude on the points on EU law and take you briefly to three further cases, and make one or two submissions about other cases that have been raised.

Then I will come back to one or two of the hypothetical points that were put to you on Tuesday and then I will finish off dealing with the domestic cases that have been raised and one or two practical issues.

If I may, I will turn first to the case of Air Canada, authorities bundle 4, tab 63. I want to pick it up at paragraph 36 on page 13.

Now, just to give context, this is concerned with an appeal against the air cargo cartel decision. As the Tribunal may well know, what actually happened in this case is there were four findings of infringement in the operative part but in the recitals there had been a discussion of essentially a single infringement by

1 airlines in relation to air cargo and the court said
2 the reasoning didn't match the operative part and in
3 those circumstances quashed the operative part and
4 remitted the matter to the Commission for further
5 consideration. The Commission has since come out with
6 a further decision in relation to these matters.

7 What I want to do is look at 36 through to 41, in
8 particular, 36:

9 "It should be borne in mind that it is in
10 the operative part of a decision that the Commission
11 must indicate the nature and extent of the infringements
12 which it penalises. In principle, as regards the scope
13 and nature of the infringements penalised, it is
14 the operative part, and not the statement of reasons,
15 which is important. Only where there is a lack of
16 clarity in the terms used in the operative part should
17 reference be made, for the purposes of interpretation,
18 to the statement of reasons contained in a decision."

19 And then it goes on.

20 In particular, it cites Suiker Unie but you will see
21 Adriatica at the bottom of that paragraph, which is
22 the authority I took you to on Tuesday.

23 37, the court here is noting the importance of the
24 fact that there exists the possibility of damages claims
25 in relation to competition matters. It is emphasising

1 the fact that breaches of European competition law can
2 give rise to damages claims. So it has that very
3 clearly in mind. If we go on to 38:

4 "In accordance with article 16(1) of Regulation
5 1/2003 [which of course we saw on Tuesday], when
6 national courts rule on agreements, decisions or
7 practices under article 101 TFEU which are already the
8 subject of a Commission decision, they cannot take
9 decisions running counter to that decision."

10 That is just the first part of article 16.

11 "39. In that respect, it must be considered,
12 contrary to what the Commission asserted in essence at
13 the hearing, that a national court would take a decision
14 contrary to that adopted by the Commission not only if
15 it gave a different legal classification to the
16 anti-competitive conduct examined, but also if its
17 decision differed from that of the Commission as regards
18 the temporal or geographic scope of the conduct examined
19 or as regards the liability or non-liability of persons
20 investigated in relation to the conduct at issue and
21 whose liability was examined in the Commission's
22 decision."

23 So here the court is emphasising what the critical
24 criteria are in terms of the definition of the scope and
25 nature of infringement that a national court will need

1 to have in mind when you are thinking about the
2 application of article 16.

3 "40. The national courts are therefore bound by
4 the decision adopted by the Commission, provided that it
5 has not been annulled or invalidated, and consequently
6 the meaning of the operative part of that decision must
7 be unambiguous."

8 So the emphasis very, very clearly here is when you
9 are thinking about this issue to do with whether or not
10 you are making consistent decisions, it is the operative
11 part that is critical. A conclusion that is entirely in
12 line with that previous case law, in particular
13 *Adriatica*. At 41 that is emphasised:

14 "In particular, clear wording of the operative part
15 of a decision finding an infringement of the competition
16 rules must allow the national courts to understand
17 the scope of that infringement and to identify
18 the persons liable, in order to be able to draw
19 the necessary inferences as regards the claims for
20 damages brought by persons harmed by that infringement."

21 So here we have, post article 16, an authority of
22 the European Court saying, look, when you are applying
23 article 16, it is the operative part that is critical
24 and they are chastising the Commission for not being
25 clear enough in relation to the operative part.

1 It is not --

2 PRESIDENT: Does this judgment, as sometimes the court does
3 in Luxembourg, set out and summarise the Commission's
4 submissions? It does not seem -- you often have
5 a section on the arguments of the parties but I cannot
6 see that.

7 MR BEARD: No. It does not really and I think part of that
8 may be actually the history of this particular ground
9 that was found by the court. My understanding is that
10 actually, this was very much the court of its own motion
11 in part deciding that there was a concern as to the
12 mismatch between the underlying reasoning and the
13 operative part. And therefore, although there had been
14 a good deal of argument -- I understand at the oral
15 hearing -- it was not necessarily something that had
16 been part of the focus of the written proceedings.

17 Often that part, sir, that you are talking about, of
18 a rehearsal of the arguments, is drawn from the report
19 for the hearing by the European Court which draws on the
20 written submissions.

21 PRESIDENT: I see, because this does seem to be referring to
22 the submissions to the Commission at the oral hearing.

23 MR BEARD: That is my understanding of the position.

24 PRESIDENT: That is what they seem to be saying at the
25 beginning of paragraph 39.

1 MR BEARD: I was not for a moment demurring in relation to
2 what is referred to at 39. I was trying to give the
3 context as to why you don't have the normal exposition
4 here.

5 PRESIDENT: Thank you.

6 MR BEARD: That is clearly important. The next case I want
7 to take you to is the flip side of the focus on
8 the operative part, which is a case which explicitly
9 states that the recitals (the preamble) do not have
10 binding effect. It is in the context of a directive but
11 of course, as I illustrated at the outset of my
12 submissions, for these purposes the nature of the
13 preambular provisions in a Commission act or Commission
14 legal act should be seen broadly in the same way as
15 between regulations, directives and indeed decisions.

16 I would like to go to volume 7 of the authorities,
17 tab 88, a case called Nilsson.

18 This case concerned particular directives relating
19 to artificial insemination in cattle. One of the issues
20 that was raised, and I am going to pick it up on page 17
21 under question 3, was whether or not the recitals to
22 the directive specified particular treatment of
23 the import and export of insemination materials such
24 that it was actually derogating from the operative part
25 of the directive.

1 That can be seen summarised in the third question in
2 52. In 53 there is a rehearsal of the recital that was
3 relied on in this regard --

4 PRESIDENT: 52, you say?

5 MR BEARD: Yes, I am sorry, paragraph 52. I am just dealing
6 with question 3 so I'm just setting it in context, sir.

7 PRESIDENT: Yes. (Pause).

8 MR BEARD: The simple point here is that what was being
9 relied on was can we rely on what is said in a recital
10 which seems to us to be contrary to what is actually
11 said in the operative terms of the directive. The
12 answer to that is given in paragraph 54 in the clearest
13 possible terms:

14 "On this point, it must be stated that the preamble
15 to a Community act has no binding legal force ..."

16 Therefore, it goes on:

17 "... and cannot be relied upon as a ground for
18 derogating from the actual provisions of the act in
19 question."

20 It goes on at 55 and says in fact, when we read the
21 recital and the terms of the directive we don't see
22 a conflict anyway. But what I rely on is the first part
23 of 54.

24 PRESIDENT: The actual issue was rather different in that
25 case.

1 MR BEARD: I absolutely accept that. It is different, that
2 is entirely clear. But what you have there is a very
3 clear statement of the court, of the upper court, saying
4 those preambular materials do not have legally binding
5 force.

6 Now, of course it is in a different context. It is
7 in a different type of legal act. But for the reasons
8 I articulated on Tuesday, that is not material for the
9 purposes of this preliminary issue.

10 That is all I wanted to go to in relation to
11 Nilsson. It is important that there is no distinction
12 being made there about any sorts of essential reasons or
13 obiter reasons or anything of that sort. It is a very
14 clear statement about binding force and of course it
15 really operates as the obverse of the proposition that
16 we are seeing in *Adriatica* and *Air Canada*, that it is
17 only the operative part that is binding.

18 Now, those cases, we say, set out the answer to
19 the question whether or not any of the recitals in
20 a Commission competition infringement provision are
21 legally binding. We say they are not. The claimants
22 obviously seek to say, well, there are various
23 situations where you can appeal against those recitals
24 so in some way one can say that they have legal effect,
25 they are legally binding.

1 With respect to the claimants, that is
2 a mischaracterisation of all of the appeals that they
3 refer to. All of those appeal cases that they have
4 referred to, whether orally or in skeleton arguments,
5 are not challenges to the recitals. They are challenges
6 to the operative part. In certain of the cases of
7 course what is said is the operative part lacks an
8 evidential basis or lacks a reasoned basis and therefore
9 there are references to the recitals as we see in ABB,
10 as we see in Servier, as we see in fact in many of those
11 cases. But it has to be a challenge to the operative
12 part because that is the legally binding part of the
13 legal act.

14 We have set out in our skeleton argument three
15 examples of this, at paragraph 10 -- I am now going to
16 refer the court to them briefly. The first is the Dutch
17 Banks case. Now, that is the case that Mr Brealey very
18 briefly took you to. I will take you to that one.
19 It is in authorities bundle 1 at tab 6. It is in
20 various places in the authorities bundle but that is
21 the one that you were taken to.

22 Mr Chairman, do you have the relevant authority?

23 PRESIDENT: Dutch Banks, authorities 1, tab 6.

24 MR BEARD: Yes, page 10. Mr Brealey read to you from the
25 bottom -- the second half of paragraph 31 and only that

1 part of this judgment. With respect, he missed
2 the critical passages in 30 and 31. 30:

3 "The court observes that the applicants do not
4 question the operative part of the decision whereby
5 the Commission, on the basis of the facts made known to
6 it, granted them negative clearance ..."

7 So they were granting clearance. They were saying
8 there were arrangements that restricted competition but
9 they were granting clearance. What was being said by
10 the appellants here was, yes, but the fact that you at
11 first say there is a problem with these agreements but
12 then clear them leaves us with a difficulty because
13 we say these agreements are not problematic at all.
14 They didn't need clearance and the court says, yes, but
15 you are not challenging the out-turn, the legally
16 binding part, the operative part. You see at 30,
17 further on, it says:

18 "However, the applicants request annulment of
19 the legal assessment expressed in paragraphs 56 and 57
20 of the decision."

21 So that is recitals 56 and 57 of the decision,
22 according to which the agreement restricts competition
23 within the Common Market to an appreciable extent.

24 And then at 30 -- sorry:

25 "Such a request raises the question of whether the

1 beneficiary of a negative clearance is entitled to
2 challenge the ground or grounds of the decision without
3 calling in question its operative part."

4 So it is squarely dealing with whether or not you
5 can bring the challenge to recitals and it [31] says:

6 "In this regard, it should be pointed out that, as
7 the Court of Justice has consistently held,
8 the proceedings provided for in [what was then] Article
9 173 of the Treaty can be instituted only against an act
10 adversely affecting a person's interests [so that is
11 a criterion], in other words against an act capable of
12 affecting a given legal position [so you have to have an
13 act adversely affecting you in order to be able to bring
14 that claim] ... whatever the grounds on which such an
15 act is based, only its operative part is capable of
16 producing legal effects and, as a consequence, of
17 adversely affecting such interests."

18 I can well understand why Mr Brealey didn't want to
19 read that sentence.

20 PRESIDENT: To be fair, he did ask us to read paragraphs 30
21 and 31 and I think we read them to ourselves. We were
22 directed to that and he paused while we read them.

23 HODGE MALEK QC: I certainly underlined that bit.

24 PRESIDENT: So did I.

25 MR BEARD: If the Tribunal has already been through it, I

1 criticise not Mr Brealey for the pause, I do criticise
2 him for the emphasis. Clearly that is a critical,
3 critical passage here.

4 Then, when we go on:

5 "As regards the assessments made by the Commission
6 in the recitals to the decision at issue, whilst it is
7 acknowledged that they do not correspond completely to
8 the applicants' opinion, they are not in themselves
9 capable of forming the subject of an application for
10 annulment. Their legality might be open to review by
11 the Community judicature only to the extent to which, as
12 grounds of an act adversely affecting a person's
13 interests, they constituted the necessary support for
14 its operative part. The Court of First Instance notes
15 that in this case not only does the act not adversely
16 affect the applicants' interests but also that the
17 contested recital does not constitute the necessary
18 support ..."

19 What is being said there is you can't challenge
20 those provisions. In this case, even in relation to
21 the operative part, you couldn't bring a challenge
22 because it did not adversely affect you and in fact
23 the recitals were not the underlying reasoning for it so
24 you couldn't bring the challenge on that basis.

25 PRESIDENT: I think it is common ground that you can't bring

1 an application for annulment just against recitals. You
2 have to bring it against the operative part but you can
3 do it on the basis that you are challenging the recitals
4 as the foundation for an aspect of the operative part --

5 MR BEARD: Well, there are various statements in skeletons
6 that seem to go further than that. If it is common
7 ground we are happy with that.

8 PRESIDENT: Is that right Mr Brealey?

9 MR BREALEY: Yes, that's correct. I said that was student
10 textbook law when I made my submissions on this case.

11 MR BEARD: We say that matters because we are saying if you
12 are asking what is legally binding under European law,
13 we know it is under European law, those recitals are not
14 legally binding.

15 The other examples we give in paragraph 10,
16 Coca Cola, that was a situation where you couldn't
17 challenge a finding of dominance in an abusive dominance
18 case. So even though Coca Cola or a Coca Cola entity
19 had been found to be dominant in that case, because
20 there wasn't an out-turn finding of abusive dominance,
21 it couldn't challenge the dominance finding even though
22 that was significant and that approach is also true in
23 relation to the case at 10(c) which is the Dutch Ports
24 case which Mr Brealey briefly took you to. That was
25 a state aid decision in which certain payments to port

1 authorities were said to be state aid but were
2 compatible and it was not permitted to challenge that
3 underlying finding in relation to state aid.

4 We say what is clear from all of these cases and
5 indeed the other ones that Mr Ward cited like ABB and
6 Lagardère and Servier that Ms Bacon is going to make
7 further reference to, and indeed others in the skeleton
8 arguments, all the court is saying, and it appears to be
9 common ground on the basis of what is now being said, is
10 that you can challenge only the operative part, that
11 legal act, that binding act and that is what is
12 articulated in the case law. The reasons themselves are
13 not binding but can be part of the challenge.

14 PRESIDENT: Sorry to interrupt you. I do not think it is
15 being said you can challenge only the operative part.
16 What is being said is you cannot challenge only
17 recitals. There is a difference. I think the
18 claimants' position is yes, you must challenge the
19 operative part, you can't simply challenge recitals, but
20 the challenge to the operative part can be based upon
21 a challenge to recitals that are the foundation or
22 the essential basis for the operative part. That is
23 I think how they put their case.

24 MR BEARD: Yes. Here there is an elision of language
25 because it is only the operative part that is binding.

1 Therefore the appellate challenge is only to
2 the operative part. The basis on which you bring that
3 challenge may be a lack of reasons, a lack of evidential
4 basis but it is still only a challenge to the operative
5 part.

6 When you bring that challenge forward to
7 the operative part, you do undoubtedly have criticisms
8 of the reasoning and recitals so if what is being said
9 is colloquially one can talk about that as a challenge
10 to the recitals, there is no objection. But if that is
11 saying that that turns those recitals into something
12 legally binding, that is where the error is made here.

13 HODGE MALEK QC: Mr Beard, are you aware of any decision of
14 any national court that decides this issue?

15 MR BEARD: No.

16 HODGE MALEK QC: It is surprising. It is a pretty
17 fundamental point.

18 MR BEARD: Well, not necessarily hugely surprising because
19 in terms of where this is coming up, it is coming up in
20 the context of the follow-on damages cases and there is
21 an extent to which in relation to the situations where
22 you are dealing with follow-on damages cases, then in
23 those circumstances that is a relatively recent
24 development. I will check in relation to a couple of
25 cases in Germany that I have been referred to in case

1 there are translations of materials where I know these
2 sorts of issues have been being raised but whether or
3 not there is a national court determination on this
4 particular issue, I will have to confirm.

5 HODGE MALEK QC: Is there any academic learning on this, in
6 the textbooks covering this?

7 MR BEARD: Not that we have identified. It is partly
8 because in most circumstances, this does not matter.
9 Therefore most of the time your Commission decision is
10 the subject of appeals out in Luxembourg, or not. Or
11 there hasn't been an appeal in Luxembourg, matters are
12 raised before the national court and even the national
13 court is adjudicating it afresh or it makes a reference
14 to Luxembourg essentially saying how should we deal with
15 some of these legal issues and challenges.

16 Outside the competition field, you don't necessarily
17 expect that to happen. It is going to be an issue that
18 is generated by these sort of follow-on damages cases.

19 HODGE MALEK QC: Of course it is.

20 MR BEARD: I will confirm the position over the short
21 adjournment but not any that has determined this in
22 the way that it is being put before you.

23 HODGE MALEK QC: Okay. That is very helpful.

24 MR BEARD: We say not legally binding, not legally binding
25 in regulations, directives or decisions. What that

1 means of course is when it comes to the hearing of
2 a follow-on damages case then factual findings or
3 assessments that are made by the Commission can be
4 the subject of evidence and submission put forward by
5 both defendants and indeed claimants in these
6 proceedings because they are not legally binding.

7 Now, on Tuesday the proposition was put to me, well,
8 say you had an infringement, a much simpler infringement
9 than the one we are dealing with today, a hypothetical
10 where let's say there was price fixing that occurred at
11 three meetings. It would be odd if you could challenge
12 the facts relating to the findings on those three
13 meetings if it was only those three meetings that gave
14 rise to the basis for the operative part.

15 We say for the reasons set out in the case law that
16 is not odd given the structure of EU decision-making,
17 the nature of the case law and its overexpectation in
18 the context of follow-on claims. But more than that,
19 what we say is you can admit of evidence and you can see
20 why it is necessary to permit that even in relation to
21 that sort of situation.

22 Say, for example, that the evidence that there was,
23 suggested that a meeting didn't take place on
24 a particular day or at a particular time or involve
25 different people, so you are not saying there was no

1 such meeting but the Commission had got the date or time
2 wrong in its decision. Now, for the purposes of its
3 operative part assessment even on this very narrow
4 hypothesis this doesn't matter at all.

5 For the purposes of a follow-on damages case it
6 might well be very important because whether or not
7 people had released prices before or after that meeting
8 might mean that the date, for example, is extremely
9 important.

10 Now, if that is the case, you need to be able to
11 admit the evidence and hear the submissions in relation
12 to that and you should not be precluding that by
13 treating each of those findings as somehow legally
14 binding.

15 PRESIDENT: But if they have released prices before
16 the meeting, why would it be an infringement at all to
17 exchange prices at the meeting if they have already been
18 published? It wouldn't have found an infringement --
19 wouldn't be relevant to the decision.

20 MR BEARD: It might well be. We are talking about
21 the Tribunal's hypothesis that's saying a series of
22 meetings where competitors gather together and they
23 exchange pricing information --

24 PRESIDENT: But confidential pricing information, otherwise
25 it wouldn't have found the infringement at all.

1 MR BEARD: Possibly, possibly. There are circumstances
2 where even publicly available information being
3 exchanged can be said by the Commission to be
4 problematic but let's leave that to one side. The point
5 is that if that date was wrong, in those circumstances
6 it would be absolutely appropriate for the purposes of
7 the exercise with which this court is engaged to be able
8 to say, well, actually, even if there was a meeting,
9 it was on the wrong date or one of the people that was
10 said to be there wasn't in fact there and it was an
11 error.

12 Now, that may not have been appealed for very good
13 reason but for you to say, oh, no, that is absolutely
14 legally binding and no aspect of that finding can
15 possibly be the subject of further evidence and
16 challenge we say is wrong. It is in no part of what
17 the Commission is doing in carrying out its public
18 enforcement function in making infringement findings and
19 imposing penalties that it is then saying all national
20 courts cannot further hear evidence in relation to those
21 matters.

22 We say that would not be in any way running contrary
23 to article 16 or indeed article 288 of the treaty.

24 If we go back to some of the points being made on
25 Tuesday about article 16, I understood the first point

1 to be, well, article 16 goes further than article 288 of
2 the treaty because 288 of the treaty is talking about
3 legal acts being binding.

4 Well, we say 288 sets out that the operative part of
5 a Competition Commission decision is binding and that
6 the first part of article 16, because article 16 as
7 a whole clearly goes further than that, is a positive
8 affirmation of that fact. It is an admonition to
9 national courts that where the Commissioners decided an
10 infringement case, a national court can't reach
11 a different end conclusion.

12 But that is clearly focused on the relevant legal
13 act, the operative part that is referred to in
14 Air Canada in particular, and it does not remotely
15 suggest, contrary to the authorities in the structure of
16 legal acts, that somehow you can't reach conclusions as
17 a national court contrary to particular issues in
18 the recitals and any particular issues in the recitals.

19 It is perhaps, just going back to the point I made
20 on Tuesday, worth remembering what the first part of
21 article 16 is codifying. I will not take you to
22 Masterfoods -- it is in the authorities bundle 1 at
23 tab 14. The court was there talking about the duty of
24 sincere cooperation which is an open-textured duty but
25 that was a case where a national court had decided that

1 exclusivity arrangements were lawful.

2 The Commission was not content with that and
3 considered that they would be unlawful and the question
4 that was being raised was should another national court
5 dealing with these matters follow the national court
6 authority or be beholden to what the Commission was
7 doing and it was being made clear -- and it's absolutely
8 clear in paragraph 52 of Masterfoods -- that even if you
9 have a conflicting national court earlier decision, you
10 ignore that and you follow the Commission decision.

11 That is what article 16 is doing. It is not
12 expanding matters or qualifying the case law. Another
13 impact of that first part of article 16 will be if the
14 Commission wants to come along and enforce a penalty
15 that is being imposed, you can't have a national court
16 second-guessing the underlying substance of the
17 infringement that gave rise to the penalty, because of
18 course penalties have to be enforced at a national level
19 if they are to be enforced.

20 So we say article 16 does not expand matters but
21 even if this court were to be thinking about these
22 matters more broadly, somehow talking about elements of
23 the decision going beyond the operative part, what
24 we don't accept is that you should do that but if you
25 do, it is only at the court's final conclusion in

1 relation to these matters that that assessment should be
2 taken.

3 You shouldn't be taking a view that excluding any
4 particular challenge to any particular finding is
5 inappropriate by extending the binding nature of
6 a Commission decision beyond its operative part and
7 identifying some sort of essential basis. If at the end
8 of the process on this broader approach to article 16
9 you look back and see whether or not you are complying
10 with a duty of sincere cooperation, you are carrying out
11 a cross-check at that point, having regard to
12 the open-textured obligation of the duty of sincere
13 cooperation. You do not pre-emptively decide that
14 particular recitals and provisions are in fact legally
15 binding when European law says they are not.

16 So that is the position in relation to European law
17 and the hypotheticals that have been put forward.
18 We have seen from Deutsche Bahn in the Supreme Court
19 that it is accepted that the scope of a European
20 decision is a matter of European law.

21 I would like to turn briefly to Deutsche Bahn in
22 the Supreme Court and deal with the domestic
23 authorities --

24 PRESIDENT: Just one second. (Pause). We are all
25 struggling with your last submission.

1 MR BEARD: It is an alternative.

2 PRESIDENT: That bit I followed. You say even if one
3 considers it more broadly, it is only at the court's,
4 that is to say this Tribunal's, final conclusion that
5 the binding nature of this question comes in and that
6 you do it as a cross-check. I don't quite follow what
7 you mean.

8 MR BEARD: No. It won't be the binding nature of recitals.
9 What you're being asked to do on this broader
10 interpretation of article 16 is ask yourself whether or
11 not the final judgment that is reached by a court is
12 contrary to a decision of the Commission. We know it is
13 all about final judgments. We have seen this in all
14 sorts of cases where cases are able to proceed whilst
15 the Commission are dealing with matters or there are
16 court appeals going on but you can't reach a final
17 judgment on a particular matter.

18 It happened for instance in relation to
19 the National Grid proceedings and so on.

20 PRESIDENT: You say you let all the argument and evidence
21 in. If in the end having heard it all we decide
22 the same way as the Commission, then of course there's
23 no --

24 MR BEARD: There is no issue.

25 PRESIDENT: If, on the other hand, we decide differently, or

1 would do, then at that point as a cross-check we
2 shouldn't do it. Which makes it slightly pointless to
3 let all the argument in, doesn't it?

4 MR BEARD: At that point you would have to review your --
5 sorry?

6 PRESIDENT: In which case it is slightly pointless to waste
7 all the time --

8 MR BEARD: No, because for the reasons I have already
9 articulated, trying to preselect what argument should be
10 admitted in relation to any particular finding, where
11 the basis on which a challenge may be brought to
12 particular aspects of particular findings may mean that
13 it is material for these proceedings, does not create
14 any relevant tension with the out-turned decision in
15 relation to article 16.

16 You couldn't possibly reach a conclusion that any
17 particular finding must be treated as absolute at this
18 stage because to do so would be treating it as
19 absolutely legally binding and article 16 is not doing
20 that. It is asking you to look at the final outcome,
21 not to try and pre-emptively identify and treat any
22 particular provision as legally binding.

23 PRESIDENT: Yes, thank you.

24 MR BEARD: So, if we go to authorities bundle 4 at tab 66
25 for the Deutsche Bahn judgment, I will just pick it up

1 at paragraph 25. My understanding of Mr Brealey's
2 submission in relation to paragraph 25 was that this
3 provided some authority for the proposition that
4 provisions beyond the operative part were to be treated
5 as binding.

6 We say, with respect, that plainly is not correct.
7 Lord Mance in the words he uses, where he is at
8 paragraph 25 talking about the assumption that
9 everything in relation to infringement in the Commission
10 decision is correct, he says, as I think you picked up,
11 Chairman, in exchanges with Mr Brealey, that it is very
12 clear that what Lord Mance is talking about is the
13 operative part of the decision and correctly doing so.

14 One sees that in his fourth sentence:

15 "It is the decision found in the present case in
16 article 1 of the operative part ..."

17 That is all that can be treated as being legally
18 binding.

19 Mr Brealey went on to say there are a couple of
20 quotes from Enron here, referring to paragraphs 50 and
21 53 of Enron, which suggest that this must be seen as
22 broader than the operative part. When you read those
23 quotes, they do not do anything of the sort:

24 "... the defendant cannot deny that it has committed
25 whatever infringement the regulator has found ..."

1 That is absolutely true because that's what's set
2 out in the operative part.

3 "...the decision that there was an infringement,
4 and a particular infringement, is conclusive."

5 Again, no issue with that, that is entirely
6 consistent.

7 So the idea -- Lord Mance has carefully picked out
8 quotes that are consistent and he doesn't go any
9 further. To suggest that there are other elements of
10 the Enron judgment that must be somehow transposed into
11 EU law is without foundation in this part of the
12 judgment.

13 Of course that is entirely understandable because
14 Enron itself was not about EU law at all. It was
15 concerned with a domestic decision, a decision which is
16 of course structured differently from the EU approach
17 and is not subject to the EU jurisprudence to which
18 I have referred the court. In very simple terms,
19 domestic decisions are not legal acts under EU treaties
20 with recitals and operative parts and they are not
21 subject to the case law that we have seen from
22 the European Courts in relation to these matters.

23 If we go very briefly to Enron, authorities 2,
24 tab 27, what we see or rather what we don't see is
25 important here. We see no consideration of the case law

1 on European law that is at the heart of any assessment
2 of the consideration of the question that we are dealing
3 with today, which is whether or not under EU Law
4 Commission recitals in a decision are legally binding.
5 No *Adriatica*, no Dutch Banks, no Masterfoods, no EU law
6 at all, save for -- well, not EU law cases in the
7 relevant section at all. The only one that is
8 trespassing on EU law is *Iberian* which is referred to in
9 passing at paragraph 49, and as we know and as Mr Jowell
10 will comment on further, the focus of *Iberian* is all to
11 do with abuse of process.

12 The more important thing to bear in mind here is
13 actually it is worth noting what was actually being
14 considered in *Enron*. If you go back to paragraph 22,
15 what was being said by the appellant, *ECSL*, was that
16 the conclusions reached by the tribunal that there were
17 no damages to be awarded was incompatible with
18 the findings made by the Rail Regulator which are
19 binding on the Tribunal.

20 And the conclusion in relation to that matter is
21 actually dealt with from paragraph 118 onwards under
22 the heading "Is the Tribunal's decision consistent with
23 the ORR's decision or findings?" and they say no, it is
24 not.

25 That is actually the question and the ratio of this

1 case. So in fact, the discussion of law that Mr Brealey
2 refers to is actually obiter to the key decision but
3 more than that, it is only concerned with a case
4 pertaining to a domestic decision where specific
5 domestic law rules apply, in particular section 58 of
6 the Competition Act which is quoted in paragraph 35 of
7 the judgment which says:

8 "Unless the court directs otherwise, an OFT's
9 finding which is relevant to an issue arising in...
10 [damages] ... proceedings is binding on the parties."

11 So it was dealing with a situation where there was
12 a specific provision concerned with the binding effect
13 of domestic provisions. Domestic provisions dealing
14 with domestic decisions.

15 It is in that context there is a reference to, in
16 paragraph 50 and 53, the context of the legislation and
17 a concern being expressed by the Court of Appeal that if
18 you were to apply to the court for certain parts of the
19 domestic decision to be disapplied as findings, you
20 would be undermining the domestic decision.

21 Now, whether or not that is correct is not a matter
22 for this court because it is to do with domestic issues.
23 There are real doubts about whether or not that is right
24 but, in any event, it is obiter. More particularly,
25 it is just not dealing with the EU law issues. So

1 the idea that at 53, the reference is to the idea that
2 the decision must carry with it a basic set of findings
3 of fact without which the decision couldn't have been
4 made is an observation about a domestic decision in
5 the context of section 58 which does not transpose to
6 the position under EU law.

7 So Enron on its own doesn't assist. Furthermore and
8 more importantly, it does not qualify what is said by
9 Lord Mance in the way that Mr Brealey suggests in
10 the Deutsche Bahn Supreme Court case.

11 That finally brings me to the BritNed case which is
12 in authorities bundle 3 at tab 47.

13 Here as you know Mr Brealey places weight on the
14 passing observations of Mr Justice Marcus Smith at
15 paragraph 61(6)(b) [sic]. Again it is clear that this
16 analysis is obiter. You can see that from 68.

17 PRESIDENT: 67?

18 MR BEARD: I am sorry, 67(6)(b) on page 28. That is the bit
19 that Mr Brealey relies on. There was not an argument in
20 relation to these issues because in that case, ABB was
21 not seeking to have the ability to qualify the findings
22 made in recitals. It was happy with those findings as
23 pleaded it was not challenging. What it wanted to do
24 was add to those matters and so there was an argument
25 about it and it wasn't relevant to the out-turn of this

1 decision.

2 So, with respect, it is an obiter comment but
3 actually when you go back and look at it in 67(6)(b),
4 what Mr Justice Marcus Smith's reasoning amounts to is
5 the statement that recitals constituting part of the
6 essential basis are binding, and it is four lines from
7 the bottom of that paragraph:

8 "This, as it seems to me, is an inevitable
9 consequence of section 58A of the Competition Act."

10 That, with respect to Mr Justice Marcus Smith, takes
11 you no further forward because it is talking about
12 the decision and the question is what is the decision
13 and what is binding in these circumstances. Article 16
14 which we have referred to, and then we go down to
15 the footnote that he is relying on. Iberian, well, with
16 respect it is not clear why Iberian is relevant here or
17 of assistance in circumstances where that case, as
18 Mr Jowell is going to talk to, is focused on abuse of
19 process. And then we are back to Enron which I have
20 just been through.

21 So with respect, insofar as that is any more than
22 obiter and we say it is not, that statement should not
23 be followed. So we say the law is clear: the operative
24 part only is binding, with the recital as an
25 interpretive aid if the operative part is ambiguous.

1 This notion of an essential basis has been developed
2 separately in EU case law in the context of appeals
3 before the EU court but it does not qualify the basic
4 approach to legally binding elements of a Commission
5 legal act which the case law sets out.

6 To embark on an exercise of trying to identify
7 the recitals which are essential is the wrong approach
8 from the wrong starting point. Damages proceedings,
9 where the operative part is not challenged, we say are
10 not ones that are going to trespass on article 16 or the
11 duty of sincere cooperation. We therefore say it does
12 not add anything. I have put forward the alternative
13 point in relation to article 16 but we do not suggest
14 that is the appropriate approach here.

15 Although time does not permit, it is worth noting
16 that the concerns articulated in particular by
17 Lady Justice Rose in the Servier case at paragraphs 72
18 to 74 -- for your notes, that is authorities bundle 3,
19 tab 54, page 26 -- will be apposite in this context
20 where you are dealing with a multifactorial assessment:
21 difficulties of ascertaining the degree of granularity
22 of any factual finding, difficulties of identifying
23 where there are a number of facts being found by
24 the Commission, which of those are supporting
25 a particular conclusion and of course the possibility

1 that factual findings may point in different directions.

2 In those circumstances, not only do we say it is
3 wrong in law but as a matter of practicality, this would
4 be taking the court and this jurisdiction down a course
5 that would be inappropriate and wrong.

6 Unless I can assist the Tribunal further, those are
7 our submissions.

8 PRESIDENT: Thank you very much.

9 Submissions by MS BACON

10 MS BACON: May it please the Tribunal. First of all,
11 apologies for the late start this morning which was the
12 result of amnesia on my part. Secondly, also apologies
13 for the state of my throat. I am going to do my best
14 but I might have to get a cough sweet at some point
15 perhaps when we break for the transcribers.

16 Appropriately for my location in this courtroom, the
17 Tribunal will have seen that our position strikes a
18 middle path between the claimants' submissions on the
19 one hand and Mr Beard's on the other.

20 As the Tribunal will have seen from our skeleton
21 argument, our submission is that if and insofar as you
22 do not accept Mr Beard's position, then in that case
23 we accept an agreement with the claimants that recitals
24 have legally binding effects if and only if they
25 constitute the essential basis for the operative part of

1 the decision but we part company from the claimants on
2 what the European Court means by that.

3 Now, as a preliminary point, as a matter of
4 translation, the phrase "essential basis" that we are
5 using is the English version of the phrase "support
6 nécessaire" in French. That is sometimes translated in
7 the cases as "essential basis" but also it's translated
8 as "necessary support", sometimes in one and the same
9 case. So the English terms are used interchangeably in
10 the EU case law.

11 Mr Brealey suggested we might be taking some point
12 on that. I am happy to confirm we are not because both
13 of those phrases, both of those translations of the same
14 French phrase convey the same idea in linguistic terms
15 as something that is necessary or essential to
16 the operative part.

17 So it is purely for convenience that we have stuck
18 with the term "essential basis" in our submissions and
19 I will generally use that term in the hearing. What
20 divides us and the claimants is our interpretation of
21 what is exactly meant by the term "essential basis".
22 They would say it includes most of sections 3 and 4 of
23 the decision and we disagree as you will have seen.

24 If I can summarise our position in a nutshell --

25 PRESIDENT: I think they say all of section 3.

1 MS BACON: Yes. Our position in a nutshell is that when the
2 European Court uses the phrase "essential basis" to
3 refer to the recitals of a Commission decision that form
4 the essential basis for that decision, it is trying to
5 capture a quite specific point and the point is that in
6 some cases, a recital in the decision may be regarded as
7 having legal effects even if that particular finding is
8 not in the operative part.

9 That means that that finding in the recital can be
10 the subject or, using the President's term, the
11 foundation if you like of an action for annulment in
12 itself which leads to the annulment of the decision even
13 if the applicant is not otherwise challenging what is on
14 the face of the operative part.

15 That particular context and that specific problem
16 that has arisen in some of the cases is what has led to
17 this line of case law and that informs in our submission
18 the meaning or scope of what is regarded as essential
19 basis.

20 I will develop that point in the following way.
21 I will set out our position in a series of propositions,
22 I will then take you to the key cases that in our
23 submission support those and then I will explain in
24 general terms how that applies to this case. Obviously
25 I am not going to get into the detail of the recitals.

1 So, starting with my series of propositions, I have
2 listed eight. Some are longer than others.

3 The first proposition is this: we agree with both
4 Mr Brealey and Mr Beard that the question of what is
5 binding in a decision or in other words what
6 the decision properly so-called is, is a matter of EU
7 law, not domestic law. And that is clear from BritNed
8 and Deutsche Bahn.

9 So that starting point is common ground and that is
10 why for the reasons just given by Mr Beard and which
11 I will not repeat, the Enron case is not relevant
12 because that concerns domestic provision which
13 specifically addresses the bindingness of domestic
14 competition decisions, not Commission decisions.

15 So that is the first proposition. The second
16 proposition is this: it also seems to be in large part
17 common ground that there is a distinction to be drawn
18 under EU law between the operative part and the recitals
19 and the distinction is this. As a general rule, it is
20 the operative part of a decision that is binding and
21 it is the operative part which is therefore generally
22 the subject or target of an action for annulment.

23 What you are seeking to annul is the content of
24 the operative part of a decision, because that is
25 the decision properly so-called. And that is clearly

1 stated in the passage in the Dutch Banks case, NBV and
2 NVB at authorities 1, tab 6 that Mr Beard just took you
3 to at paragraph 31, and that is the passage that
4 Mr Brealey also took you to on Tuesday.

5 So that distinction is our second proposition.
6 The third proposition is that the reason for this
7 distinction is that as we also saw on Tuesday, EU law
8 draws quite a formal distinction between the operative
9 part of any EU legal act, whether that is a decision or
10 a regulation or something else, and the recitals that
11 form the grounds or reasons for that legal act. And in
12 principle as a matter of EU law, it is the operative
13 part which is binding as described in article 288 TFEU.

14 Four, that is therefore the starting point but
15 the EU courts have in the line of cases which we have
16 cited in our skeleton, and some of which I will come to,
17 acknowledged that recitals may exceptionally have
18 independent legal effects where they are regarded as
19 constituting the essential basis for the operative part.

20 Point five: in understanding what is meant by
21 essential basis in context, it is important to
22 understand the reason why this exception has been
23 recognised. That comes to my nutshell point at the
24 start. The reason is that sometimes an undertaking or
25 other legal person who brings an application for

1 annulment will not actually want to challenge what is on
2 the face of the operative part but will want to
3 challenge something in the recitals that looks very much
4 like a decision on a point.

5 In that case, if you were to follow slavishly the
6 general rule or starting point that would create
7 a procedural problem because an annulment action can
8 only lie under the treaty in relation to acts that are
9 intended to produce legal effects. So if you were to
10 say only the operative part could ever produce binding
11 legal effects then that would preclude a challenge that
12 was specifically targeted at the finding in the
13 recitals.

14 So it is in those circumstances that the court had
15 to develop a workaround and the workaround is to say
16 that in some cases particular recitals are necessary to
17 identify what has actually been decided. And in those
18 cases, the decision can be annulled by challenging
19 effectively the recital itself, even if there is no
20 specific challenge to what is written on the face of the
21 operative part. It is a kind of judicial fudge.

22 MR JUSTICE FANCOURT: Even if there is no challenge to
23 the operative part?

24 MS BACON: You would have to formally say that you are
25 challenging the operative part. But actually in

1 practice, and I'll show you an example of this but I was
2 going to come to the classic example, the classic
3 example of it is Lagardère.

4 To summarise the point now before going to the
5 detail, that is referred to in our skeleton. The
6 decision in the operative part was that the merger was
7 approved. But what was at issue in that dispute wasn't
8 the approval of the merger, they wanted the merger to
9 remain approved, very much so. The challenge was there
10 was a legal assessment in the grounds and the legal
11 assessment was relating to the ancillary restrictions or
12 a finding that most of the restrictions were not
13 ancillary and the court found that that was a "legal
14 assessment" which determined the substance of what had
15 been decided and therefore produced binding legal
16 effects.

17 So there was nothing at all on the face of the
18 operative part that they wanted to challenge. What they
19 wanted to challenge really was only the content of
20 the recital. So as I said, it is judicial creativity to
21 get around that problem. That's the context of this
22 particular line of cases.

23 MR JUSTICE FANOURT: The distinction between that and
24 the Dutch Banks case, was in the Dutch Banks case the
25 decision itself did not depend in any way on the finding

1 that was objected to --

2 MS BACON: Exactly, it wasn't necessary to.

3 MR JUSTICE FANCOURT: Whereas in Lagardère --

4 MS BACON: But in Lagardère, yes, the court went through a
5 process which explained that actually this was part of
6 the decision that the Commission was supposed to be
7 reaching. It was part of its function. I am not going
8 to take you to all of it but I will take you to the key
9 passages.

10 Another example is where the operative part does not
11 fully set out the scope of the decision or it is
12 ambiguous, so it's necessary to look at the recitals to
13 clarify that scope, and ABB is an example of that and
14 Air Canada sets out the general proposition too and
15 I will take you to the relevant bits of Air Canada.

16 Another kind of case is where the operative part is
17 framed in terms so that it doesn't set out a particular
18 point but necessarily presupposes a prior legal point
19 that will have been decided.

20 An example of that is a French language case called
21 Provincie Groningen that I am going to come to too.

22 All of those are cases where the court thinks
23 the Commission has indeed definitively decided something
24 in a legally binding sense but in a way it is put in
25 the wrong part. It is not in the operative part for

1 whatever reason. It is in the recitals, not
2 the operative part. But the court thinks that is
3 something that has been and in some cases necessarily
4 must have been decided.

5 Conversely the same context has been used to define
6 what has not been decided in the Dutch Banks case. What
7 has not been decided and therefore cannot be challenged
8 in an application for annulment.

9 My fifth proposition is that the context of this
10 helps us to understand what the scope of the provision
11 is.

12 My sixth proposition --

13 PRESIDENT: Sorry, your fifth proposition is what example?

14 You have given us a lot of examples.

15 MS BACON: It was an example but before I gave you the
16 examples I said this, that in understanding what is
17 meant by "essential basis" it is important to look at
18 the reason for developing this concept and the reason
19 for why the court is addressing this problem in
20 the cases.

21 My sixth proposition is that what will constitute
22 the essential basis for any decision is a fact specific
23 exercise that will vary from case to case depending upon
24 the type of decision. But the common factor that seems
25 to run through this line of cases is that the purpose of

1 the exercise is to identify what has actually been
2 decided and decided with a capital D, if you like,
3 either explicitly in the operative part or in
4 the recitals where they contain something that is
5 essential to the decision in the sense that it is
6 essential to understanding what the decision is.

7 Seventh point: Mr Ward said he was not aware of any
8 authority where an appellant was told that particular
9 factual findings were not binding. Our position is the
10 exact opposite. The starting point is that factual
11 findings in recitals are not binding as a matter of EU
12 law. That is my second proposition. They are the
13 evidence and the reasons for the decision but they are
14 not the decision itself.

15 We are not aware of any case supporting the
16 proposition that a pure finding of fact that is simply
17 one of many different pieces of evidence on which
18 the decision relies can be regarded as the essential
19 basis or part of the essential basis.

20 By the way, I place no emphasis on the distinction
21 between the essential basis or part of the essential
22 basis. I do not think anything turns on that. If
23 Mr Ward were right then that would completely undermine
24 the careful and consistent distinction made in the case
25 law between the operative part of the decision and its

1 recitals and it would produce the result as you see in
2 this case essentially where all the recitals are
3 regarded as binding provided that they are in general
4 setting out evidence relevant to the finding in the
5 operative part. In other words, not going off on
6 a frolic and addressing some completely immaterial
7 point.

8 Leaving that aside. Mr Ward's case, Mr Brealey's
9 case is if all of those recitals in general go towards
10 the decision in the operative part then they must all be
11 binding. But the EU courts have never endorsed that
12 formulation of what is binding. Indeed it would
13 completely undermine the distinction that's always drawn
14 in all of these cases between the recitals and the
15 operative part.

16 My last point is this: that of course does not mean
17 that in an application for annulment the applicant
18 cannot put in issue the various facts or findings made
19 by the Commission as a means of saying the operative
20 part should be annulled for whatever reason: errors of
21 law or insufficiency of reasons or manifest errors of
22 assessment. Mr Beard made this point on Tuesday.

23 It is a trite proposition that one of the purposes
24 of legal acts being accompanied by a statement of
25 reasons under EU law is to enable the person affected to

1 challenge the act if it is based on some error. You get
2 that proposition in numerous cases.

3 That is precisely what the basis of the action for
4 annulment was in *Servier* and many other cases. The
5 challenge was not to the facts in the recitals in the
6 abstract or in themselves, the challenge was to the
7 findings in the operative part of the decision and
8 the sufficiency of the evidence on which those findings
9 were made as well as errors of law and other challenges.

10 In many decisions you have a challenge that will
11 refer to necessarily the recitals. But simply because
12 in challenging the decision in the operative part,
13 a vanilla challenge if you like to the content of the
14 operative part, an applicant can and will refer to lots
15 of recitals, that does not mean that all of those
16 recitals that you refer to as part of your challenge
17 become transmogrified into being essential basis, or
18 still less that all those recitals that you refer to to
19 challenge the operative part become binding as a matter
20 of EU law.

21 That was not the position of *Servier* in the domestic
22 *res judicata* proceedings. It was certainly not the
23 position of the President of this Tribunal or the Court
24 of Appeal in those proceedings. I accept there was
25 a slightly different context there, but some attempt has

1 been made to draw analogies with them. That was not
2 what even in that context Servier's counsel were saying,
3 as in I was saying.

4 So even in that different context, it was not being
5 said that everything in the recitals in that case of
6 a judgment somehow became essential basis.

7 So those are our essential propositions. Can I take
8 you then to the case law? I am going to do it somewhat
9 whizzily on my iPad but I will give you the references
10 in the authorities bundle. For want of any better
11 order, I am simply going to go in the order in which
12 these appear in the bundle. Starting with the Lagardère
13 case, that is at authorities bundle 1, tab 17.

14 This was a really peculiar case. It was a merger
15 approval decision as I have told you. It was withdrawn
16 after it was adopted and then reissued with the same,
17 exactly the same operative part but a different finding
18 on the ancillary restrictions and the crucial point as
19 I have already said was that the disputed finding on
20 ancillary restrictions was in the grounds and not the
21 operative part. So when the merging parties sought to
22 challenge that, the Commission said no no, that is not
23 possible because there is nothing in the operative part
24 that you are complaining about. What you are
25 complaining about is something in the recitals and that

1 is just a non-binding opinion, they said, and the court
2 disagreed.

3 The relevant passage starts at I think paragraph 62.

4 If you don't mind me giving you the paragraph numbers.

5 PRESIDENT: No. Not at all.

6 MS BACON: Paragraph 72 summarises the various submissions
7 of the Commission and the applicant:

8 "If, according to the defendant's submissions, its
9 reasoning in the grounds of ..."

10 PRESIDENT: Sorry, you are at paragraph?

11 MS BACON: 72.

12 PRESIDENT: Second sentence, yes.

13 MS BACON: "If ... the reasoning in the grounds ... has only
14 the force of an opinion, without any binding legal
15 effect, the action for annulment must be dismissed as
16 inadmissible ... On the other hand, if, as the
17 applicants argue, the alteration made by the decision of
18 10 July [that is the new replaced decision] ... in the
19 reasoning of the grounds ... altered the substance of
20 what was decided in the operative part ... the later
21 decision will have produced binding legal effects such
22 as to affect the applicants' interests by bringing about
23 a distinct change in their legal position."

24 There was then in the next pages some discussion
25 about the competence of the Commission and that

1 concluded at paragraph 90. This was the discussion
2 about what the Commission was supposed to be doing here
3 regarding ancillary restraints.

4 Paragraph 90:

5 "... when the parties to a concentration notify the
6 Commission of contractual clauses as restrictions
7 directly related to and necessary to the implementation
8 of the concentration, they must be deemed to form an
9 integral part of the notification of the concentration.
10 In the case of a clear and precise request falling
11 within the competence of the Commission, the latter must
12 provide an adequate reply."

13 This was the point I was making earlier, that this
14 was something that the Commission was supposed to be
15 addressing.

16 "Consequently those provisions confirm that the
17 Commission's reasoning in the grounds of the decision of
18 approval with regard to such restrictions are in the
19 nature of a decision in the same way as the approval of
20 the concentration."

21 So the point was being made that this has
22 a decisional quality. It is a decision, even if it is
23 in the grounds.

24 Then at paragraph 98, the court pointed out that
25 this was a complex economic assessment on the part of

1 the Commission which had a broad discretion.

2 Paragraph 100, again the restrictions must be deemed
3 to be economically inseparable to the concentration if
4 they are directly related and necessary to it.

5 Then at 103, again this procedural point that
6 the merger provisions had established a specific
7 decision-making procedure to enable the merging parties
8 to obtain legal certainty. In the last lines:

9 "... not only in relation to the concentration
10 [overall] but also ... the restrictions notified ... as
11 being [ancillary]."

12 So looking at the purpose of the provisions and
13 the specific legal framework for the decision, the
14 Commission then concluded at paragraph 109, and this is
15 I believe among others the paragraph we cite in our
16 skeleton argument:

17 "... the Commission is not delivering a mere opinion
18 without binding legal force but, on the contrary, is
19 making legal assessments which, by virtue of the
20 contested provision, determine the substance of what
21 the Commission has decided in the operative part ..."

22 So it is a legal assessment that determines
23 the substance of the operative part.

24 And that if you like is the springboard in my
25 opening propositions that what you are looking for is

1 something that is decisional in nature in the context of
2 what is being done which will vary from decision to
3 decision. Something that is decisional in nature, even
4 if it is in the recital, the specific problem there
5 being none of that was in the operative part.

6 The next case I wanted to look at was Coppins which
7 was cited by Ms Demetriou in her skeleton argument.
8 This was an antitrust case where there was a finding of
9 a single and continuous infringement and the general
10 court, which is the authority cited in Ms Demetriou's
11 skeleton argument, initially annulled the finding of an
12 infringement on the basis that the applicant had not
13 participated in the single and continuous infringement
14 described in the decision. That is in authorities
15 bundle 2/28, and if you would like to take that up,
16 there is a particular point I want to go to.

17 The point of interest in that case was the finding
18 that --

19 PRESIDENT: Just a moment.

20 MS BACON: Yes, I am sorry.

21 The point of interest there was the finding of
22 a single and continuous infringement was not in
23 the operative part, it was in the recitals. The court
24 said that this didn't matter. One of the reasons given
25 in paragraph 33, which I think is on page 6,

1 paragraph 33, the court said that the fact that the
2 single and continuous infringement finding was in the
3 recitals didn't matter because the Commission's practice
4 in drafting decisions isn't consistent. Some decisions
5 will refer expressly to a single and continuous
6 infringement but others won't. And the court thought
7 that the annullability of a decision could not depend on
8 whether the decision happened to have specified in
9 the operative part that the infringement was a single
10 and continuous infringement.

11 PRESIDENT: Paragraph?

12 MS BACON: 33. And the last sentence is particularly
13 important:

14 "The scope of the annulment cannot depend on whether
15 or not the Commission includes a reference to a single
16 and continuous infringement in the operative part of the
17 decision."

18 So the court was recognising the non-homogeneity of
19 decisions and is unwilling to allow the annullability to
20 turn on a procedural technicality. This is the
21 underlying reason for all of this line of case law.

22 It is not to be defeated by a procedural technicality.

23 PRESIDENT: I think that is the situation in the present
24 case, isn't it, that article 1 does not refer to single
25 and continuous infringement?

1 MS BACON: Exactly, and I was going to make exactly that
2 point. So we recognise that this is exactly a Coppens
3 kind of case where the settlement decision also doesn't
4 refer to the SCI in the operative part and because of
5 Coppens we accept that the finding that the addressees
6 participated in an SCI is part of the essential basis
7 and it is therefore binding on this Tribunal. That is
8 accepted by the defendants, subject of course to
9 Mr Beard's argument, and recital 71 and 78 both set out
10 that finding.

11 So that is the Coppens analogue in this case. Just
12 to tell you though for the record, the judgment of the
13 General Court was actually set aside by the CJEU. And
14 just for your note, that is at bundle 3, tab 55.
15 The reason was that although Coppens hadn't participated
16 in the entirety of the SCI, the court found it had
17 participated in some of it and the court thought the
18 decision was severable. So it didn't annul the finding
19 of infringement entirely but it annulled it insofar as
20 the finding was that Coppens had participated in certain
21 aspects of the SCI.

22 PRESIDENT: Did the Court of Justice quash this decision?

23 MS BACON: Yes, it did and then it decided the matter for
24 itself. It was one of those cases. It set aside
25 the decision but it thought it had sufficient

1 information to reach the final decision itself. The
2 final decision was to annul the original Commission
3 decision but insofar as Coppens was found to have
4 participated in part of the SCI.

5 So that illustrates the sort of finding that is
6 essential basis. Again what we are talking about is
7 something which has decisional characteristics or a
8 decisional quality. The finding that there was an SCI
9 is a final legal assessment, even if it is not set out
10 in the operative part in words of that precise effect.

11 HODGE MALEK QC: So you accept the test in paragraph 34, do
12 you?

13 MS BACON: 34?

14 MR BREALEY: 34 is obviously important, the last few lines.

15 MS BACON: Yes, so the test in 34, the first part of 34
16 simply says that the enacting terms are inextricably
17 linked to the statement of reasons so that if the act
18 has to be interpreted, account must be taken. We accept
19 that and that is a point made in our skeleton argument.
20 It is a substance over form point. This is
21 a proposition that is set out in a number of cases.

22 And then the test in the next part of 34 is one that
23 we entirely endorse. It is exactly the same test as is
24 set out for example in the Dutch Banks case or the Dutch
25 Ports case. To the extent that as grounds of a measure

1 adversely affecting the interests of those concerned
2 they constitute the essential basis for the operative
3 part of that measure, or if those grounds are likely to
4 alter the substance of what is likely to be in
5 the operative part.

6 The court in that case is applying that and saying
7 the fact that there was a single and continuous
8 infringement, finding it in the recitals, the court must
9 have regarded that as constituting the essential basis
10 of the operative part, as in describing what it was that
11 was the nature of the infringement.

12 35 is also important because the court goes on to
13 explain that for example, the final finding could only
14 be explained on the basis of the finding of a single and
15 continuous infringement.

16 So for the avoidance of doubt, the finding of
17 a single and continuous infringement not only defines
18 what it is that the infringement was but also is
19 a necessary predicate for the court's analysis.

20 HODGE MALEK QC: It seems to me that Mr Beard goes further
21 than that because he says look at the operative part and
22 that is binding and that is something very clear and you
23 don't look at the reasons or the recitals. It may be
24 you can challenge a reason or recital following this
25 procedure but it does not mean that it is binding on

1 you. That is where the line is drawn.

2 MS BACON: As I say, my position is somewhere between
3 Mr Beard and Mr Brealey on that.

4 MR JUSTICE FANCOURT: Can you take us to the way in which
5 the ground was held to be part of the decision as
6 expressed? There is reference to "they", the grounds,
7 in paragraph 34. I want to understand what it is that
8 is being treated as part of the operative part of the
9 decision.

10 MS BACON: Well, the section -- are you looking at
11 the second half of 34, "the assessments made in the
12 grounds of a decision can be subject to judicial
13 review"? I am not sure what your question is. That
14 specific sentence is basically one of those cut and
15 paste paragraphs that you get all over European
16 judgments. Exactly the same wording is used in
17 Netherlands, in the Dutch Banks case and the Dutch Ports
18 case and numerous other cases.

19 MR JUSTICE FANCOURT: My question is how was the finding
20 expressed in the Coppens case itself, single and
21 continuous infringement? Was it a summary to that
22 effect in a sentence or two or were there extensive
23 conclusions leading into it?

24 MS BACON: I am being told that we will get the reference.
25 What you can see is the operative part of the decision

1 is at paragraph 15 of the judgment. That does not refer
2 to a single and continuous infringement.

3 I imagine -- and we will call up the original
4 decision -- I imagine somewhere in the original decision
5 there was something along the lines of recital 71 and 78
6 in our case, which has the conclusion that for all of
7 these reasons, we find that there was a single and
8 continuous infringement.

9 MR JUSTICE FANOURT: So it is just the conclusion not
10 the reasons that you say is being treated as
11 the decision; it has just slipped into the reasons
12 rather than being encapsulated in the operative part?

13 MS BACON: That is effectively what the court is saying.
14 The court is saying in some cases it will be in the
15 operative part.

16 The relevant recital, we can give you the decision
17 but I am being shown the extracts from the original
18 decision. Recital 345 of the original decision said
19 this:

20 "It is concluded that the complex of conduct in this
21 case displays the characteristics of a single continuous
22 infringement within the meaning of article 81 of the
23 treaty", committed from October 1984 to September 2003.

24 And there would then obviously have been other
25 recitals which explained the elements of that and then

1 the CJEU was then effectively severed and said there
2 were different parts of the SCI. Coppens was liable for
3 some of it but not for all.

4 PRESIDENT: That is the recital which is referred to in
5 paragraph 25 of the judgment.

6 MS BACON: That is right. And I have just read out to you
7 recital 345.

8 PRESIDENT: Yes.

9 MS BACON: So, that is Coppens which we say entirely
10 supports the way that we have framed the concept of
11 a recital to the essential basis and our admission on
12 the relevant parts of the decision in this case is
13 consistent with Coppens rather than being undermined by
14 it.

15 Then I wanted to go to Air Canada.

16 PRESIDENT: Before you do that, would that be a sensible
17 moment to take a short break?

18 MS BACON: Yes, that would be, because I am about to start
19 a new case.

20 (11.30 am)

21 (A short break)

22 (11.40 am)

23 MS BACON: Just before I entirely move on, let me give you
24 one more reference. We are going to get you
25 the relevant parts to the recitals over lunch, but among

1 those, one of the recitals I would also ask you to read
2 is 307 which says specifically what the single and
3 continuous infringement comprised in these terms:

4 "The Commission considers that in the case being
5 dealt with here, the participation of Allied Arthur
6 Pierre, Compass, Gosselin [and so on] in the agreement
7 on commissions and the agreement on cover quotes,
8 the participation of Coppens in the agreement on cover
9 quotes and the participation of Allied Arthur Pierre
10 [and so on] in the agreement on the prices for
11 international and removal services in Belgium...
12 correspond to the concept of a single, continuous
13 infringement of article 81."

14 So that is the way it sets it out in concrete terms.
15 Those are effectively equivalent to the relevant
16 passages in the recitals in this decision.

17 MR BREALEY: I apologise for interrupting. If the decision
18 is going to be handed up, we see from paragraph 35 of
19 Coppens the very first line, it's recitals 307 to 345.
20 So I think it might be helpful --

21 PRESIDENT: Well, when we have the decision, Mr Brealey, if
22 anyone wants to make submissions on it, they can. Let's
23 wait until we actually have it.

24 MS BACON: I wanted to set out now, before we move on,
25 the passages on which we rely.

1 Air Canada, that is authorities bundle 4, tab 63.
2 This in our submission, you have seen this already,
3 I want to take you to some of the other parts of that
4 because in our submission this specifically addresses
5 the issue of what is binding for the purposes of
6 domestic follow-on damages proceedings, and also and
7 particularly effectively sets out what the operative
8 part ought to contain for that purpose.

9 Mr Beard started at 36, can I just ask you to start
10 at paragraph 35 because that really starts to set up
11 this point. The point being made there is that:

12 "The principle of effective judicial protection ...
13 requires that the operative part of the decision adopted
14 by the Commission, finding infringements of the
15 competition rules, must be particularly clear and
16 precise and that the undertakings held liable and
17 penalised must be in a position to understand and to
18 context that imputation of liability and the imposition
19 of those penalties, as set out in the wording of the
20 operative part."

21 So it is the principle of judicial protection that
22 sets up the points that the court then makes.

23 You then see paragraph 36, paragraph 38. Now,
24 paragraph 39 is then important for the point that I am
25 making which is that it describes how a national court

1 can differ to the Commission and it says that:

2 "... a national court would take a decision contrary
3 to that adopted by the Commission not only if it gave
4 a different legal classification to the ... conduct ...
5 but also if its decision differed from that of
6 the Commission as regards the temporal or geographic
7 scope of the conduct examined or as regards the
8 liability or non-liability of persons investigated in
9 relation to the conduct at issue ..."

10 And then at 40:

11 "The national courts are therefore bound by
12 the decision adopted by the Commission ... and
13 consequently the meaning of the operative part of that
14 decision must be unambiguous."

15 So the court is effectively setting out a shopping
16 list of what the national courts are bound by in saying
17 that that should be in the operative part --

18 PRESIDENT: I am not sure, Ms Bacon, they are saying that is
19 the exhaustive list.

20 MS BACON: No, I am not saying it is exhaustive but that is
21 in particular what the court says that national courts
22 are bound by. But then they make the point again
23 clearly at paragraph 41:

24 "... clear wording of the operative part of
25 a decision finding an infringement of the competition

1 rules must allow the national courts to understand
2 the scope of that infringement and to identify
3 the persons liable, in order to be able to draw
4 the necessary inferences ..."

5 And then at the end of paragraph 42:

6 "... the wording of the operative part ... is
7 evidently decisive ..."

8 So this in our submission is a good starting point
9 for identifying what as a minimum the court thinks
10 should be in the operative part.

11 It is in that context that you have seen at
12 paragraph 36 the court says:

13 "Only where there is a lack of clarity ... should
14 reference be made [to the recitals] for the purposes of
15 interpretation ..."

16 So the starting point that is being set out in this
17 passage is that the operative part ought to contain the
18 material necessary for the national court to understand
19 the scope of the infringement and the persons liable.
20 Also the temporal and geographic scope of the conduct
21 which falls within what the court regards as the scope
22 of the infringement.

23 It is only if it doesn't contain that, according to
24 this court, that you then refer to the recitals. That
25 is fully consistent with the proposition that we have

1 developed that it is in cases where the decisional
2 aspect of the decision -- there is a particular
3 decisional aspect that for whatever reason falls outside
4 of the operative part that you then look at the concept
5 of an essential basis and say, well, that is still
6 essential basis of the decision, that determines what
7 was decided and therefore challenge can be made to that.

8 As you have seen from the passage I showed you in
9 Coppins, the court is pragmatic and acknowledges that
10 not every decision is going to be perfect, not every
11 decision sets out exactly what is the scope of the
12 infringement, and it acknowledges therefore that you
13 might need to look at the recitals to determine that.

14 Can I then take you to the Provincie Groningen case
15 which is at the eighth authority bundle, at -- well, it
16 starts at tab 105. The English translation of this --

17 PRESIDENT: Let me just get it out.

18 MS BACON: I was going to say don't go to the judgment
19 itself. I want you to start with the decision which is
20 at 106A of authorities 8. I hope you have been provided
21 with the decision.

22 The reason I am going to this case is that this is
23 a rather unusual example of a case where one particular
24 finding in the decision was found to be essential basis
25 and another wasn't. So it sheds some light on where

1 the court draws the line and I would like to start with
2 the decision because that is helpful to understand what
3 happened.

4 This is a decision about an aid scheme for
5 the acquisition of land for nature conservation. If you
6 see, if you turn up the decision at tab 106A, this
7 should say "State aid SA.31243 ... subsidy scheme for
8 acquisition of land for nature conservation" and
9 the Commission then followed a fairly straightforward
10 formula as regards state aid cases, first and starting
11 at --

12 PRESIDENT: This is the decision?

13 MS BACON: It should be "State aid SA.31243".

14 PRESIDENT: I think Mr Beard told us that decisions always
15 start with a "whereas".

16 MS BACON: Well, state aid decisions don't. Some other
17 types of legal act do but what you see here is a fairly
18 typical state aid decision.

19 PRESIDENT: Yes.

20 MS BACON: There are a few bits about the description of the
21 facts and then you get to a section about assessment.
22 Pretty much every state aid decision I have read, and
23 I have read a lot, follow this formula. We have
24 a section that starts "Assessment" at paragraph 15.
25 Again according to the tried and tested formula, there

1 is first of all an assessment of whether there is aid
2 within the meaning of article 107(1). You see the
3 heading:

4 "4.2. Presence of aid pursuant to Article 107(1)
5 TFEU."

6 Without getting into a lecture on state aid, in
7 order to find aid there are various different
8 constituent elements which the court sets out at
9 paragraph 16 -- sorry, the Commission sets out at
10 paragraph 16, and then the Commission goes on to examine
11 those different elements, the first of which is the
12 presence of an undertaking.

13 The conclusion at paragraph 17 is that:

14 "[The] Dutch nature managers eligible for a grant
15 under the notified scheme are undertakings within the
16 meaning of article 107(1)."

17 What you will see is that that conclusion referred
18 back to a previous decision. It didn't set out
19 the reasoning there. It simply incorporated by
20 reference a previous decision. So for good measure
21 we have included at the next tab the previous decision.

22 You don't need to turn it up now but in summary that
23 previous decision, which was a couple of months before
24 and concerned a similar aid scheme in the Netherlands,
25 the previous decision found that although these land

1 management organisations, who were the same ones who
2 were the beneficiaries under the previous aid scheme,
3 although they were likely to carry out some non-economic
4 activities, other of their activities were economic in
5 nature and insofar as that was the case for particular
6 beneficiaries, they were undertakings. So recognising
7 the multiplicity of tasks that these organisations might
8 carry out.

9 So the decision in this case which refers back to
10 the previous one was not that there were any specific
11 beneficiaries of the scheme who were definitely
12 undertakings as a matter of fact. Notwithstanding
13 the rather vague and general wording, what they were
14 making or the Commission was making here was a more
15 general finding that there were undertakings insofar as
16 these organisations carried out economic activities
17 which at least some of them did.

18 That was what was going on in paragraph 17.
19 The Commission then concluded that the other state aid
20 conditions were satisfied. At paragraph 34 you see
21 a conclusion that the notified measure constitutes state
22 aid.

23 Then the Commission went on to consider whether
24 the state aid could nevertheless be approved and it
25 decided that it could be approved under a particular

1 framework and that is what is recorded in the operative
2 part of paragraph 67. That is headed "Decision". So
3 paragraph 67 is what we would regard as the operative
4 part of this decision. That is how it is described.
5 The actual decision is that "the measure is compatible
6 with the internal market".

7 That sets up then the judgment. I am sorry for
8 taking you to that background but it was necessary.
9 The judgment then is at 106. I should say that 106 is
10 our translation because this was a judgment that was
11 only published by the court in French and Dutch.
12 We have the original French version in 105.

13 So this decision was then challenged by both
14 the Netherlands and some of the -- sorry, it was
15 challenged by the aid-granting authorities in
16 the Netherlands and it was challenged by some of the
17 beneficiaries under the scheme and what they were
18 challenging is set out at paragraph 36 of the judgment.
19 They were challenging two things. First of all,
20 the finding that there was state aid which I have taken
21 you to. And secondly, the classification of
22 the environmental managers or beneficiaries as
23 undertakings.

24 To assess those arguments, the court started by
25 referring at paragraph 36 to Lagardère for the

1 proposition that the grounds of the act should be taken
2 into account to determine what has been decided in
3 the operative part. That is at paragraph 36 in the last
4 sentence.

5 Again, it is the core of our submission as to what
6 we are talking about when we are referring to essential
7 basis.

8 PRESIDENT: Shall we just read paragraph 36?

9 MS BACON: Yes. (Pause).

10 PRESIDENT: Yes.

11 MS BACON: So the court then applies that test to the two
12 aspects that are challenged by the applicants.
13 Regarding the finding that there was state aid, the
14 court's conclusion on that is set out in the second half
15 of 37. And what the court says is that although
16 the operative part only refers to article 106(2), which
17 is the exemption provision or compatibility provision if
18 you like, that finding presupposed that the Commission
19 has first considered that the notified measure
20 constituted aid, which of course it had considered, in
21 the passage I showed you.

22 Therefore it must be stated that the conclusion that
23 the scheme constitutes state aid formed the necessary
24 support for the operative part. So it is because
25 the explicit wording in the operative part presupposed

1 some prior legal finding, a legal finding that there was
2 state aid.

3 So that part of the challenge, that part of the
4 Commission's decision was essential basis or necessary
5 support, and in this translation it is translated as
6 necessary support.

7 But the position regarding the conclusion that there
8 were undertakings was different. In the first half of
9 paragraph 37 the court says that the categorisation:

10 "... the characterisation of the beneficiaries ...
11 as undertakings ... is part of the preliminary analysis
12 necessary to the conclusion that the scheme falls within
13 the scope of the provision."

14 So it is recognising that this is something that has
15 to be done before you can conclude there is state aid.
16 But then it then says in paragraph 38:

17 "However, without a legally binding finding in
18 the operative part of the contested decision regarding
19 the status as undertakings of the environmental
20 managers, of which the applicants ... are part [and so
21 on...] the grounds in the contested decision relating to
22 that status [that being paragraph 17 of the decision
23 I took you to] do not constitute the necessary support
24 for the operative part ... and are therefore not subject
25 to the control of the EU ..."

1 So they cannot form the basis for any interest in
2 bringing the proceedings. So then the court proceeds to
3 assess admissibility only in relation to the state aid
4 findings.

5 Now, this is a very elliptical paragraph. No
6 reasons are given. We do not have the, obviously,
7 arguments put to the court before this, on this point
8 which might shed light on it. But the only reason that
9 I can think of that it makes this finding, and
10 particularly because it refers to "without a legally
11 binding finding", is the point that I have just made to
12 you that actually there was no specific finding in
13 the decision that any specific undertakings were -- any
14 specific organisations were undertakings, the term of
15 art, because the decisions simply refer back to
16 the previous decision which also didn't reach that
17 conclusion.

18 MR JUSTICE FANCOURT: It was not expressly dealt with at
19 all.

20 MS BACON: No. There was a general finding that there were
21 undertakings but if you look at the reference back, what
22 you see is there are undertakings insofar as the
23 organisations perform certain economic activities. And
24 even in the previous decision there was no specific
25 finding that any particular organisation was an

1 undertaking.

2 So what the court seems to be saying here is in
3 the absence of a specific binding finding on this point,
4 it can't constitute essential basis, whereas there was
5 a specific and definitive conclusion that there was
6 state aid.

7 It is also worth bearing in mind that as far as one
8 is looking at undertakings, that is a predominantly
9 factual assessment of the kind of activities they carry
10 out. And that is the kind of assessment that the court
11 carried out in the earlier decision, which is why
12 we included it in the bundle. So this --

13 PRESIDENT: Just one moment.

14 MS BACON: Yes. (Pause).

15 PRESIDENT: I'm just trying to think this through. The
16 finding that the scheme constitutes state aid, that
17 could be challenged as necessary support, but the
18 finding that the scheme constitutes state aid, if one
19 goes back to the decision at the next tab, as
20 paragraph 16 explains, depends upon four conditions, of
21 which the undertakings point is unsurprisingly
22 identified as one of those conditions, the second
23 condition.

24 MS BACON: Now, I would have said that if this had been
25 a case of individual aid to a single undertaking and

1 there had been a specific finding in the decision that
2 this undertaking is an undertaking with a capital U for
3 the purpose of the state aid rules because -- and then
4 a number of reasons why -- that, I think it would have.
5 It is like the constituent elements of an infringement
6 of article 1, in this case that there is an object
7 infringement or that there is an appreciable effect on
8 trade.

9 But I think what the court is saying here, and you
10 get that by unpicking what the decision actually was,
11 there wasn't a specific finding about any of these
12 beneficiaries because it was a much more general
13 finding. There were undertakings there somewhere.

14 HODGE MALEK QC: So there was no finding in the recitals
15 that the specific entities were undertakings?

16 MS BACON: No. And that was because this was an aid scheme.
17 It was going to be applicable to lots of different types
18 of organisations that carried out lots of different
19 types of activity --

20 HODGE MALEK QC: But if that had been determined, and that
21 was in the --

22 MS BACON: If it had been a legal assessment, having regard
23 to all the facts and having regard to what we describe
24 as an undertaking, this is an assessment you get in many
25 cases, this is an undertaking because it carries out

1 economic activities, then I would have accepted and
2 probably the court would have accepted in that case that
3 it could form essential basis. But there was not any
4 specific finding at all.

5 That has obvious resonance with this case because
6 what we see is that the vast majority of section 3
7 consists of general statements about the nature of the
8 infringement but what there is not there is anything
9 that can be identified as a specific legal assessment in
10 relation to specific addressees that could be regarded
11 in the terms used here as amounting to a legally binding
12 decision, capital D decision, by the Commission.

13 By contrast, where you do have specific conclusive
14 findings such as that there was a single continuous
15 infringement, or that it was an object infringement,
16 which is the direct analogue to the conclusion here that
17 the scheme constituted state aid, we recognise that
18 those form part of the essential basis of the decision.

19 So it is a contrast between specific decisional
20 findings and general references but which does not
21 actually make a binding finding and you can see why that
22 was the case there. So in our submission, that is quite
23 a good illustration of where the court draws a line and
24 it also shows that although one can look generally at
25 the recitals to identify what has been decided as was

1 done in this case, that doesn't mean, necessarily mean,
2 that all those recitals that you look at are in
3 themselves found to be binding.

4 It is clear that -- well, can you see from the
5 judgment that the court was very much looking at
6 recitals 16 and 17, 17 concerning the assessment in
7 relation to undertakings, but did not go on to conclude
8 that that was part of the essential basis. So that is
9 the Provincie Groningen case. As I say, we have done
10 our best with the translation. It was very difficult to
11 translate it but for reference, the French version is
12 there at paragraph 105.

13 The next case I want to refer to is ABB, the power
14 cables case. That is the last one that I want to take
15 you to. It is in the same bundle at tabs 109 and 110.
16 I am going to call this up myself.

17 Now, I am not sure you actually need to go to it
18 because I can make my submissions probably without going
19 to it. As you will see, that was a case where the
20 decision referred in very general terms to an
21 infringement in the extra high voltage underground
22 and/or submarine power cable sector and the decision --
23 the truncated version of the decision is at tab 108.

24 The claimants in the case didn't deny --

25 PRESIDENT: Sorry to interrupt you. Is this the decision

1 that was the basis of the BritNed case?

2 MS BACON: Yes, I believe so.

3 The claimants in the General Court didn't deny that
4 there was an infringement in that sector in general but
5 the question was what the scope of the infringement was,
6 in other words what products were covered.

7 The operative part was on that point somewhat
8 ambiguous. It was therefore necessary to look at
9 the recitals to ascertain that the infringement was
10 actually covering or found to cover by the Commission
11 all types of underground power cables with a voltage of
12 110 kV or above and that was the point that ABB
13 challenged, saying in fact it only covered power
14 cables -- the infringement covered power cables with
15 a higher voltage, 220 or above.

16 Mr Ward put that as a challenge to the detail of the
17 factual findings, and it was not. It was a challenge to
18 the central aspect of the scope of the decision,
19 i.e. the products that the decision covered. The kind
20 of thing that in Air Canada the court had said ought to
21 be precisely in the operative part so that the
22 undertaking could know what it was being fined for.

23 The analogue in this case is recital 5, as I believe
24 the President mentioned on Tuesday; recital 5 in our
25 decision which does define the products covered by the

1 decision. It defines what is meant by "medium and heavy
2 trucks" and it -- although that is not referred to in
3 the skeletons because it fell outside of the scope of
4 the Tribunal's order for the purpose of this hearing,
5 we have accepted that recital 5 forms part of the
6 essential basis of the decision because it defines
7 the product concerned by the infringement.

8 So that is the analogue to ABB. So ABB is another
9 illustration like Coppens of the sort of matter that
10 the European courts regard as the essential basis of the
11 decision. And it explains and supports the approach
12 that we have taken in this case.

13 So those are the cases that I wanted to take you to.
14 I now want to conclude with some submissions on how in
15 general terms that applies in this case.

16 Some of those submissions I have effectively set up
17 already. We know from Air Canada that as a minimum,
18 the operative part needs to be setting out or should be
19 setting out the legal classification of the conduct, so
20 in this case the finding that there was an infringement
21 of article 101, also the temporal and geographic scope
22 of that and the liability or non-liability of the
23 persons investigated. That is what Air Canada would
24 regard as the minimum core of the decision that ought to
25 be in the operative part. In this case, all of that is

1 in the operative part as it so happens.

2 We also know from Coppins that a finding that there
3 is an SCI is also regarded as part of the essential
4 basis. We have therefore admitted as essential basis
5 the part of recital 71 that makes that finding, and also
6 recital 78.

7 We also know from ABB that the identification of the
8 products covered by the infringement should also be
9 regarded as essential basis and on that basis we've
10 admitted as essential basis recital 5. We have also
11 accepted as essential basis the specific legal
12 assessments that are the predicate findings to the
13 decision in the operative part.

14 So, the findings that the infringement consists of
15 either agreements or concerted practices; a necessary
16 part of article 101. That is in recital 68.
17 The finding that the conduct had as its object
18 the prevention, restriction or distortion of
19 competition, that is in recital 69 and 81. The finding
20 that there were appreciable effects on trade for the
21 purposes of establishing the effect on trade test under
22 article 81. That is in recital 85.

23 PRESIDENT: So these are not legal findings; you can say
24 they are factual conclusions.

25 MS BACON: Well, I would say --

1 PRESIDENT: But to say something has an effect on trade is
2 clearly a factual conclusion.

3 MS BACON: It is a legal finding that has a factual
4 underpinning. I am agnostic as to whether one tries to
5 put it in a pigeonhole of a legal assessment or a legal
6 assessment based on factual considerations. Like many
7 issues it is a mixed question of fact and law but it's a
8 conclusive assessed finding. It is a finding of an
9 essential element of the legal test.

10 PRESIDENT: Yes but it is slightly different.

11 MS BACON: If you look at the point about object, that is
12 a legal conclusion but it is based on a factual
13 underpinning.

14 PRESIDENT: It is a legal concept but the finding that here
15 what went on had that object is a factual finding, isn't
16 it?

17 MS BACON: I would put a factual finding in the category of
18 where was X on a particular date. Does X having
19 a conversation on a particular date amount to an object
20 infringement, I would put it as a legal finding. But
21 I am agnostic as to whether one tries to pigeonhole it
22 in legal or factual or somewhere in between. It is
23 a decisive conclusion that an element of the required
24 test for infringement is satisfied.

25 So I was just going through the list. The last one

1 on my list was that the conditions in article 101.3 TFEU
2 and article 53.3 of the EEA agreement are not satisfied,
3 so no exemption. Recital 88.

4 So, we accept that all of those are essential
5 assessments of the Commission without which the decision
6 could not stand. They are all definitive findings and
7 they are the premises, the essential premises of the
8 decision in the operative part. So even if they are not
9 included on the face of the operative part, the Tribunal
10 can identify those as being part of what the Commission
11 has decided, to pick up the language of Lagardère and
12 Provincie. You are looking for what the decision is.
13 The rest is evidence or reasoning. It is not decisional
14 findings.

15 Now, what does that mean for what we can challenge
16 or dispute? We obviously cannot deny the infringement
17 found by the Commission, as identified in the operative
18 part and the recitals that we accept are essential
19 bases. So if there are any denials in our pleadings --
20 and we have now done a very detailed pleading
21 exercise -- if there are any denials in that which are
22 inconsistent with any of what I have identified as
23 essential bases, that would be excluded by the operation
24 of article 16 of regulation 1 and section 58A.
25 We accept that.

1 To see whether that is the case, one would need to
2 look at the amended defences that have only just been
3 filed. I am not criticising the claimants for not
4 making any submissions on that. I am saying that that
5 is an exercise to come to in due course. If in due
6 course, the claimants do, having looked at the very
7 detailed defences, identify denials that are
8 inconsistent with the operative part as well as the
9 recitals that we have identified as essential basis,
10 then it will be open to them to come back to court and
11 say you can't do that because that is inconsistent with
12 what you have accepted.

13 As expected, what you will see in the defences is
14 something of a patchwork of some specific admissions,
15 some specific denials and some non-admissions and they
16 are much more detailed than the recitals pleading that
17 you have seen, the response to Ryder's recital schedule.

18 PRESIDENT: We were told I think by Ms Demetriou that, with
19 very few exceptions, it is non-admissions. I know she
20 was basing it on the schedule, I think.

21 MS BACON: That is the point I was going to come on to
22 because the detailed pleading in the defences, that does
23 not easily map on to the settlement decision because
24 the settlement decision is not really in a form that
25 lends itself to a pleading and that is why

1 the settlement decision, because it makes a lot of
2 general statements, one cannot easily plead back to it
3 because some of those general statements are not
4 necessarily true for all addressees and at all times.

5 So the response to those general statements are not
6 likely to come in the form of a straightforward
7 admission or denial. That point was canvassed at
8 the November case management conference last year.

9 If I can just hand up -- this may or may not be in
10 the bundles already. It should be in for example tab 42
11 of the VSW core bundle. It is not in mine and it may
12 not be in other people's either. I have just extracted
13 the relevant bit of the transcript. For everyone else
14 in court, it should be in VSW core bundle, tab 42.
15 It is a transcript of Day 1 of the November CMC.

16 I think picking up at page 47, Ms Demetriou made
17 the point that she was concerned that, at the bottom of
18 page 47, if the defendants were going to be advancing
19 a different factual case they should say so. And over
20 the page, the Chairman, you sir, said:

21 "Well, what they may be saying is we do not accept
22 it and you have to prove it. They don't have to advance
23 a different positive case."

24 There was a bit more discussion on that and then
25 Mr Pickford, who is not here today, stood up and in

1 a section starting at page 52, he made exactly the point
2 that I just adverted to. At the bottom of page 52,
3 starting at line 22, he says:

4 "There are some assertions that are in very general
5 form and we might have to simply ..."

6 Then in line 25:

7 " -- that we should just plead to the entirety of
8 large parts of the Commission decision. There are some
9 things we can do practically. There are some sort of
10 assertions in the Commission decision which are not
11 suitable for being responded to in a pleading."

12 Then he says:

13 "Indeed, Mr Ward accepts that in his submissions
14 where he says that the decision is not framed
15 precisely."

16 Then he says:

17 "What is quite clear is that there are many recitals
18 in the decision that we will just have to, I think,
19 respond on a pragmatic basis because some of them are
20 not capable, we say, of the kind of pleading based
21 response that would ordinarily occur."

22 And then you said:

23 "Yes. We do not want complex responses on this. If
24 you say in your response this is so general that
25 we don't see it can be binding or capable of admission,

1 so be it."

2 The problem was then canvassed there. That is
3 the reason why you see a lot of non-admissions in
4 the recitals schedule. There are more detailed
5 statements of position, either admissions or denials, in
6 the particular pleadings in the defences because those
7 are more specifically pleading to particular allegations
8 that have been put and there was -- then, with
9 the benefit of having done that exercise, one can then
10 give a more complex response.

11 HODGE MALEK QC: If we have time to today or tomorrow,
12 I would like one of you to take me through their defence
13 and point out paragraphs which are asserting something
14 that is contrary to what is in a specific recital. So
15 you can say: look at paragraph X, that is inconsistent,
16 that is a positive case in response to this recital.

17 I know it is difficult but just give me some
18 examples.

19 MS BACON: No. I do have a couple of examples. So, for
20 example, recital 47 --

21 PRESIDENT: You are in the recitals? Where are you?

22 MS BACON: You can look at that wherever you like.

23 PRESIDENT: Recital 47 in the decision?

24 MS BACON: You could look at the decision. That is fine.

25 That is talking about gross price information and

1 the effect of exchanging that. Now, if you pick up
2 the admissions schedule -- you don't need to, I can tell
3 you what we said in the admissions schedule.

4 We admitted some of this but in relation to
5 the second sentence of the recital, we didn't make any
6 admissions. By contrast, in the --

7 PRESIDENT: Is this the -- just one moment --

8 MS BACON: If you want to see what we admitted to and what
9 we didn't, you can take up the Ryder schedule or you can
10 take up the consolidated schedule of September.

11 It doesn't make any difference. But we didn't admit
12 the second sentence and I can just give you
13 the reference to the amended defence in Ryder.

14 In Ryder, amended defence, paragraph 1A.3.2.4 there
15 is specific denial. It is just one example.

16 MR JUSTICE FANCOURT: Denial of what, sorry? Of the second
17 sentence of paragraph 47?

18 MS BACON: Of the second sentence:

19 "Denied that the exchange of gross price information
20 enabled Iveco and other OEMs to calculate each other's
21 net dealer prices or transaction prices even if
22 approximately."

23 So just as was alerted to in that November CMC,
24 there were non-admissions which were filed before we had
25 done a detailed exercise of going through the pleadings.

1 When we came to do the pleadings, as one would expect,
2 we were able to give more colour and put in some
3 specific admissions and some specific denials. I have
4 just given you one example.

5 HODGE MALEK QC: Look. You can have an admission, you can
6 have a non-admission, you can have a denial but then you
7 can have a denial plus a positive case. What I am
8 looking for is something in the last category. That is
9 all I am asking.

10 MS BACON: Yes. If you look at the denial in that case,
11 it explains our positive case. We explained that it is
12 denied that this enabled the OEMs to calculate the net
13 dealer prices or transaction prices.

14 MR JUSTICE FANCOURT: Can you give us the paragraph
15 reference in that statement, please?

16 MS BACON: The paragraph reference I was giving you was
17 Ryder defence, 1A.3.2.4. Page 7 of the defence.

18 PRESIDENT: This is Iveco's defence?

19 MS BACON: Yes. In the core bundles, it is in the Ryder
20 core bundle at tab 10.1 and that denial --

21 PRESIDENT: Just one minute, please.

22 MS BACON: That denial is explained in detail over about
23 a page and a half.

24 PRESIDENT: Yes.

25 HODGE MALEK QC: Where do I find that in these bundles?

1 MS BACON: So, if you go to the Ryder core bundles,
2 I believe it is the first of the Ryder core bundles.
3 PRESIDENT: A1.1, tab 10?
4 MS DEMETRIOU: Sir, I am sorry to rise, but for our part
5 we don't have the Ryder core bundles so we are not able
6 to follow this point.
7 MS BACON: Yes, it is a detailed submission. I was not
8 intending to take you to it. I was responding to
9 Mr Malek's request for an example.
10 HODGE MALEK QC: You were responding to me.
11 MS BACON: It was just one example when, with the benefit of
12 a full pleading exercise, we are able to give a more
13 specific and positive case but I appreciate that many
14 people in the court will not have all of those pleading
15 bundles.
16 PRESIDENT: Sorry. This is the defence of Iveco?
17 MS BACON: Iveco, to the Ryder amended --
18 PRESIDENT: It is paragraph -- page 7, you say?
19 MS BACON: Yes.
20 HODGE MALEK QC: It is 1A3.2.4.
21 PRESIDENT: It is the amended defence, isn't it, tab 11?
22 MS BACON: Tab 10.1.
23 PRESIDENT: 10.1?
24 MS BACON: 10.1, yes, and the explanation for it is given
25 for in the preceding sub-paragraph. I do not want to

1 take up the Tribunal's time now. I am also conscious
2 that Mr Jowell needs to get on with his submissions.

3 HODGE MALEK QC: If you could just give me a piece of paper
4 tomorrow which identifies the paragraphs in here that
5 I need to look at for examples of not just denials but
6 denials plus, i.e. denials in the affirmative case.

7 MS BACON: Or admissions plus, I presume?

8 HODGE MALEK QC: No, I don't need that.

9 MS BACON: Right, denials plus. We will do that insofar as
10 we can.

11 I think that just brings me to my final point which
12 is, having looked at all of that, as I said it is a
13 matter for another day for the claimants to identify
14 pleaded points that they say are inconsistent with
15 the binding parts of the decision. What is not
16 appropriate is for the claimants to look at it the other
17 way round and say, well, more of the decision we think
18 should be regarded as binding and therefore we are going
19 to broaden the scope of the concept of essential basis,
20 because that would be circular.

21 The correct sequence of questions -- and here
22 I think I am in agreement with Mr Beard -- is to ask
23 first: what is the essential basis for the operative
24 part as defined by EU law? Work out what is binding and
25 then to ask whether the amended defences are

1 inconsistent with that.

2 The point of difference between me and Mr Beard is
3 that he says that the correct answer to the first
4 question is that none of the recitals are binding and
5 we say if the Tribunal does not accept that, then
6 we accept that some of the recitals are essential basis
7 but on a limited basis for the reasons I have given.

8 Unless the Tribunal have any further question, those
9 were our submissions on the general principle.

10 MR BEARD: Before Mr Jowell stands up, just in relation to
11 the list that you were referring to, you said not
12 admissions which one can understand because it is
13 qualified permission but with non-admissions, there will
14 be a lot of material where there are non-admissions
15 because of the generality of the pleading but there will
16 actually be positive statements made. Presumably that
17 fits into the category of material that is relevant for
18 the assessment, sir, that you are looking at in relation
19 to this?

20 HODGE MALEK QC: Yes. That is fine. That is very helpful.

21 MR JUSTICE FANCOURT: The very paragraph that Ms Bacon was
22 referring to was an example of that actually because
23 it starts:

24 "It is not admitted for the following reasons ... "

25 MR BEARD: Yes, I am grateful. That is it exactly. I just

1 wanted to clarify what we were embarking on. Thank you.

2 Submissions by MR JOWELL

3 PRESIDENT: Yes, Mr Jowell?

4 MR JOWELL: May it please the Tribunal, may I gratefully
5 adopt Ms Bacon's submissions on the test for binding
6 recitals. I should also note that I'm in the same
7 difficulty as Ms Bacon as regards my throat, so I may be
8 reaching for the water.

9 May I start by identifying points that we understand
10 are not in contention on the issue of abuse of process.

11 The first point that is not in contention or at
12 least should not be in contention is that in considering
13 the application of this document, the Tribunal need only
14 ultimately be concerned with those assessments or
15 findings in recitals that are not already binding as
16 a matter of EU law. And that is because insofar as
17 findings in recitals are binding as matter of EU law,
18 there is no need to determine whether they would also be
19 binding as a matter of the English law doctrine of abuse
20 of process.

21 On any view, the English law doctrine is superseded
22 and insofar as that is the case. So in considering
23 the potential application of abuse of process, I will be
24 focusing my submissions on whether it is an abuse of
25 process for the defendants to deny or not admit what

1 have been called by Mr Justice Marcus Smith in the
2 BritNed case the inessential findings in the recitals.

3 The second point that I think was common ground as
4 clarified by a response Ms Demetriou gave in response to
5 a question from the Tribunal towards the end of her
6 submission, it is common ground I believe that it would
7 not be an abuse of process in subsequent domestic
8 proceedings for an addressee to seek to contest an
9 inessential recital in what I would call an ordinary
10 Commission decision.

11 By an ordinary Commission decision, I mean one that
12 is not arrived at following the Commission settlement
13 process.

14 So the claimants' submission on abuse of process as
15 we understand it applies only either to settlement
16 decisions generally or possibly to the settlement
17 decision that was reached in the particular
18 circumstances of this case.

19 The third point that is common ground is that abuse
20 of process, if it arises at all, is alleged to arise
21 only under English law and not under European law. That
22 was a point on which we sought clarification in response
23 to the claimants' pleadings and if I can show you
24 the answer to that, it is in the common bundle A at
25 tab 6.

1 You will see we requested:

2 "Please clarify ..." this is in respect of the
3 Veolia/VSW claimants, Ms Demetriou's clients:

4 "Please clarify whether each of the claimants' pleas
5 as to abuse of process are alleged to be based on (1) EU
6 law, (2) English law or (3) both EU and English law."

7 And the reply was:

8 "Claimants' pleas as to abuse of process are based
9 on English law."

10 Well, that is clear.

11 There is no contention as I understand it that EU
12 law requires these inessential recitals in Commission
13 decisions, including settlement decisions, to be given
14 any binding force. That is not election.

15 So what the issue boils down to is whether
16 the English doctrine of abuse of process can allow
17 the claimants to improve on the position that would
18 otherwise pertain under EU law. Now, a final, further,
19 further and final point that I should mention that is
20 not in contention from our side, from the defendants'
21 side, is this. It is that the findings in the
22 Commission decision which are recorded by -- which are
23 recorded as having been accepted or at least in outline
24 by the addressees, we accept those are admissible
25 evidence before the English court.

1 I do not need to take the Tribunal to it but that is
2 clear from Lord Hoffmann's speech in the Crehan v
3 Inntrepreneur case, at paragraph 69. That is at
4 volume 4 and coincidentally at tab 69. Lord Hoffmann
5 notes that recitals in a Commission decision are
6 admissible evidence and in his words, he says that they
7 are potentially very persuasive evidence.

8 It is also accepted that in any event, admissions by
9 one party to a litigation, prior admissions, are
10 admissible evidence anyway. That is clear from any
11 textbook on the law of evidence. So insofar as
12 the inessential recitals may be properly regarded as
13 admissions, they will be admissible also for that reason
14 too. So what that means is that the court, when it
15 comes to determining the issues of causation and
16 quantification will be able to take into account
17 the inessential recitals and it will be able, insofar as
18 it regards them as admissions, potentially to give
19 the weight to it --

20 HODGE MALEK QC: When you say admissions, which admissions
21 are you referring to and to whom?

22 MR JOWELL: Well, it is the statement that is in
23 the Commission decision that these have been accepted in
24 outline by the defendants.

25 HODGE MALEK QC: So when you have a recital setting out

1 the background fact, you have accepted those facts and
2 you say that is an admission?

3 MR JOWELL: It may be, at least in general terms. One could
4 say that it is an admission of the main facts. That is
5 something that we say can be taken into account.

6 Now, what weight to give to that is a matter we say
7 to be decided in due course but we accept that at least
8 in general terms a party may face an uphill battle in
9 contesting the points that it has already admitted.

10 MR JUSTICE FANCOURT: When we get to the trial, if we do get
11 to the trial, are you submitting that this is
12 generalised second-hand evidence, not the best evidence,
13 hearsay and therefore the Tribunal cannot give any
14 weight to it?

15 MR JOWELL: That may be.

16 MR JUSTICE FANCOURT: It is a very summarised finding.

17 There is not a lot of detail or granularity.

18 MR JOWELL: I accept that. That may be, but my point is
19 simply that it is not that the Tribunal in due course is
20 shut out from considering those findings, as
21 Lord Hoffmann said, and it may also give what weight it
22 sees fit to the fact that they have been accepted.

23 Against that, the issue for today, the issue on
24 abuse of process is whether the Tribunal should be shut
25 out effectively from an assessment of those facts. What

1 the claimants are saying is that the defendants will be
2 absolutely bound by all of the relevant recitals that
3 they have identified, regardless of --

4 PRESIDENT: I think regardless -- and no doubt you will come
5 to it -- Ms Demetriou put a sort of gloss or nuance on
6 the way that she put it, at least in the course of
7 argument, she recognised that if there is a particular
8 fact to which a defendant wants to advance a positive
9 case, it may not be an abuse for a defendant to do so.

10 What, as I understood the thrust of her submission
11 was the abuse is the defendants could just sit back and,
12 say, not admit and require the claimants to prove again
13 what is set out in the decision.

14 MR JOWELL: Well, I -- yes.

15 PRESIDENT: And then for the defendants to say, well, your
16 evidence isn't very powerful or shoot holes in it and
17 cross-examine all the witnesses to try to avoid the same
18 finding being made. That is the way her submissions
19 came across.

20 I think she accepted if there is a specific point
21 where say your client wants to say, no, we were not at
22 that meeting, it is not an abuse for you and we have one
23 core evidence to show that, that would not be an abuse.

24 Is that right, Ms Demetriou?

25 MS DEMETRIOU: My Lord, not quite.

1 What I said was that certainly the fact that by and
2 large they are not advancing a positive case is an
3 additional reason why it is abusive and I said that
4 because it is a fact-sensitive assessment to
5 the application of the abuse of process test, if there
6 were circumstances in which they sought to advance
7 a positive case and there were particular facts which
8 meant that it would be unfair for the rule of abuse of
9 process to shut them out -- for example, if the fact
10 only came to light after they had made their
11 admission -- then that is something that the Tribunal
12 could take account of.

13 I was not going so far as to say that every time
14 they advanced a positive case, they would be permitted
15 to re-open the point. I hope that is clear.

16 PRESIDENT: Yes. It makes it slightly difficult to decide
17 in general whether it is an abuse to challenge those
18 recitals or not.

19 MS DEMETRIOU: Well, sir, in this case, my submissions on
20 that were that with only three exceptions, which I dealt
21 with, they are only non-admissions and so in respect of
22 the three exceptions, I would say that the application
23 of the test requires the defendants to show that there
24 is some particularly cogent reason why the abuse of
25 process principles do not apply.

1 PRESIDENT: Yes.

2 HODGE MALEK QC: You say you accept that you have made
3 admissions and if there is an admission, that can be
4 used against you as an admission for whatever weight
5 the evidence has.

6 MR JOWELL: Absolutely --

7 HODGE MALEK QC: Presumably, you say where is the room for
8 abuse of process in that?

9 MR JOWELL: Precisely, and I do not think there is room for
10 this middle ground sort of approach.

11 The type of abuse of process that is contested for
12 here, as Ms Demetriou put it at the outset of her
13 submissions, it is abuse of process on the basis of
14 a collateral attack. There is clear law in that area
15 that in those circumstances, the defendant is completely
16 barred from then calling the relevant decision findings,
17 the determination, subject only to the extraordinary
18 exceptions in I think it is the Phosphate Sewage line of
19 cases where there is something that entirely changes all
20 aspects of the case. I think it is an even higher test
21 than *Ladd v Marshall* is regarded.

22 Now, of course, Ms Demetriou can, with grace and
23 favour if you like, say, well, we are not going to shut
24 you out but that is not a position which we wish to be
25 in or we say the Tribunal should be in because

1 the Tribunal should not have its hands tied by these
2 findings. That is the effect of this abuse of process
3 argument.

4 If there is abuse of process of a very different
5 type which is in relation to pleadings which are not
6 admissions, it is necessary for the Tribunal to deal
7 with that on another occasion by going through
8 the relevant pleadings and considering whether there is
9 that form of abuse of process in the form of a
10 non-admission where it is not permissible to make one
11 but that is a completely different animal.

12 So I would intend, if I may, to structure my
13 submissions in the following way --

14 HODGE MALEK QC: Going back to admissions, I am sorry, but
15 if this was a normal CPR case under CPR14, you would
16 have a formal admission and you are bound by that and
17 the judge will follow that unless and until you apply
18 for permission to withdraw that admission and that is
19 done but here you are saying my admission is not in
20 the context of these proceedings, my admission was
21 before the Commission and I have accepted certain facts
22 that are set out in the settlement decision. But at the
23 same time I seem to have, from what you are saying, an
24 open-ended right to put in evidence that contradicts
25 those admissions.

1 Is that what you are trying to say?

2 MR JOWELL: Yes. Suppose that the admissions had been made
3 in a press release for example and the parties had said,
4 "We regret our conduct which consisted of the following
5 ... " Then that would be admissible evidence --

6 HODGE MALEK QC: It is admissible evidence but it is a very
7 different animal from a formal admission under CPR14,
8 even under the old rules.

9 MR JOWELL: It is but my point is that an acceptance to
10 the Commission in the context of Commission proceedings
11 is not of itself binding in this court in the same way
12 as an admission under CPR14.

13 So what I would like to do, if I may, is to go
14 through some of the general principles under the law on
15 abuse of process and to show you, if I may, the high
16 hurdle, very high hurdle that the claimants would need
17 to overcome in order to establish it.

18 Secondly, to consider why it would not be an abuse
19 of process to contest inessential recitals in an
20 ordinary Commission decision. In that context, I am
21 going to have to go back to the judgment of
22 Mr Justice Laddie in the judgment in the Iberian case
23 and then to consider whether it would make any
24 difference if the recitals were accepted by
25 the addressees pursuant to the settlement process and

1 embodied in the settlement decision.

2 I will seek to explain to the Tribunal why we say
3 a settlement decision is to be treated no differently
4 from an ordinary decision and why there is certainly no
5 basis to suggest that the high hurdle to abuse of
6 process in the form of collateral attack can meet
7 the conditions. Finally, I wish to consider
8 the suggestion that there is something special about
9 the particular circumstances of this settlement decision
10 that render it an abuse of process.

11 So if I may start with the general principles and if
12 I could ask the Tribunal to take up authorities
13 bundle 5, tab 74, which is a fairly recent judgment of
14 the Court of Appeal in the case of *Wilson v Sinclair*.
15 The issue in this case was whether an arbitral award
16 gave rise to an abuse of process in the form of
17 collateral attack.

18 If I may take you to the judgment of Lord
19 Justice Simon, he starts his consideration of
20 the authorities in this area at paragraph 39. I commend
21 the whole section to you but in the interests of time,
22 I am going to have to cherry-pick.

23 In paragraph 42, you will see that he quotes from
24 Lord Hobhouse in *Arthur JS Hall*. You will see he cites
25 a quotation from Lord Hobhouse who says:

1 "To challenge in later litigation an earlier
2 non-binding decision between parties is not itself
3 abusive, provided there are good reasons for doing so.
4 So far as the questions of law are concerned, the
5 doctrine of precedent contemplates this. So far as
6 questions of fact are concerned, each court had to try
7 and decide questions of fact on the evidence adduced
8 before it. Judicial comity and common sense take care
9 of most situations in practice but the law does tolerate
10 the possibility of apparently inconsistent decisions.
11 The element of vexation is an aspect of abuse, the use
12 of litigation for an improper purpose, trying to have
13 repeated bites at the same cherry. The objectionable
14 element is not the risk of inconsistency."

15 So that is an important point.

16 Then at paragraph 44, he quotes again from
17 Lord Hobhouse, in this case *In re Norris* and you will
18 see:

19 "These are illustrations of the principle of abuse
20 of process. Any such abuse must involve something which
21 amounts to a misuse of the litigation process. Clear
22 cases of litigating without any honest belief in any
23 basis for doing so or litigating without having any
24 legitimate interest in the litigation are simple cases
25 of abuse. Attempts to relitigate issues which have

1 already been the subject of judicial decision may or may
2 not amount to an abuse of process. Ordinarily such
3 situations fall to be governed by the principle of per
4 rem judicatam or of issue estoppel (admitted not to be
5 applicable in the present case)."

6 And the next words are important:

7 "It will be a rare case where the litigation of an
8 issue which has not previously been decided between
9 the same parties or their privies will amount to an
10 abuse."

11 And if you go forward, you will see in the next
12 paragraph, the two tests of Sir Andrew Morritt which are
13 often recited in the authorities and used in
14 the authorities are recited, that it must be either
15 "manifestly unfair to a party to the later proceedings
16 that the same issues be relitigated or (ii) to permit
17 such relitigation would bring the administration of
18 justice into disrepute." Those are by their very nature
19 very high tests to meet.

20 You will see also if you then go to paragraph 48,
21 there is a useful summary by Lord Justice Simon of
22 the theme. Paragraphs 1 to 5 are relevant for present
23 purposes. You will see in paragraph 4 in particular he
24 puts the test slightly differently to
25 Sir Andrew Morritt. He refers to two circumstances:

1 "... it may be an abuse of process, where
2 the parties in the later civil proceedings were neither
3 parties nor their privies in the earlier proceedings, if
4 it be manifestly unfair to a party in the later
5 proceedings that the same issues be relitigated... or,
6 as Lord Hobhouse put it in the Arthur JS Hall case, if
7 there is an element of vexation in the use of litigation
8 for an improper purpose."

9 Underneath that he then adds the In re Norris case:

10 "It will be a rare case where the litigation of an
11 issue which has not previously been decided between the
12 same parties or their privies will amount to an abuse of
13 process ..."

14 Now, my learned friend sought to take the sting out
15 of that last point by saying, well, yes, in cases of
16 abuse of process in the form of collateral attack, it
17 will almost always be the case that you will not have
18 the same parties. Well, technically, that may or may
19 not be right because there is also the possibility that
20 you may have the same parties but a slightly different
21 issue or something that does not give rise to an issue
22 estoppel. That would also fall into that category.

23 But leaving that aside, the matter that my learned
24 friend glosses over that is that one does not simply
25 apply the two-limb test in isolation. The approach that

1 is enjoined by the authorities is that the court must
2 only apply the test in highly exceptional circumstances,
3 in rare circumstances.

4 One sees that coming out in another decision,
5 a recent decision of the Court of Appeal very clearly,
6 which is the Kamoka case, if I can ask you to go to
7 that? It is in bundle 2 at tab 44.

8 This was a claim for unlawful imprisonment on behalf
9 of the relevant Libyan nationals. It was alleged that
10 a decision of a SIAC tribunal in a closed procedure gave
11 rise to an abuse of process point. If I can take it
12 from page 21 of the judgment, it is judgment of
13 Lord Justice Flaux at paragraph 66 and perhaps if I can
14 just ask you to read from paragraph 66 to paragraph 73?
15 (Pause).

16 So you will see, particularly from
17 Lady Justice Gloster's comments in the Ablyazov case
18 that there is a maximum of restraint that is applicable
19 here. Having identified that this is a critical
20 question, whether they were the same parties or their
21 privies, Lord Justice Flaux then went on to decide that
22 they were not. If I could show you paragraph 119 also
23 at page 35 of the judgment?

24 Having identified in the first two sentences, he
25 talks about whether there is identity of interest in

1 order to establish privity of interest. He then says
2 this:

3 "As is clear from the authorities (specifically
4 Lord Hobhouse in *In re Norris...*) cases where subsequent
5 proceedings are an abuse of process, notwithstanding
6 that the claimant or his privy was not a party to
7 the earlier proceedings, are entirely exceptional."

8 Now, my learned friend placed considerable reliance
9 on the judgment of Mr Justice Laddie in the case of
10 *Iberian v BPB*. May I go back to it briefly? It is in
11 volume 1, tab 7.

12 We make three points about this judgment. The first
13 point is that in that case, BPB were seeking to
14 relitigate the question of whether it had committed any
15 infringement of competition law at all. It was seeking
16 to completely ignore the infringement decision itself.
17 One can see that from paragraph 7. So it sought to put
18 in issue all of the major issues decided against it by
19 the European Commission and which have been subsequently
20 upheld by the courts in Luxembourg. It was effectively
21 seeking to deny the operative part and the essential
22 basis.

23 Now, neither of the parties in that case made any
24 distinctions between the facts essential to the decision
25 and the inessential facts. So Mr Justice Laddie didn't

1 have to consider the question of whether inessential
2 recitals could be binding on an English court. That was
3 not a point that he had to wrestle with but there is
4 a very strong indication in the reasoning of
5 Mr Justice Laddie that he would not have done so had he
6 considered the point.

7 That is because you will see from paragraph 57 and
8 also paragraph 72 that he put a great deal of weight on
9 the fact that the parties had an opportunity to appeal
10 the Commission decision and indeed had so appealed.
11 Perhaps if I can take you to his key conclusions on this
12 point which are in paragraph 72, he says:

13 "These cases suggest that the court shouldn't
14 interpret our rules of procedure in a way which will
15 give rise to an appreciable and unnecessary risk that
16 the courts here and the Commission would come to
17 inconsistent results in relation to competition issues.
18 Of course, due regard has to be paid to the interests of
19 justice to the parties but where, as here, the parties
20 have disputed the same issues before the Commission and
21 have had real and reasonable attempts to appeal from an
22 adverse decision, there is no injustice in obliging them
23 to accept the result in Europe. The position is
24 a fortiori when, as here, the opportunities of appeal
25 have been used to the full. Therefore whether expressed

1 in terms of res judicata or abuse of process, it would
2 be contrary to public policy to allow persons who had
3 been involved in competition proceedings in Europe to
4 deny the correctness of the conclusions reached there.
5 The parties are bound."

6 Incidentally, my learned friend took you to
7 the passage in paragraph 75 but that actually is dealing
8 with a different submission, that the parties were bound
9 as a result of what was then article 189 of the treaty
10 by the Commission decision but the key aspect of his
11 conclusions on abuse of process is that passage in
12 paragraph 72.

13 Now, the second point that we would stress in
14 relation to Mr Justice Laddie's judgment is that he does
15 emphasise the fact, the importance of the fact, that
16 the claimant was very closely involved in
17 the proceedings both before the Commission and
18 the courts.

19 PRESIDENT: Just to understand this, paragraph 75 and
20 following, notwithstanding the reference to abuse of
21 process in paragraph 72, is that not the section where
22 Mr Justice Laddie was really looking at the abuse of
23 process argument as the alternative?

24 MR JOWELL: No. In my submission, he is really looking at
25 it -- it is the conclusion in 72 where he reaches his

1 views on abuse of process. In 75 and following, he is
2 looking at the argument that the defendants are bound by
3 the European decisions as a result of article 189 but
4 I accept that there is some crossover and he does
5 cross-refer.

6 PRESIDENT: He starts 75:

7 "This brings me to the final way in which
8 the plaintiff puts his case ..."

9 Even if res judicata does not apply, the argument is
10 not dependent upon the state of the plaintiff etc --

11 MR JOWELL: Yes.

12 PRESIDENT: But to use English terminology, it is an abuse
13 of process. Isn't that it?

14 MR JOWELL: No. In my respectful submission, what they are
15 saying there is the defendants are bound by the European
16 decisions. They were the direct addressees of them and
17 that is based on -- you will see in the next paragraph,
18 76 -- the effect they say of article 189 of the treaty
19 which means that the defendants were bound as a matter
20 of European law but --

21 PRESIDENT: Yes, but then the question is are they bound in
22 the English court?

23 MR JOWELL: Yes. I accept it is somewhat tied up but he has
24 already reached the conclusion in 72 that the parties
25 are bound as a matter of English law, he says, as

1 a matter of abuse of process. So in my submission, he
2 is coming on to a slightly different point.

3 It is important to him that, in reaching
4 the assessment on the abuse of process, that
5 the claimant was closely involved in the proceedings as
6 well. One sees that in paragraph 44 and 46 to 47 where
7 he describes it as a head-on dispute between
8 the parties.

9 PRESIDENT: I am not sure I understand this case the way you
10 are suggesting because this is the section, starting in
11 75 and ending in what ought to be paragraph 89 on
12 page 22 but it has been misnumbered, the Hunter case was
13 concerned, etc, discusses Hunter, discusses English
14 authority and then he concludes in the last sentence
15 with his conclusion on abuse of process.

16 MR JOWELL: He does come back to abuse of process but there
17 were two distinct strands to the claimant's arguments,
18 one based on abuse of process and one based on
19 article 189. In my submission he has come to his
20 conclusion on abuse of process already, at paragraph 72,
21 and that is the heart of his reasoning. Central to that
22 is the fact that they could appeal and had appealed and
23 also important was that the claimant were themselves
24 involved.

25 The final point before the short adjournment if

1 I may, that we would like to make, and here perhaps
2 the most important point is that it is now superseded by
3 the fact that there is a European statutory code that
4 covers the fact that Commission decisions are binding
5 and the extent to which they are binding and that has
6 come in the form of article 16 of regulation 1/2003
7 which you have already been shown by Mr Beard.

8 The fact that this is now a codified area has
9 received express judicial recognition more than once.
10 If I could ask you to take up the citations from our
11 skeleton argument in the interests of time? It is in
12 the skeleton argument bundle at tab 4, paragraph 27.

13 You will see that in *Crehan v Inntrepreneur*
14 the House of Lords noted that the law on the
15 relationship between the Commission and national courts
16 was so to speak codified by article 16 of council
17 regulation number 1/2003. That is how the House of
18 Lords described it.

19 Lord Carlile in the *2 Travel Group* said in
20 the context of an OFT decision:

21 "Clearly by parity of reasoning what
22 Mr Justice Laddie said in *Iberian* is equally applicable
23 as regards OFT decisions. However we do consider that
24 the decision of Laddie J in *Iberian* has now been
25 overtaken by legislation in the case of European

1 Commission decisions by article 16 of regulation 1/2003.
2 We do not consider there to be a role for Iberian in
3 this case, given the existence of section 58."

4 And after the short adjournment, I would like to
5 take you to the actual case of BritNed, which is
6 the third case that we refer to in this regard.

7 PRESIDENT: Yes, so we will say five past two.

8 (1.05 pm)

9 (The short adjournment)

10 (2.05 pm)

11 PRESIDENT: Yes, Mr Jowell.

12 MR JOWELL: Sir, I was about to take the Tribunal to
13 the BritNed authority and if I could ask you briefly to
14 look at that again. It is in volume 3, tab 47.
15 I simply wish to point out certain features on page 28.

16 PRESIDENT: Yes.

17 MR JOWELL: In sub-paragraph 67(6)(c) you will see that
18 Mr Justice Marcus Smith remarks that:

19 "A recital not constituting part of the essential
20 basis for a decision. Such recitals are not binding on
21 this court. I do not consider that such a conclusion is
22 inconsistent with the duty of sincere cooperation ...
23 and I can identify no other rule -- whether of European
24 law or English law -- that compels such a conclusion."

25 And he quotes from Crehan v Intrepreneur, the

1 passage that I mentioned at the outset to the Tribunal,
2 in which Lord Hoffmann mentions that Commission recitals
3 are admissible and may be regarded by the court as
4 highly persuasive.

5 You will see in the footnote that he had well in
6 mind Iberian because he refers to it in footnote 44.
7 We say that Mr Justice Marcus Smith was right and that
8 his approach is right for at least two reasons.

9 PRESIDENT: So he is right on (c)?

10 MR JOWELL: Yes. We say that that is for two reasons,
11 because first of all, his approach is consistent with
12 the statutory scheme which renders binding only
13 the operative part of any essential recitals and it
14 would be inappropriate in our submission to graft on to
15 that a wider effect to a Commission by use of the abuse
16 of process doctrine.

17 Even more fundamental perhaps, he is right for this
18 reason, that inessential findings in a Commission
19 decision are not by their very nature appealable to
20 a court of law. They are not --

21 PRESIDENT: He is not addressing settlement of course in
22 this.

23 MR JOWELL: No, he is not. I accept that.

24 PRESIDENT: That is common ground, is what he says.

25 MR JOWELL: I accept that but I simply want to focus for

1 present purposes on the underlying reasons which I think
2 are common.

3 PRESIDENT: Yes.

4 MR JOWELL: Where you have a finding in a decision of an
5 administrative agency like the Commission from which
6 there is no appeal, a finding from which there is no
7 appeal, it cannot be an abuse of process to relitigate
8 those findings before a court and that is not least
9 because it would be contrary to article 6 of the
10 European Convention on Human Rights, because it would
11 preclude the right of access to a court.

12 Now, there is an interesting debate -- perhaps
13 debate may be putting it too highly but there is an
14 interesting issue in the case law which is whether even
15 a court decision which is unappealable can be used as
16 a basis for the collateral attack doctrine.

17 But certainly when you have an administrative agency
18 which is not a court, an unappealable decision cannot
19 be.

20 May I now turn to the question of whether it makes
21 any difference that the decision is a decision arrived
22 at after a settlement process? For that purpose it is
23 necessary to consider a bit about what the settlement
24 regime's role is and how it supports the Commission's
25 enforcement of EU law.

1 If I could ask you first to go back to the
2 regulation which is in bundle 8 at tab 103, and in
3 recital 4 you will see the first sentence in which it
4 sets out the purpose of the settlement regime --

5 PRESIDENT: Just a moment. Yes, recital 4?

6 MR JOWELL: 4:

7 "A settlement procedure should therefore be
8 established in order to enable the Commission to handle
9 faster and more efficiently cartel cases."

10 So that is what this is about. It is about
11 assisting the Commission in expediting matters. And
12 more colour is given if you go to the Commission's
13 notice -- forgive me for dotting around -- which is in
14 bundle 2 at tab 26.

15 PRESIDENT: Shall we keep this out, the regulation?

16 MR JOWELL: No.

17 In recital 1 of the Commission's notice on
18 settlement you will see the second sentence:

19 "The settlement procedure may allow the Commission
20 to handle more cases with the same resources, thereby
21 fostering the public interest in the Commission's
22 delivery of effective and timely punishment, while
23 increasing overall deterrence."

24 And then in the second recital you will see that it
25 notes that:

1 "When parties to the proceedings are prepared to
2 acknowledge their participation in a cartel... and their
3 liability therefore they may also contribute to
4 expediting the proceedings leading to the adoption of
5 the corresponding decision."

6 I should also note while we are passing the last
7 sentence in which it is noticed that the Commission
8 does not negotiate the question of the existence of an
9 infringement of Community law and the appropriate
10 sanction. This is not a negotiation process.

11 What this is all about is encouraging settlement to
12 assist the Commission and make it more speedy and
13 effective.

14 Now, in recognition of that desirability of
15 encouraging settlements, as Ms Demetriou has pointed
16 out, the Commission provides incentives to settle.
17 The principal incentive is a potential reduction of the
18 fine by 10%.

19 As I will come to in a moment, for my client, MAN,
20 because it was the first immunity applicant, it didn't
21 in fact benefit in this case from that 10% reduction at
22 all because it already had full immunity from fines.
23 But for others, it is accepted they obtained a 10%
24 benefit. But that is of course not a massive advantage.
25 Certainly not compared to the reductions that one gets

1 for engaging in a leniency process.

2 We also accept that there is a potential advantage
3 to a defendant in that settlement decisions may be more
4 succinct. But again, in many cases that is not going to
5 be a very substantial advantage and it shouldn't be.
6 The ability of a settlement addressee to influence
7 the form of the settlement decision shouldn't be
8 overstated, as I have just shown you. The Commission
9 does not negotiate questions of the existence of the
10 infringement.

11 The reason why there are incentives to settle is
12 because settling also brings with it intrinsic
13 disadvantages. To give just a few obvious examples,
14 settling brings forward in time when a binding decision
15 is made. That is usually a disbenefit. In addition,
16 although a substantive appeal from a settlement decision
17 is still possible -- and that is an important point
18 which I will come to in a moment in a different
19 context -- but although an appeal is still possible
20 after you have accepted a settlement decision, it is
21 going to be much more difficult to have a successful
22 appeal in circumstances where a party has already
23 accepted the infringement and settled.

24 These inherent disadvantages are apparent indeed in
25 the present case where one has one defendant, Scania,

1 that has chosen not to settle. It perceived that
2 the disbenefits did not exceed the benefits of
3 settlement. And the Commission itself implicitly
4 recognises that for many defendants it won't be obvious
5 that settlement is advantageous because it seeks,
6 actively seeks in its regime to avoid disincentivising
7 parties from settlement.

8 One example of that, which is expressly recognised
9 in the Damages Directive -- and if I could just give you
10 the reference, it is in bundle 2, tab 37, recital 26 and
11 it is also set out in paragraph 40 of our skeleton
12 argument -- is that the Commission recognises that
13 settlement submissions must be afforded complete
14 confidentiality precisely because it does not wish to
15 disincentivise parties from settlement.

16 So the Commission has to strike a careful balance to
17 ensure in the overall public interest that the features
18 of its settlement regime encourage settlement and don't
19 discourage it.

20 Now, Ms Demetriou took you through the details of
21 the settlement regime in exquisite detail but one thing
22 that she didn't show you was anything in that regime
23 that stipulates that the entirety of a Commission
24 settlement decision, including its inessential findings,
25 is to be binding on parties subsequently before

1 a national court.

2 The EU institutions could have legislated for that,
3 they could have provided in the settlement regulation
4 that those addressees of a Commission decision that
5 accept the recitals pursuant to a settlement process are
6 thereafter bound to accept all such recitals in future
7 national court proceedings that seek to quantify and
8 assess damages for the infringement in question, or the
9 Commission could, as Mr Malek posed in a question at
10 the outset of my learned friend's submissions, they
11 could have included a provision in the settlement in
12 question which stipulated that they would not in
13 the future be allowed to make a statement which
14 contradicts that which is set out in the statement of
15 facts or that the addressees would not be allowed to
16 deny publicly the various things set out in
17 the decision. They could have done so but they did not.

18 There is nothing to suggest that that is any part of
19 the Commission's practice and of course, if
20 the Commission had done so in this instance,
21 the defendants would not be able to take the positions
22 that they now take.

23 So one is entitled to ask, well, would it even be
24 desirable if the Commission did introduce such
25 a provision or practice into its settlement regime?

1 We would suggest it would not, for two reasons.

2 First of all, it would open up a clear gap between
3 ordinary Commission decisions on the one hand and
4 settlement decisions on the other. The settlement
5 decisions would become binding to a greater extent and
6 that would deter settlement and that would in turn lead
7 to fewer settlement decisions. And on any view it would
8 encourage a greater degree of scrutiny and nitpicking by
9 defendants over the precise term of the inessential
10 elements of settlement decisions and that would lead to
11 greater delay and those are precisely the ends that
12 the Commission wishes to avoid and which it regards as
13 against the public interest.

14 It would also be unnecessary because the addressees
15 are bound by the operative part of the decision and by
16 any essential recitals and that is quite enough to allow
17 claimants to bring their claim to national courts,
18 particularly when the inessential recitals will also, as
19 I have said, be admissible.

20 If one steps back, what the claimant's submission
21 amounts to is an invitation to this Tribunal to gold
22 plate the Commission's settlement regime to give it
23 a greater potency under UK law than the EU institutions
24 have chosen to give it under EU law.

25 If this Tribunal were to accept that it would have a

1 number of undesirable consequences. First of all it
2 would mean that there would be of lack of uniformity in
3 the legal effect of settlement decisions as between
4 Member States. We may in this country have an abuse of
5 process doctrine but there is no reason to suppose that
6 any, or certainly not every, other Member States have an
7 equivalent doctrine.

8 PRESIDENT: We don't know. They may do, in which case, if
9 they do, then there is a disharmony if we don't apply
10 ours. We are just in the dark, aren't we?

11 MR JOWELL: The default position is that it has the effect
12 that it has under EU law and that is the default
13 position. There is no reason to suppose that other
14 Member States would give the Commission decision,
15 the settlement decision, a greater potency than ours.

16 PRESIDENT: I do not think we can make any assumptions one
17 way or the other. The idea of some sort of abuse of
18 process doctrine is not a peculiar one or something that
19 one would regard as some great quirk of the common law,
20 even if we assume only Ireland may have something
21 similar as another common law country. But we just
22 don't know whether there is some doctrine of equivalent
23 effect that could apply.

24 MR JOWELL: My point is simply this: if there are
25 differences between Member States, and one can

1 anticipate that at the very least there may well be
2 differences, then you would have a lack of uniformity in
3 the legal effect of a European Union instrument in
4 different Member States and this is an area, in our
5 submission, in which the EU institutions have harmonised
6 matters and they have given to Commission decisions
7 a particular extent of bindingness -- if I can put it in
8 that inelegant way -- and it is not appropriate for
9 Member States to go further and create a lack of
10 uniformity where there is not one already there --

11 PRESIDENT: So you say --

12 MR JOWELL: -- undermining the harmonisation.

13 PRESIDENT: You say as a matter of EU law any doctrine of
14 national law of any Member State which would give
15 a Commission decision greater binding force should not
16 be applied?

17 MR JOWELL: We do go that far.

18 PRESIDENT: That is your submission.

19 MR JOWELL: We do go that far. However, it is not for
20 the national courts to determine the extent. National
21 courts can apply their own procedure but they shouldn't
22 be entering into the question of the extent to which
23 a Commission -- a European instrument is binding, which
24 is effectively what this is doing.

25 Of course I do not need to go nearly that far

1 because the burden is not on us to establish that this
2 is contrary to EU law. The burden is on the claimants
3 to show that not doing this would positively bring our
4 legal system into disrepute.

5 As I have said, there are very good reasons why one
6 should not do this. As I have said, it would deter
7 settlement. One can imagine that if one takes the
8 position, say, of Scania which would no doubt be saying
9 to itself, well, we were correct not to enter. If this
10 Tribunal were to apply the abuse of process doctrine,
11 Scania would be saying you are absolutely right not to
12 settle because look what happens to those who settle.
13 All the recitals become binding upon them, whereas for
14 us of course the inessential findings are not binding.
15 That is not a position that should be encouraged.

16 A further important point is this, which derives
17 from the fact that Commission settlement decisions as
18 I mentioned can be appealed, even after they have been
19 settled.

20 For your note, you will see that in paragraph 41 of
21 the settlement notice which is in authorities bundle 2,
22 tab 26. There is no reason to suppose that the ability
23 to appeal a settlement decision is any more expansive
24 than the ability to appeal an ordinary decision. And
25 therefore, findings in the settlement decision that are

1 inessential to the operative part are unappealable.

2 It would be in our submission most curious if
3 findings, inessential findings that they could not
4 contest to the Court of Justice could nevertheless
5 become binding under national law.

6 PRESIDENT: Well, you would have an option. You would say
7 you don't have to settle. You may get the same decision
8 but then those parts won't be binding.

9 MR JOWELL: Yes. You have an option but also, the
10 European --

11 PRESIDENT: Then you go and get your 10% award.

12 MR JOWELL: I accept that, but you are nevertheless granted
13 a right of appeal but that right of appeal would not
14 apply to inessential findings and you would be shut out
15 purely by the act of having settled, whereas the act of
16 having settled would not preclude you from appealing and
17 having access to a court for binding recitals.

18 I do say that is at the very least a curiosity and
19 an inconsistency.

20 We say that, as I said, on any analysis they come
21 nowhere close to overcoming the high hurdles of showing
22 either that it would bring the administration of justice
23 in this country into disrepute not to apply the abuse of
24 process, nor would it be manifestly unfair to
25 the claimants. On the first point, one can test it in

1 this way.

2 Suppose that in another Member State, France or
3 Germany, the inessential findings in the settlement
4 decisions are not binding; they are regarded as
5 admissible in the way Lord Hoffmann says in *Courage v*
6 *Crehan* but they effectively maintain the default
7 position under EU law. Could one seriously say that
8 such an approach brought the administration of justice
9 in France or Germany into disrepute? In our submission
10 that would be an absurd epithet to apply to systems of
11 law that would simply allow for a degree of latitude to
12 the courts.

13 If that is the case, looking across the water to
14 their legal systems, then the same must apply here.

15 Now, may I turn to a number of factors that my
16 learned friend relied on? Let me start -- there were
17 some that were general and some were specific. The two
18 general ones were, well, these recitals have been
19 admitted, and the other general one was that the
20 defendants have gained a benefit in the form of reduced
21 fines and in other respects.

22 Now, admission alone cannot make a difference for
23 the reason that I mentioned earlier, that if one had,
24 say, an admission in a press release for example that
25 would not be a reason to hold a party irrevocably to

1 that press release. So the additional factor that it
2 may constitute admissions cannot in itself amount to
3 a reason for invoking the abuse of process doctrine.

4 As regards the benefit, well, first of all I should
5 give you the chapter and verse on why it is that MAN did
6 not in fact benefit from a 10% reduction. In the
7 interests of saving time, if I could perhaps do that by
8 reference to -- give you just the references. In the
9 decision which is in the outer confidential bundle
10 volume 1, you will see at recital 128 on page 27 that in
11 December 2010 the Commission granted conditional
12 immunity from fines under -- in respect of this
13 infringement.

14 Now, as an immunity applicant, as the first immunity
15 applicant, MAN was conditionally entitled to a 100%
16 discount on its fine. So, no fine. You will see that
17 in the Commission notice on leniency which is in
18 bundle 8 at tab 113, point 8. Now, the conditions for
19 obtaining immunity are various forms of cooperation
20 which are set out in particular at point 12 of that same
21 notice but it was not a condition of receiving immunity
22 that MAN should settle.

23 Settlement is not a condition of the receipt of
24 immunity. And so, having received immunity provided it
25 cooperated, MAN's fine was always going to be zero.

1 Settlement came much later on. It came in 2015 to 2016.
2 You will see that in the decision at paragraphs 41 to
3 43.

4 So, for MAN's part it did not cease any reduction of
5 10% by entering into a settlement. But the point about
6 the receipt of a benefit is a bad one, not just for MAN
7 but actually for everyone, because, yes, they received
8 a benefit but they also paid a price and the price was
9 entering into a settlement agreement with all the
10 inherent disadvantages that I have already mentioned.

11 Now, it is said, ah, but having done so they should
12 then be -- they can't then not if you like accept the
13 consequences of having entered into that decision but
14 the consequences of having entered into that decision
15 are simply those that apply under EU law.

16 As we have seen, the consequences under EU law stop
17 at the operative part and any recitals that are binding
18 and to suggest that somehow the parties to this
19 settlement agreement -- this settlement agreement should
20 have anticipated the operation of the English doctrine
21 of abuse of process is both circular and parochial.

22 It is circular because it assumes what they are
23 setting out to prove, namely that under the abuse
24 process doctrine you can't go back in any respect on
25 anything in a settlement recital, but it is also

1 parochial because the idea that these parties, none of
2 whom are headquartered in the UK and where you have
3 a cartel that is centred firmly in Continental Europe,
4 should have anticipated the application of our abuse of
5 process doctrine at the point of time they entered into
6 a settlement agreement is fanciful.

7 PRESIDENT: Well, you say it is fanciful. They are all
8 advised by major international law firms. The idea that
9 when they consider, as they do very carefully, should
10 we settle or not, that they don't sit down with their
11 lawyers and go through the likely consequences in all
12 the jurisdictions where they may be sued I would find
13 astonishing.

14 MR JOWELL: Well --

15 PRESIDENT: It seems to me that is the most basic thing any
16 large corporation -- we are dealing with multi-national
17 companies here. This is not some small German company
18 that is dealing with a local law firm in Bielefeld that
19 knows nothing about English law.

20 MR JOWELL: I hear what you say. My submission remains that
21 they can't have been expected to anticipate the
22 potential application of the English doctrine of abuse
23 of process at the time they entered into their
24 settlement agreement. It is not as though there is any
25 decided case law on this point.

1 PRESIDENT: The Iberian case would alert you to the fact
2 that there might be some argument on abuse.

3 MR JOWELL: Might be, but as we've seen, the authorities
4 state that -- or Iberia firmly state that Iberian has
5 been overtaken by the statutory code.

6 PRESIDENT: Well, if you are right, there is no abuse and
7 that's that. But if there is an abuse, I am not sure
8 the fact that you say it is fanciful to think they might
9 have thought about it for my part does not carry much
10 weight.

11 MR JOWELL: Those are my submissions on that point. In any
12 event it is clearly circular.

13 What we say is the claimants are really attempting
14 to increase the price of entering into this settlement
15 agreement retrospectively.

16 Now, my learned friend also mentioned -- relied on
17 the OFT v Somerfield judgment. It is a case about
18 a completely different point. It is a case about
19 whether a defendant can appeal out of time from
20 a settlement decision.

21 That is not what the defendants here are seeking to
22 do. They are simply seeking not to be entirely shut out
23 from contesting certain inessential recitals in
24 a settlement decision, findings that would not be
25 binding in an ordinary decision, and that turns on

1 completely different considerations and a quite
2 different legal test.

3 If anything, the indications are that under English
4 law, no distinction should be drawn between whether
5 a decision concludes by way of settlement or following
6 a judicial determination. Again, for your reference,
7 that is Lord Justice Thomas at paragraph 11 of the
8 Aldi Stores judgment which you will find in authorities
9 bundle 4, paragraph 72, and is cited in paragraph 36 of
10 our skeleton argument.

11 PRESIDENT: Authorities 4, tab?

12 MR JOWELL: Tab 72, paragraph 11. It's cited in paragraph
13 36 of our skeleton argument.

14 What Lord Justice Thomas says is:

15 "No distinction should be drawn as a matter of law
16 between cases where the original action concludes by
17 settlement and where it concludes by judgment."

18 Now, my learned friend says also --

19 PRESIDENT: That is settlement between private parties?

20 MR JOWELL: Yes. My learned friend also ran through various
21 matters specific to this case.

22 PRESIDENT: I think the settlement point here is not that it
23 settled. It is that it settled on the basis of the
24 acceptance of the facts in recital 3. If it was, as
25 most domestic settlements are, without any admission,

1 without prejudice, the parties have just come to terms,
2 that is clearly very different, which I think is what
3 Lord Justice Thomas was talking about.

4 MR JOWELL: It is not entirely different because it may be
5 that the parties settled then leading to a decision and
6 that -- well, with a final finding embodied in the
7 settlement agreement. So it could be said that the
8 parties also in private litigation have accepted that
9 result.

10 But the point here is that, yes, they were accepted
11 but they were accepted for the purposes of the
12 Commission's process and not for anything wider
13 inferred.

14 So, if I may finally come then to the specific
15 points that my learned friend referred to, she said that
16 she had prayed in aid the fact that the settlement
17 decision was arrived at after a statement of objections
18 had already been served in the case. We can't see how
19 that is material to anything the Tribunal has to decide.
20 If anything, that was a disadvantage because it meant
21 that the settlement decision would be liable to be
22 longer than a typical settlement decision and it reduced
23 the opportunities of the defendants to contest
24 the decision without jeopardising the settlement.

25 My learned friend also prayed in aid the fact that

1 in the recital schedule many of the facts are met with
2 bare non-admissions rather than denials and don't state
3 a positive case.

4 Now, this submission is misguided for many reasons,
5 some of which have already been canvassed. The first is
6 as Ms Bacon has already observed, the basis of the
7 exercise that the defendants were invited to undertake
8 was simply to state which recitals were admitted and
9 which were not admitted. They were not expected to
10 specify which were positively denied or to state
11 a positive case in relation to non-admissions.

12 Secondly, as I have already indicated, this really
13 strays into a quite different area of abuse of process.
14 It elides -- abuse of process is, as Lord Sumption might
15 put it, a portmanteau term. This is a quite different
16 variety of abuse of process that is being alluded to.
17 It is not abuse of process in the form of collateral
18 attack.

19 And insofar as the pleadings contain inappropriate
20 non-admissions, that can be a matter for determination
21 in due course but we do ask this rhetorically, since
22 reliance is placed on the fact that there are
23 non-admissions: how can a non-admission be a worse, more
24 egregious form of collateral attack than a denial? It
25 doesn't make sense. Which shows you we are not in

1 collateral attack territory at all here really.

2 Finally my learned friend went through, as you saw,
3 some of the non-admissions and she indicated that --
4 it was discussed earlier, she would be prepared to
5 accept corrections to demonstrable errors but this is
6 not a matter that should be left to the discretion of
7 the claimants to make concessions on an ad hoc basis.
8 It is a matter that should be left to the court.

9 The court can take into account the fact that
10 a factual proposition in a recital has been endorsed by
11 the Commission and it can give due weight to that fact.
12 But the court should not have its hands tied so that
13 it is precluded from taking into account other evidence
14 that may show that notwithstanding that, the recital
15 needs correction. That is how a flexible and reputable
16 legal system works.

17 It is not desirable in our submission for courts to
18 be shut out from consideration of the accuracy of these
19 inessential findings and compelled to parrot whatever
20 has been accepted by the European Commission. That
21 would be, if anything, a mark of a disreputable legal
22 system.

23 Finally, I should say something very briefly about
24 the alternative way the claimants put their case which
25 is to say that it would be manifestly unjust to them if

1 we were not bound to the inessential recitals.

2 First of all, it is highly relevant to that
3 assessment, the assessment of fairness to the claimant,
4 that they played no part at all in the Commission's
5 process. They were not like the claimants in Iberian in
6 that respect. It is extremely difficult to imagine
7 circumstances in which a party which played no part in
8 the original determination can invoke that limb of the
9 abuse of process doctrine.

10 Secondly, it is simply not credible to suggest that
11 it was the content of the inessential recitals that made
12 any difference at all to their bringing the action.
13 The findings that matter to them as to any claimant are
14 the operative part and any essential findings. And that
15 is a perfectly sufficient basis for a claim,
16 particularly in circumstances where they know they are
17 going to get, in due course, the Commission file and
18 they will in any event be able to rely on the
19 inessential findings as admissible evidence.

20 So we say there is no unfairness to any of the
21 claimants in holding that this decision is no more or
22 less binding than any ordinary Commission decision would
23 be in the same circumstances and certainly no manifest
24 unfairness of the type required to ground an abuse of
25 process finding.

1 Those are my submissions, unless I can be of any
2 further assistance.

3 HODGE MALEK QC: We have been over the concept of formal and
4 informal admissions. We have agreed if there is an
5 admission we are in the ballpark of what I would call an
6 informal admission, i.e. outside of what is
7 the equivalent of CPR part 14. So what that would mean
8 is you would look at a recital and say there is an
9 admission that that recital is correct, but you are free
10 to put in any evidence you want to contradict or qualify
11 that because you would say, well, that is an admission
12 but it is not a binding admission in the absolute sense.

13 On the other hand you have the abuse of process
14 concept which the plaintiffs are so far bringing in but
15 what I would like to figure out is where you say the
16 limits are because if, for example, we accept the
17 argument that it is an abuse of process in principle for
18 you to deny facts you have admitted as part of the
19 settlement process, are there going to be any
20 qualifications to that?

21 One qualification would be a sort of Ladd v Marshall
22 point, which is that there is a fact in there which you
23 were unable to contradict on the basis of information
24 reasonably available to you at the time but now
25 the evidence has come in and you want to introduce that.

1 Are you going to be allowed to say "I can bring that in
2 because it is not bringing the legal system into
3 disrepute. I am just bringing in something in
4 circumstances where I didn't have the information
5 available at the time".

6 The second qualification is what about facts and
7 information which you have in your files which you could
8 with reasonable diligence have dug up at the time to
9 contradict but you didn't. Are you going to be allowed
10 to put that in and say "I have admitted that fact and
11 although when I look at my files I can see there is an
12 answer to that, I now want to put that answer in".
13 Where are we on that scenario as well?

14 So, really, there is the other scenario. Let's say
15 there is a fact that is demonstrably wrong, so for
16 example in the decision it says a meeting took place on
17 1 November, you have admitted that by way of
18 a settlement process, but in fact you have a document
19 showing it is on 1 December; are you going to put that
20 in on the basis that it is demonstrably wrong? So where
21 are we on all of that?

22 MR JOWELL: The reason I am looking in the bundle is I am
23 trying to find the reference in the Kamoka case to
24 Phosphate Sewage Co Ltd v Molleson I think it is.

25 Yes, I have found it. If you go to authorities

1 bundle 2, tab 44, page 31. One sees the difficulties
2 that this sort of line leads one to in this case because
3 the judge at first instance held that the SIAC
4 Tribunal's determination was an abuse of process to go
5 behind it.

6 Then he was forced to consider the test in Phosphate
7 Sewage v Molleson which you will see alluded to in
8 paragraph 104 of the judgment. You will see -- and
9 perhaps you will see the final line here which states
10 the Phosphate Sewage test which is:

11 "... if fresh evidence has come to light which
12 fundamentally changes the nature of the case."

13 That is a very similar test that I seem to recall
14 one has when one is trying to set a judgment aside for
15 fraud, that sort of thing. It is a very high test.

16 HODGE MALEK QC: That is a very high test but that's also in
17 circumstances where you're looking at things which are
18 fundamental, whereas what we are talking about at the
19 moment is facts and matters which are not otherwise
20 binding.

21 MR JOWELL: I agree with that. The way to leave this is not
22 to say there is some sort of -- not to try to fashion
23 some form of test that we have to meet.

24 HODGE MALEK QC: But what I am trying to do is test the
25 proposition by seeing where the limits are. One way of

1 looking at it is to say, well, you have admitted it as
2 part of the settlement process. An abuse of process has
3 been denied. And that is it.

4 Another way of looking at it is to say that doesn't
5 sound right. If you are looking at what brings the
6 legal system into disrepute, it can't bring the legal
7 system into disrepute for you to adduce facts that you
8 were not aware of with reasonable diligence at the time
9 of the settlement, to say actually this is wrong. We
10 found this document, we couldn't find it before, but
11 that shows it is wrong.

12 We need to figure out where the limits are in order
13 to test whether or not it is a sensible proposition.

14 MR JOWELL: I think if I may say so the answer to this is
15 really a very simple one. One should not be
16 stipulating. This Tribunal should not hold it is an
17 abuse of process to challenge, except in these
18 circumstances. That is to try to fashion a sort of ad
19 hoc approach to the abuse of process doctrine which
20 actually cannot be done because the abuse of process
21 doctrine is also a species of res judicata. That is
22 the point that Lord Sumption makes in Virgin Atlantic.

23 HODGE MALEK QC: I do not agree with that but let's not go
24 into that.

25 MR JOWELL: It overlaps with the doctrine of res judicata.

1 PRESIDENT: The rationale overlaps. The doctrine overlaps.

2 MR JOWELL: Yes, but what it does is bind the parties and
3 the law is clear that it binds them unless they can pass
4 the very, very high Phosphate Sewage test. So that is
5 not the appropriate course for this Tribunal to take.
6 It will tie its hands to an excruciating degree.

7 There is not a middle way in which the Tribunal can
8 apply the abuse of process doctrine of the collateral
9 attack type and then soften it in an ad hoc way. In my
10 submission, that can't be done.

11 What the Tribunal can do is to say abuse of process
12 does not apply here in this form. This is not a Hunter
13 type of abuse of process. However we lay down a firm
14 marker, etc, that in assessing the evidence, all that
15 we can take we will take due account, as Lord Hoffmann
16 says, of the Commission recitals and of the fact that
17 they are accepted and we will consider each claim and
18 each point on its merits. That is the proper approach
19 in my submission.

20 Otherwise, you are straying into very, very novel
21 territory of trying to apply the abuse of process test
22 but then effectively disapplying it. I am not sure that
23 can be done.

24 MR JUSTICE FANOURT: All the authorities of abuse of
25 process tell us that it is an incredibly fact sensitive

1 analysis depending on the particular facts of the case.
2 So surely it must depend upon a proper analysis of
3 exactly what case is sought to be advanced by way of
4 defence by the defendants against the background of the
5 previous findings and the circumstances of the previous
6 findings.

7 MR JOWELL: In my submission, with respect, I do not think
8 that is the correct sense in which they talk about it
9 being fact sensitive. They say it is a fact sensitive
10 enquiry on the way to determining whether the parties
11 are in these highly exceptional circumstances bound by
12 the findings of this previous determination or decision.
13 But what they don't say is one then applies a fact
14 sensitive enquiry in relation to each finding within
15 that decision.

16 That is not -- in my submission, if the Tribunal
17 wishes to leave open a fact sensitive enquiry, that
18 shows that the abuse of process doctrine of this type
19 does not apply here and that the court should leave it
20 to its own determination in due course to take into --
21 it can take into account the findings in the previous
22 decision in this case and can take into account other
23 evidence. And it can if necessary lay down a particular
24 approach as to how it wishes to weigh the various
25 factors. But what one doesn't do is apply abuse of

1 process on a finding by finding basis. There is no
2 authority in my submission for that.

3 HODGE MALEK QC: I think you understand the point I am
4 making. I am not looking at the Phosphate Sewage type
5 of get-out for abuse of process because I fully
6 understand that if you are looking at a specific recital
7 and you want to challenge a fact in that recital, you
8 are never going to fall within the Phosphate Sewage
9 exception.

10 What I am trying to do is ask what are the limits on
11 this particular case, as to whether or not you can
12 challenge a recital and if so on what basis where the
13 other side are generally right about the abuse of
14 process. It is probably better to hear Ms Demetriou
15 deal with that in reply.

16 MR JOWELL: I have made my submissions. In my submission,
17 it is quite a binary choice and the court can't fashion
18 its own form of abuse of process at this time, in my
19 respectful submission.

20 PRESIDENT: Thank you very much.

21 MR HARRIS: Sir, if I may, with permission of the Tribunal I
22 have one short point on abuse and it follows on from
23 precisely Mr Malek's point with Mr Jowell just now and
24 it is a practical difficulty arising from the back door
25 that Ms Demetriou seems to have left open as to whether

1 or not something is an abuse.

2 Yesterday, as I understood it, the submission was
3 that if there was an error of fact then it might not be
4 manifestly unfair, notwithstanding the terms of recital
5 3, for the defendants to come back and say actually this
6 is not abusive because that is an error of fact.

7 I think the door was slightly further shut today, if
8 I understood it, where she said it might only be an
9 error of fact of that variety if it was something that
10 you didn't know at the time or query, with Mr Malek's
11 point that you couldn't have known at the time.

12 But it gives rise to this real practical difficulty
13 which is that, as we understand it, the claimants are
14 coming here today to seek a declaration from the
15 Tribunal that it is abusive on the part of all the
16 defendants to contest any of the facts in sections 3 and
17 4 of the decision. That is what we are being told. In
18 which case that is the end of those facts for the
19 purposes of this trial when this Tribunal gives that
20 judgment. There is to be no disclosure and there is to
21 be no witness evidence and there is to be no litigation
22 of that point at trial.

23 But it gives rise to this difficulty. Almost by
24 definition the defendants wouldn't have made these
25 "errors" if they had something in their own files and in

1 their own information that would have shown them the
2 true light. Not exclusively, I accept there might have
3 been an error that was in the defendant's own
4 possession. But it might well be that the error only
5 comes to light after today, after the ruling that
6 Ms Demetriou seeks that shows that it was for example an
7 error on the part of Daimler to have admitted that
8 a meeting took place on this date or that something
9 particular happened on that date.

10 Yet that is still an error but I might be precluded
11 from seeing that error and then being entitled through
12 this back door to litigate it because I won't have
13 disclosure from any other party including the claimants.

14 Let me give you an example of where the disclosure
15 might come from the claimants. There are a lot of as
16 you know recitals in which there are either denials or
17 non-admissions as to the public availability or
18 otherwise of the information that is said to be
19 commercially sensitive.

20 But it may well be the case that although there has
21 been a non-admission as to that matter by my client,
22 I do not know, nevertheless in the data banks or the
23 memory, institutional or personal, on the part of the
24 claimants, they do know it was publicly available or
25 they had it.

1 Let me give you a specific type of such information.
2 There is said to be commercial sensitivity for example
3 about the pricing of different types of Euro engines and
4 indeed as to things like warranties. It doesn't really
5 matter, various different types of component.

6 But those sorts of bits of information get released
7 by OEMs, including that which I represent, many months
8 before they become public in the true public
9 availability sense, and yet if you are a would-be
10 customer, one of the claimants, you can obtain that
11 information from a dealer when you are going to
12 the dealer and saying "In six months' time I would like
13 to buy a new version of the truck, what is it going to
14 cost me?" And then the dealer says to you, because the
15 dealer has been told by the OEM, "Oh well, these are
16 going to be the prices".

17 So it might on the face of it look to the OEM as if
18 that is non-public information and therefore they react
19 at this stage in a certain way, but later on, including
20 through disclosure from the claimants, it transpires
21 that that wasn't relevantly secret or non-public
22 information because the claimants actually knew it.

23 So that is a real practical difficulty that
24 militates in favour of not having this across-the-line,
25 blanket, it is an abuse to go any further, because it

1 would mean that the back door that has been first of all
2 opened and then a little bit more closed is actually
3 meaningless. I would be in practice precluded from
4 doing anything about it. And that we say is another
5 reason why these abuse submissions go too far and why we
6 strongly endorse, if I may put it like this, what
7 Mr Jowell was just submitting, that the Tribunal has to
8 adopt a more flexible attitude.

9 It is also an answer in my respectful submission to
10 your queries today, Mr Malek, that there shouldn't be
11 any of these -- well it's not Phosphate Sewage, I think
12 we perhaps all accept that, but it also should not be:
13 you didn't know or you couldn't reasonably have known in
14 the circumstances. It has to be: we go to trial and
15 then we see where it turns out at trial and including
16 Mr Jowell's point that you can take into account,
17 obviously, the fact that there was an admission made
18 during the course of the settlement procedure.

19 That is the only point I had to add and I think
20 Ms Ford has some further --

21 MR BEARD: May I provide one reference before Ms Ford
22 begins? It's just in relation to a point made by Mr
23 Malek and also in relation to, sir, Mr Chairman, your
24 comments about private settlements.

25 If I could refer you, you don't have to look at it

1 now, paragraph 77 of our skeleton, the use of the
2 language of admission and any presumptions about what
3 caveats may or may not have been made in the course of
4 settlement are things that we need to be extraordinarily
5 cautious about, given the confidentiality of the
6 settlement process. We have dealt with that in
7 paragraph 77 of our skeleton argument. Thank you. And
8 thank you to Ms Ford.

9 PRESIDENT: Yes, Ms Ford?

10 Submissions by MS FORD

11 MS FORD: Sir, I gratefully adopt the submissions made by
12 Ms Bacon and Mr Jowell and I have only one supplemental
13 point to make, which goes to the test for whether
14 a recital is binding as a matter of EU law. You will
15 have seen from our pleaded case that we say a finding in
16 a recital constitutes the essential basis for
17 the operative part of the decision if, in the event that
18 the finding were to be successfully challenged on
19 appeal, it would lead to the annulment or partial
20 annulment of the operative part of the decision.

21 There is a case in the bundle to which the Tribunal
22 has not yet been taken which is illustrative of that
23 principle. It is the HSBC case, the recent judgment of
24 the General Court.

25 It is particularly relevant to look at because of

1 the submission Mr Ward made which Ms Bacon also referred
2 to. He said he was not aware of any case where someone
3 had been appealing the substance of a decision and yet
4 told that a particular part of the factual assessment
5 are not binding. In my submission, the HSBC case is an
6 example of that scenario. It is in authorities
7 bundle 5, tab 75.

8 If the Tribunal starts at recital 1, you see the
9 judgment sets out the infringement that has been found
10 against the appellants and what they find is an
11 infringement of article 101 and article 53 by taking
12 part in a single and continuous infringement with
13 the object of distorting the normal course of pricing on
14 the market for euro interest rate derivatives linked to
15 certain rates.

16 That is the relevant infringement. If you then look
17 on to paragraph 16 in the judgment, you see that
18 the conduct that was actually in issue is a series of
19 bilateral contacts which took place between traders at
20 competitor banks and they were engaging in various forms
21 of information exchange. You can see the subparagraphs
22 (a) to (g) set out the various types of exchange that
23 were the matter of concern.

24 If you look to paragraph 42, you see that
25 the applicants sought the annulment of the decision and

1 also a variation of the amount of the fine imposed.

2 The applications were successful in two respects.
3 The first you can see from paragraphs 194 to 195. What
4 you see there is that they were successful in showing
5 that two of the relevant discussions didn't have an
6 object that restricts competition within the meaning of
7 article 101. So we have seen the overall infringement
8 concerned the whole series of relevant information
9 exchanges and HSBC were successful in showing that two
10 of those did not themselves have the object of
11 distorting competition.

12 They were also then successful if you look at 273 to
13 274. They were successful in challenging the precise
14 scope of their liability for the conduct of the other
15 participants in the infringement. But the question for
16 the court was then, well, does that have any impact in
17 terms of the operative part of the decision and the
18 answer to that is in 295 to 296 on page 35 where the
19 court says:

20 "It should be noted that the errors made by the
21 Commission in its findings relating to its discussions
22 of 9 and 14 March 2007 [those are the paragraphs that
23 I showed you]... have no effect on the lawfulness of
24 article 1 of the contested decision and in particular on
25 article 1(b) of the contested decision, since the

1 conclusion it contains remains substantiated even if
2 those discussions are discounted."

3 It goes on to say that the same applies to the other
4 areas that I showed you concerning the extent of HSBC's
5 liability.

6 So the point being that although there was
7 a successful challenge to certain facts which
8 underpinned the relevant decision, because those facts
9 were insufficient to impugn the operative part of the
10 decision, they are essentially not binding.

11 HODGE MALEK QC: But then they go to the level of the fine.

12 MS FORD: They do go to the level of the fine, that's right,

13 which is an appeal under a separate treaty provision.

14 That is in our submission how you ask, that's the test
15 you apply to find out whether any of the recitals in the
16 settlement decision are binding, you say if the factual
17 content of this recital is successfully challenged on
18 appeal, would it result in impugning the operative part
19 of the decision or not.

20 PRESIDENT: If you take the example that I put, I think it
21 was on Tuesday, of a decision which finds an
22 infringement by collusive behaviour based on three
23 meetings, one on 1 January, one on 1 February, one on 1
24 March, the operative part just says that there was an
25 infringement. If you successfully challenge the

1 recitals and say, no, there was no meeting on 1 January
2 or it was an innocuous discussion, there was no meeting
3 on 1 February and there was no meeting on 1 March, then
4 the operative part would fall.

5 MS FORD: It would. And what that tells you --

6 PRESIDENT: So those three recitals then become the
7 essential basis of the decision.

8 MS FORD: In my submission that is not the case because you
9 could challenge any one of them and the remainder would
10 still apply. What you are not permitted to do is
11 undermine the irreducible minimum content which gives
12 rise to the infringement.

13 PRESIDENT: But if you challenged all three, the operative
14 part would go but you say, no, one, if you challenge
15 the first one it would stay because of the second and
16 third; if you challenge the second, it would stay
17 because of the first and the third; and if you challenge
18 the third, it would stay because of the first and the
19 second, so none of them are, which seems a slightly
20 bizarre result.

21 MS FORD: What you are bound by is a finding of
22 infringement, and so you are not permitted to challenge
23 facts to the degree that you are essentially going to
24 result in the annulment of the operative part. But it
25 does lead to the conclusion that you can challenge any

1 one of those meetings because those meetings on their
2 own if they fell away would not result in the annulment
3 of the operative part, and that is in my submission
4 entirely consistent with paragraph 53 of Enron which
5 Mr Brealey took you to. Obviously it is in a domestic
6 context rather than an EU context but what the Court of
7 Appeal said there was, a decision must carry with it a
8 certain basic set of facts without which
9 the decision could not have been made.

10 There will be an irreducible minimum of infringing
11 conduct which it is not possible for the defendants to
12 challenge. But they certainly can challenge individual
13 instances of infringing conduct because those individual
14 instances, if successfully challenged, would not impugn
15 the operative part as a whole.

16 PRESIDENT: I see. The other thing I want to ask you:
17 you have taken us to HSBC. If you look at paragraph --
18 I think you referred to it -- recital, is it 16, on the
19 basis of a -- no, it wasn't 16. They found a single
20 continuous infringement. Recital 1. That indeed is in
21 article 1 of the decision, set out at recital 12. If
22 you go on then, that is to recital 18 where the court
23 repeats that conclusion, single and continuous
24 infringement, and then article 19:

25 "In order to substantiate that finding ..."

1 And then it sets out three matters. In the first
2 place, the Commission declared all those instances had
3 a single economic aim of reducing the cashflows, etc.
4 Secondly, the various instances formed a common pattern
5 of behaviour and so on, and then in the third place, it
6 declared the traders participating in the
7 anti-competitive exchanges knew or should have been
8 aware of the general scope and the central
9 characteristics of the cartel.

10 Now, those three conclusory findings, namely single
11 economic aim, common pattern of behaviour and knew or
12 should have known of the general scope and
13 characteristics of the cartel as a whole, would you say
14 those are then the irreducible minimum to find a single
15 and continuous infringement? If any one of those
16 dropped away -- certainly if the first dropped away and
17 I think the second, you wouldn't have a single and
18 continuous infringement.

19 MS FORD: That is the basis on which the Commission found
20 a single and continuous infringement and the Commission
21 has found that each of those applies in respect of each
22 instance of communication between traders. It is saying
23 that the instances of conduct each contribute to the
24 single economic aim and that each --

25 PRESIDENT: Yes, I am not asking about whether each of those

1 occasions -- I think you have dealt with that -- was
2 the essential basis but this is the conclusion based on
3 all those facts of the three essential elements to make
4 up a single and continuous infringement. So what I am
5 asking is whether those conclusory statements are the
6 essential basis in the way that you have put it.

7 MS FORD: Sir, the submission I am making is you can
8 challenge any of those conclusory elements in respect of
9 any of the individual instances but as you say, those
10 conclusory elements lead to a conclusion of single
11 continuous infringement, that is something which
12 essentially --

13 PRESIDENT: You can't challenge them for the individual
14 instances because the common pattern of behaviour, it is
15 not one instance. The whole point is it is all those
16 together that lead you to find a common pattern of
17 behaviour. You can't say they met on or had an exchange
18 on date X, therefore there is a common pattern of
19 behaviour. Those are all the subsidiary findings which
20 lead to these conclusions. And you make the point,
21 well, even if they hadn't met on or had an exchange on
22 date X, there are exchanges on date Y and Z so you could
23 still have a common pattern of behaviour. So the
24 exchange on date X is not an essential basis,
25 I understand that.

1 But it is the next stage that I am asking about,
2 namely a finding that there is a common pattern of
3 behaviour which is a conclusory finding based on a whole
4 lot of underlying facts. Is that an essential basis for
5 what is in the operative part, namely a single and
6 continuous infringement?

7 MS FORD: Mr Piccinin points out that the third element, the
8 awareness of the general scope of the central
9 characteristics of the cartel as a whole which is part
10 of this was part of the matters that were successfully
11 challenged in respect of some of the conduct. I think
12 that is 269 of the decision. This was the basis on
13 which it was eventually concluded that HSBC's
14 responsibility for the conduct was more limited, because
15 in the case of each of these criteria, you ask, well,
16 did the individual --

17 PRESIDENT: Yes, well, on that basis, they held they were
18 not liable for certain conduct I think.

19 MS FORD: They held they were not liable for the conduct of
20 others insofar as they were not aware of it but that
21 finding was not sufficient to annul the operative part,
22 not even a partial annulment. Simply it's a finding
23 which would fall away and it didn't affect the finding
24 of a single and continuous infringement because they
25 were sufficient in the remainder, sufficient

1 underpinning in the remainder for the finding of single
2 and continuous infringement to remain.

3 So the court is always going to be looking at, well,
4 if this particular instance falls away, is there
5 sufficient left over such that the operative part of the
6 decision is not impugned.

7 PRESIDENT: What about the finding of a single economic aim
8 which is I believe a prerequisite to finding a single
9 and continuous infringement.

10 MS FORD: Again, it would be open to an appellant to say in
11 relation to this particular instance of coordination it
12 does not fall within the single economic aim that you
13 have found gives rise to a single and continuous
14 infringement. However, if that nevertheless left
15 a residual body of coordination which had been found to
16 satisfy single economic aim, that would not impugn the
17 operative part of the decision.

18 PRESIDENT: If you could impugn and say there is no single
19 economic aim at all --

20 MS FORD: That would be something which would undermine
21 the operative part of the decision and therefore one can
22 conclude that that element of it is a binding legal
23 finding.

24 PRESIDENT: That is really what I was trying to understand.
25 The conclusion that there is a single economic aim and

1 that there was a common pattern of behaviour but not
2 that it necessarily included all these instances --
3 MS FORD: That nevertheless leaves it open.
4 PRESIDENT: -- that would be essential basis?
5 MS FORD: That leaves it open for an appellant to challenge
6 any of the individual instances because the operative
7 part can survive without any of them. So none of those
8 individual instances, the application of those to any
9 particular instance of coordination is not necessary.
10 PRESIDENT: No. You would have to challenge -- say that
11 there is no common pattern of behaviour at all.
12 MS FORD: You would.
13 PRESIDENT: But that finding that there is a common pattern
14 of behaviour is the essential basis or an essential
15 basis of finding a single and continuous infringement.
16 MS FORD: The overall finding is it doesn't preclude any
17 individual instance from being challenged. So any
18 individual instance is not binding in my submission.
19 PRESIDENT: Yes, thank you.
20 MS FORD: Sir, you have a submission that that is entirely
21 consistent with paragraph 53 and thereon because what's
22 being said is there is a factual underpinning.
23 The point I would emphasise is: it is not surprising
24 that when you apply this test, what you get is a very
25 limited number of recitals which are in fact binding as

1 a matter of EU law and the reason why it is not
2 surprising is because the purpose of the recitals,
3 the reason for which they have been drafted is not to
4 identify a series of factual propositions from which
5 domestic defendants may not derogate. Their purpose is
6 to provide the Commission's reasoning for its decision.

7 So they are not necessarily formulated in a way
8 which leads you to a conclusion that they are binding
9 because they undermine the operative part. They are
10 either too vague, too broad, they generalise or they
11 provide details of individual instances of conduct which
12 each could fall away and does not undermine the
13 operative part.

14 I make this submission because the claimants seek to
15 give the impression that it is a surprising outcome that
16 when you pick through the recitals, only a limited
17 number of them are actually binding. In my submission,
18 it is not surprising because the recitals themselves are
19 not purporting to set out a code of propositions from
20 which you may not derogate.

21 PRESIDENT: But they have to include all the evidence on
22 which the Commission can rely to support its
23 conclusions.

24 MS FORD: They do. They include that evidence but that does
25 not answer the question of whether that evidence is

1 binding on a domestic court.

2 PRESIDENT: No.

3 MS FORD: Sir, unless I can assist further, those are my
4 submissions.

5 PRESIDENT: Yes, because you act for Volvo, if one looks for
6 paragraph 119 of the -- recital 119 in the decision, it
7 says that the evidence submitted by your clients
8 contained contemporaneous handwritten notes, meeting
9 reports, meeting invitations of an employee personally
10 participating in the meetings which are part of the
11 infringement.

12 "The evidence contained exact meeting dates and
13 detailed information about further anti-competitive
14 contacts. As these additional facts allowed the
15 Commission to increase the duration of the
16 infringement ..."

17 And they've explained above that it enabled them to
18 take -- gave them the basis for taking the starting date
19 back from January 2001 to January 1997, so an extra five
20 years.

21 "As these additional facts allowed the Commissioner
22 to increase the duration of the infringement they are
23 not taken account against Volvo for the purpose of
24 determining its fine."

25 And you are only fined with respect to the later

1 date.

2 I would be interested to hear what you say in terms
3 of any allegation of, in looking at abuse, that you
4 have -- your clients very specifically detailed their
5 involvement with specific dates of meetings, reports of
6 what happened at the meeting and so on, if now, for that
7 period, you could challenge what is said about them.
8 And that clearly includes, therefore, the meetings that
9 are referred to I think in recital 52.

10 MS FORD: Sir, I would make two points in response to that.
11 The first is that we know it is common ground that if
12 this weren't a settlement decision and Volvo as
13 a leniency applicant had provided all this information,
14 nevertheless on the application of the Iberian approach
15 Mr Justice Laddie took, it would not be abusive for
16 Volvo to then seek to go behind that, the reason being
17 that Mr Justice Laddie's reasoning is premised on
18 the availability of an appeal. And it is accepted that
19 in circumstances where there isn't an appeal against
20 non-essential findings, there can be no abuse.

21 So the starting point is if this were not
22 a settlement decision, there would be no question that
23 the mere fact that Volvo had been a leniency applicant
24 and had provided all this material should lead to it
25 being precluded from challenging it in domestic

1 proceedings as a consequence of abuse of process.

2 The second question is what difference does it make
3 that this is a settlement decision? In my submission it
4 makes no difference at all and the reason for that is
5 the admissions Volvo makes are not even binding on Volvo
6 vis a vis the Commission. Not even the Commission which
7 is the recipient of these admissions in the context of
8 the Commission's settlement process can say to Volvo:
9 you admitted this so you are not entitled to challenge
10 it. Because as we saw from paragraph 41 of the
11 settlement notice, Volvo does have a right of appeal.
12 It is limited in the manner that Mr Jowell indicated but
13 nevertheless, Volvo is entitled to appeal
14 notwithstanding that it has made admissions.

15 So those admissions are not even binding as between
16 Volvo and the Commission. In those circumstances in my
17 submission it would be quite extraordinary if domestic
18 law were to dictate that Volvo is bound to a greater
19 degree than it is vis a vis the Commission itself.

20 PRESIDENT: Yes. Thank you.

21 I think before we start replies, it would be
22 appropriate to take a five-minute break.

23 (3.25 pm)

24 (A short break)

25 (3.35 pm)

1 Reply by MR BREALEY

2 MR BREALEY: Thank you for the indulgence of the jackets.

3 MR JUSTICE FAN COURT: You don't realise how warm it is in
4 here until you come back in from outside.

5 MR BREALEY: I'm grateful.

6 I make three points in reply.

7 The first point is for the reasons eloquently given
8 by Ms Bacon, DAF's first submission is plainly wrong in
9 law. We gratefully adopt what she has said on the
10 binding nature of the recitals. Although she reserves
11 her position, what she has said shows it is plain as
12 a pikestaff that recitals in a Commission infringement
13 decision are capable of producing binding legal effects.
14 I will say no more about that for the moment but that is
15 the first point.

16 The second point is the defendants do not disagree
17 with the proposition of law I advanced in opening and
18 the principle is this, and I will repeat it:

19 "Where the Commission adopts an infringement
20 decision, a recital which constitutes a part of the
21 essential basis for that finding of infringement is also
22 binding."

23 So I said in opening:

24 "Where the Commission adopts an infringement
25 decision, a recital which constitutes a part of the

1 essential basis for that finding ... is also binding."

2 Ms Bacon accepted that.

3 Third, therefore the key is what is meant by
4 "essential basis". Can I go to Coppens please? This is
5 the only case I will go to, the Coppens case. That is
6 at authority bundle 2, tab 28. The relevant paragraphs
7 are paragraphs 34 and 35.

8 We know the defendants accept that the meaning of
9 trucks is essential, whether something is an undertaking
10 is essential and what is a single and continuous
11 agreement is essential.

12 If I could ask the Tribunal to read 34 and 35 and
13 then make a couple of points. Really it is only 34 and
14 the first few lines of 35 which are relevant. So I ask
15 the Tribunal to note the last four lines up from the
16 bottom of 34:

17 "Although only the operative part of the decision is
18 capable of producing legal effects, the fact remains
19 that the [and I emphasise the next words] assessments
20 made in the grounds of a decision can be subject to
21 judicial review."

22 Now, if they are subject to judicial review, they
23 must have certain binding legal effects.

24 Go to the first line of 35. We see what the grounds
25 of the decision there are. We have seen in 34 the

1 assessments made in the grounds of a decision. The
2 relevant grounds of the decision are in particular
3 recitals 307 and 345. That is why I wanted the Tribunal
4 to have those recitals, because it shows in detail what
5 those recitals are concerned with.

6 HODGE MALEK QC: You said sotto voce that it follows that
7 the mere fact that you can go to judicial review on the
8 grounds that the measure adversely affects the interests
9 of those concerned may constitute the essential basis.
10 So you are saying that means a fortiori it is binding,
11 is that right? Is that what you are saying?

12 MR BREALEY: Yes. One cannot seek judicial review of
13 a measure of a recommendation or an opinion. It has to
14 produce legal effects.

15 HODGE MALEK QC: Not necessarily. Let's say there's
16 something in there that says something about the nature
17 of your business which would adversely affect your
18 reputation and if it is in there you may lose business
19 and customers. It is not necessarily binding on you but
20 it can be binding on you -- it won't necessarily be
21 binding on you but it can certainly have adverse effects
22 on you.

23 MR BREALEY: Yes, it can have legal effects.

24 HODGE MALEK QC: It does not have to be legal effects.

25 Let's say you are a broker and it says you acted

1 fraudulently or whatever. If that is in a decision,
2 that is going to cost your brokerage a couple of basis
3 points when you try and borrow money, because people are
4 going to say you have a bad reputation. It may not be
5 binding on you in the sense that it is legally binding
6 but it can certainly affect your interest. What I am
7 querying is the premise of what you said, which is that
8 if it has an adverse effect on you, it is necessarily
9 binding on you.

10 MR BREALEY: My submission is that if you look at what is
11 said there:

12 "Assessments made on the grounds of a decision can
13 be the subject of judicial review by the courts to
14 the extent that as grounds of a measure adversely
15 affecting the interests of those concerned they
16 constitute the essential basis for the operative part."

17 HODGE MALEK QC: Thank you.

18 MR BREALEY: And that is the test. Necessary support.

19 HODGE MALEK QC: But it starts off by saying:

20 "Although only the operative part of the decision is
21 capable of producing legal effects ...".

22 The point I am making is you can have something in
23 a decision which adversely affects your interests which
24 you may be able to challenge by way of judicial review,
25 even if it doesn't bind you, in the sense that if it's

1 something in there that affects your reputation.

2 MR BREALEY: I do not believe that would be subject to
3 judicial review in the community courts. It has to be
4 linked to the operative part of the decision which
5 adversely affects your interests. So for example the
6 relevant market or finding of dominance in an abuse
7 case. That is a necessary support for the finding of
8 a 102 infringement.

9 HODGE MALEK QC: I am just trying to test it.

10 MR BREALEY: I see. We saw that from Coca Cola to a certain
11 extent.

12 So I think the Tribunal has seen the decision in
13 Coppens. Has it been handed up?

14 PRESIDENT: No. (Handed).

15 MR BREALEY: This is recitals 307 and 345. As is clear from
16 the grounds of a decision and in particular from recital
17 307 and 345 ...

18 MR BEARD: I am sorry, have other copies been made
19 available?

20 MR BREALEY: Well, it was Iveco that produced them.

21 PRESIDENT: Are there -- how many copies have been provided?
22 They came from Iveco.

23 MR BEARD: I am grateful. I will share with Mr Harris.

24 PRESIDENT: Thank you.

25 MR BREALEY: I have spare ones here.

1 PRESIDENT: I think there is a request for spares. If you
2 can just hand those along?

3 MR BREALEY: In a nutshell, what the difference is between
4 Ms Bacon and potentially us is that the Commission's
5 findings at 308 to 344 would not be an essential basis.

6 She admitted, I think, that the conclusion on the
7 single or continuous infringement would be essential.
8 307 and 345. When one gets to the support for that,
9 somehow it loses its essential character and we say that
10 that is incorrect and actually leads to a perverse
11 result.

12 So, what do we say is the test? We say the test is
13 how Lord Justice Lloyd in Enron described it at
14 paragraph 50 and 53:

15 "If these factual findings constitute necessary
16 support ..."

17 He used "directly related", we don't mind,
18 "necessary support" is okay, if it is necessary support
19 for the finding of infringement then it is binding and
20 it is as simple as that.

21 And then that is to a certain extent a fact-specific
22 exercise which we shall go through tomorrow but as
23 I understand it from Ms Bacon's submission, the test
24 that I put forward which is essentially the BritNed test
25 is accepted.

1 I thought at one point it was something to do with
2 part of the essential reasoning. Ms Bacon said no. It
3 can be a part of the essential reasoning and that is
4 today, page 40, line 17.

5 So as far as I am aware, the test for what is
6 binding is agreed at least between the claimants and
7 Iveco and MAN who gratefully adopted Iveco's
8 submissions. The question now is how do you apply that
9 test?

10 Do you apply it in an extremely narrow way and just
11 say, if you look at Coppens, it is 307 and 345. Or do
12 you actually flesh out what the single continuous
13 infringement is?

14 PRESIDENT: Well, I think they say: essential basis, if
15 there are a whole series of facts relied on taking you
16 to in this case the conclusion at 345, those facts are
17 not -- no one of those facts is the essential basis
18 because without it, the conclusion at 345 would still
19 survive. And the first one in fact isn't, because that
20 is not essential basis, because you could challenge
21 that, show it is wrong, it wouldn't change the decision.
22 And the second one isn't because if you challenged that
23 and showed it is wrong, there would be all the others
24 and so on.

25 MR BREALEY: With great respect, we adopt the point that

1 my Lord puts to Ms Ford on the three meetings, A, B, C.
2 It has to be looked at collectively. It can't be looked
3 at individually, otherwise you end up with a perverse
4 result. You have a cartel that has one meeting.

5 You can say that is the minimum and challenge that
6 one meeting. Infringement goes. But now you have more
7 of a structured cartel that goes on for a long time and
8 now you have more than one meeting, you have three
9 meetings or ten meetings. But you now can't say that
10 any particular meeting is essential. Because you fail
11 on one, that may not be the knockout blow that they
12 want. It is, with the greatest respect, absurd.

13 I am conscious of the time. Mr Ward wants to make
14 a few submissions and then Ms Demetriou would like to
15 finish her abuse this afternoon for a fresh start
16 tomorrow. So unless there are any questions?

17 PRESIDENT: Thank you very much.

18 Reply by MR WARD

19 PRESIDENT: Mr Ward?

20 MR WARD: Thank you sir. Ms Bacon tried to distance herself
21 from Mr Beard's position but in substance, it is almost
22 as extreme. As the Tribunal will have seen from the
23 schedules, in fact the other defendants accept almost no
24 recitals are binding.

25 Now, you have heard our overarching submission that

1 the authorities show that recitals are binding to the
2 effect that they alter the substance or explain
3 the content of the operative part. And here, as you
4 have seen, the operative part is extremely broad.

5 So one authority relied on by both Ms Bacon and
6 Mr Beard was Air Canada which was a very unusual case
7 where there was an overt mismatch between the operative
8 part which was in terms of individual infringements and
9 the recitals which were in terms of single and
10 continuous infringement.

11 But paragraph 36 which they both relied on talks
12 about the scope for using the recitals where there is
13 lack of clarity in the operative part. Now, here,
14 article 1 talks about collusion on pricing and gross
15 price increases. And those words are obviously very
16 vague as a description of a 15-year pattern of
17 anti-competitive conduct. So to understand what is
18 meant by collusion and what is meant by pricing, we have
19 to look at the recitals.

20 The recitals give a series of explanations of what
21 kind of collusion/overpricing we are talking about. So
22 for example there are recitals which talk about net
23 prices in certain instances. Another example, just by
24 way of illustration -- sir, would it be helpful to go to
25 that? -- I am thinking for example of recital 51, just

1 by way of illustration.

2 If you skim down about two-thirds of the way down or
3 halfway down, it says:

4 "Occasionally the participants, including
5 representatives of the Headquarters of all of the
6 Addressees, also discussed net prices for some
7 countries."

8 So that is part of what is meant by net pricing or
9 at least it will be our submission that it is.

10 If you keep that open for a moment, I will
11 illustrate the same point another way. In DAF's
12 defence, it says that there is no finding of any
13 agreement in respect of the timing and passing on of
14 costs for the introduction of emission charges because
15 of course the operative part talks about collusion in
16 that regard but doesn't use the word agreement.

17 But on the very same page, we can see three recitals
18 in which agreements in this regard are specifically
19 referred to. So in recital 50, you will see:

20 "These collusive arrangements included agreements
21 and/or concerted practices on pricing and gross price
22 increases in order to align gross prices in the EEA and
23 the timing and the passing on of costs for the
24 introduction of emissions technologies required by EURO
25 3 to 6 standards."

1 Again in recital 51, towards the end, it talks again
2 about agreements, agreed on the timing of introduction
3 of Euro emission standards, and we can see that just
4 below the part I read you a moment ago. And then again
5 in 52, about ten lines down:

6 "They agreed not to offer Euro 3 standard compliant
7 trucks ..."

8 So those are just illustrations of the way in which
9 the recitals will inform what is meant by the very broad
10 language of the operative part even if one applies the
11 Air Canada test that my friends urge upon you.

12 Now, what Ms Bacon sought to do was interpolate
13 a test of her own which one cannot find in the case law,
14 which is that something had to be decisional in order to
15 be binding.

16 She essentially uses that approach to strip the
17 decision of any factual content at all. And we can see
18 that again by looking at what is accepted as binding --
19 I am so sorry, what is accepted as essential basis and
20 what is not, in section 4 which is the part of legal
21 assessment that in principle they at least accept some
22 parts of are binding.

23 May I ask you now to turn to paragraphs 68 and 69?
24 This is application of law on agreements and concerted
25 practices. Recital 68 says:

1 "The conduct described in section 4 [meaning 3]
2 above can be characterised as a complex infringement of
3 article 101" and can be classified as agreement or
4 concerted practice.

5 You will recall that is accepted as essential basis
6 even though everything in section 4 is not.

7 And then:

8 "69. The conduct therefore presents all of the
9 characteristics of an agreement and/or concerted
10 practice."

11 That first sentence is accepted. But then at 69,
12 the last sentence is not:

13 "The addressees were in particular involved in
14 above-described anticompetitive arrangements concerning
15 the sale of trucks."

16 So where it starts to descend to the facts it is
17 immediately said that is not essential, and they take
18 precisely the same approach to recitals 71, 81 and 85.

19 So 71, the first sentence is admitted as essential
20 basis which says there is an infringement, but then
21 the rest of it which seeks to describe that infringement
22 is said to be non-essential.

23 81, exactly the same again, they say it is essential
24 the anti-competitive behaviour described in
25 paragraphs 49 to 60 had the object of restricting

1 competition, but non-essential the description of that
2 conduct.

3 Finally and again 85 is the same. They are willing
4 to accept the first sentence, which is [paraphrased]:

5 "Taking into account market share, it can be
6 presumed effects on trade are appreciable."

7 But not the second sentence which deals with
8 evidence.

9 So Ms Bacon's approach, the so-called decisional
10 approach, aims to strip the decision of all of its
11 factual content so the defendants are free, as they are
12 seeking to do, to put us to proof.

13 So the consequence of their argument is
14 intentionally that all of the factual basis of this
15 decision has to be reproved in front of this Tribunal.
16 And in our respectful submission, that approach is wrong
17 in principle.

18 Now, this is an unusual decision because of course
19 it is a settlement decision and it is in summary form,
20 as you have heard many times already. But what is very
21 important is that this summary assessment that is in
22 section 3 is very condensed. It contains nothing except
23 findings of infringement. It doesn't contain padding or
24 context or narrative or any of those things.

25 We can see that from recital 71. May I take you

1 back there please?

2 This time we are in the second sentence. After
3 saying it is a single and continuous infringement,
4 the Commission says -- and it is of course admitted:

5 "At the same time on the basis of the facts
6 described above [ie section 3] any one of the aspects of
7 conduct, including in respect of any one of the products
8 and in respect of any one of the Member States or wider
9 regions, has as its object the restriction of
10 competition and therefore constitutes an infringement in
11 its own right."

12 So that is not always going to be the case. A lot
13 of what you have heard is in terrorem. Can it really be
14 the claimants are saying that all the recitals of every
15 decision are essential basis? No, we are not. It is
16 a fact-sensitive assessment. But in this case, these
17 recitals are all findings of infringement and in our
18 respectful submission they are all essential basis. If
19 decisional is in some way the test, then they are
20 decisional, because each of them contains findings of
21 infringement.

22 Now, of course, the defendants actually have
23 admitted all of this but it is relevant to consider
24 whether they were appealable. Had they actually
25 disagreed with any of this? So, if for example they had

1 concluded that there was no collusion between
2 headquarters over a 15-year period or there was no
3 collusion over emission standards, then in our
4 respectful submission those were matters that were
5 capable of being appealed.

6 On Ms Bacon's case nothing at all in section 3
7 appears to be appealable. Yet in the course of her
8 submissions, her eighth proposition, she accepted, as
9 she was bound to, that appeals in Luxembourg can proceed
10 on the basis of challenges to the facts.

11 Now, sometimes that challenge to the facts is just
12 a challenge to the adequacy of the evidence. Are
13 the inferences from it sufficient? Does it really
14 justify a finding of single and continuous infringement?
15 Or, like in Coppins, is there a gap in the Commission's
16 evidence?

17 But it is also perfectly possible to say, as the
18 President said in argument to Ms Ford, this meeting
19 didn't happen or if it happened it was innocuous, there
20 was no exchange of information.

21 There is an excellent example of that in recital 52.
22 If you have the schedule that has the mark-up of what is
23 agreed and not agreed, that would be the most useful
24 place to see this point.

25 Recital 52, and if you have the right version there

1 are two patches of grey shading which represents what is
2 agreed by everybody. And the bits that are agreed by
3 everybody are "two meetings took place". It is page 8
4 of the internal numbering of the original spreadsheet.

5 You will see that all of the defendants admit two
6 things: one, that on 17 January 1997 a meeting was
7 organised in Brussels; and two, that another meeting
8 took place on 6 April 1998. But what they dispute in
9 different ways and subject to various different caveats
10 is what was actually discussed.

11 So on 17 January, if you look two paragraphs down,
12 it says:

13 "The evidence demonstrates that future gross list
14 price changes were discussed."

15 An egregiously obvious breach of article 101, one
16 might say.

17 Then in the meeting of 6 April 1998 it says:
18 representatives of the headquarters attended and
19 "the participants coordinated on the introduction of
20 Euro 3 standard compliant trucks. They agreed not to
21 offer Euro 3 standard compliant trucks before it was
22 compulsory to do so and agreed on a range for the price
23 additional charge for Euro 3 standard compliant trucks."

24 We are put to proof on those elements of what
25 actually happened at this meeting. The proposition

1 I want to test is was that appealable and in my
2 submission, obviously it was. If they actually thought
3 this didn't happen and they all got together to talk
4 about their plans for the summer holidays, then this
5 meeting was innocuous and it could not form the basis of
6 a finding of infringement.

7 Going back to the President's example to Ms Ford, if
8 that was the only thing that formed the basis of this
9 infringement finding, plainly it could have been
10 appealed. If it was that and two more a bit like it,
11 they could have been appealed too. But to win outright,
12 they would have had to knock all three over. The
13 problem with Ms Ford's submission is she atomises the
14 decision and says every little individual bit of the
15 decision isn't enough to cause it to be annulled. But
16 that is right. That is because it is an extremely long
17 and complicated cartel.

18 If you want to win overall, you either need some
19 high level point or you need to knock it all out. But
20 instead of knocking it all out of course, what they have
21 actually done is admit it.

22 Now, I want just finally -- and I am very near the
23 end -- to go back to Power Cables and then talk about
24 two of the authorities that my friends opened, the
25 Groningen case and HSBC, because the President,

1 Mr Justice Roth, asked me a question about Power Cables
2 yesterday, about what definition there was of the
3 relevant Power Cables in the decision.

4 It is in my respectful submission a question that is
5 helpful to answer. For that reason, a lot of trees have
6 died and there is now a volume 9 which contains the full
7 decision. But we will only look at a handful of
8 paragraphs. If I can ask you to turn it up, it really
9 is a brief point I need to make on this. It is behind
10 tab 114. We're going to look at about four or five
11 recitals.

12 PRESIDENT: It does illustrate the difference between
13 a settlement decision and a --

14 MR WARD: Oh yes, it certainly does.

15 Starting on page 7 with the first recital, it says:

16 "This decision relates to a cartel concerning extra
17 high voltage submarine and extra high voltage
18 underground power cables."

19 You will recall that is roughly the formulation that
20 is used in the operative part but there is more detail.

21 Paragraph 13 says, after a very short summary:

22 "It is therefore concluded that the cartel
23 arrangements covered all types of underground power
24 cables of 110 kV and above and submarine power cables of
25 33 kV and above, including all products, works and

1 services sold to the customer."

2 So that is not the language of the operative part
3 but using the recitals to interpret it, we can see that
4 is what the cartel was actually about, the infringement
5 decision.

6 Moving on to page 152, we find recital 643 which
7 summarises the anti-competitive conduct that has been
8 found. You will see it says just three lines up from
9 the bullet points:

10 "As indicated in recital 493, the principal
11 activities of the complex of agreements and concerted
12 practices in this case, which have as their object a
13 restriction of competition within the EEA, were as
14 follows."

15 And then there are seven bullets. If you glance
16 down, you get the flavour. It is wide ranging, it has
17 different forms: allocation of territories, agreement of
18 prices, cover bids, exchange of information and then
19 the one we're interested in is (f):

20 "The implementation of practices to reinforce the
21 cartel such as the collective refusal to supply
22 accessories or technical assistance to certain
23 competitors."

24 The reason I emphasise (f) is that is the one bit
25 that was partially successfully appealed.

1 Just to complete the picture here, if we go to 493,
2 which is on page 121, if your eyes cast over this, you
3 will see it is a very high level summary of which bits
4 of evidence support which of the heads of infringement,
5 just for context.

6 There is obviously a vast swathe of recitals before
7 that which contain factual material, not all of which
8 will be essential basis.

9 Then finally, before putting this away, just by way
10 of reminder, at page 259 is the operative part. You saw
11 this yesterday:

12 "The following undertakings infringed article 101 by
13 participating for the periods indicated in a single and
14 continuous infringement in the extra high voltage
15 underground and/or submarine power cable sector."

16 And then what I showed you yesterday and therefore
17 won't re-open is the litigation in which the claimant
18 ABB, which was the leniency applicant, achieved
19 a victory by having annulled a small part of this, part
20 of recital 643(f) in effect, namely accessories apropos
21 of cables between 110 and 220 kV only. We went over
22 that yesterday, I won't go back.

23 In my respectful submission there are four points
24 one can take from this case. Firstly, it is possible to
25 bring a challenge even if the applicant accepts that the

1 infringement occurred because of course ABB was the
2 leniency applicant and that was in the general court
3 judgment, paragraphs 28 and 29.

4 Secondly, and it follows from this, a challenge may
5 be brought even if it would not annul the contested
6 decision, merely causing its meaning to alter. One
7 reason why that is permitted is of course the prospect
8 of follow-on claims.

9 And thirdly, such recitals that explain the scope of
10 the infringement are also binding on the national court.
11 That is why they are appealable. And in answer to
12 Mr Malek's point, the question of whether it is binding
13 things that are appealable is addressed in the Coca Cola
14 decision which is at F4, tab 60, paragraphs 77 to 79.

15 But I think that much is in any event common ground.
16 Now, Ms Bacon is in a difficult spot because she is
17 obliged to concede that factual challenges are possible
18 yet she does not want to concede that any of the factual
19 matters are in fact essential basis. In my respectful
20 submission, that is what exposes at the heart of it the
21 flaw in her reasoning.

22 Two more cases to deal with very briefly.
23 The Groningen case, which was the Dutch state aid case
24 about environmental organisations, she made the point
25 that it was going to be not appealable that these

1 organisations were undertaking this. We can see why,
2 for the court's notes, at paragraph 37 of the judgment
3 this is described as "merely preliminary analysis".
4 Ms Bacon accepted that there was no specific finding at
5 all about any beneficiary in particular. She said that
6 is very different from when there is a specific finding
7 on these points.

8 Well, for the reasons I have already shown the
9 Tribunal, there are specific findings in this case, in
10 section 3. They are all infringements because that is
11 what section 71 tells us.

12 Then finally, the HSBC case that Ms Ford took you
13 to, I am afraid I was obviously not clear when I was on
14 my feet yesterday because it is said that what
15 I submitted was there were no cases that showed
16 challenges based on recitals had failed. That is
17 certainly not what I intended to say. What I intended
18 to say is there are no cases that we are aware of where
19 the court has cheese-pared through the recitals and said
20 some of these factual recitals are essential basis and
21 you can appeal, but this part of factual challenge that
22 you are seeking to advance is inadmissible.

23 HSBC is in our submission an authority that supports
24 our position because as you have already seen,
25 challenges were brought.

1 Sorry, this was a very complex infringement with
2 many, many aspects and in the end, it was successful on
3 a very small amount. But the court didn't say, well,
4 that is inadmissible because even though that part is
5 wrong, it is only part of the decision or it is not
6 essential basis because the essential basis is always at
7 a higher level, at the decisional level. It has
8 admitted it. It has allowed it. But then it said it is
9 not enough to cause the finding of single and continuous
10 infringement to be overturned.

11 Now, what is not entirely clear is they didn't take
12 the same approach as the court in ABB except that, if
13 one reads the rest of the decision, the decision was
14 annulled anyway on separate grounds. But in our
15 respectful submission, it is support for the proposition
16 that the findings were challengeable, even though
17 individually they were not enough to knock out the
18 decision.

19 It may well be where you have a very complicated
20 infringement like HSBC and like the present case that if
21 you are going to challenge, you are going to have to
22 challenge a lot of the legs of the argument or the legs
23 of the centipede but that does not mean that they are
24 not part of the essential basis.

25 The final point I would make is Ms Ford said

1 the problem with our argument is we are relying on
2 recitals that are either too vague on the one hand or
3 too individual on the other. That is why on their case
4 we can't win. In our respectful submission, as I'll
5 develop much more tomorrow, both categories of recital
6 are in fact binding.

7 Unless I can assist further, those are my
8 submissions.

9 PRESIDENT: Thank you very much.

10 Ms Demetriou, time is marching on as you can see.

11 MS DEMETRIOU: Yes, but not quite as quickly as the clock
12 shows!

13 My Lord, I make it 13 minutes past. I think I can
14 be done in 15 minutes.

15 PRESIDENT: You can have until half past, but we will not
16 measure it by that.

17 MS DEMETRIOU: It is a sign.

18 Reply by MS DEMETRIOU

19 MS DEMETRIOU: I'm going to respond to Mr Jowell's key
20 points in the order in which he made them, and he
21 started by making submissions about the authorities,
22 that essentially we are in agreement that the Hunter
23 test as set out in subsequent authorities, including
24 Bairstow which comprises two limbs, manifestly unfair to
25 the parties in subsequent proceedings and bringing of

1 administration of justice into disrepute, is the test.

2 The additional point that Mr Jowell sought to make
3 by reference to the authorities is that cases that meet
4 that test will be rare. That is fine as far as it goes
5 but it does not answer the question that the Tribunal
6 has to decide which is: is this such a case? And we say
7 it is. What the defendants are seeking to do here, we
8 say, is in fact extreme. I take it from an exchange
9 between Mr Malek and Mr Jowell which encapsulates what
10 they are seeking to say. That is from today and you'll
11 find it when you get to the transcript of today on page
12 30 from line 23.

13 What Mr Malek asked Mr Jowell is he said:

14 "... at the same time I seem to have from what you
15 are saying an open-ended right to put in evidence ...
16 that contradicts your admissions. Is that what you are
17 trying to say?"

18 Mr Jowell said yes, yes, that is what they are
19 trying to say. And he then said:

20 "Suppose the admissions had been made in a press
21 release, for example and the parties had said we regret
22 our conduct which consisted of the following, then that
23 would be admissible evidence."

24 But I do not need to point out to this Tribunal that
25 what we have here which are the admissions made and

1 accepted after a considerable investigation are not in
2 the same category, in fact are radically different to
3 admissions which might be made in a press release.

4 Mr Jowell took the Tribunal to Kamoka. Again,
5 we don't dissent from the exposition of the test but
6 it is very important to bear in mind that Kamoka was
7 a very different case. So when the Court of Appeal
8 overturned the first instance judge's finding that the
9 abuse of process rule applied, it is important to bear
10 in mind the facts.

11 Can I take the Tribunal to one paragraph? Kamoka is
12 at F2, tab 44, the final tab in that bundle. The
13 paragraph that I want to take you to is paragraph 93 on
14 page 29.

15 PRESIDENT: Page 29?

16 MS DEMETRIOU: If you look at page 28, there is a heading
17 "No abuse of process" which is the application of the
18 test to these facts. At 93 is the Court of Appeal's
19 reasons:

20 "First and foremost, at the time of the earlier
21 proceedings in SIAC and the Control Order proceedings,
22 the appellants did not have access to the newly
23 discovered material and were thus unaware that they had
24 any cause of action against the Security Services and
25 others for false imprisonment. It was thus not possible

1 for the appellants to raise points as to the lawfulness
2 of their detention or restriction pursuant to the
3 Control Orders either in the earlier proceedings or in
4 parallel proceedings at the same time. Where a claimant
5 does not know that he has a cause of action at the time
6 of the earlier proceedings, I do not see how it could be
7 said that proceedings on that cause of action after he
8 becomes aware of its existence are abusive."

9 That is obviously worlds away from the present case.
10 I am not going to turn it up but in the context of
11 I think it was the Kamoka judgment, Mr Jowell asked you
12 to look at a citation from Lord Hobhouse in the Norris
13 case, and just for the Tribunal's note you will see from
14 that case, the reference is authorities 4, tab 67 --
15 I do not ask you to turn it up because of the time --
16 that in that case none of the parties, none of the
17 parties in the subsequent proceedings were the same.
18 That is analysed very careful by the court and you will
19 see paragraph 26 is the key paragraph.

20 Mr Jowell then went on to the Iberian case. I am
21 afraid to say that our contention is that he has simply
22 misread that authority because it is clear, we say, that
23 the court -- that Mr Justice Laddie considered the
24 issues that arose under three heads as I made clear in
25 opening. The second head, which is the section that

1 leads up to paragraph 74, was based on the line of
2 authorities which was the predecessor, the juridical
3 predecessor to article 16 of regulation 1/2003. And
4 then the abuse of process domestic argument was then
5 considered in paragraph 75 and following and we see that
6 in particular --

7 PRESIDENT: That was the point that I sought to put to Mr
8 Jowell.

9 MS DEMETRIOU: That is exactly the point that you made, sir.

10 But in any event, our case does not stand or fall on
11 Iberian. So we recognise that there are differences
12 between Iberian and the present case but the reason
13 Iberian is important is that it demonstrates that as
14 a matter of English law the Hunter principle can apply
15 to decisions of the European Commission and that is
16 something which unequivocally derives from that judgment
17 and on which we rely.

18 Now, moving on from the authorities, Mr Jowell had
19 two main substantive arguments. The first was that our
20 contentions are inconsistent with the statutory scheme
21 laid down by article 16 and the second substantive
22 contention was that our submissions undermine the
23 rationale of the settlement process because they create
24 disincentives to settlement.

25 I am going to take those in turn. In relation to

1 the first, which is alleged inconsistency with the
2 statutory scheme, we say that this is incorrect because
3 article 16 of regulation 1 and the English abuse of
4 process rule are different types of rule directed at
5 different targets. And they are not inconsistent with
6 one another.

7 So article 16 establishes that a national court
8 cannot take a decision that runs counter to a decision
9 taken by the Commission. And it gives effect to the EU
10 law duty of sincere cooperation which operates as
11 between Member States including the courts of Member
12 States and the European institutions. And of course the
13 abuse of process rule is a rule of English procedural
14 law which is aimed at the conduct of the parties to
15 litigation. And its rationale is to protect the
16 interest both of private litigants and the state in not
17 having issues litigated again.

18 We do not say that the abuse of process rule applies
19 to recitals to a Commission decision as a general matter
20 in all cases. I made that very clear in opening. It
21 would not in our submission apply in a case that was not
22 a settlement case, for example. Its application depends
23 on all of the factual circumstances.

24 EU law does not as a general matter preclude the
25 application of national procedural rules such as this.

1 The general position is that according to the principle
2 of national procedural autonomy, national procedural
3 rules can be applied so long as they don't offend the
4 principles of non-discrimination or effectiveness which
5 the abuse of process rule does not do.

6 Mr Jowell did not engage at all with the point
7 I made in opening about Hunter where an equivalent
8 argument to that which he makes before this Tribunal was
9 rejected. It was argued by the appellants in that case
10 that it could not be an abuse of process to seek to
11 litigate the issue of whether they had been assaulted by
12 the police despite the earlier criminal proceedings
13 because sections 11 and 13 of the Criminal Evidence Act
14 addressed the circumstances in which criminal
15 convictions were admissible or conclusive in civil
16 proceedings.

17 I pointed the Tribunal to the references where that
18 argument was made but despite those provisions and
19 despite that argument, the House of Lords held that
20 it was an abuse to seek to relitigate the matter and
21 that is because the abuse of process rule could coexist
22 alongside those substantive provisions. It is really
23 the directly analogous point and Mr Jowell did not
24 grapple with that at all.

25 What Mr Jowell said is that if we are correct, the

1 abuse of process rule would lead to inconsistency in the
2 enforcement of competition law in the different Member
3 States and he went as far as to say in response to
4 a question put to him by the President that any rule of
5 national law that gives a Commission decision less force
6 is contrary to EU law. And we say that is obviously
7 wrong because take for example limitation rules.

8 If a limitation rule applies, then the Commission
9 decision can't be relied on at all in national
10 proceedings. And yet we know from these very
11 proceedings that the defendants in this case have indeed
12 pleaded that some of my client's claims are time-barred
13 as a matter of German law and they seek to rely on the
14 German limitation provisions.

15 We say there is no real material distinction between
16 that type of case and a case in which rules relating to
17 an abuse of process may vary between Member States.
18 We simply don't know, as Mr Justice Roth points out.

19 Now, Mr Jowell also took the Tribunal to BritNed and
20 the 2 Travel Group cases and he said that those were
21 authority for the proposition that article 16 has
22 superseded Iberian. We say no, not at all. They were
23 dealing with a different point. So they were dealing
24 with the second of the issues dealt with in Iberian, the
25 Delimitis issue. It is correct that the case law relied

1 on by Mr Justice Laddie in that second part of its
2 analysis has now been codified in article 16.

3 Again I am not going to turn it up but if
4 the Tribunal goes back to the 2 Travel Group case which
5 is at F5 tab 73, it is clear, apart from the point
6 I have just made, it is clear from paragraph 68 that
7 this point was not argued. In fact the Tribunal made
8 clear in that case that the point had not been pursued
9 and that they dealt with it very swiftly at
10 paragraph 70. Again, BritNed was not addressing this
11 point, it was not focusing on abuse of process at all,
12 still less on settlement decisions.

13 I move on to Mr Jowell's submissions on
14 the settlement regime. He started by saying that 10%
15 off a fine is not very much of an advantage. Well,
16 the question is what is the totality of the fines in
17 this case? The totality of the fines imposed in this
18 case is around 3 billion euros. In our submission, 10%
19 of 3 billion euros is definitely something worth having.
20 That is not the only benefit the defendants derive from
21 the settlement decision. As I said in opening, what
22 they have is a high level decision which you can
23 contrast with the Power Cables decision to see how much
24 thinner it is.

25 Of course under article 20(b) of the settlement

1 notice they have the ability to indicate the maximum
2 amount of fine that they would accept. Now, Mr Jowell
3 then said -- these points, these advantages are also
4 relevant to Mr Jowell's MAN specific point which is that
5 they didn't get the 10% reduction because they in fact
6 got a 100% reduction as a result of being an immunity
7 applicant.

8 Two points to make about that: first of all they had
9 other benefits but secondly, the immunity was
10 conditional and we say -- so, paragraph 20 of the
11 leniency notice requires ongoing cooperation and we
12 don't think it takes much imagination to think that
13 faced with that obligation and the enormous prize at the
14 end of it, that MAN may well have felt reluctant to
15 distance itself from the settlement procedure in
16 circumstances where all of the other defendants apart
17 from Scania had agreed to settle. It may well have felt
18 quite rightly that there would have been a risk in those
19 circumstances of losing the enormous prize of a 100%
20 reduction in fine but ultimately it obviously felt there
21 was some benefit to it in settling.

22 PRESIDENT: I do not think Mr Jowell, although he referred
23 to MAN, was seeking to argue that MAN should be treated
24 for the abuse differently from everyone else.

25 MS DEMETRIOU: No. I think that is a fair comment.

1 Now, Mr Jowell also said that there is nothing in
2 the settlement notice to say that recitals in
3 a settlement decision would be binding in national
4 proceedings. But we say -- and he says that given that
5 there is nothing in the notice to say that, then the
6 fact that through the English rule of abuse of process
7 they might end up being binding is something which
8 creates a disincentive to settlement. But we say that
9 point should be turned around.

10 The settlement notice provides a detailed scheme for
11 the making of admissions. Just to turn it up again,
12 it is in authorities 2, behind tab 26. I would ask
13 the Tribunal to turn back to paragraph 20 on page 3.
14 Now, that says that the -- in order to gain the benefits
15 that I have discussed, parties opting for a settlement
16 procedure must introduce a formal request to settle in
17 the form of a settlement decision and that must contain,
18 looking at (a), an acknowledgment in clear and
19 unequivocal terms of the parties' liability for the
20 infringement summarily described as regards its object,
21 possible implementation, the main facts, their legal
22 qualification, including the parties' role and duration,
23 etc.

24 So there is nothing there to say that that clear
25 acknowledgment is somehow qualified in some way, that

1 these admissions which they are required to give are for
2 a single narrow purpose only. That would make the
3 admissions not worth the paper they were written on.

4 On the contrary, we see in recital 3 to the decision
5 a clear and unequivocal statement that the defendants
6 accepted all the facts in the decision and you have
7 heard nothing from the defendants in this hearing to say
8 that in some way the facts reflected in the decision did
9 not reflect their settlement submissions or their
10 admissions. They haven't made that submission.

11 MR BEARD: I am sorry, it is important in that regard the
12 settlement materials that were put in are subject to
13 a confidentiality regime. It is for that reason
14 I directed the Tribunal to paragraph 77 in our skeleton
15 argument. It is not a submission open to the claimants
16 in relation to these matters --

17 PRESIDENT: I think all they are saying is the recital, as
18 I understood Ms Demetriou, says the facts have been
19 accepted.

20 MS DEMETRIOU: Yes.

21 PRESIDENT: And none of defendants have said that statement
22 is erroneous.

23 MR BEARD: No. And that is absolutely right. Ms Demetriou
24 was going further in relation to what she was saying
25 about the status of the admissions and whether or not

1 any conditionality had been put in relation to any
2 admissions and nothing can be said in relation to that.

3 MS DEMETRIOU: I think Mr Beard has totally misunderstood my
4 submission, which I understand the Tribunal does
5 understand. He said it would be unfair and parochial to
6 hold these defendants to their admissions on the basis
7 of the English rule of abuse of process.

8 But quite apart from the point put to Mr Jowell by
9 the Chairman concerning the advice these parties would
10 have got and the knowledge they would have had from the
11 Iberian case, Mr Jowell's submission rather implies that
12 the defendants might have had some expectation that they
13 were making admissions to the regulator in return for
14 which they got a substantial reward in the expectation
15 that they would be able to resile from them later in
16 national proceedings.

17 If that was their expectation, and that is really
18 the premise of Mr Jowell's submission, then we say that
19 is abusive behaviour par excellence.

20 A further point made under this head by Mr Jowell
21 was a point based on article 6 of the Convention on
22 Human Rights. He said that defendants were unable to
23 appeal these recitals. Now, that is at least partly
24 contradicted by the point Ms Ford made, which is that
25 the settlement notice says that they can appeal against

1 the settlement decision. It is true that in respect of
2 those recitals which turn out to be non-binding then
3 they couldn't have done --

4 PRESIDENT: I think that is the point that is being made.

5 MS DEMETRIOU: That is the point. But the point Mr Jowell
6 didn't grapple with at all was the point that I made in
7 detail in opening, which is that these are their
8 admissions and if it turns out that the decision doesn't
9 accurately reflect their admissions, they do have
10 a remedy because there is a procedural right which is
11 triggered, namely the right to receive another statement
12 of objections putting these points to them. And if that
13 is not complied with then of course they can appeal
14 against the procedural unfairness that would result.

15 Now, finally I want to turn to the point about
16 non-admissions. Both Mr Harris and Mr Jowell somewhat
17 distorted my submission. Can I just please ask the
18 Tribunal, does the Tribunal have the transcript from
19 yesterday -- from Tuesday, I am sorry?

20 HODGE MALEK QC: Yes.

21 PRESIDENT: Yes, we do.

22 MS DEMETRIOU: This is page 121 of the transcript. It was
23 a point put to me by Mr Justice Fancourt. I would just
24 ask the Tribunal -- I am not going to read it out now
25 but the passage starts from line 7 and then the point

1 put to me by Mr Justice Fancourt is the point I then
2 accepted.

3 So our position in this case is that although there
4 might be in theory a settlement case in which there is
5 some particularly egregious fact which can be borne into
6 account in the fact sensitive analysis, none has been
7 put forward in this case. That is our point.

8 Mr Malek asked Mr Jowell what are the limits here,
9 so on what basis might the defendant be permitted to
10 re-open the facts if we are otherwise right?

11 That question was put against the premise of the
12 backdrop on which we rely of course, which are all the
13 facts that I emphasised in opening. We say that this is
14 in the circumstances of this hearing a hypothetical
15 point because as Mr Justice Fancourt observed, the
16 application of the Hunter test is a fact-sensitive test.
17 We say it applies that the abuse of process rule applies
18 here for all the reasons that I gave in opening.

19 It was for the -- it was incumbent on the defendants
20 to explain or to put forward particular factual
21 circumstances on the basis of which they would contend
22 that the rule does not apply, and they have come to this
23 Tribunal armed with nothing, nothing at all.

24 They take instead a binary position and Mr Jowell
25 was at pains to emphasise this. A binary position which

1 was either the test applies or it doesn't. First of all
2 that is inconsistent with the fact sensitive nature of
3 it, but secondly they simply have not put forward any
4 facts at all on the basis of which the Tribunal could
5 conclude that there is some particular fact which makes
6 it okay for them to resile from these admissions in all
7 the circumstances which I have said. This is in
8 circumstances where these proceedings, these
9 proceedings, were commenced three years ago and where
10 the defendants are involved in other proceedings.
11 Mr Harris said in an earlier CMC that his client alone
12 is involved in some 500 similar claims across Europe.
13 It is not that they are not in a position to put forward
14 these facts if they exist.

15 The final point that I want to make relates to the
16 point put by Ms Ford which is that the defendants could
17 have appealed and the point is here that they didn't
18 appeal. There is nothing at all which suggests that
19 they do not accept that the final decision reflects
20 their admissions.

21 My Lord, unless you have anything further, those are
22 my submissions in reply.

23 PRESIDENT: Yes.

24 HODGE MALEK QC: If there is a formal admission in the

25 context of these proceedings, do you accept that that

1 admission can be withdrawn with the permission of the
2 Tribunal?

3 MS DEMETRIOU: In these proceedings?

4 HODGE MALEK QC: If in any proceedings you make an admission
5 in those proceedings, ordinarily CPR14 comes in and
6 under CPR14 you can withdraw an admission with the
7 permission of the court or the tribunal. So you accept
8 that.

9 Looking at the abuse of process, you say there are
10 two separate bases for it so the answer may depend upon
11 which basis you apply.

12 You accept that it is not binding in the sense that
13 it is absolute, you accept there may be circumstances in
14 which a party may be allowed to resile from a fact
15 stated in the recitals. You accept that?

16 MS DEMETRIOU: I accept that because it is a fact sensitive
17 analysis, there may be some particularly grey fact, I do
18 not exclude that, but none has been put forward in this
19 case.

20 HODGE MALEK QC: If you are trying to identify the basis of
21 it, do you accept it is a Ladd v Marshall scenario?

22 MS DEMETRIOU: No. I do not accept that. I do not accept
23 that if the defendants for example were to come along
24 and say "We have now located some employee we couldn't
25 locate at the time and he is going to come along and say

1 something different happened", I do not accept at all
2 that that would be permissible.

3 HODGE MALEK QC: That's fine. At least I understand where
4 you draw the line. Thank you.

5 MR JOWELL: I appreciate this is irregular, however in the
6 interests of justice I can give our response on the
7 Hunter point in two sentences, if that would assist the
8 Tribunal. I can do so. It is entirely ...

9 PRESIDENT: No. We have got the point. I do not think that
10 is permissible.

11 Thank you all very much. We will resume at -- is
12 10.30 satisfactory for everyone? Is there any request
13 that we should start earlier? No. 10.30 tomorrow.

14 (4.38 pm)

15 (The hearing was adjourned until 10.30 am
16 on Friday, 6 December 2019)

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21

22

23

24

25

INDEX

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Submissions by MR BEARD1

Submissions by MS BACON32

Submissions by MR JOWELL86

Submissions by MS FORD141

Reply by MR BREALEY156

Reply by MR WARD163

Reply by MS DEMETRIOU179