

1 This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its  
2 judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public  
3 hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The  
4 Tribunal's judgment in this matter will be the final and definitive record.

5 **IN THE COMPETITION**

Case No. : 1357/5/7/20 (T)

6 **APPEAL TRIBUNAL**

7  
8  
9 Salisbury Square House  
10 8 Salisbury Square  
11 London EC4Y 8AP  
12 (Remote Hearing)

Monday 10<sup>th</sup> May 2021

15 Before:  
16 The Honourable Mr Justice Jacobs  
17 (Chairman)  
18  
19 (Sitting as a Tribunal in England and Wales)

20  
21 **BETWEEN:**

22  
23  
24 Stellantis N.V. (formerly Fiat Chrysler Automobiles N.V.) & Others

Claimants

25  
26 -v-

27  
28 NTN Corporation & Others

Defendants

29  
30  
31  
32 **A P P E A R A N C E S**

33  
34 Philip Woolfe (on behalf of the Claimants)  
35 Robert O'Donoghue QC and Hugo Leith (on behalf of the NTN Defendants)

36  
37  
38 Digital Transcription by Epiq Europe Ltd  
39 Lower Ground 20 Furnival Street London EC4A 1JS  
40 Tel No: 020 7404 1400 Fax No: 020 7404 1424  
41 Email: [ukclient@epiqglobal.co.uk](mailto:ukclient@epiqglobal.co.uk)  
42  
43  
44  
45  
46  
47  
48  
49  
50  
51

Monday, 10 May 2021

(10.30 am)

**Housekeeping and introductory remarks**

**MR JUSTICE JACOBS:** Good morning, Mr O'Donoghue and Mr Woolfe.

**MR O'DONOGHUE:** Good morning.

**MR WOOLFE:** Good morning.

**MR JUSTICE JACOBS:** I've read what you asked me to read. I had various things in this morning, which I haven't quite caught up with, various bundles and so forth, so I haven't looked at any of those. I'm working from hard copies that were kindly provided to me of the core bundles but I have all the other stuff in soft copy.

Just in terms of where I would like the focus of the argument, there's quite a lot of argument in the case about whether or not this application is open to your clients, Mr O'Donoghue. I don't think I need to trouble you on that. It seems to me that you can make this application. If Mr Woolfe wants to spend time telling me that you can't make this application because it's somehow prohibited by what went on in January, he can make that argument and obviously I'll listen to it. But I don't think it's productive for you to address that, at least in opening.

I'm not persuaded, at the moment, that these requests for disclosure truly arise out of the amendments which the Claimants themselves made. It seems to me, looking at the materials, that they arise from either consideration of documents which you have been given as part of the disclosure exercise, or because you have been reconsidering things in the light of your preparation of

1 witness statements. If you want to address me in detail as to how they arise  
2 from the amendments you can do, but I don't really think that takes it very  
3 much further forward.

4 What I'm really interested in, in relation to all of these categories, is the extent to  
5 which, if you like, on the merits they merit disclosure, applying the relevant  
6 CAT principles, which I think are the ones set out in Mr Woolfe's written  
7 argument, paragraph 8, namely to ensure that the case is dealt with justly and  
8 at proportionate cost. That seems to me to be the appropriate test.

9 Now, that doesn't stop either of you addressing me on these other points if you think  
10 it's productive. Equally, I don't get any assistance at all, I think, from many  
11 pages of the Claimants' skeleton dealing with the way in which NTN has  
12 approached its disclosure obligations. It doesn't seem to me that that's  
13 relevant. Again, Mr Woolfe can persuade me or spend some time on that but  
14 I'm not likely to be very receptive to that kind of argument.

15 That's where I stand, and I think that helps you both to focus on what I'm interested  
16 in.

17 **MR O'DONOGHUE:** My Lord, that's extremely helpful, and will obviously save time  
18 and allow me to cut to the quick.

19 **Application by MR O'DONOGHUE**

20 **MR O'DONOGHUE:** My Lord, I appear with Mr Leith on behalf of the Defendants,  
21 who are the applicants in this application. Mr Woolfe is for the Claimants, who  
22 are the respondents to the application.

23 Picking up on your helpful introductory remarks, I wanted to divide my submissions  
24 into two parts. I want to make a handful of contextual remarks and general  
25 points which frame the disclosure issues, and then I will go through the four  
26 categories and deal briskly with FCA's main points by way of response.

1 So that's how I intend to proceed.

2 My Lord, starting with the general points, the first point, of course, is the point  
3 your Lordship observed at the very outset of the first CMC, which is that this is  
4 an enormous claim for damages, said to be worth £80 million. Of course, our  
5 case is that it's worth zero, because there was either no overcharge or there  
6 was pass-on. But your Lordship is entitled to proceed on the basis that that is  
7 the quantum at issue. This is obviously an important cardinal when  
8 considering the question of proportionality, or at least is one of them.

9 The second point is that FCA's approach to disclosure and document retention is in  
10 many ways quite extraordinary, which in part explains some of this  
11 application. For a disclosure period covering more than a decade we have  
12 had a total of 16 emails. And at least speaking for myself, in more than  
13 25 years of commercial practice I cannot recall a case in which the cache of  
14 emails has been so diaphanously thin.

15 It is less than 3 per cent of the emails we have disclosed. It's about one email per  
16 year of disclosure and, for what it's worth, I have had more than 16 emails  
17 before court this morning.

18 Of course, it's not simply that it's just 16 emails. Many of the 16 emails have nothing  
19 to do with NTN, or, if they do, are pretty banal. So we are starting from a low  
20 ebb.

21 Now, the reasons for this rather striking state of affairs remain pretty obscure, and  
22 they have shifted over time. I quickly ask your Lordship to turn to  
23 Ms Whiteford's first statement. That is in the second core bundle, tab 8, and  
24 it's paragraph 45.

25 She says that laptops of employees were scrubbed and emails deleted when the  
26 employees left FCA. But if we then go to the EDQ, which is in the first bundle,

1 tab 6, page 361, and if your Lordship can look at the response in relation to  
2 question 13, there's no mention of any policy on automatic deletion. And in  
3 fact it indicates there are no such automatic policies. So this is the direct  
4 opposite of what paragraph 45 of Ms Whiteford's statement says.

5 The other point is, if your Lordship looks over the page at 362, question 14, you will  
6 see that the document retention measures put in place at the litigation hold by  
7 the Claimants was put in place three days before the claim form was issued.  
8 So this really is quite remarkable on a number of fronts.

9 The third point is that the central issue in this case is how buyer power operated in  
10 practice. The disclosure we seek in broad terms goes to this central topic. A  
11 key question will be whether FCA was in practice able to use its buyer power  
12 to substantially reduce any effect of the cartel, as well as how it dealt  
13 internally with increases in its costs.

14 As we set out in our skeleton, it is a matter of public record in competition law  
15 decisions for the last 20 years that automotive OEMs like FCA are the  
16 absolute masters in buyer power since they are limited in number and use  
17 highly sophisticated procurement techniques. And the disclosure we seek is  
18 intended to shed important practical light on how FCA use procurement  
19 techniques, and their impacts.

20 The fourth point, which is my penultimate point before I move to the categories, is  
21 that the disclosure we seek in this application is important in the context of  
22 economic evidence as well. And FCA is under a significant misapprehension  
23 here. They seem to think that all Dr Rosati will be doing is using statistical  
24 data on costs, for example, to build his regression model to quantify the  
25 overcharge and pass-on and that information of a qualitative nature will not be  
26 relevant to his evidence. And this is wrong, as outlined in some detail in

1 Mr Balmain's third statement.

2 The econometric analysis will be, of course, as your Lordship will understand,  
3 an important piece of evidence in terms of the regression and econometrics.  
4 But having corroborating internal documents confirming the plausibility of the  
5 econometric results will also be important, and indeed that is the logical  
6 starting point. In particular, we will want to see how FCA has approached the  
7 exercise of buyer power internally. And any documents indicating that FCA is  
8 seeking to adjust prices on the basis of, amongst other things, cost changes,  
9 how much of these cost increases it seeks to pass on, how they calculate the  
10 cost increase, which costs are included, how frequently they do so, and so on,  
11 will be important to the quantitative analysis as well.

12 In short, the qualitative evidence will allow an economist and, we would suggest, the  
13 trial judge to triangulate the economic models. And as I will come to in  
14 a moment, which is my last point by way of context, this is best practice in this  
15 area, as recently endorsed by the High Court and Court of Appeal.

16 Now, leaving aside the question of expert evidence, NTN will also wish to address  
17 the factual position on the interaction, the infringement and the commercial  
18 levers available to FCA.

19 The factual position is an important part of the pleaded case. Your Lordship has the  
20 references in the skeletons. Let me just give them to you quickly again:

21 Our general case on causation is at paragraph 41(b) of our Amended Defence,  
22 which is core bundle 3/173 and we give a particular example. And the  
23 response to that is in the Re-re-amended Particulars of Claim, which is at  
24 paragraph 40H.8 and the pleaded case was that the exchange of information  
25 was effective to increase the prices offered. Then finally in our defence at  
26 paragraph 35I(j), our case is that the pricing offers made were driven by

1 various factors, including countervailing buyer power. And it is denied by us  
2 that the prices ultimately agreed were actually affected by the exchange of  
3 information.

4 So the parties have joined on the pleadings on these issues.

5 The final point to some extent ties in with the fourth point I made. But it also stands  
6 apart in an important respect. The only follow-on cartel damages case to go  
7 to full trial and judgment and on further appeal to the Court of Appeal, is the  
8 BritNed case.

9 We deal with this in our skeleton at paragraphs 11 and 12. This is a paradigm case  
10 as to how the factual and other qualitative evidence is central to the  
11 evaluation of the cartel's possible effects. It also shows how a failure, in  
12 an economic regression model, to have regard to the relevant market facts,  
13 and instead to use proxies for them, can be fatal to the robustness of such  
14 a model.

15 If we can quickly turn to the case itself, my Lord. It's in the authorities bundle, tab 6,  
16 and I want to start at paragraph 171 on page 516.

17 Your Lordship will see the heading "Competitive pricing during the negotiation  
18 process".

19 **MR JUSTICE JACOBS:** Hang on one second. I need to get there.

20 **MR O'DONOGHUE:** My Lord, it's authorities bundle, tab 6, and it's internal  
21 page 516, paragraph 171.

22 **MR JUSTICE JACOBS:** So I'm looking at Marcus Smith rather than the  
23 Court of Appeal.

24 **MR O'DONOGHUE:** My Lord, yes, we start with the High Court.

25 **MR JUSTICE JACOBS:** And you lost this case, did you, in the Court of Appeal,  
26 effectively, is that right?

1 **MR O'DONOGHUE:** My Lord, yes. One of the irritating things, I'm sure, for judges  
2 is for counsel to have a tendency to cite cases they were in and on which they  
3 were successful on a particular point. And on this particular point, it was  
4 a point I argued which I was unsuccessful on. So at least I can't be accused  
5 of that opportunism.

6 **MR JUSTICE JACOBS:** Yes. Okay.

7 **MR O'DONOGHUE:** So my Lord, we start at paragraph 171 of the judgment. You  
8 see the heading at G -- the entire section is concerned with competitive  
9 pressures arising in the negotiation process. Then you see 171:

10 "In order to assess the manner in which the cartel had or may have had an effect on  
11 a final concluded price, it is important to pay regard to the process of  
12 negotiation, the competitive pressures that existed and the extent to which  
13 these were subverted by the cartel."

14 So that was the issue the judge was addressing, and that's the entirety of the  
15 section.

16 You will then see that this continues up to paragraph 200 and he goes through in  
17 some detail the negotiations in this case.

18 Then you will see the conclusion 593, which is paragraph 441.

19 **MR JUSTICE JACOBS:** Yes.

20 **MR O'DONOGHUE:** So the use of buyer power in the factual was considered very  
21 significant in that case. Indeed, if your Lordship flicks on a couple of pages to  
22 444, the issue in BritNed was actually quite stark.

23 You will see at 444 the judge found that because of the commercial pressures and  
24 other reasons the common costs were not subject to an overcharge. And  
25 then if you go over the page to 449 the basis on which the overcharge was  
26 awarded in BritNed was a sum of €7.5 million. As we see in 449, ABB had an

1 over-engineered cable with far more copper than its competitors. So this was  
2 a case where the commercial pressures and buyer power were highly  
3 effective. The overcharges found weren't really to do with an increase in price  
4 but that the cartel shielded ABB from having a relatively inefficient, higher cost  
5 product with too much copper.

6 So it is quite a powerful demonstration as to how buyer power can be a more or less  
7 complete answer in cases like this.

8 Just to round off on this point, your Lordship refers to the Court of Appeal, quite  
9 rightly. We made the point in the Court of Appeal: well, look, buyer power in  
10 the factual of the cartel doesn't really tell you anything about the position in  
11 the counterfactual. So we said: in principle, this approach was wrong.

12 We don't need to turn it up, but the Court of Appeal, as your Lordship observed, to  
13 my detriment, rejected this argument. It's paragraph 129 and 130 of their  
14 judgment, which is in the next tab. I don't think we need to turn it up. We set  
15 it out in full at paragraph 27 of our skeleton.

16 So in principle the Court of Appeal said: these qualitative factors to do with buyer  
17 power are relevant and material to overcharge. And we say, following  
18 BritNed, given that this has been endorsed at the appellant level, this  
19 approach is unimpeachable.

20 Now, before I move on to the categories. Just while we are on BritNed I want to pick  
21 up on a couple of things Mr Woolfe says in his skeleton about BritNed. It will  
22 save time as I move forward. My Lord, if we can go to paragraph 45 of his  
23 skeleton, it's really the penultimate sentence. He said that the reason in  
24 BritNed there was a detailed qualitative assessment was:

25 "It arose from the fact that it was not possible to conduct a quantitative analysis of  
26 the overcharge."

1 By contrast, in this case there will be quantitative analysis. And he also makes  
2 a further point that it was a bespoke project. He says there was no  
3 quantitative evidence on the question of overcharge in BritNed.

4 And that is simply wrong. Neither Marcus Smith nor the Court of Appeal said that  
5 a quantitative or regression analysis could not be done in that case. In fact,  
6 as I will show your Lordship, together with the qualitative analysis we have  
7 just seen, it was central to the judge's conclusions.

8 If we go back to the High Court judgment at paragraph 288, page 545. Dr Jenkins --  
9 she was for BritNed -- she had her regression analysis. You can then see at  
10 289 this was a comparison of during the cartel and afterwards.

11 That was the claimants' case in BritNed.

12 Then if we flick forward to 321 on page 557 you will see Mr Biro -- he was for ABB,  
13 and the trial judge sets out that there were three forms of quantitative analysis  
14 advanced by him, and that included econometric analysis -- you see under  
15 2 -- and this was a regression analysis.

16 So it is simply wrong to say in BritNed that there was not also on both sides  
17 quantitative analysis accompanying the qualitative analysis.

18 If you then go to the judge's conclusions, which are at 345, which is on page 545,  
19 and his reasons for rejecting Dr Jenkins' evidence. He says:

20 "Fundamentally, Mr Biro's approach is more straightforward than Dr Jenkins's. This  
21 approach is tied very closely to the facts and to the data produced by ABB."

22 And you will see that Dr Jenkins was not relying on market facts but was relying on  
23 proxies for the market. And the judge said, in essence, the proper approach  
24 is to ground this in the market facts. You will see at 376 -- we don't need to  
25 turn it up -- an explanation of the problem with proxies and the problem that  
26 the judge saw with Dr Jenkins' approach. She had substituted proxies for the

1 actual ABB costs and data when doing the analysis, whereas Mr Biro used  
2 the ABB costs and data.

3 Certainly there was no suggestion that it was the bespoke nature of the BritNed  
4 project which led to Dr Jenkins' analysis being rejected. It was rejected for  
5 two reasons: first, based on the qualitative evidence we have just seen and,  
6 second, even on the parameters of the quantitative evidence -- evidence,  
7 granted, of the market facts as opposed to proxies -- was to be preferred.

8 But the basic point is, Mr Woolfe is dead wrong when he suggests that the reason  
9 qualitative analysis was used extensively in BritNed was because quantitative  
10 analysis in that case was not possible. That is simply wrong.

11 My Lord, in a sense, the premise of Mr Woolfe's submission is a surprising one,  
12 because why on earth do we need a ten-week trial if the exercise is simply for  
13 your Lordship to look at two quantitative models and essentially nothing else,  
14 and decide, well, I like the look of that one but not that one?

15 I mean, we understood from the outset of this case, in the case management  
16 information sheet, that FCA would be putting forward at least three to four  
17 witnesses of fact dealing with the qualitative aspects of the procurement of  
18 these bearings, and we will be putting forward one witness of fact, who was  
19 the person responsible for the relationship with FCA, again dealing with the  
20 qualitative aspects of the negotiations and the relationship, the types of things  
21 we saw in BritNed, whereas, if Mr Woolfe's submission is to be believed, none  
22 of that evidence is remotely relevant to the trial judge's assessment. And we  
23 say that that simply isn't credible.

24 Now, moving to the categories, my Lord, I can take these hopefully quite briskly as  
25 your Lordship has done quite a bit of prereading at least on the core issues.

26 Can I start with category 1, to pick up a point your Lordship mentioned at the outset.

1 This is a point I think it is fair to say emerges primarily out of the preparation  
2 of witness evidence, because during that process we learned that FCA had  
3 an annual convention with its suppliers. And these are self-evidently very  
4 important events since, as we set out in our witness evidence, it was a form in  
5 which FCA set out their criteria for selecting suppliers, including price and cost  
6 expectations and strategies.

7 And we seek two things: one, copies of the presentations or communications, and,  
8 second, the notes which were intended to speak to the presentations or  
9 communications. So that's paragraphs 1(a) and (b) of my draft order.

10 Now, we have one example in the bundle. It is said to be confidential. I don't fully  
11 understand why, because this was a public presentation to a number of  
12 suppliers, but I will of course respect the designation at this stage.

13 To avoid disrupting the hearing, I refer your Lordship to the key parts rather than  
14 read them out, because we'd have people jumping in and out all the time,  
15 which isn't very business-like or fair on them.

16 **MR JUSTICE JACOBS:** I have had a look at this presentation, or at least the bits  
17 that you have referred to in your skeleton argument. So I know where it is.

18 **MR O'DONOGHUE:** Yes, the core bundle, tab 9, and it's at 676. My Lord, in my  
19 copy the numbering is absolutely tiny. It's in the bottom right-hand side, but it  
20 is just about legible.

21 A few points. First of all, as we can see from the cover page, these presentations  
22 came from very senior people within FCA. One of them was the COO. These  
23 are clearly important from FCA's perspective.

24 If we can then go forward to page 796, your Lordship will see that there are three  
25 boxes on that slide. If I can ask your Lordship to read the second of those  
26 boxes, that's also relevant to category 3, which I will come to in a minute.

1 Three more references --

2 **MR JUSTICE JACOBS:** Go a bit slower, because you want me to look at certain  
3 documents. 796 you have taken me to, right?

4 **MR O'DONOGHUE:** Yes. My Lord, you will see there are three boxes.

5 **MR JUSTICE JACOBS:** I do, yes.

6 **MR O'DONOGHUE:** If I can ask you to look at the second of those boxes. I mean,  
7 this will also be relevant to category 3, which I will come on to in a moment.

8 Three more references. At 810 your Lordship will see the total value of purchases  
9 that FCA planned to make from its supplier, at least at that stage.

10 Then at 821 you will see some numerical metrics of supply and performance. And  
11 then 822 and 823 -- very important -- you will see an explanation of the  
12 specific value of the targeted costs savings per vehicle -- the sum is obviously  
13 confidential -- and that those savings were intended to be made within  
14 a specified period.

15 There are also statements making clear that a supplier contribution to meeting those  
16 targets is required.

17 Now, in our submission this kind of information is highly relevant, in a number of  
18 respects. First of all, it is relevant to the commercial levers point which we  
19 saw in BritNed that FCA exerted against suppliers, including NTN.

20 Second, if FCA did incur an overcharge on the price of bearings, it is relevant to  
21 whether they would have avoided the burden of that overcharge by reducing  
22 their other costs of supply in order to meet the overall target of costs savings,  
23 which we have just seen, at least in that presentation. And the fact that, as  
24 the document appears to suggest, FCA had a hard-edged target, the figure in  
25 euros your Lordship has just seen, of total costs and costs reductions per  
26 vehicle, does suggest prima facie that this form of mitigation would have

1 occurred if there had been any overcharge.

2 The existence of such a target is particularly important because it does suggest that  
3 FCA's commercial policy was not simply to reduce all of its costs by the  
4 maximum amount that its suppliers would bear, but rather to reach a specified  
5 and planned level of overall costs going forward.

6 Now, in terms of FCA's response, three points, my Lord. I will not deal with lateness,  
7 following your Lordship's helpful indication. We agree, my Lord, there is  
8 nothing to the point, given that there's no prejudice -- to happen to the trial  
9 timetable.

10 The first point FCA makes is the suggestion that the documents would not be  
11 relevant. If this is intended to suggest they would not, as a factual matter, be  
12 relevant, we say that is obviously wrong. Even based on the single document  
13 we've just seen, they are plainly relevant to issues of buyer power, cost  
14 reduction and the issue of mitigation.

15 And in particular, FCA glosses over what the supplier convention document says on  
16 its face. It spells out that over a specified fixed period FCA was setting  
17 a target that its cost per vehicle would be limited within a specific target range.  
18 And we saw the euro figure. The target would be made up through reducing  
19 one cost or another: if not bearings then FCA's procurement people would  
20 sharpen their pencils and cut something else.

21 And this is the point we would like to explore. It is a highly significant point.

22 Now, FCA does make some factual assertions in support of their arguments on  
23 relevance. This is paragraph 17 and 18 of my learned friend's skeleton. He  
24 says that our arguments on mitigation through reduced supply costs must be  
25 wrong because FCA would simply have tried to reduce all of its costs of  
26 supply to the greatest extent possible -- to use his phrase -- in the factual and

1 the counterfactual.

2 This is, with respect, confused thinking. The basic logic of reduced supply cost  
3 mitigation, recognised by the Supreme Court in Sainsbury's, must be that  
4 there may be instances where a claimant would not simply have reduced all of  
5 its supply costs to the greatest possible extent in the factual and the  
6 counterfactual.

7 Just to give your Lordship an example: one example may be where a claimant  
8 decides it has total budget of, say, £1 million to spend on a particular part of a  
9 project, and that if it gets within £1 million it would be satisfied and wouldn't  
10 press its suppliers any further.

11 This could well arise because the way that a complex business runs could be that it  
12 just sets its procurement people upfront hard-edged targets or budgets so  
13 they have something concrete to aim for and something to be measured  
14 against. And in a sense, the example I showed your Lordship in relation to  
15 the particular targets seems to be exactly on point.

16 The Supreme Court in Sainsbury's recognised this possibility in the cases before it  
17 which concern claimants who were supermarkets and retail chains. If we can  
18 quickly turn to that, my Lord. It's authorities 9, at page 808 and it's paragraph  
19 215:

20 "The question of legal causation is straightforward in the context of a retail business  
21 in which the merchant seeks to recover its costs in an annual or other regular  
22 budgeting. The relevant question is a factual question: has the claimant, in  
23 the course of its business, recovered from others the costs of the MSC [which  
24 was the interchange fee in that case] including the overcharge contained  
25 therein."

26 So in a sense that is bang on point, because one is looking at mitigation not simply in

1 the form of pass-on to their consumers but also in the form of whether other  
2 suppliers -- in this hypothesis, non-bearing suppliers -- would be leant on to  
3 contribute towards the achievement of the target.

4 So that is the point being made at 215. The upshot of that is that it is therefore  
5 necessary to investigate whether in fact this was the case.

6 Now, what Mr Woolfe does, with respect, is he simply asserts that they would have  
7 reduced their costs of supply to the greatest extent possible. But that is  
8 assuming the answer to the issue that needs to be investigated at trial with  
9 evidence and cross-examination. And he contends that it is implausible that  
10 FCA would have done anything other than reduce its costs to the maximum  
11 amount possible.

12 We have two responses to that: first, it's directly contrary to paragraph 215 of the  
13 Supreme Court judgment we have just seen. And second, and in any event,  
14 this will be a hotly contested factual point at the trial, on which we will need  
15 documents to put to the witnesses. And what Mr Woolfe seeks to do is to  
16 effectively obtain a reverse summary judgment on this point at this stage and  
17 just shut out debate on these issues at trial. And we say that is wrong in  
18 principle.

19 Second, FCA says at paragraphs 19 to 21 of its skeleton that the issues of buyer  
20 power mitigation would be measured by Dr Rosati's -- our expert -- qualitative  
21 evidence, and that qualitative evidence on buyer power mitigation and  
22 pass-on will not assist.

23 This is wrong, as I have outlined earlier, based on Mr Balmain's evidence and his  
24 discussions with Dr Rosati. Both qualitative and quantitative evidence are  
25 important and mutually reinforcing.

26 And indeed, as we see in section G of the BritNed judgment, one starts with the

1 factual or qualitative evidence, to build a picture of how the purchaser actually  
2 procures the products in question and applies commercial levers and other  
3 forms of buyer power. That is the logical sequence.

4 The final point, before I move to the second category, is that FCA says it would be  
5 too burdensome to locate these presentations and communications and the  
6 accompanying notes.

7 Now, on the face of it, my Lord, locating the most important presentations given  
8 annually to their suppliers, cannot be that difficult. This was a major annual  
9 event. It seems to be the major annual supplier event. It is simply not  
10 credible to suggest they cannot be located.

11 FCA has already located a number of presentations from 2014 to 2018 without  
12 difficulty. And for other years, doing a keyword search, for example on the  
13 word "supplier" or "presentation" or similar words would be a good place to  
14 start.

15 It shouldn't be difficult to locate the relevant people. As your Lordship can see on  
16 page 803 of the presentation we turned up, there are pictures and names of  
17 the people, at least at that stage, and it can't be that difficult to approach these  
18 people and try to find out whether they were the relevant people at the time  
19 and, if not, who did they take over from.

20 This really cannot be that difficult, in the scheme of things.

21 And the fundamental problem your Lordship faces is that the Tribunal has been  
22 given the barest of details as to what precisely has been done here. There's  
23 a completely non-specific assertion in Ms Whiteford's evidence that it appears  
24 that individuals from the period before 2014 are no longer at the company and  
25 that all of their emails and laptops have been deleted or scrubbed.

26 But my Lord, this is an 87 billion-euro company. The suggestion that documents of

1 this importance to the company would not be reasonably available anywhere  
2 within the company, such as central storage, and not capable of being made  
3 available, is simply not credible. One obvious place to start is, why not email  
4 the procurement team to see if anyone has copies of the presentations?

5 The trouble for your Lordship is the Tribunal has no information that would give it any  
6 confidence that a reasonable and proportionate search has been done.

7 The evidence from Ms Whiteford does no more than assert that because some of the  
8 people concerned appear to have left the company, the documents are  
9 unavailable.

10 With respect, this isn't good enough. It is a remarkably casual approach for  
11 an £80-million claim.

12 Now, one obvious point which Ms Whiteford doesn't address in any shape or form is  
13 if we quickly go back to the EDQ, and it's the first bundle, tab 6, at 361.

14 Your Lordship will see under question 13, the first and second points. So FCA has  
15 regular backups of documents and emails on share drives and it also has  
16 a share point centralised platform for documents.

17 Ms Whiteford says nothing about these central repositories and backups. All she  
18 says is, "We think some people appear to have left and we reckon their  
19 laptops and emails were scrubbed", which is itself surprising. One wonders,  
20 rhetorically, how does one ensure a transitional handover from one employee  
21 to another if everything is deleted?

22 But in any event, the final point, before I move to category 2, is as set out in  
23 paragraph 21 of Mr Balmain's second statement. We wanted actively to  
24 engage on keywords and custodians and other issues going to the  
25 proportionality of searches.

26 We have not had a single concrete proposal from FCA, just full opposition to the

1 application. And this contrasts with the approach we have taken in  
2 this litigation.

3 As the Tribunal can see from footnote 2 of Mr Balmain's second statement, in the  
4 case of NTN, disclosure of after-market transaction data has been provided to  
5 FCA, notwithstanding our position that such disclosure has not been ordered.  
6 We have sought to cooperate, to narrow differences, to give more than we  
7 say we're strictly required to give, in the interests of the smooth functioning of  
8 this litigation.

9 And we have had stonewalling from FCA and in particular we have not had  
10 a proposal saying, well, if we limited the following custodians we think  
11 something can be found, or, if we limit it to certain keywords it becomes more  
12 tractable. We have had essentially a scorched earth policy.

13 Moving to category 2 --

14 **MR JUSTICE JACOBS:** Just before you do that, can I ask you, I mean, you  
15 attended these conventions. And have you searched for these documents?

16 **MR O'DONOGHUE:** My Lord, yes. We don't have them. It's not clear to us these  
17 presentations were actually handed out. So if we had them we obviously  
18 wouldn't be here. So the answer is no.

19 But the second point, my Lord, is that in a way it's not so much the presentations,  
20 although they are interesting, it is the notes accompanying the presentations,  
21 in terms of what was intended to be achieved. That really is the internal,  
22 inward-facing exercise as to what FCA's objectives were.

23 So that's the second part of our order. In many ways these are much more  
24 interesting and revealing, because it's the unvarnished truth. What may be  
25 particular interesting is what was not divulged to suppliers but was discussed  
26 internally. So if, for example, as we saw in the slides, a particular target was

1 set out in relation to costs per vehicle, if that was essentially a form of bluffing  
2 and that in practice FCA would have been content with a lower level of  
3 reduction, they were essentially overachieving, if that was not divulged to the  
4 supplier that would be highly significant.

5 So it is both. We say the presentations are a good start, but the notes in terms of  
6 objectives and in terms of what was not said are no less important, and in  
7 many ways may be more interesting.

8 **MR JUSTICE JACOBS:** Well, that's a much wider category of documents because  
9 that is basically not tying it to the presentation; it's looking for things which  
10 were unrelated to the presentation which may have been said at any  
11 particular point in the space of 15 years.

12 **MR O'DONOGHUE:** The drafting of the order is linked to the presentations or  
13 communications --

14 **MR JUSTICE JACOBS:** Can I have a look at that, because it just seems to me --

15 **MR O'DONOGHUE:** It's at tab 7.

16 **MR JUSTICE JACOBS:** Thank you.

17 **MR O'DONOGHUE:** -- of the core bundle. Certainly, my Lord, our objective is all of  
18 this will be tethered -- the notes will be tethered to the presentations, so that  
19 there is that direct link.

20 **MR JUSTICE JACOBS:** So "A" is the presentations?

21 **MR O'DONOGHUE:** Yes. "B" is essentially the notes that would have preceded the  
22 making of the presentations.

23 **MR JUSTICE JACOBS:** Well, are those effectively the speaking notes for the  
24 presentations or is it intended to be a search for whatever communications  
25 there may have been over an unspecified period of time leading into what was  
26 ultimately in the presentations, which is a much wider category?

1 **MR O'DONOGHUE:** My Lord, the intention was to tether this very directly to the  
2 presentations. My Lord, I would suggest this is a very good example of how  
3 the application of keywords -- so if one searched for notes connected to some  
4 keyword to do with "presentations", it would capture that specific link. But we  
5 were not suggesting and we are not suggesting a much more wide-ranging  
6 trawl of anything which has any conceivable link with the presentation or the  
7 subject-matter of the presentation. It would have to be linked to the  
8 presentation itself.

9 So we think the application of keywords and custodians could be effectively achieved  
10 at proportionate cost.

11 **MR JUSTICE JACOBS:** One of the things which you ask for under A is  
12 "communications made to suppliers at the convention". I don't know how long  
13 these conventions lasted. They may have lasted a couple of days, with  
14 a large number of people present.

15 Is it intended that there should be a search for any document which records any  
16 statement made, whether privately at a dinner, by one person on the FCA  
17 side to any one of the people who attended? Is that the idea?

18 **MR O'DONOGHUE:** Well, that certainly is the objective. Again, it seems to me that  
19 through custodians and keywords one can limit this to something tractable.

20 We are essentially interested in what, over the course of this day or two, was actually  
21 conveyed to suppliers. That's one thing. And then, second, to understand, in  
22 terms of the objectives of FCA in putting forward these presentations, what  
23 were they intended to achieve.

24 And as I said, my Lord, a critical part will be, in a sense, what was not divulged to  
25 suppliers and whether there was an element of bluffing, as I indicated. So we  
26 do say that through the application of custodians and keywords this can be

1 kept within manageable bounds, and it is essentially linked to those  
2 presentations and to that particular period.

3 **MR JUSTICE JACOBS:** The keywords you suggest -- which I think you said  
4 "presentation" and "supplier" -- I mean, potentially would capture things which  
5 are completely unrelated to these conventions.

6 **MR O'DONOGHUE:** My Lord, it goes back to my point about cooperation. If FCA  
7 had come to us and said, well, look, we've done keyword searches based on  
8 presentation and suppliers and convention, and that gives us 1,000  
9 documents, but if we add a fourth word it reduces it to 50 documents. And of  
10 course we would have embraced that with open arms.

11 So it is a question of cooperation. And one of the problems your Lordship faces  
12 today is, there is a lot of hand-waving by FCA: well, this will be difficult. But  
13 your Lordship has been given no indication as to how many custodians are  
14 involved, how many documents, how long this would take, what it would cost.  
15 And we have given an open invitation to come forward to us with particular  
16 suggestions for narrowing this base to custodians and keywords in particular.  
17 And we have had nothing.

18 The court is entitled to expect the parties to cooperate, and in the way that we have,  
19 for after-market data. We have had nothing. They essentially get on their  
20 high horse and say, well, this is all too hard. And we've had nothing.

21 With respect, that isn't good enough. And the parties should be cooperating. And  
22 here we've had no attempt to meet us even halfway.

23 **MR JUSTICE JACOBS:** How does this tie in with the debate which we had last  
24 July, or maybe it was June? Because there was quite a discussion at the  
25 CMC as to the parameters of any searches and any disclosure and I gave  
26 a written judgment on that, which to some extent gave you certain documents,

1 particularly relating to pricing and to costs, but said to some extent what you  
2 are looking for was too wide. To what extent are you now seeking to reopen  
3 that by this request?

4 **MR O'DONOGHUE:** My Lord, we say no, for three reasons. First of all, the  
5 qualitative evidence on how negotiations were conducted, that is something  
6 which is clearly relevant and isn't simply a function of data.

7 Second, of course, in the context of costs reductions in particular, and mitigation  
8 through imposing costs reductions on other suppliers, we have a new  
9 development in the form of the Supreme Court in Sainsbury's.

10 And third, my Lord, I mean, I do keep coming back to the point that we have had  
11 a total of 16 emails, many of which, as I said, have nothing to do with NTN or  
12 this case.

13 So there is, in my submission, a rather gaping hole in terms of the qualitative  
14 evidence, and we have tried to come up with a credible means of plugging, to  
15 some extent, that gap.

16 **MR JUSTICE JACOBS:** You've had other disclosure apart from emails, pursuant to  
17 the orders which I made last June, presumably? I mean, you must have had  
18 a lot of data. And I ordered, for example, certain categories of documents  
19 which were more qualitative. And have you not had any of those? I'm  
20 thinking about what was ordered under 2(e). Was it 2(e) of schedule 2? Or  
21 5(e). I can't quite remember.

22 **MR O'DONOGHUE:** That's why we say under paragraph 1(c) of our order "to the  
23 extent not already covered by 5(e)".

24 **MR JUSTICE JACOBS:** Because you ordered under paragraph -- I'm looking at  
25 schedule 2. I don't know where this is in the bundle. I had to find it  
26 independently. It may be in the supplemental bundle.

1 **MR WOOLFE:** My Lord, it's in the core bundle. It's at the front of Mr Balmain's  
2 witness exhibit.

3 **MR JUSTICE JACOBS:** Thank you very much. Can we just look at that.

4 **MR WOOLFE:** My Lord, schedule 2 begins on page 218 of that bundle.

5 **MR JUSTICE JACOBS:** Yes. Right. The area where there was particular debate  
6 was on paragraph 5. Sorry, I said 2 but it's paragraph 5 of schedule 2 at  
7 page 220, I think.

8 **MR O'DONOGHUE:** Yes, my Lord. We say 5(a) to (d). That is essentially data, for  
9 want of a better word.

10 **MR JUSTICE JACOBS:** Right. What about 5(e), "Policies and internal guidelines  
11 issued --

12 **MR O'DONOGHUE:** My Lord, (e) was certainly intended to be potentially more  
13 qualitative in nature. The problem we face is that we received next to nothing  
14 in terms of qualitative information. And in a sense the presentation I showed  
15 your Lordship, it rather proves my point, because this was something which  
16 was significant in terms of pricing costs and qualitative -- and indeed had  
17 targets. And for reasons we don't fully understand, that has not been  
18 disclosed. Certainly the presentations for that period, they should be  
19 disclosed.

20 **MR JUSTICE JACOBS:** So are you saying you've had nothing under 5(e) or  
21 nothing very much under 5(e)? Leave aside emails, but by way of policies  
22 and internal guidelines? Is that right?

23 **MR O'DONOGHUE:** I will double-check, but that's certainly how it has been  
24 explained to me.

25 **MR JUSTICE JACOBS:** Okay.

26 **MR O'DONOGHUE:** My Lord, of course the final point is that it is common ground

1 that the correct approach in this case was not standard disclosure, that it  
2 would be staged disclosure. And this is essentially the only further stage that  
3 we have sought. And it's important to bear that in mind as well.

4 It was never intended, in my submission, based on the stage approach, that the  
5 order made in July of last year would be the start and end point. And indeed,  
6 as your Lordship further ordered in January, if somebody came back with  
7 a further disclosure request which seemed to be well-founded the Tribunal  
8 would consider it on its merits.

9 So we don't accept that this order was some form of guillotine, and we do say that  
10 there are deficiencies in terms of what has been provided, which are manifest  
11 even based on the limited material we've just seen.

12 **MR JUSTICE JACOBS:** So category 2 you need to go to.

13 **MR O'DONOGHUE:** My Lord, yes. My Lord, you will see from paragraph 1(c) of the  
14 draft order, that's where this category is set out.

15 **MR JUSTICE JACOBS:** Yes.

16 **MR O'DONOGHUE:** The Tribunal has my point, and we have had 16 emails, most  
17 of which have very little to do with the issues in this case. But out of the 16,  
18 one very interesting email has emerged. So if I can just turn that up quickly.  
19 It's in our skeleton --

20 **MR JUSTICE JACOBS:** I did have a look at it but remind me where it is.

21 **MR O'DONOGHUE:** It's in the first bundle at tab 6, page 317.

22 My Lord, this is also said to be confidential. We don't understand why, given that it's  
23 2008, but I'm not going to argue about that at this stage.

24 **MR JUSTICE JACOBS:** I have looked at that, to the extent that I can, and have  
25 tried to follow what was being said.

26 **MR O'DONOGHUE:** Yes. So my Lord, the basic point is that certain raw material

1 costs had increased. It was then decided to increase prices to recover this  
2 cost. And senior management were actively looking at ways to do so, and set  
3 out a series of indicative suggestions and were in principle open to any good  
4 idea to effect such cost recovery.

5 Now, we say documents of this kind are obviously relevant to pass on the mitigation.

6 First, it shows that in principle FCA would seek to pass on any cost increase.

7 Second, it shows that FCA would look at all aspects of its business as a way to pass  
8 on a cost increase. And if your Lordship can go to page 371 of the bundle,  
9 the same email, you will see a number of options listed there for cost  
10 recovery. I'm not going to read them out, but your Lordship will see for  
11 example there are some pretty creative ideas, on paint and alloys, as to how  
12 that might be achieved.

13 So they were thinking long and hard and very creatively about how to pass on these  
14 raw material cost increases to their customers.

15 Now, it's also important to note from the first page of this email chain that these  
16 instructions came right from the top. The email comes from a Mr Sistino, who  
17 appears from publicly available information to have been the CEO at the  
18 relevant time of the Fiat brand and the CEO of light commercial vehicles.

19 We therefore seek disclosure of similar instructions, consistent with the Supreme  
20 Court statement in Sainsbury's that the claimant bears a heavy burden of  
21 producing relevant information in response to a pleading of mitigation.

22 Now, in response, Mr Woolfe makes essentially three points: first is his point on  
23 BritNed which we have just seen, which is that he says qualitative evidence in  
24 general is irrelevant.

25 I mean, that is simply wrong, as I've shown your Lordship.

26 He seeks to bolster that argument on the irrelevance of qualitative analysis by

1 making a point based on the European Commission's passing on guidelines.  
2 They are in the supplemental bundle at tab 23, if I can just ask you quickly to  
3 turn that up.

4 First of all, they say, the guidelines are just guidelines and they cannot displace what  
5 the Supreme Court has said in Sainsbury's on FCA's heavy burden in relation  
6 to the pass-on of cost increases. And it is clear that evidence in the factual of  
7 these matters is central to the issues of pass-on and mitigation.

8 But second, even on the narrow terms of the guidelines themselves, Mr Woolfe is,  
9 with respect, wrong. If your Lordship can turn to paragraph 37 of the  
10 guidelines. It's on page 239 of tab 23. You will see there the qualitative  
11 evidence is considered highly relevant, and it gives a number of examples of  
12 internal documentation of a qualitative nature that would be relevant to the  
13 question of pass-on.

14 So even on the basis of these guidelines Mr Woolfe is clearly wrong. Both  
15 qualitative and quantitative are relevant to pass-on, internal documents.

16 Third, Mr Woolfe, with respect, has lost sight of the distinction between causation  
17 and quantification in relation to pass-on. As your Lordship can see from  
18 paragraph 1 of the guidelines, they are about quantification. But in this case,  
19 questions of causation can be assessed not just by reference to the  
20 quantitative evidence but also by reference to factual or qualitative evidence.

21 And this is not confined to evidence in the form of data that is used in econometric  
22 quantitative modelling. If we can go back to Sainsbury's, authorities 8,  
23 paragraph 216. This is the heavy burden point. I will just give your Lordship  
24 the quotation.

25 **MR JUSTICE JACOBS:** What's the reference again, sorry? Paragraph 218?

26 **MR O'DONOGHUE:** Paragraph 216, my Lord.

1 They say:

2 "Once the defendants have raised the issue of mitigation from pass-on there is  
3 a heavy evidential burden on the merchants to provide evidence as to how  
4 they have dealt with the recovery of their costs in their business."

5 The second point Mr Woolfe makes is that it is unnecessary. And again this seems  
6 to be largely based on his mantra that the qualitative evidence is not relevant.

7 And that's wrong, as we just saw. The qualitative evidence is important to  
8 understanding the plausibility of pass-on of the market at hand. For example,  
9 if the qualitative analysis shows unerring evidence of pass-on of all cost  
10 increases, a model showing zero pass-on may seem distinctly odd.

11 And equally, if the qualitative evidence shows the seller wanted to pass on but there  
12 were market-specific reasons that prevented it from doing so -- for example  
13 the market was too competitive -- a qualitative model finding 100 per cent  
14 pass-on may not be credible.

15 The final point Mr Woolfe makes is, again, to say, well, this would be terribly  
16 burdensome.

17 Your Lordship has my point on the value of this claim. Again, there is a fundamental  
18 deficiency in FCA's position on the question of burden. They have given no  
19 indication as to how this exercise has been scoped, how many custodians  
20 would be involved, how many documents, how long the exercise would take  
21 and what would it cost.

22 And this information is important, in my submission, since, without these figures,  
23 trying to assess proportionality is like trying to clap with one hand.

24 As we set out in paragraph 1(c) of the draft order, we have sought to make the terms  
25 of the order narrow and precise. Your Lordship will see in the text marked  
26 "confidential" these are specific defined terms within FCA. And it is clear from

1 Ms Whiteford's evidence that FCA hasn't even attempted to run these  
2 searches. They are not cooperating as the court is entitled to expect. And  
3 again, they're just getting on their high horse and saying, well, this is all  
4 difficult.

5 And it's not as if FCA is feeling around in the dark here. The emails we've just seen,  
6 they do, at least as a starting point, allow FCA to identify potentially relevant  
7 individuals.

8 There's also the point I mentioned under the first category, which is that there is  
9 a central database for documents, called Share Point and Share Drives. And  
10 again, Ms Whiteford says nothing about any of these.

11 Fundamentally, the claims on burden are overblown. We know these price  
12 increases were relatively rare, perhaps once or twice a year. Hence the  
13 expression "annual price rises", so in terms of the period of focus that can be  
14 perhaps tailored in a very specific way to the period around the price change  
15 or price changes in a given year.

16 My Lord, that's category 2. Then very quickly, category 3:

17 Under this category, as your Lordship will see from paragraph 1(d) of the order, we  
18 seek disclosure of score cards or similar documents involving  
19 periodic evaluations.

20 **MR JUSTICE JACOBS:** I just want to go back to category 2 for the moment, before  
21 we move on. How does this category differ from what has already been  
22 ordered under 5(e)? **(Pause).**

23 If I go back to the order which is exhibited to Mr Balmain at page 220, I mean the  
24 document that you've shown me, which you say is very important, is produced  
25 presumably because it falls within 5(e). That's why you have it, because it's  
26 a guideline as to how you should price.

1 **MR O'DONOGHUE:** Yes, it's the only one we have.

2 **MR JUSTICE JACOBS:** Right. As I understand it, you are already seeking similar  
3 documents?

4 **MR O'DONOGHUE:** Yes, that's why 1(c) is prefaced with, "to the extent not already  
5 covered by paragraph 5(e)."

6 **MR JUSTICE JACOBS:** Well is it already covered by 5(e)?

7 **MR O'DONOGHUE:** One can debate -- (e) says "policies and/or internal guidelines,"  
8 whereas if you look at my draft order under C(1), it's more the nature of the  
9 explanation. So there may be a distinction, in my submission a rather  
10 specious one, between formal policies or internal guidelines used on a  
11 departmental level and the communication or particular explanations of  
12 specific price increases made by FCA. So I would focus on the words  
13 "explanation" in C(1) and "directions or instructions" in C(2).

14 It does appear that FCA has taken a rather rigid interpretation of 5(e), and limited  
15 that to policies and guidelines. In a sense the email we've just seen is almost  
16 an eloquent silence because the obvious question is well, if you are doing this  
17 for this de minimis raw material price increase, are we really to believe that for  
18 all the other years in which price and costs also increased you sat there and  
19 did nothing and said, "Well, we'll just suck it up and that's too bad"? I mean  
20 it's simply not credible. So we say there is a gap, it may arise from a rather  
21 rigid interpretation of 5(e), but in any event we say that what has been  
22 disclosed is plainly inadequate.

23 **MR JUSTICE JACOBS:** Right. Well Mr Woolfe can explain to me in due course  
24 what has been done to comply with 5(e) because he seems to be saying that  
25 what you are asking for is incredibly burdensome and difficult.

26 **MR O'DONOGHUE:** My Lord, he asserts that, but he doesn't really explain it.

1 **MR JUSTICE JACOBS:** I'm not clear at the moment, and he can explain to me why  
2 it is, that what you are looking for doesn't already come within existing order.  
3 Your submission, Mr O'Donoghue, is it does come within the existing order; is  
4 that right or have I misunderstood that?

5 **MR O'DONOGHUE:** It should have. As I said, it is quite striking we have the single  
6 email, and then for all the other costs increases and price increases we have  
7 absolutely nothing. That is simply not credible.

8 The price rise we've just seen -- I won't read out the figures because it is said to be  
9 confidential -- was absolutely tiny. The raw material price increase was  
10 de minimis. You see from the highest levels these people are tearing their  
11 hair out and trying to come up with all kinds of creative ideas on alloys and  
12 paint and what not, saying, "Is there any way we can seek to recover this cost  
13 increase across the entirety of the business, and please come up with other  
14 creative ideas."

15 Are we to believe that for this tiny increase they would go to these extraordinary  
16 efforts, and yet for every other increase or change in cost over a period of  
17 perhaps a decade or more they sat on their hands and did nothing? It's just  
18 not credible.

19 So there is a clear gap, it does need to be plugged. It may stem from a rather literal  
20 interpretation of 5(e). That is why we put a reference to 5(e) in the draft order.  
21 But in any event the practical point is this gap needs to be plugged as  
22 a matter of urgency. This is very, very important information which is  
23 absolutely fundamental to the questions of pass-on and mitigation in  
24 particular.

25 **MR JUSTICE JACOBS:** Okay.

26 I interrupted you, because you were just about to start on the third category, which

1 are the --

2 **MR O'DONOGHUE:** Yes. I'm going to do the final two categories more briskly.

3 The third category, your Lordship will see 1(d), which is the score cards and similar  
4 documents used to evaluate NTN's commercial performance. Now this  
5 request also arose directly from our witness evidence preparation, because,  
6 without waiving privilege, our witness told us for the first time that there were  
7 specific core card mechanisms implemented by FCA, and if we can go to --  
8 it's common ground these score cards exist -- if we can go to Ms Whiteford's  
9 statement at paragraph 59, please. My Lord, it's in the second bundle, tab 8.

10 **MR JUSTICE JACOBS:** I have that. Page 397.

11 **MR O'DONOGHUE:** It's 59. Again, it's said to be confidential, I'm not going to read  
12 it out. It's on page 397, my Lord.

13 **MR JUSTICE JACOBS:** Without reading, as I understand it, the score card  
14 mechanism, insofar as relevant, was only implemented for the relevant  
15 territory in 2018, so that there wasn't a score card mechanism prior to that  
16 time.

17 **MR O'DONOGHUE:** My Lord, no. I think the point --

18 **MR JUSTICE JACOBS:** (Overspeaking).

19 **MR O'DONOGHUE:** So, my Lord, it's really a question of terminology. You will see  
20 at paragraph 58 there was a system with a particular name, which was in  
21 a different geographic territory. Then at 59 there was a different system in  
22 place within the EA. So it's really a question of terminology.

23 **MR JUSTICE JACOBS:** Okay.

24 **MR O'DONOGHUE:** So I think all she's saying is, well, if it's the particular system in  
25 relation to Europe, it has a different name.

26 **MR JUSTICE JACOBS:** I see, okay. There was a system plus something else,

1 according to this passage.

2 **MR O'DONOGHUE:** My Lord, yes. That's really the critical point. It's not just the  
3 score cards. You will see in the second sentence, if I could ask your Lordship  
4 to read that. **(Pause)**.

5 There were a whole series of specific measures monitoring particular metrics of  
6 supply and performance, and we want the documents which calibrate NTN's  
7 performance. That's the basic point.

8 **MR JUSTICE JACOBS:** You are not asking here for anything relating to other  
9 bearings suppliers, focus purely on NTN?

10 **MR O'DONOGHUE:** My Lord, yes. You will see from (d) it is limited to the NTN  
11 Defendants. Now of course it may be when we get the documents -- if we get  
12 the documents -- performance may be a relative thing, it may not be  
13 measured in absolute terms. So if NTN's performance is being compared to  
14 somebody else -- what we're interested in is performance, whether it's  
15 absolute or relative -- we don't know yet, but in principle, as your Lordship will  
16 see in the draft order, we are interested in how they assessed our  
17 performance.

18 My Lord, we say with respect that this is a rather self-evident request. If on its own  
19 metrics and score cards NTN was matching or exceeding expectations,  
20 including, if relevant, in comparison to other suppliers, that would be highly  
21 relevant to buyer power. Indeed, there's no need to speculate about this. The  
22 only logical reason FCA operates these performance metrics on a global  
23 basis is that it allows it to form a much more rigorous assessment of how well  
24 its suppliers are doing and how effective its buyer power is in practice.

25 In particular, as Ms Whiteford acknowledges, suppliers were monitored for their  
26 compliance, with the costs savings being targeted, that's the quotation. That

1 is highly significant, because it suggests that all suppliers would have been  
2 under pressure to meet specific costs targets, and such targets would have  
3 provided FCA with the means of mitigating any overcharge, but also negating  
4 any overcharge effect resulting from the infringement in the first place.

5 My Lord, just to wrap up on this point, as we saw in paragraphs 58 and 59 there is  
6 difference of terminology in terms of the score card name between North  
7 America and Europe. Obviously we see the European system. The draft  
8 order would need to be tweaked to reflect that.

9 Before we move to category 4, just a handful of quick points on what Mr Woolfe  
10 says. As your Lordship will see from paragraph 60 of Ms Whiteford's  
11 statement, 397, her main point is that in principle buyer power in the factual is  
12 not relevant to the counterfactual. That was the argument I did make in  
13 BritNed, but which was rejected. So that is a bad point.

14 Quite apart from that point of principle, it is a very curious argument for FCA to  
15 make, since, as I've just noted, the only reason FCA uses the score card  
16 system and other metrics globally is that it allows it to use its buyer power  
17 more effectively and benchmark suppliers' performance. So to turn round and  
18 say, "Well, that's not remotely relevant," it seems to me a very odd and  
19 uncommercial submission given that it's their system, they must be using this  
20 for a jolly good reason, and it must be effective, that's why it being rolled out  
21 all over the world, not just in Europe.

22 To come to further points, FCA says at paragraph 45 of their skeleton, "Well, you  
23 would be aware of costs reductions we demanded from you based on the  
24 documents that you have received." What we seek is FCA's internal  
25 evaluations of its use of buyer power in respect of NTN. How it  
26 communicated externally is only part of the picture, and in many ways the less

1 interesting part of the picture, because for example if NTN was, during the  
2 infringement, matching all of the score card expectations and matching and  
3 beating those of other suppliers, that would be a significant factor showing  
4 that FCA's buyer power was highly effective.

5 Again the point is made about burden, it is asserted unevidenced and it's completely  
6 overblown. We are seeking documents concerning a particular named score  
7 card system and other specific performance metrics that FCA regularly uses  
8 to benchmark its suppliers. We want to know NTN's scores and the  
9 documents speaking to those scores and its performance, and it is simply not  
10 credible to suggest that extracting the NTN information in this regard is so  
11 burdensome as to make it disproportionate. Again, it's an obvious area where  
12 these keywords would be effective and relatively cost-effective as a means of  
13 getting those documents.

14 Like every other category, your Lordship has nothing on the number of custodians,  
15 how many documents, how long the review would take, and in particular what  
16 it would cost. If FCA's intending to make good a point that in the context of an  
17 £80 million claim something is disproportionate, it needs to tell the court how  
18 much this would cost, and your Lordship has nothing going to that crucial  
19 aspect of proportionality. We say as a result, my Lord, it doesn't even get off  
20 the ground.

21 The final category I can wrap up very quickly. This is in paragraphs 1(e) and (f) of  
22 my draft order. It is presentational strategy documents from FCA's global  
23 purchasing department on the strategy for controlling costs, and then (f), "any  
24 other instructions, criteria, specified targets for costs and/or the total costs that  
25 FCA expected to pay for particular models."

26 Again, we say the relevance and materiality of these documents cannot be in doubt.

1 It is important to note that FCA acknowledges that it did use cost targets  
2 relating to particular vehicles or particular spare parts, that is paragraph 71 of  
3 Ms Whiteford's statement, and the documents would therefore provide a direct  
4 insight into the way that FCA used such targets and other commercial risk  
5 controllers' costs.

6 On overcharge, the court will need to form a clear qualitative picture of how in fact  
7 FCA dealt with the suppliers in terms of controlling their costs and prices.  
8 Equally, on pass-on and mitigation, evidence that FCA employed a series of  
9 sophisticated measures to control costs suggests that there was a highly  
10 plausible relationship between an increase in the supply costs and the  
11 pass-on of those costs. These documents will also show whether any  
12 overcharge on bearings would have been mitigated through reductions in  
13 other costs of supply, which is clearly a relevant consideration following the  
14 Supreme Court in Sainsbury's.

15 Finally, my Lord, before I end my opening submissions, just to pick up on a couple of  
16 points which are said by way of response. First, it is said the documents are  
17 not necessary. I have basically dealt with that. They are obviously relevant to  
18 buyer power and mitigation, and on mitigation in particular, how in practice  
19 FCA dealt with cost increases within its business is now a central point of  
20 relevance following the Supreme Court in Sainsbury's.

21 Indeed, in a sense, the point made here as well touches on the second category.  
22 We saw their context in the 2008 emails, that even in relation to the  
23 de minimis price increase, FCA was engaged in a root and branch enquiry  
24 across the business to come up with any way in which this increased cost  
25 could be passed on to consumers. Again, this came from the highest levels in  
26 the company. But fundamentally, control of costs was the purchasing

1 department's job, so we want the documents and how they dealt with cost  
2 control, cost targets or total costs.

3 The final point, my Lord, before I stop. Again, we have the burden point. In relation  
4 to category 4, in my submission FCA's evidence is even weaker than its  
5 already weak evidence on burden in relation to the other three categories. If  
6 we look at paragraph 75 of Ms Whiteford's statement, she basically says they  
7 would have to identify the custodians and search for documents, but the court  
8 has no information in paragraph 75, or indeed elsewhere, as to what would be  
9 involved. Again, how many custodians, how many documents, how long, and  
10 what it would cost relative to the size of the claim.

11 In truth, therefore, her evidence amounts to no more than saying that if they were  
12 ordered to do this, they would have to do it, and it might not be easy. But that  
13 isn't remotely good enough in the context of a proportionality plea. The  
14 suggestion which has been made, faintly, that the purchasing department  
15 produced no strategy documents on the control of costs is extremely  
16 surprising indeed given the enormous sums spent by FCA on their suppliers,  
17 and the rather obvious point that the creation of a purchasing department was  
18 specifically intended to control those costs.

19 On that issue, Ms Whiteford gives no particulars of any preliminary enquiries or  
20 searches done for such documents, and it is submitted that FCA should be  
21 pressed to carry out a reasonable and proportionate search and explain what  
22 it has and has not done and what has emerged by way of documents.

23 My Lord, those are my opening submissions.

24 **MR JUSTICE JACOBS:** All right. Thank you very much.

25 Is this being transcribed, this hearing?

26 **MR WOOLFE:** I believe so, my Lord.

1 **MR JUSTICE JACOBS:** I thought it was. I think it's sensible anyway to give  
2 everybody a break, including the transcriber and including me. So let's do  
3 that for ten minutes. There are one or two points, Mr Woolfe, you might want  
4 to just check on with your solicitors, so is that enough time for you?

5 **MR WOOLFE:** Yes, that should be fine, Sir.

6 **MR JUSTICE JACOBS:** All right. We will start again in ten minutes' time.

7 **(11.51 am)**

8 **(A short break)**

9 **(12.02 pm)**

10 **Submissions by MR WOOLFE**

11 **MR JUSTICE JACOBS:** Thank you very much. Yes, Mr Woolfe.

12 **MR WOOLFE:** Sir, first of all I should begin just by dealing with one clarification on  
13 the lateness point, which is you indicated at the start that you would listen if  
14 necessary to any submission that you should not hear this application at all.  
15 I am not advancing any such submission, and we never intended to advance  
16 any such submission. We do say the lateness is a relevant factor, and I will  
17 be picking up a few points on lateness as I go along. It is a factor that feeds  
18 into the exercise of a discretion which overall is about doing what is  
19 proportionate.

20 That is all we were trying to say. Unfortunately it was something that was said at  
21 some length, but we are certainly not saying you are shut out from hearing the  
22 application.

23 My Lord, in terms of preliminary points, I was going to make some short points  
24 regarding the approach to disclosure, then look in some detail at the  
25 allegations which are in play on the pleadings and go into those at slightly  
26 more length than Mr O'Donoghue did, then look again at some details of the

1 disclosure that has already been ordered and given, and then turn to the four  
2 categories.

3 One theme, my Lord, is that I think it's important to pick apart a bit more carefully  
4 why each category of disclosure is said to be necessary, rather than simply  
5 saying, "Oh, we have some pleading of buyer power, some pleading of  
6 pass-on, some pleading of mitigation arising out of the costs, and here's some  
7 stuff." It's actually quite important to look at each category and see which of  
8 the allegations that are being advanced it actually goes to and what sort of  
9 probative value it could have, if any, bearing in mind what has already been  
10 ordered and given in relation to those allegations.

11 In terms of the approach to disclosure, Sir, you already have it well in mind what the  
12 overall approach is. However, I was going to pick up just a couple of points  
13 arising out of the Competition Appeal Tribunal's judgment in the Trucks case.  
14 That is in the authorities bundle at tab 8. I'm sorry, wrong reference ...

15 **MR JUSTICE JACOBS:** I think it is tab 8. It's --

16 **MR WOOLFE:** It should be tab 8. It's behind tab 7 in mine for some reason which  
17 has confused me.

18 This judgment sets out the Tribunal's best thinking, as it were, in a cartel damages  
19 case as to the correct approach to disclosure. It's really for the detail of it that  
20 I'm referring to rather than the broad principles of proportionality and the like.

21 If you pick it up at page 718 of the bundle, and just for your note, over the next few  
22 pages, at paragraphs 23 through to 27 the Tribunal sets out the same powers  
23 which you are exercising in this case. So a power under rule 60 of the CAT  
24 rules, the governing principles in rule 4, rule 53 which is general case  
25 management, and the power to order disclosure. Then you will see at  
26 paragraph 27 at the bottom of page 721 there's a reference to the Practice

1 Direction on disclosure.

2 If I can just ask you to pick up one point that is relevant to what the Tribunal says  
3 further on page 722, at the top of that page, the Tribunal quotes from the  
4 Practice Direction on disclosure. You will see at paragraph 2.4:

5 "In determining any application for disclosure, the Tribunal will consider the  
6 legitimate interests of all parties and third parties concerned and will, in  
7 particular, consider the factors set out in Article 5(3) of the damages  
8 directive."

9 Those are then set out in footnote 16, which is at the bottom of the page. I would  
10 ask you to note these. Those factors are the extent to which the claim or  
11 defence is supported by available facts and evidence justifying a request to  
12 disclose, scope and cost of disclosure, whether the evidence is confidential,  
13 and so forth. But it's whether the claim or defence is supported by available  
14 facts and evidence, I would underline.

15 Then on page 725 the Tribunal lays down some broad principles. This is  
16 the Tribunal speaking now. At 35(1), not standard disclosure. 35(2):

17 "Disclosure will be [and I emphasise] confined to regular documents."

18 And it discusses relevance, but it's "confined to", it's not "extends to". You don't get  
19 every relevant document.

20 35(3), the Tribunal says that strong justification is required for proving "train of  
21 enquiry" disclosure, and then there are some specific points about settlement  
22 submissions and the like at subparagraphs (4), (5) and so forth.

23 (6) underlines that disclosure will be by reference to specific pleaded issues and  
24 specific categories of documents. (7) is a summary of proportionality. At the  
25 end of that, 7(e), as well as the things you would expect from CPR-type  
26 principles, the specific factors listed in rule 42(c) as well. Then it goes on to

1 say, "reasonable and proportionate search" in paragraph 36.

2 Then I would ask you to read the observations of the Tribunal in paragraphs 37 and  
3 38, because this is where the Tribunal, having set out its general points on  
4 disclosure as disclosure, turns to the issue of disclosure in competition  
5 proceedings, which concern causation and quantum, and it refers to the  
6 Commission's guidance on the quantification of damages claims.

7 You will see at paragraph 37:

8 "The issues in the proceedings, while complex, largely concern causation and  
9 quantum. The nature of these proceedings must be borne in mind."

10 You will see the quotation from the Commission guidance on quantification at  
11 paragraph 9 of those guidelines are set out below. First, the EU principle of  
12 effectiveness. In the second sentence:

13 "The quantification of such harm requires comparing the actual position of the injured  
14 party with the position this party would have been in without the infringement."

15 Unsurprising.

16 "This is something that cannot be observed in reality; it is impossible to know with  
17 certainty how market conditions and the interactions between market  
18 participants would have evolved in the absence of the infringement."

19 Essentially what we are concerned with in these cases is the counterfactual, largely.

20 "All that is possible is an estimate of the scenario likely to have existed.  
21 Quantification of harm in competition cases has always, by its very nature,  
22 been characterised by considerable limits to the degree of certainty and  
23 precision that can be expected. Sometimes only approximate estimates are  
24 possible."

25 Then it cites something similar from the guidelines on passing-on. The national court  
26 should be influenced by the nature and size of the claim, the merits of the

1 submission and the availability of data, what is proportionate, and so forth.

2 And there we are.

3 Then the Tribunal goes on to consider that in the context of the Trucks case before it  
4 at paragraphs 39 and 40. At 39 they say:

5 "We emphasise there is no single right answer [again it's the counterfactual point].

6 No one can ever know what prices both the new trucks and the used trucks  
7 would have been charged in the absence of the infringement since that is  
8 a hypothetical world that never was. Further, the President made clear during  
9 the hearings that in a case of this nature it is necessary to consider early on  
10 what method or methods will be used to determine the issues of causation  
11 and quantum so that disclosure can be tailored accordingly."

12 In light of that, they set out the broad principles. Paragraph 40, the burden of proof  
13 is on the claimant, so us, to satisfy you, the Tribunal, that the infringement had  
14 an effect on prices. So if that hurdle is passed:

15 "(2) The Tribunal will seek to arrive at a reasonable estimate of what the effect might  
16 have been and what any pass-on might have been, again on the balance of  
17 probabilities. (3) reasonable estimate means an estimate arrived at in  
18 a proportionate manner. These are large claims but they still need averages,  
19 extrapolations and aggregates. It does not mean that every logical avenue  
20 that might be relevant can be explored, or that all data which is arguably  
21 relevant must be provided."

22 And they quote Mr Justice Birss.

23 Below that:

24 "The decision as to what disclosure to order is appropriate is informed by the views  
25 of the economic experts, but is not determined by what data they would like to  
26 have or what method they would like to use. It is for the Tribunal to decide."

1 Again, reference to the principle of effectiveness at 4. Then at 40(5), this is the bit  
2 we cited in our witness statement and my skeleton argument:

3 "It is not simply a question of relevance. Disclosure will only be ordered in relation to  
4 a specific category of document if the Tribunal is satisfied that the documents  
5 sought are relevant and the disclosure would be necessary and proportionate.  
6 The Tribunal will not make an order merely because it determines that the  
7 documents are relevant."

8 I would also ask you to read a paragraph we didn't cite to you before, which is  
9 subparagraph 6. This deals really with the (inaudible) point that  
10 Mr O'Donoghue places some stress on:

11 "These actions seek damages for loss on many hundreds of transactions involving  
12 a very large number of vehicles over an extended period and a very large  
13 number of claimants. Further, the infringements concerned complex  
14 communications between participants over a 14-year period with different  
15 involvement on the particular occasions.

16 "The approach to proof of causation and quantification, both as regards any  
17 overcharge and as regards pass-on, will therefore be very different from that  
18 which can apply where the claim is for loss on one or two very large  
19 transactions concluded following extensive negotiation. Compare BritNed. It  
20 is unlikely to be realistic in these cases for the issues to be approached by  
21 examining each price charged for each transaction subject to the claim and  
22 seeking to ascertain how any antecedent exchange of information or  
23 coordination between the OEMs may have influenced that price. Similarly, as  
24 regards pass-on, it would appear to be disproportionate even if it were  
25 possible to consider the resale or disposal of each truck that is subject to the  
26 claim."

1 And there we are. Then at 41, finally, at the bottom of that page, beginning in the  
2 middle of that paragraph with the word "Instead":

3 "It seems to us the issues will probably have to be approached by analysis of large  
4 amounts of pricing and market data using established economic techniques to  
5 determine what, if any, was the effect of the infringement on prices and any  
6 pass-on through the relevant period. That is not to say the evidence of  
7 witnesses of fact will be irrelevant, but we anticipate it will be of a more  
8 general nature."

9 And then that would have significant implications for the nature of the disclosure  
10 ordered.

11 So we say that gives you a flavour of both the high-level principles of disclosure and  
12 proportionality and necessity but also how they are played out in a case which  
13 is dominated by the econometric modelling evidence. That's not to say that  
14 no other material is relevant. But it does go to how useful it is to seek an ever  
15 larger amount of such material.

16 If I can just bear that out briefly on BritNed, because, with respect to Mr O'Donoghue,  
17 he slightly mischaracterised my point. It may be that I didn't express it as well  
18 as I might.

19 He said I was making two points. Really I'm making one point, which is the point that  
20 was being made by the Tribunal in the Trucks case, which is that BritNed  
21 concerned a single transaction. It was a single interconnector between Britain  
22 and the Netherlands, and a single tender.

23 If I can turn you to BritNed in the authorities bundle at tab 6. Mr O'Donoghue took  
24 you to paragraph 322, which sets out the two economists' approach. And  
25 then I don't think he took you to this paragraph, though. I could be wrong.  
26 Paragraph 343 on page 565. 343 through to 345:

1 "The approaches of Dr Jenkins and Mr Biro are in essence different and they reach  
2 quite different conclusions as regards the overcharge. Dr Jenkins concluded  
3 that the overcharge was considerable, whereas Mr Biro concluded that there  
4 was no evidence of any overcharge. They cannot both be right."

5 Then 345:

6 "The Tribunal finds that Mr Biro's approach was more straightforward than that of  
7 Dr Jenkins. That is particularly the case for his margin analysis. This  
8 approach is tied very closely to the facts and to the data produced by ABB."

9 That, as I understand it, was a comparison of the margin that ABB earned on this  
10 project versus other tenders it participated in.

11 And then to somewhat fast-forward, at paragraph 414 on page 584 he criticises Dr  
12 Jenkins for using proxies, and so forth. Then at 417 he says:

13 "Dr Jenkins' regression analysis is insufficiently reliable to be used in any way at all.  
14 She defined too complex a regression and it cannot be relied upon."

15 And then 418(2):

16 "The fragility of the model is in large measure hidden by Dr Jenkins' use of  
17 averages."

18 Dr Jenkins uses an average across both -- all sorts of projects with the cartel period.

19 And the Tribunal goes on to analyse the fact that the model implied that some of  
20 these projects had negative overcharges and so forth.

21 Anyway, then we come to 419 to 421, which is on page 587. The Tribunal does  
22 find -- and this is point that Mr O'Donoghue made, and I'm sorry if my skeleton  
23 argument didn't make this fully clear. "Mr Biro's model provides evidence on  
24 which I can rely." And he says which he has separately considered.

25 "On the other hand, Dr Jenkins' model is one on which I can place no weight, and  
26 reject that evidence."

1 So he rejects an approach which is averaged across lots of different tenders.

2 Then 420:

3 "It is less necessary for me to explain why I would have preferred Mr Biro's. The  
4 reason, however, is very simple and can be shortly stated. Submarine cable  
5 projects are bespoke and unique, both in their specification and in the manner  
6 in which they are negotiated. I have described the negotiating process in the  
7 case of the BritNed project in some detail and will revert to this in the next  
8 section. It is clear that the BritNed negotiating team conducted negotiations in  
9 a skilful and hard-nosed manner, which may well have had an effect on ABB's  
10 margins. That may not be the case for other projects. Equally the client in the  
11 case of other projects may not have had the option of simply not proceeding  
12 with the project."

13 It's worth just picking up a couple of other paragraphs. 431 on page 591. The court  
14 emphasises that it is not dealing with the general effects of the cartel on the  
15 market:

16 "I am concerned with the single much narrower issue of the overcharge of BritNed  
17 arising out of a single specific transaction."

18 So it's one transaction only.

19 And then at 435 there's quite a specific finding, that although some persons within  
20 ABB, who was the cartel, knew of the cartel, and knew that ABB would face  
21 limited competition, that knowledge did not translate into a direct influence on  
22 direct costs.

23 And there's a specific finding that they honestly complied with trying to put forward  
24 a competitive bid.

25 Now, that, I would observe, is information coming from the cartel's side as internal  
26 information from the cartel as to what they thought they were doing.

1 My Lord, the simple point I wanted to make is that that was quite a particular case. It  
2 was essentially a bid-rigging, sort of a fraud case, where people are supposed  
3 to bid on an open competitive basis but in fact it's rigged and about one  
4 transaction. It wasn't a case where the Tribunal was happy with adopting  
5 an approach of doing this kind of modelling that averages out across the  
6 market as a whole.

7 By contrast, you will see in the Trucks judgment the Tribunal said, well, that's that  
8 case, and in a case that involves many, many transactions that's not  
9 a realistic or appropriate approach.

10 **MR JUSTICE JACOBS:** You don't suggest, however, that qualitative evidence is  
11 relevant -- I think, Mr O'Donoghue, are you -- I can hear my echo. Maybe it's  
12 you.

13 Ah, yes.

14 The point I was making was, Mr Woolfe, you accept, as I understand it, that  
15 qualitative evidence may be of relevance, and to some extent that was  
16 ordered back in July of last year. But you say that I have to take into account  
17 that that in a case like this is not the main way in which the analysis is going  
18 to be done.

19 **MR WOOLFE:** My Lord, exactly. That's right. We don't say it's not relevant in any  
20 way. As you will see, I think, when you drill down into the issues, what  
21 becomes apparent is, certainly on the buyer power in relation to the bearings  
22 issue, what Mr O'Donoghue refers to in his skeleton as the overcharge issue,  
23 the relevant material there would be disclosure around the RFQs, the  
24 negotiation of the tender between the Claimants and the Defendant. And  
25 disclosure on that has been ordered. And it's quite interesting to go back to  
26 the transcript of the last hearing on that. And you will see some interchanges

1 between my learned friend and my then learned leader Mr Harris on the issue  
2 of what can be taken from the RFQ disclosure. And there's quite a tension  
3 between what is being said now against us and what was being said then.

4 But if you are looking for what the relevant material on negotiations is, on bearing  
5 buyer power, is that relating to the RFQs. And that's been given.

6 And much more general contextual material as to what was said in a conference hall  
7 to a lot of suppliers about FCA's general hopes and dreams, we would say, is  
8 not going to give you much of an insight -- foreshadowing what Mr  
9 O'Donoghue will say, as to how negotiations between FCA and NTN would  
10 have panned out in the counterfactual.

11 My Lord, having touched upon the law, save for Sainsbury's, which I think I'll come  
12 back and deal with Sainsbury's at the relevant juncture, can I turn to  
13 the pleadings.

14 Actually, if we can begin by picking it up in my learned friend's skeleton argument at  
15 paragraph 3, and he refers to the key issues in the proceedings, namely -- I'm  
16 not sure where you are looking for this but it's in the supplementary bundle at  
17 page 130, paragraph 3.

18 **MR JUSTICE JACOBS:** I have it loose. I have it printed out.

19 **MR WOOLFE:** Yes. He refers to the key issues: overcharge and mitigation. I would  
20 observe, and you see this in the pleading, the mitigation issue is that -- they  
21 are two really very separate issues.

22 One is: did you mitigate by raising your prices downstream? That is passing on,  
23 mitigation. The other is: did you mitigate through seeking to negotiate down  
24 your other costs?

25 The factual basis of this allegation is there's a difference. There are three allegations  
26 that are in play.

1 Now, if we are looking at the pleadings, we should briefly look at -- I think, Sir, you  
2 were with me that none of this arises out of the Claimants' amendments, so  
3 I don't need to go back to the re-amended particulars. No.

4 **MR JUSTICE JACOBS:** I don't think Mr O'Donoghue has really pressed that point.  
5 But it's all academic as to how we got to where we are. Largely academic. It  
6 seems to me that you have accepted that in principle the application can be  
7 made, but there may be discretionary factors. And I think that's right and  
8 I think Mr O'Donoghue hasn't really pressed the point that this all arises out of  
9 your amendment.

10 So let's not focus on that. I'm more interested in the merits of the particular  
11 applications.

12 **MR WOOLFE:** In that case, my Lord, if we jump straight to page 172 of volume A of  
13 the core bundle. I'm not dealing with the archaeology of how it arose, but  
14 simply with the pleading as it stands.

15 You will see at paragraph 41 it starts with a denial. It says that no overcharge was  
16 caused. And then without limitation. There is something about indirect  
17 purchases, which doesn't concern us.

18 Then 41(b). This is the pleading of what is called -- I will put buyer power in respect  
19 of bearings, essentially, because in the middle of that paragraph it says:

20 "Further, it is averred that the claimants had the means of seeking reductions in the  
21 price they paid through the mechanism of annual price reductions and other  
22 forms of negotiation and commercial pressure."

23 But this is -- "the Claimants thereby mitigated their loss and/or had the means of  
24 doing so."

25 **MR JUSTICE JACOBS:** It is not just bearings, because once you accept that  
26 there's an argument about being able to reduce other costs for other bits of

1 the car, it's a more general allegation. But equally, there's no issue that  
2 OEMs in this industry are people with significant buyer power. Do you accept  
3 that?

4 **MR WOOLFE:** My Lord, whether we accept it's buyer power in an economics terms  
5 I don't know, but certainly we say it was a sophisticated purchaser who tried to  
6 drive down costs and would no doubt be seen as an important customer by  
7 their suppliers. That is hardly surprising for one of the world's major  
8 automotive groups.

9 But there is a distinction, though, between, I think, the -- maybe in principle anyway,  
10 between the allegation that we exercised buyer power in respect of bearings  
11 and squeezed out any cartel overcharge, essentially, so that no overcharge  
12 ever arose. That's the allegation I understood was being put at 41(b).

13 **MR O'DONOGHUE:** My Lord, can we also read 41(c) while it is open, please.

14 **MR WOOLFE:** Yes, to be clear, I'm not saying that the other costs point is not being  
15 taken. I am just trying to distinguish different allegations.

16 You will see the particulars which I have given under 41(b) about OEMs in general.

17 Before we come to -- in terms of the buyer power allegation, there is a mention of  
18 costs audits, I believe, in that section, in subparagraph (3). My Lord, in terms  
19 of how this will work at trial, primarily the overcharge is going to be -- this is a  
20 denial of overcharge point, essentially. The overcharge is going to be proved  
21 or disproved largely by reference to regression analyses.

22 Now, we do know what the Claimants actually paid for bearings. The data as  
23 regards the prices they paid and the volumes they purchased has been  
24 disclosed. That's the actual foundation of the volume of commerce and  
25 overcharge analysis.

26 The actual disputed issue which is being raised about overcharge is a counterfactual

1 one. This is the point the Tribunal in Trucks was making, which is, how much  
2 would the Claimants have paid for bearings absent the cartel?

3 So it's not a question of the Defendants saying, "You negotiated such-and-such  
4 a discount", and we are saying, "No, no, we didn't", and you have to go off to  
5 look for documents to find out what discount we did or did not negotiate. It's  
6 all a question of what price would have been paid in the absence of the cartel.

7 Now, at 41(c) there's a mitigation case that is put in two ways. You will see the  
8 words added in red. This is the new stuff by amendment in 41(c).

9 Mitigation through reducing their other costs, and also through passing on, which has  
10 been there since the start.

11 Now, in terms of the pleading on this, Sir, mitigation through reducing other costs is  
12 wholly unparticularised. Literally nothing is given. It is said that we should  
13 have mitigated through passing on other costs, and then they attempt to put  
14 the burden of the disclosure on us, in general, apparently, on the basis of that  
15 very thin allegation.

16 And if I can then turn to Sainsbury's in this context and what it actually said. I have to  
17 go to both the Supreme Court judgment and the Tribunal judgment.

18 If I can deal with the Tribunal judgment first. Sir, the Tribunal judgment should be in  
19 your authorities bundle at tab 3, which is in the first authorities bundle.

20 My Lord, just give me a moment to find my various files. **(Pause)**.

21 It is tab 3. The section on damages in the CAT judgment begins on page 270. It  
22 begins to get interesting at page 279 for our purposes.

23 **MR JUSTICE JACOBS:** Is this 279 of the bundle?

24 **MR WOOLFE:** 279 of the bundle. 243 of the internal numbering. This is dealing  
25 with passing on. Paragraph 434:

26 "The problem is that it can be difficult to ascertain whether and, if so, how, a given

1 cost has been passed on. The manner in which an enterprise might react to  
2 an overcharge was something that was explored in opening. When faced with  
3 an unavoidable increase in cost, a firm can do one or more of four things.

4 One, it can make less profit.

5 Two, it can cut back what it spends money on. [And what becomes apparent is, is it  
6 really meaning discretionary spending rather than unavoidable costs.]

7 Three, it can reduce its costs [which I think means costs as distinct from spending  
8 stuff, sort of widgets that you are going to supply on, so you can't  
9 avoid purchasing].

10 Four, increase its own prices."

11 Then those are the same things that are picked up at paragraph 455.

12 **MR JUSTICE JACOBS:** I think the Supreme Court approved this analysis of what's  
13 possible.

14 **MR WOOLFE:** Yes. It's sort of stepping back, what is logically possible, and there  
15 might be argument over whether you would split 2 and 3. But these are the  
16 logical possibilities, exactly. And the Tribunal repeats those again at 445, and  
17 then makes some important findings of fact over the course of the subsequent  
18 paragraphs.

19 **MR JUSTICE JACOBS:** Can I ask, Mr Woolfe, why am I looking at this case? In  
20 support of what proposition? I'm not saying I shouldn't look at it, but what  
21 propositions do you seek to from gain from this case?

22 **MR WOOLFE:** The problem is, again, the Tribunal zeros in on what is the issue --  
23 especially in respect of other costs, which is said has somehow been  
24 approved by the Tribunal in Sainsbury's in the Supreme Court.

25 There were two points. One is that the Tribunal rejected it on the facts, not as a  
26 matter of law, therefore the Supreme Court changed nothing. But also I want

1 to show you why it was rejected on the facts. The Tribunal was zeroing in on  
2 what is the causative link between the tort and this alleged mitigation. So did  
3 the cost savings arise out of the alleged tort? And that is the key factual  
4 issue. And therefore the key issue on which my disclosure would have to  
5 bear.

6 I'm going to take you to the Supreme Court judgment and point out a couple of things  
7 they say about it.

8 So from 461, Sir, what Sainsbury's would have done: it would have considered its  
9 own spending and sought to reduce costs in negotiations. But importantly,  
10 461(1):

11 "Each year Sainsbury's would seek to reduce costs and become more efficient. In  
12 terms of keeping costs down we find that this is something Sainsbury's would  
13 do as a matter of course and in any event unrelated to any particular  
14 unavoidable cost or cost increase."

15 And then at (4) you get the discussion of British Westinghouse which I won't trouble  
16 you with, except to say it was always a case about costs savings.

17 Then paragraph 478, page 299, the Tribunal rejects the idea that costs savings can  
18 be regarded as a benefit. And then (1) first reason:

19 "Most fundamentally any cost savings sought and achieved by Sainsbury's would  
20 have been sought and would have been achieved whatever the level of the  
21 MIF."

22 So essentially the Tribunal's finding of the fact that the costs savings, that it may or  
23 may not have been achieved, are not caused by the inflation of the MIF, or  
24 are not sufficiently related for the purpose of mitigation.

25 Then the Tribunal draws an analogy to British Westinghouse. If you recall the facts  
26 of that case, Sir, it was some I think generators that didn't work very well.

1 They were replaced by new machines. It was accepted that the new  
2 machines were bought by way of mitigation, I think that's why the costs of  
3 them was claimed. But these new machines were so good that the costs  
4 savings from them wiped out all of the loss and the House of Lords said, yes,  
5 in that case you don't get any money.

6 So the fact that you have cost savings being a relevant form of mitigation has been  
7 good law for over a hundred years. The CAT is relying on British  
8 Westinghouse, it's not disagreeing with it. It's simply finding as a matter of  
9 fact on its case that the relevant link between the tort and the acts of alleged  
10 mitigation isn't there.

11 If we can turn to the Supreme Court's judgment, which should be in the authorities  
12 bundle at tab 9, albeit I have at tab 8. This I can take quite quickly. At  
13 page 805 of the bundle, page 70 of the report, paragraph 205, the Supreme  
14 Court approved this sort of fourfold division of what might be done as a result  
15 of increased costs.

16 Then 206, if there is evidence that the merchants have adopted either option 3 or  
17 option 4, which was reducing costs for passing on:

18 "... the compensatory principle mandates the courts to take account of their effect  
19 and there will be a question of mitigation of loss."

20 No disagreement with that. We say it's not new but I think that ...

21 In the discussion on mitigation, paragraph 211:

22 "We are also satisfied that the merchants are correct in their assertion that there is  
23 a legal burden on the defendants to plead and to prove that the merchants  
24 have mitigated their loss."

25 So the burden is on the defendant. And I would emphasise the requirement of  
26 pleading. And as you have seen we have the barest possible pleading in this

1 case. We have the pleading that you mitigated because you reduced other  
2 costs. No attempt to say what other costs or how; it's simply there we are.  
3 And that is the assertion which is now being used to try and found this  
4 disclosure application.

5 Then jumping forward to page 215, again what the Supreme Court does is  
6 essentially repeat what the CAT said about British Westinghouse:

7 "The issue of mitigation that arises is whether in fact the merchants have avoided all  
8 or part of their losses."

9 It quotes Viscount Haldane:

10 "When in the course of his business the claimant has taken action arising out of  
11 the transaction, [emphasised in the report, by the Supreme Court,] which  
12 actions diminishes loss, the effect may be taken into account. Here also  
13 a question of legal or proximate causation arises as the underlying words  
14 show."

15 He goes on to say:

16 "The relevant question is a factual question: has the claimant in the course of his  
17 business recovered from others the cost of the MSC?"

18 So it's simply a factual question of: is there a link between the tort and some act in  
19 mitigation of other costs.

20 My Lord, having set the scene in terms of the law and the pleading, what I hope is  
21 when we turn to the categories we can zero in a bit more sharply on exactly  
22 why it is being said this material should be given, the nature of the case being  
23 advanced against us, rather than the bill being served up in a sort of a soup.

24 If I can deal with one more preliminary point before turning to the supply of  
25 convention documents, which is on the order for disclosure back in July 2020,  
26 if I can show you the categories that I've given. It's at bundle A, tab 6 it

1 begins at page 206 is your order. And at schedule 1 you have what the NTN  
2 Defendants were required to disclose. That's page 213. And you can see  
3 that all information as to bearings prices and so forth was material which they  
4 already have and they are now disclosing. There is no dispute as to the  
5 actual fact of what was paid.

6 Then we have -- if I could just stress, at paragraph 5, so information as to the  
7 Defendants' costs, probably is irrelevant. Paragraph 7, RFQ disclosure. You  
8 may recall this, Sir. You ordered a sampling exercise in respect of the RFQ.  
9 So these are the tenders as between the Claimants and the Defendants. We  
10 were each to nominate a certain number and we were each to disclose the  
11 documents comprising the RFQ. This is what they were required to  
12 disclose: the documents comprising the RFQ, the tender; responses prepared  
13 and submitted; their internal assessments of each RFQ and process or  
14 strategy documents concerning the way in which they went about securing  
15 business.

16 You would expect, pausing there, Sir, that a supplier who is large and sophisticated  
17 and supplies an automotive company would be factoring into their  
18 assessment their perception of buyer power, and whether or not they thought  
19 they could achieve the cartel overcharge that they were setting out to achieve.  
20 This is material which they should be disclosing, which has already been  
21 ordered -- it would be in their hands.

22 Schedule 2 sets out our disclosure. Again, it has the equivalent requirement of sales  
23 data, again the actual data and how it should be paid for the bearings. And  
24 the RFQ point gets picked up straight away at paragraph 2. You will see what  
25 we are disclosing on this. Again the documents comprising the RFQ relating  
26 to the selection of tenderers, documents relating to the criteria for awarding

1 the contract, shortlist criteria, response from other tenderers, evaluations and  
2 responses from tenderers, documents relating to the process or strategy,  
3 negotiating the final price for the Defendants in respect of the RFQs, and  
4 procurement manuals or other guidance.

5 So in respect of our actual interactions, the critical negotiations, the court will have  
6 available to it from both sides all the disclosure they can give as to what they  
7 were doing and what they were thinking as to those specific RFQs and those  
8 specific negotiations. So insofar as Dr Rosati or Mr O'Donoghue wants to  
9 have evidence of negotiations they will have it. What we say is less relevant  
10 are these matters which are now being brought up which we say is nothing  
11 like as critical as the RFQ disclosure.

12 In respect of passing on, I ask you to note paragraph 5 of the order on page 220.

13 Just to pause there, I think at one point, Sir, there was an interchange  
14 between you and Mr O'Donoghue about paragraph 5 in the context of buyer  
15 power. As I understand it, this is about pricing downstream, effectively. And  
16 the passing on analysis is about trying to trace through movements in FCA's  
17 costs through to movements in FCA's prices. But the policies or guidelines  
18 that are referred in in 5(e) are about vehicle pricing downstream, just to clarify  
19 any misunderstanding.

20 And as you see at paragraph 6 in terms of costs --

21 **MR JUSTICE JACOBS:** Things are raised in the context of category 2, which is  
22 concerned with pricing downstream I think, isn't it?

23 **MR WOOLFE:** Yes, it is. Category 2 is concerned with pricing downstream. I think  
24 categories 1, 3 and 4 are all concerned with buyer power in one of its two  
25 forms. I think they aren't all concerned with both.

26 **MR JUSTICE JACOBS:** Yes.

1 **MR WOOLFE:** My Lord, if I can turn then, with that in the background, to the  
2 supplier convention documents. As we understand, the request for these is  
3 being advanced on two bases: one is this point about buyer power in respect  
4 of bearings, certainly the overcharge point; and the other is effective  
5 mitigation through cost reduction. So those are the two factual allegations  
6 which it is being prayed in aid of.

7 Just dealing with the buyer power in respect of bearings point, my Lord, the first  
8 contextual point is the counterfactual price of what would have been paid for  
9 bearings, absent the cartel, is going to be the regression analysis conducted  
10 by the experts. That is the before, during and after comparison which tries to  
11 derive a counterfactual price by adjusting for the various factors that influence  
12 price and so forth.

13 We say this is a case, such as Trucks, where it is being done in that way. It's not  
14 feasible to look at each of the individual transactions and to try to conduct  
15 some sort of court assessment: does the court give a gold star to FCA's  
16 negotiators or not in respect of each of these RFQs and each of  
17 the transactions over a long period of time?

18 Now I do accept we are somewhere between the two poles of possible cases, in that  
19 we do have a series of tenders here, but it's not one tender as per BritNed, it's  
20 many, many tenders. I think we ended up with a sample of 24 which is only  
21 a subset of all the tenders across the period. I understood at the last CMC  
22 there were 40 or 50 across the period. That's my recollection. That's our first  
23 point. The context is regression model.

24 The second point, if we do want to look at negotiations between the parties what you  
25 would look at is the disclosure in relation to the negotiation of specific tenders.  
26 That's the RFQ disclosure which both sides were ordered to give on a sample

1 basis and which we have given.

2 And I also make the further point that the best evidence of whether or not we did  
3 manage to squeeze out the cartel overcharge will be in the hands of the  
4 cartelists, because they know what their costs were, they know what their  
5 margins were, they know what they were hoping to achieve and they will know  
6 whether they achieved it or not. By its very nature it's not stuff that we would  
7 be in the best position to judge on.

8 Now, my Lord, just to touch on this, at the first CMC, if you recall, we were actually  
9 seeking disclosure of the RFQs on a non-sample basis because we wanted to  
10 see a complete picture of how the cartel operated with respect to the RFQs.  
11 Now Mr O'Donoghue resisted that, including on the basis that it wouldn't be  
12 revealing to do a sort of tender-by-tender analysis in that way. It may be that  
13 post-BritNed and whatever he's reflected and seen the light, I don't know. But  
14 that is the key point where we interacted with them rather than the supplier  
15 convention material.

16 If I could then just move to that material to show its very different and general nature.  
17 It's exhibited to Ms Whiteford's statement, so it's in the second core bundle at  
18 tab 9 and you were shown one or two pages of it. It's actually not one  
19 presentation, it's a series of presentations. As I understand it there are six of  
20 them that have been exhibited. They are the presentations from one year,  
21 2016, Ms Whiteford has located. They actually begin on page 734, I believe --  
22 even before then -- if you flick through, what you see is lots of pictures of cars  
23 and the odd inspiring slogan but not very much in the way of detail and not  
24 very much -- this isn't negotiation material, this isn't remotely comparable to  
25 what was being used in BritNed.

26 The high point of my learned friend's case, I think, in all of this material is the

1 presentation which starts at 80, which is from a Monica Genovese who was  
2 the Head of Purchasing EMEA.

3 If I could ask you to turn over the page to 802, you will see a picture of the EMEA, so  
4 that's the, I assume, Europe, Middle East and Africa, is the usual abbreviation,  
5 leadership. These are people who are involved in some sense in this  
6 presentation. And over the page, "Group purchasing EMEA leadership", and  
7 you see quite a lot of people.

8 I would say if we are going to start doing searches for everything that somebody may  
9 have said, drafts -- commenting on drafts in a presentation given to suppliers.  
10 You can see that this is one year. This is 2016. This will have changed. It  
11 will be different in 2014, 2017, whichever year it may be. We are looking at  
12 significant numbers of people.

13 Now, we can then see she makes some points about margins at page 804 of the  
14 bundle, just some very high level references to Fiat's financial targets, so the  
15 kind of thing you would find in updates to the stock market, that kind of thing.  
16 Nothing specific about plans with respect to bearing manufacturers there.

17 Then if you roll on to pages 822, 823 and 824, this is the reference to what  
18 Mr O'Donoghue calls "a hard-edged target" for cost reductions. So a number  
19 of points to make about this: it's nothing specific to do with bearings. You  
20 won't expect her to be standing up on a stage in front of a lot of people or the  
21 suppliers talking about their relationship with NTN, and their negotiations with  
22 NTN. I think you take judicial notice of that's not the kind of thing people do.  
23 There is a reference to a very high level figure, a very round figure, of  
24 intended costs, hopeful costs savings. Then there are some references to  
25 wanting to get a supplier contribution to that.

26 Now it's not in dispute that in fact we sought that the price we obtained from

1 suppliers should go down year-on-year. If you recall we actually plead that as  
2 part of our case. It's expected that there should be annual price reductions  
3 across the course of a contract to reflect the efficiencies over time, the  
4 build-up, unless they think that some of those should go to its benefit.

5 So just pausing there, what we do say is that when you step back and think it's  
6 primarily going to be regression analysis, you have the RFQ negotiating  
7 material, then what is this kind of material really going to add to the mix?  
8 Because my learned friends are going to be having to say: "oh, in the  
9 counterfactual you would have -- although we were cartelists in the action we  
10 wouldn't have been cartelists in the counterfactual, you would have got the  
11 same price anyway in negotiations with us." But that's his point on supplier  
12 convention documents, buyer power in respect of bearings. I simply submit  
13 that documents of this type, or presentations made to a room-full of suppliers  
14 are not going to be remotely of assistance to the Tribunal in trying to decide  
15 that issue.

16 So that's on the buyer power in respect of bearings point.

17 Then in respect of the other costs point, I must admit it is a strange sort of allegation  
18 that somehow, as a result of the cartel in respect of bearings, FCA was able  
19 to or did go out and negotiate reductions in costs that it would otherwise not  
20 have done. But I also submit that again look at these documents, they are not  
21 going to be of any assistance to Mr O'Donoghue in trying to prove that, or  
22 indeed presentations, because there's no -- Mr O'Donoghue's clients were at  
23 these conventions, there's no evidence from them, they recall sitting there and  
24 recall somebody getting to the stage and saying, "We have noticed that our  
25 bearings costs are quite high therefore we are going to be negotiating harder  
26 with you lot to negotiate down our other costs, unfortunately we have to do

1 that." These are very, very high level presentations about overall commercial  
2 strategy.

3 The high point of Mr O'Donoghue's case is to try and present this figure on page 822  
4 as being a hard-edged target and a rather speculative suggestion is being  
5 advanced that because there was a hard-edged target in place, when FCA  
6 achieved its target costs reductions it ceased to be interested in achieving any  
7 more costs reductions.

8 Now a number of points to make about that. It's not pleaded. I would submit it's  
9 rather a Peruvian Guano-type situation. What they've done is pleaded a very  
10 high level allegation, and we had some rather speculative remarks from  
11 Mr O'Donoghue about what other documents may or may not show, what if  
12 they're internal documents that show that the person wasn't really thinking  
13 what they said on the stage, et cetera, et cetera. And what they are really  
14 seeking, it seems, is chain of inquiry disclosures in the hope that something  
15 may turn up. But I would submit that as matters stand there's very little to  
16 show that any of this material would actually be of assistance to the Tribunal  
17 in dealing with this negotiation of other costs point.

18 If they did think that this was important they could have identified further RFQs.  
19 They could have carried out their own further disclosure internally (inaudible)  
20 further RFQs and said, "Right, on our negotiations we think there's some  
21 evidence over here of your buyer power". But I understand that was allowed  
22 in the (distorted audio).

23 Finally to finish on the supplier convention points before the short adjournment, we  
24 do say that these would be hard to obtain for --

25 **MR JUSTICE JACOBS:** Sorry, can I just ask: how would their disclosure assist on  
26 the question of whether or not you were able to squeeze other customers,

1 because the pricing of the bearings was too high, if I can put it that way, in  
2 order to get your target? I mean, NTN wouldn't have any internal documents  
3 which would assist on that if they looked at our RFQs, would they?

4 **MR WOOLFE:** If you are looking at the kind of material internal to a supplier as to  
5 their perception of buyer power, NTN would only have its own materials as to  
6 how its perception of buyer power was. I completely accept that. But we  
7 won't have that material in respect of how other suppliers proceed anyway. It  
8 certainly won't apply in the supplier convention documents. If they were trying  
9 to look at something more particularly and say, "Ah, this is how FCA behave  
10 in negotiations, they use these tactics, they are highly effective", and then  
11 draw some sort of inference that we behave in the same way in respect of  
12 other suppliers, that sort of inference we have behaved the same way across  
13 the board might make some sense. But this very high level general  
14 presentation made to a room full of suppliers about the brand values of FCA  
15 and the like, and the occasional reference to, "We are trying to pursue some  
16 costs savings", I will submit is not going to be terribly informative as to  
17 whether or not we have buyer power. What does this presentation show  
18 about how good FCA is at negotiating for these other suppliers? I would  
19 submit nothing.

20 **MR JUSTICE JACOBS:** The RFQs have been disclosed on a sample basis, would  
21 evidence the way in which FCA was able to renegotiate with NTN. So you  
22 wouldn't need wider disclosure of RFQs to be able to establish that point.

23 **MR WOOLFE:** No. That's not the point, Sir. I'm simply saying that if they had  
24 thought evidence of negotiating -- negotiating powers, is so critical to their  
25 case, that they have in their possession further material in relation to us  
26 negotiating specifically with them, and perhaps this goes for to the buyer

1 power of bearings point rather than of the other costs point. We would submit  
2 that is of far greater probative value on either of those points than this high  
3 level convention material.

4 Sir, if I can just briefly deal with the point about the obtaining of these documents.

5 I did foreshadow when we looked at the document itself there are a lot of  
6 people named on it. In fact in 2016, as I said -- some six presentations have  
7 been disclosed here, and you will have seen on that one from Monica  
8 Genovese quite a large range of people from the EMEA leadership team were  
9 referenced. So it would be quite a lot of people who would need to be  
10 searched for if we are going to find these if they are not in a centrally located  
11 place.

12 In terms of what Ms Whiteford says about these it's dealt with at paragraphs 44 and  
13 45, pages 392 and 393 of bundle B. She says at paragraph 45:

14 "I understand from FCA that the presentations made at the supplier conventions  
15 between 2014 and 2018 should be available."

16 So we are not saying those are hard to obtain, we do say they are irrelevant, or not  
17 of much interest:

18 "Prior to that period the supplier conventions were suspended for a number  
19 of years."

20 So simply it didn't happen for a number of years. That's Ms Whiteford's evidence on  
21 instruction of clients:

22 "For the years prior to the suspension, which I understood took place around 2009,  
23 FCA sought to identify the employees responsible. It appears, however, that  
24 the relevant employees are no longer at the company. There are no records  
25 of any presentations made at supplier conventions."

26 So if we carry out further searches our current expectation is we would either

1 struggle to find any from 2004 to 2009 or it would be an extremely  
2 burdensome task for very little probative value. So that's the complete picture  
3 that we have as to these documents for the three periods: one, will be hard to  
4 get in the cartel period; one towards the end of the cartel period when they  
5 don't exist; one at the end when we can get them, we say they are irrelevant.

6 Sir, just pausing there, I simply say that drawing it all together we say it wouldn't be  
7 proportionate to order us to carry out searches for these documents for the  
8 reasons I've just given.

9 **MR JUSTICE JACOBS:** The ones for 2014 to 2018 are not burdensome, and  
10 I rather had the impression that you may already have obtained those in order  
11 to give the sample.

12 **MR WOOLFE:** My Lord we haven't obtained those, we have obtained the ones that  
13 we've given, the ones from 2016. And we do say they are not relevant.

14 But one thing I would perhaps point out, that we have obtained the presentations --  
15 sorry, I should say in terms of burden of this, if you would turn to the draft  
16 order, which is at tab 7 of volume A, you were saying, Sir, in interchange with  
17 Mr O'Donoghue, their request goes beyond merely the presentations because  
18 they want presentations:

19 "All communications made to suppliers at those conventions."

20 Which may be a significantly broader category than merely presentations.

21 Then (b):

22 "In respect of the presentation of communications any drafts or notes of such  
23 communications."

24 So they are looking for not just the presentations that were given, which maybe we  
25 have obtained these in respect of 2016; but also a wider category of what  
26 drafts were made of what speaking notes in advance and so forth. And we

1 say it's being done at this stage. This is where lateness does come in  
2 because we were being asked to do it at a stage when we were supposed to  
3 be preparing witness evidence. It will have required to obtain all sort of drafts  
4 and notes of that sort, will have required custodian disclosure of those kinds  
5 of people I showed you on the slide, and maybe others as well, in respect of  
6 each of the years for which disclosure is sought, and requires doing so in  
7 Italy, a country which has its problems with Coronavirus at the moment and  
8 coming out with some detailed custodian searches for stuff which would be of  
9 extremely limited, even relevance, let alone probative weight.

10 **MR JUSTICE JACOBS:** Okay. Mr Woolfe should we take a lunch break now.

11 I have the impression you are probably going to be 20 minutes, or something  
12 like that; is that right?

13 **MR WOOLFE:** On balance -- maybe a little longer but not significantly longer than  
14 that. It's quicker now, having set the scene to a great extent. And because  
15 the same arguments come round again and again in respect of several  
16 categories it will be somewhat quicker.

17 **MR JUSTICE JACOBS:** Okay. Let's take a lunch break and start again in at 2.00.

18 **(1.02 pm)**

19 **(The short adjournment)**

20 **(2.00 pm)**

21 **MR JUSTICE JACOBS:** Are we ready to resume? Good. All right.

22 Yes, Mr Woolfe.

23 **MR WOOLFE:** Sir, if I turn to category 2. On this, Sir, I'd say that the starting point  
24 is really to look at what was ordered in July 2020 and compare that against  
25 what's now being asked for. And we also want to take into account the ruling  
26 which you gave on the issue of passing on.

1 The 20 July order -- you will have seen this, but I will take you to it again. This is in  
2 bundle A, tab 5, page 220, which is where schedule 2 of the 20 July order sits.  
3 It starts on page 218 of schedule 2. The headings refer to the issue, volume  
4 of commerce overcharge, and, on page 220 pass-on.

5 And you can see there that what you directed, Sir, was a very rich set of documents,  
6 data and information, including -- and it's worth pausing to see what they  
7 already have.

8 The price books for each model, with RRP, including all options. Invoicing and  
9 actual sales data on vehicles sold to dealers, actual price paid, downstream  
10 price. Information on discounts by month and by model. Financial  
11 information -- and this is one worth noting in particular -- on profit and loss,  
12 volume, gross revenue and target margins on vehicles at the model level.

13 And finally, you directed policies and/or internal guidelines used by the department  
14 responsible for vehicle pricing within FCA. I'm going take you to your ruling in  
15 a moment, Sir, where you decided that that's what we should give.

16 Mr O'Donoghue did say, I think, at one point that no disclosure was given under this,  
17 albeit I think he then paused. In fact, I'm instructed that we disclosed 49  
18 documents under paragraph 5(e). So substantial disclosure on policies and  
19 internal guidelines has been given.

20 In terms of what we understood by it, Sir, I'm going to take you to your ruling. In the  
21 supplementary bundle, if you have that to hand. I don't know if you have it on  
22 hard copy or on screen. It's at tab 12.

23 **MR JUSTICE JACOBS:** I have it in soft copy.

24 **MR WOOLFE:** Right. It's tab 12, starting at page 118.

25 Essentially, we had given our submissions on the pass-on issue in June, and you  
26 delivered this judgment in between the June and July CMCs.

1 I think it's worth -- at paragraph 13 you set out on page 222 the categories of  
2 documents which they were seeking:

3 "List price, pricing policies and discounting policies prior to impact for consumers.  
4 Our financial treatment of the costs of bearings, business segment  
5 management accounts ..."

6 Data and various things. Then there was our proposal in response on page 124.  
7 You can see essentially what was directed, except that we were proposing (e)  
8 a representative sample of policies under internal guidelines.

9 You considered that point. And if we can pick it up at page 127, paragraph 33, you  
10 say:

11 "NTN's proposed order seeks a variety of matters which, so Fiat contends, go  
12 beyond the cost and pricing data which are essential to the econometric  
13 analyses."

14 5(d) seeks disclosure of Fiat's financial treatment of the cost of bearings, including  
15 various matters: cost models, budgets and so forth.

16 5(e) seeks disclosure of business segment management accounts or reports  
17 showing revenues, volumes and costs.

18 And we accepted that the disclosure of some materials going beyond data is  
19 appropriate in order to enable the experts to prepare their reports. But we say  
20 our paragraph 5 was enough and we were still contending for samples.

21 Paragraph 35, the submission of Mr O'Donoghue is recorded about management  
22 accounts. And then at 36 and 37 is your decision, Sir. 36:

23 "It is appropriate for a reasonable and proportionate search to be carried out for  
24 internal documents concerning the relationship between costs and pricing, not  
25 limited to a representative sample of policies and/or internal guidelines."

26 We had submitted that every single policy would be a huge endeavour.

1 And you continued, Sir:

2 "In my view, however, it is appropriate, in the context of a very large claim, for  
3 a reasonable and proportionate search to be carried out for policies and  
4 internal guidelines which applied during the relevant period. The nature of  
5 this search will be for Fiat and its advisers to design and organise, and in due  
6 course to justify.

7 "If, following a reasonable and proportionate search, there is disclosure of  
8 the policies and internal guidelines used by the relevant department over the  
9 eight-year period concerned in relation to the five large European markets  
10 [that is where it was to be limited], I consider that this should be sufficient,  
11 particularly if the search includes, as I think it should, a search for any  
12 documents that specifically discuss the pricing of vehicles in the context of the  
13 cost of bearings. In that regard, I am doubtful as to the likely existence of any  
14 documents falling within the latter category, bearing in mind the relatively  
15 small cost of bearings when compared to overall product costs. I have not  
16 been persuaded that any search beyond this is required."

17 So that was the ruling that led to the paragraph in the order we have just seen, that  
18 included both disclosure of target margins and disclosure of internal policies  
19 and guidelines. And as I say, I'm instructed that we have disclosed 49  
20 documents specifically under paragraph 5(e).

21 Now, your Lordship asked Mr O'Donoghue how does what is being asked for now  
22 differ from what was being asked for back then.

23 I'll show you what's being asked for now. This is at tab 7 of core bundle A, and it's  
24 different, in a sense, in two key respects.

25 **MR JUSTICE JACOBS:** Sorry, can I just ask. You disclosed documents under 5(d),  
26 including target margins. Do you have the data on how many documents

1           there you disclosed or not?

2 **MR WOOLFE:** I don't have information on how many documents we disclosed.

3           Some of it may be in the form of data. It may be it is one of the things that is  
4           difficult to sum up in X number of documents. Some people are trying to  
5           check, but --

6 **MR JUSTICE JACOBS:** All right. Now I've lost where you were taking me to.

7 **MR WOOLFE:** Core bundle A, tab 7.

8 **MR JUSTICE JACOBS:** Okay.

9 **MR WOOLFE:** Put forward by the Defendants now.

10 So at paragraph (c) on page 375, they say:

11 "To the extent not already covered by paragraph 5(e)."

12 And then:

13 "Documents communicating general price increases, including covering emails,  
14           memoranda or similar, providing an explanation."

15 And then:

16 "Any other directions or instructions given by the claimants' pricing directors or other  
17           members of the claimants' pricing team in the period 1 January 2004."

18 I realise I've just read out something that's highlighted in yellow, but I do struggle,  
19           I have to say, to see how a job title could be (inaudible) in a draft order. So  
20           I apologise.

21 I submit, Sir, it differs in two respects, but what we wanted to stress was policies and  
22           guidelines. What they are looking for is communications which contain  
23           an explanation. So that's the difference, at the level of principle. We didn't  
24           understand, certainly before my learned friend started his submissions, that  
25           what was being asked for was coterminous with what was all stuff which  
26           already fell within the previous draft order.

1 So that's the difference at the level of principle. At the level of practice, the  
2 difference is that this will require custodian searches, because they are  
3 looking for communications that have gone out from members of the pricing  
4 team over a 15-year period, as to the level of pricing required to cover costs.

5 So that will require searching for such communications through every email and  
6 letter coming out of those pricing teams. That is obviously a very, very  
7 burdensome exercise in custodian disclosure, that goes far beyond what you  
8 directed when sitting in the Commercial Court, of being disclosure of policies  
9 and guidelines.

10 Now, stepping back, that's the context of what was being asked for before and  
11 what's being asked for now. Our first submission is that they have what they  
12 need to do the passing-on analysis. They have their pricing and cost data for  
13 the regression model that their economist seeks to run, and they have  
14 contextual material in the form of policies and guidelines, as you directed.

15 That's the first submission: they have what they need. And the question is, what  
16 would instructions add to that? And we submit it falls within what the Tribunal  
17 was saying in the Trucks case, that you don't simply find every single  
18 document that could be relevant; you actually do try to assess to what extent  
19 these documents will advance the case at trial, as against the burden of  
20 producing them.

21 The second point we make is that these documents, in setting out that they want to  
22 achieve a price increase, are not likely to be hugely helpful. The key issue on  
23 passing on is whether or not in fact Fiat did succeed in raising prices off the  
24 back of any cost increase that was imposed. And as we said, primarily it's the  
25 regression analysis that would achieve that.

26 Thirdly, we say it's hugely burdensome. On that I refer you to the evidence of

1 Ms Whiteford. That is in the core bundle B, tab 8, at paragraph 54. Perhaps  
2 start at 53.

3 They're asking for documents spanning a period -- it says almost 20 years but I think  
4 it's 15 years, going back to 2004. It is not correct that these are easily  
5 identifiable, given the business's document retention policy.

6 Now, Mr O'Donoghue criticised that retention policy, but I would stress, this is not a  
7 matter of document retention during litigation; this is just what document  
8 retention policy it operated as a business from 2004 onwards. It is what it is.

9 And then a reference is made to a proportion of bearings as part of the costs.

10 She says she's made enquiries as to the types of documents that may be  
11 responsive, and they are likely to be in the form of a certain type of  
12 communication that was periodically sent to national markets. She says  
13 there's no central repository, so it would require to identify the individuals who  
14 relayed those communications and then carry out searches. So it will be  
15 a matter for burdensome custodian searching.

16 And we would say what's in paragraph (c)(ii) is incredibly broad.

17 Then the fourth point. We do make reference to a lateness point here. It's to be  
18 weighed in the exercise of your discretion. This is not a new point. The  
19 passing-on issues were properly pleaded back in February of last year.  
20 Disclosure requests were brought forward to a CMC in June and in July.  
21 You've seen the disclosure requests that were there. You ruled upon them.

22 Now, if they had wanted to, they could have asked for this back then. I'm not sure  
23 whether they are saying they did ask for it. If they did ask for it, then  
24 your Lordship clearly rejected it. If they weren't asking for it, the question is,  
25 why not? And why should they be allowed to raise this now, at the cost to the  
26 trial timetable which carrying out these types of custodian searches of

1 significant numbers of individuals over a 15-year period will entail.

2 Some effort has been made to tie this to the email of 6 November. What I would say  
3 about that is, that email was disclosed on 6 November. No application for  
4 disclosure arising out of it was made until the end of March. That is of very  
5 significant delay as well.

6 Also one wonders what in fact they gained from that email, in the sense that if their  
7 case is that attempts were made to pass on costs, you know, asking for  
8 communications relating to passing on is not exactly rocket science. So if  
9 they had wanted it they should have asked for it before. It is not very helpful  
10 and would be grossly disproportionate.

11 So that's everything I wanted to say on cost increases. Did you have any questions  
12 arising from that?

13 **MR JUSTICE JACOBS:** Yes. I was going to ask you, in paragraph 54 it refers to  
14 a category of letters, which is marked in yellow so I won't describe it. These  
15 will be letters which are sent out centrally -- these are communications sent  
16 out centrally, are they, from FCA to various national markets?

17 **MR WOOLFE:** Yes. Perhaps, to illuminate that, if we look at the email, in fact, as to  
18 the nature of how pricing does actually work, because what I want to get  
19 across, Sir, is that the actual decision on the setting of pricing does get  
20 devolved down to the national markets, because they are trying to sell  
21 vehicles in respect of their own conditions of supply and demand in France, in  
22 Germany, in Italy and in the UK. And passing on here would happen when  
23 the vehicle is sold by FCA to a dealer in London, in Paris, in Madrid or  
24 wherever.

25 So that's the level at which the passing on analysis has to look, in terms of the price  
26 that is achieved. So any central directive would only matter to the extent that

1 it was achieved at the tip of the octopus's tentacles. We need to go to the  
2 email to get that, if you remember the email, Sir, saying, "We want to  
3 achieve ..."

4 The email is in tab 9 of the same bundle on page 827. What you can see on page 3  
5 of the email, so page 829, is that we are responding to a certain type of cost  
6 increase. There is an attempt to raise prices in a very generalised way. I  
7 understand we have many, many vehicles and option types and so forth, and  
8 a certain percentage increase must entail doing something in respect of a lot  
9 of different vehicles. So that had been sent out. And it's said at the bottom of  
10 that that an HQ team is available.

11 But this, then, is -- well, maybe it doesn't make a difference to the marketing point.  
12 What it does make is the point that at some point any instruction like that has  
13 to be broken down into a series of much more specific steps, and it's to those  
14 people who are taking those steps that any instruction would go. So there  
15 would be a lot of communications in relation to a single increase of this  
16 nature, or lots of people whose materials need searching, if I can put it that  
17 way.

18 **MR JUSTICE JACOBS:** If you were just searching for the category of documents in  
19 54, which is described there, I mean, how burdensome would that be? You  
20 say it might have to go to a number of individuals, but there probably wouldn't  
21 have been that many of these type of documents each year, would there?

22 **MR WOOLFE:** Sir, do you mean 54 of Ms Whiteford's --

23 **MR JUSTICE JACOBS:** I do, yes.

24 **MR WOOLFE:** I have to take instructions on that, I'm afraid. At the moment I simply  
25 don't know how many there would have been. But you would be looking --  
26 depending on what level disclosure has to happen as well, because you have

1 letters sent to each of the national markets. There may have been a number  
2 over a 15-year period, different individuals and so forth, so that could  
3 be substantial.

4 Again, it's not so much about the number, it's about what searches you have to do to  
5 identify them. It may be there's only one document I'm looking for, but if it's  
6 the needle in the haystack, I have to take the haystack apart to find it and it is  
7 extremely burdensome.

8 **MR JUSTICE JACOBS:** Okay.

9 **MR WOOLFE:** Shall I move on, then, to the scorecards, Sir.

10 The score cards are put forward on the basis -- I refer to my learned friend's skeleton  
11 argument, here, at paragraph 58. They are being advanced, it appears, both  
12 on the basis of the question of buyer power -- he says at the end of 58:

13 "The assertion that buyer power is relevant to the assessment of overcharge and  
14 mitigation to the reduction of other supply costs."

15 So it appears to be buyer power both as regards bearing suppliers and as regards  
16 other costs. So I will deal with those two assertions of relevance separately.

17 As regards the relevance of these scorecards to bearings suppliers, in a sense  
18 I would reiterate the same points I was making under the heading of the  
19 supplier convention documents. The primary focus of the overcharge analysis  
20 will be regression modelling.

21 The most relevant documents as regards any degree of buyer power that was  
22 exercised will be those arising from the RFQ disclosure, because that is the  
23 negotiation directly between parties. The scorecards are evaluations of  
24 commercial performance of suppliers. So these are not part of a negotiation  
25 process of the RFQ. If they were, they would be in the sample. These are  
26 scoring how well a supplier is doing that has already contracted.

1 Now, the evidence of Ms Whiteford as to what there actually is is highly relevant to  
2 whether these are likely to be of any significant interest to the Tribunal, and as  
3 to the degree of burden.

4 I refer you to her witness statement in bundle B, tab 8, paragraph 59. What I would  
5 like you to do is to read 59 and 63. And what you can see is that there is one  
6 system, which is in the USA and was not used in the EEA. The primary  
7 system prior to 2018 was another system. And if you read the first sentence  
8 of 59 you can see what that system relates to.

9 And then separately, reference is made to how commercial performance was  
10 monitored, which is not within that system. It's done by a team.

11 And then if I can ask you then to turn to paragraph 63, the system that deals with  
12 quality has been in place for a certain period of time but there's a limitation on  
13 extraction of data, for some reason.

14 And then what Ms Whiteford also says is that as regards the commercial  
15 information -- so commercial monitoring:

16 "This is not held centrally and it would consequently be necessary for FCA to identify  
17 individuals within the company in relevant roles in the various different  
18 departments."

19 So as regards the relevance of this to bearings suppliers, what I would say is, any  
20 assessment of them in the context of negotiations is given down the RFQ  
21 route, not down this route. And it's highly unclear -- well, scoring them on  
22 quality is not likely to add a great deal to the debate. And the financial  
23 monitoring of them, which is not related to negotiation but appears to be in  
24 relation to them as suppliers in general, which any company will naturally do,  
25 not related to buyer power at all, that would require burdensome custodian  
26 searches again over a 15-year period.

1 We would submit that there's no reason to carry out a whole lot of searches as to  
2 how a customer monitored its supplier to see how well they were delivering  
3 what it was expecting them to deliver, for the sake of working out if they had  
4 buyer power. The two are entirely different issues.

5 Then as regards the suggestion that these scorecards are relevant to the mitigation  
6 by other costs argument, this, I must confess, I don't fully understand,  
7 because all that is requested is the scorecards relating to the NTN  
8 Defendants, not even all scorecards relating to all bearings suppliers. It is  
9 thus hard to see how this is going to be terribly informative, how commercial  
10 monitoring of the NTN Defendants' performance of their contracts is going to  
11 inform the court about the extent to which Fiat held buyer power with respect  
12 to other costs.

13 Do you have any questions arising out of this category, Sir?

14 **MR JUSTICE JACOBS:** No. I understand your points. Thank you.

15 **MR WOOLFE:** Then finally, as regards cost targets, again I think it's helpful to look  
16 back at what we have given. I am sorry to keep on referring you back, Sir, to  
17 your previous order, but it's worth looking at again. This is bundle A, tab 6, on  
18 page 220.

19 This is in the context of passing on, but I do stress again paragraph 5(d), that we  
20 have given financial information on profit and loss, volume, gross revenue and  
21 target margins at the model level, which is an important context when what  
22 they are looking for now is saying we must be given information as to  
23 target costs.

24 Now, again, anything relating to the cost targets in respect of bearings, insofar as it  
25 bears upon negotiation, we say would be included in the RFQ disclosure. On  
26 that, if we turn back a page or so in this order you will see what we were

1 ordered to disclose at paragraph 2 on page 218.

2 We have the criteria for awarding a contract, at 2(c), shortlist criteria. And then at

3 2(f):

4 "Valuations in response to the RFQs. Documents relating to the process or strategy  
5 for negotiating the final price. And procurement manuals or other guidance  
6 materials."

7 So insofar as there are any targets which were actually bearing upon what we were  
8 doing in the negotiation, they would appear to fall within the description of  
9 documents relating to the process or strategy for negotiating a final price, or  
10 indeed guidance materials.

11 Now, as regards other costs, again you have to ask what extra these costs targets  
12 would give them, given they have target margins and they have certainly  
13 general guidance as to what was done in respect of RFQs.

14 But this is also a problem and we do say the lateness is highly relevant, because this  
15 is a request that would cause very significant disruption to the trial process.

16 Now, you will recall I took you through Sainsbury's, the reference to British  
17 Westinghouse and the Supreme Court. We say that mitigation by reducing  
18 other costs has always been a plea that is available in law, going back to  
19 British Westinghouse. That was the very basis of the decision of  
20 Viscount Haldane, that cost savings which resulted from the act of mitigation  
21 were to be brought into account. That is one way of summarising what he  
22 said.

23 So that has always been open to them to say. They could have pleaded it when they  
24 pleaded their defence a year ago. Even if they did think that the Supreme  
25 Court said something different, which we say it didn't, the Supreme Court's  
26 judgment was handed down, I think in July of last year -- June, I'm informed.

1 And they could have written to us shortly after that, and indeed even before  
2 the second day of the hearing of the CMC in July last year, saying: we know  
3 the Supreme Court have said this; we want to raise a new point and we're  
4 going to be asking for disclosure on it. Or they could have raised it at some  
5 point in September or October or before the last CMC.

6 It's not said that this request for costs targets arises out of disclosure we have given.

7 There is some reference in a different context to that very round figure in the  
8 supplier convention presentations, but I don't think it's raised in this context.

9 It's not said it arises out of witness statement preparation.

10 We say they left it until the very last minute, before the guillotine which the Tribunal  
11 did impose came into force, to apply for this, when we were in the middle of  
12 preparing witness evidence. And in that context what they have done is to  
13 plead a single line: "you mitigated by reducing your other costs". With no  
14 particulars given to support that at all or anything to understand how they put  
15 their case. They put it at the most generalised possible level.

16 And then they make reference to the heavy burden that the Supreme Court made  
17 reference to, when that allegation is properly raised, and off that, at this  
18 incredibly late stage, seek to get very wide-ranging disclosure that will require  
19 significant custodian searches.

20 If I can just refer you to the burden of what would be required, again in  
21 Ms Whiteford's evidence. If we pick it up at page 399 of the bundle.  
22 Paragraphs 66 and 67 set out the request. There are two limbs to it. And  
23 they are -- both will require extensive searching but the second in particular is  
24 incredibly broad. So presentations and strategy documents from the  
25 purchasing department over, I think, a 12-year period.

26 And then at 67 she sets out the second limb of their request:

1 "Any other periodic instructions or criteria issued that department that specify targets  
2 for costs and the total costs they aim to pay."

3 There's no limitation on how those might be issued. This would require searching  
4 any emails as to how this may have gone out, and so forth.

5 If you can look at paragraph 74 and following, she sets out what would be required.

6 So she's informed by the purchasing team in respect of the first category: it  
7 did not produce documents of the type sought, but it wasn't actually what the  
8 purchasing department was doing. The strategic level stuff:

9 "However, I am informed it is possible that other teams in FCA may have produced  
10 such materials."

11 So what's required is to go and identify which departments may have produced  
12 high-level strategy presentation documents about strategy for this, and then  
13 identify any employees who are still with them who were in the department at  
14 the relevant time, and then try to find their inboxes and hard drives and so  
15 forth.

16 So this is a very, very burdensome process that is now being launched right in the  
17 middle of preparation of witness evidence. It would be a very, very  
18 time-consuming process. These sort of things take months.

19 As regards 76, "Instructions as to targets for costs", she says she understands that  
20 cost type letters were sent out to inform suppliers. It doesn't perhaps deal  
21 with the internal instructions, but again we can assume that that's  
22 an incredibly wide category. And whatever the volume of material that will be  
23 responsive to it, to look for any instructions that may be issued requires you to  
24 search every single avenue by which those instructions may have been  
25 issued. And in particular that would require, we say, custodian searches.

26 Now, that would be ordinarily the complaint of a disclosing party, were we dealing

1 with this at a first CMC or a second CMC. But this is being raised at the very  
2 last minute, before a guillotine came into force, when it could have been  
3 raised a year ago or nine months ago and so forth. And we do say it is  
4 a highly material factor in circumstances where they already have information  
5 as to target margins and as to general guidance in respect of negotiating  
6 strategy, and when we are facing a wholly unparticularised allegation.

7 And on that basis we do say it wouldn't be proportionate to require us to carry out a  
8 speculative line of disclosure.

9 My Lord, that's everything I had to say about the four categories. Was there  
10 anything else you wanted to ask me about, either arising out of those or out  
11 of --

12 **MR JUSTICE JACOBS:** There are a couple of points which I raised as we went  
13 along, and I think you were going to get some information about. One of them  
14 was what had been disclosed under 5(d). Have you had anything on that?

15 Do you want to take -- I know it's very difficult because you are not in the same room  
16 as your team and so forth. Shall I just give you three minutes or so just to  
17 catch up?

18 **MR O'DONOGHUE:** My Lord, if it helps, our understanding is that under 5(d) and  
19 5(e) one document has been disclosed in total. Sorry, 5(d) and 5(c). Forgive  
20 me. One document.

21 **MR WOOLFE:** Okay. My Lord, my instructions are that, under 5(e), 49 documents  
22 were disclosed. Under 5(c) and 5(d), a single document, being  
23 a spreadsheet, was disclosed, containing a very, very large amount of  
24 relevant information. So it may be one document, but in one sense the Bible  
25 is only one book, that you are allowed to take to your desert Island. So it's  
26 a very, very large book. It's a very, very large document.

1 **MR JUSTICE JACOBS:** Right.

2 **MR WOOLFE:** That was one question about 5(d), my Lord. Was there something  
3 else you wanted me to check as well?

4 **MR JUSTICE JACOBS:** There was one other question. I have forgotten what it  
5 was now. Probably it doesn't matter. It may come back to me. I thought  
6 there was something else which I asked you as you went along and you were  
7 going to get information on.

8 **MR WOOLFE:** I will check back through my notes. If it's a matter of information  
9 I can check that perhaps while the hearing proceeds and, if there is  
10 something, I will come back to you on it.

11 **MR JUSTICE JACOBS:** Thank you very much, Mr Woolfe. That is fine.

12 Okay, yes, Mr O'Donoghue.

13 **Submissions in reply by MR O'DONOGHUE**

14 **MR O'DONOGHUE:** My Lord, can I start with the overall architecture of this case  
15 and how it has been case-managed.

16 In my submission, your Lordship's order back in July of last year was predicated on  
17 an assumption that a disclosure order at that stage would yield a large  
18 number of documents and in particular would give NTN an insight into the  
19 internal FCA deliberations on pricing and costs in particular.

20 Now, that, with respect, simply has not occurred. First of all, FCA's disclosure has  
21 been proved to be lamentable. We now learn for the first time in  
22 Ms Whiteford's evidence that FCA had a policy of automatically scrubbing  
23 laptops and deleting emails of departing employees.

24 The second point is, and this really is the critical point, that the suggestion that NTN  
25 has all the materials on negotiations, the qualitative materials, is absurd. We  
26 have a total of 16 emails.

1 Now, to be clear, my Lord, this is all emails disclosed by FCA. It is not simply the  
2 emails which go to paragraph 5(e), schedule 2. And as we said in our  
3 skeleton argument, which has not been challenged in any shape or form, of  
4 this grand total of 16, most of them are not concerned with NTN and/or are  
5 banal.

6 Just to pick up the point your Lordship put to Mr Woolfe, which he was reluctant to  
7 answer, under 5(c) and (d) we have one document. It is an Excel  
8 spreadsheet. It doesn't contain any qualitative evidence whatsoever.

9 And that is why I said at the outset -- and I stand by the submission, and if anything it  
10 has been reinforced by what we have heard from Mr Woolfe -- FCA's  
11 disclosure frankly is a mess, with enormous gaps. And that is completely  
12 unacceptable in the context of an £80 million claim.

13 Now, my Lord, we are applying for staged disclosure. The premise of my application  
14 today is that the first stage on the FCA side has very far from lived up to  
15 expectations. There are gaping holes. We have tried, notwithstanding the  
16 asymmetry of the information, to come up with four specific and targeted  
17 categories in an effort to plug that gap.

18 So that is the basis of the application today. And it's important not to lose sight of  
19 that context. And I would in particular ask your Lordship to emphasise, 16  
20 emails in an £80 million claim for disclosure and straddling a period of more  
21 than a decade. It is absolutely baffling.

22 **MR JUSTICE JACOBS:** Can I ask you, on the RFQ documents, where they were  
23 supposed to disclose matters relating to negotiation, you say there's been  
24 nothing, really, apart from what is to be found in the 16 emails. Is that right?

25 **MR O'DONOGHUE:** My Lord, the 16 is the totality of all disclosure, for everything.

26 **MR JUSTICE JACOBS:** I understand.

1 **MR O'DONOGHUE:** On the RFQ, your Lordship in a sense was sold a bit of a pup,  
2 because Mr Harris at the CMC fought long and hard to get as many RFQs  
3 and APRs as possible. They were allowed to select up to 12. In fact they  
4 chose only up to five. And that may in part explain the gaps in disclosure.

5 Mr Woolfe mentioned a figure of 24. I have no idea where that figure comes from.  
6 They selected five.

7 **MR JUSTICE JACOBS:** And did you select some?

8 **MR O'DONOGHUE:** My Lord, no. Well, we didn't select any more of ours, no.

9 **MR JUSTICE JACOBS:** You also had given disclosure of documents relating to the  
10 negotiation process.

11 **MR O'DONOGHUE:** My Lord, yes. My Lord, the point I made at the outset was that  
12 their disclosure of emails is about 3 per cent of ours, something like 16 versus  
13 600, in terms of documentation. What we would be particularly interested in,  
14 of course, it's not so much the emails they send to us, we will have those, it's  
15 their internal deliberations on their side. I mean, the outward-facing stuff is all  
16 very interesting, but what is particularly revealing is the inward-facing stuff.  
17 And as far as we can tell we have nothing or next to nothing on that. As I say,  
18 of the 16, many seem not to concern us at all, and none of them seem to  
19 contain any internal deliberations. So there's a gaping hole and it has to be  
20 plugged and now is the time.

21 My Lord, the second point before I turn to the categories, is of course there has been  
22 a very significant intervention which is a Supreme Court judgment on the  
23 question of mitigation pass-on in Sainsbury's. Now, that was handed down  
24 the day before the CMC last year and it does contain a series of important  
25 findings on first of all as to mitigation through reducing other supply costs and  
26 second as to the heavy burden on a claimant to give a disclosure.

1 This has led to pleading amendments by both parties and it has to a good extent,  
2 although not exclusively, triggered some of the applications today.

3 Your Lordship may or may not be aware of this, but essentially the same process of  
4 request and disclosure on mitigation on pass-on is currently happening in  
5 several other cases before the Tribunal, following the Supreme Court  
6 judgment. For example in Trucks, which I'm involved in, a number of the  
7 defendants have made pleading amendments on pass-on and mitigation, and  
8 they have also made disclosure applications of the claimants in those cases.  
9 Some of those were heard last week before the Tribunal.

10 There is also a pending judgment in Royal Mail v BT case, the Trucks litigation,  
11 where the Tribunal will also apply for the first time, as we understand it, some  
12 of the broad principles set out in Sainsbury's on pass-on and mitigation,  
13 including evidential burdens on defendants and claimants. It's obviously  
14 a matter for your Lordship, but it may be appropriate for your Lordship to  
15 consider that judgment -- I think it's coming out this week or next week -- first  
16 before ruling on these applications.

17 So this is a developing area of the law. It is affecting case management and  
18 disclosure in a profound way, not just in this case but in many other pending  
19 similar claims; and that, at least in substantial part, is the motivation for the  
20 application before your Lordship today.

21 Come the final points before I deal with the four categories as briskly as I can. My  
22 learned friend was engaged in a compare and contrast between BritNed and  
23 the Trucks litigation. Can we just go back to my learned friend's skeleton  
24 argument just to make sure we are clear on what point he is addressing. It's  
25 at paragraph 35. The point he was making there was, well, the reason  
26 BritNed looked at qualitative stuff was in that case the quantitative stuff simply

1 did not occur or was not relevant. And as your Lordship saw on  
2 paragraph 416 of the judgment, that is completely and utterly wrong. There  
3 was econometric regression evidence on both sides which was taken into  
4 account by the judge, as well as qualitative evidence. So he's simply wrong in  
5 what he said about BritNed.

6 He then made a different point on his feet which is, well in the Trucks case there are  
7 tens of thousands of trucks which are the subject of the claims, whereas in  
8 BritNed there was one major contract or perhaps a couple of major contracts.  
9 But in this case, my Lord, as I said at the outset of my reply, FCA is  
10 interrogating a grand total of five RFQs. So we say, if a comparison is to be  
11 made between the tens of thousands of individual contracts in Trucks and  
12 BritNed, the present case is more firmly in the BritNed territory than it is in the  
13 case of Trucks.

14 But the fundamental point which Mr Woolfe elegantly ducked is, is FCA seriously  
15 suggesting that a qualitative assessment is irrelevant in the present case?  
16 Are they going to put forward any evidence of a qualitative note?

17 As I said to your Lordship, and which he did not controvert, we had understood from  
18 the case management information sheet that they will be putting forward three  
19 to four witnesses who will deal with qualitative aspects of the case. And  
20 certainly our witness will be dealing with qualitative evidence in some detail.

21 Come the final points, my Lord, first of all, just to round off what I want to say on  
22 Trucks, if your Lordship goes back to the Ryder judgment in tab 8 of the  
23 authorities, page 76, paragraph 36. There the Tribunal says:

24 "The search will be a reasonable and proportionate search and it will be for the  
25 disclosing party [which is FCA] to specify what search it has carried out and  
26 why it contends any particular search would be unreasonable when it

1 complies with the order."

2 Then you see the factors listed in the subparagraphs: number of documents  
3 involved, nature and complexity of the proceedings, costs of retrieval and so  
4 on. I won't deal with the individual categories but as a general point FCA has  
5 simply failed to engage with these requirements. And your Lordship is in  
6 a very unfortunate position of points on proportionality being made at length,  
7 without any indication whatsoever from the Claimants, on any category, how  
8 many custodians will be involved, how many documents and what this would  
9 cost relative to the size of the claim.

10 That is unfortunate but that is not a neutral point. As we see in the Ryder judgment,  
11 it is for FCA to put forward a proper case on proportionality, and frankly  
12 beyond some hand-waving they simply haven't done that.

13 Can I move to individual categories, starting with the first category, which is  
14 paragraphs 1(a) and (b) of my draft order. Three points: first, it is clear from  
15 even the single presentation we've seen that these presentations may contain  
16 highly relevant material on things like cost targets and leaning on other  
17 suppliers to support contributions to cover increases in costs. My learned  
18 friend assumes that no other presentation would contain anything of similar  
19 relevance and with respect, not only can he not say that but it does appear  
20 from one presentation we've seen that that is likely to be untrue.

21 Second, to come back to the point I said at the outset, the suggestion that NTN has  
22 all the materials in negotiations is simply wrong. We have a grand total of 16  
23 emails, that's everything, not just paragraph 5(e). And as I've said to  
24 your Lordship on more than one occasion, most of them have nothing to do  
25 with NTN and are completely banal. And my learned friend at no stage has  
26 sought to disabuse the court of that notion, as I know that FCA has only

1 selected five RFQs out of 12. And what disclosure has been made certainly  
2 does not show in any shape or form FCA's internal deliberations during the  
3 negotiations. And of course they show nothing at all about FCA leaning on  
4 other suppliers to make up for increases in costs, which is the pass-on  
5 mitigation points. And these gaping holes need to be plugged as a matter of  
6 urgency. We have suggested through the first category, relevant and  
7 proportionate ways of doing so.

8 Third point, FCA has refused to cooperate on the question of searching and  
9 proportionality. If for example, as Mr Woolfe adverted to in his submissions,  
10 he said, "Well, we can search for Monica Genovese", who was the person,  
11 my Lord, who was the head of EMEA procurement, and, say, a few other  
12 custodians, using particular keywords, we would have bitten FCA's hand off.  
13 We have had no engagement whatsoever on what they say they could do,  
14 simply them getting on their high horse and saying, "This is all very hard and  
15 we can't do any searches".

16 With respect, it cannot be that hard to locate these important presentations and the  
17 internal notes people used when putting them together. And it may in the first  
18 instance not even need custodians or keywords, why not simply email people  
19 and say, "Has anybody got a copy of the older presentations?"

20 But if we are to go down the route of key words and custodians we will cooperate as  
21 we have made abundantly clear to make that tractable. We can come back to  
22 your Lordship, if there is a dispute as to the scope of that exercise, and in my  
23 submission that is the way forward for a relevant and proportionate search to  
24 be done. And we have grave concerns about your Lordship essentially taking  
25 it on a very high level of aggregation or abstraction, that well, this will be hard  
26 and we couldn't possibly do it. Again in the context of £80 million claim they

1 must do more. They buried their head in the sand.

2 My Lord, on the second category, just to tease out what are the differences between  
3 what was originally included in paragraph 5(e) and what we seek today. We  
4 don't need to turn it up, my Lord, but paragraph 5(e) concern policies and/or  
5 internal guidelines used by the department responsible for vehicle pricing.  
6 Now our order by contrast under paragraph 1(c) it says:

7 "To the extent not already covered by paragraph 5(e) ..."

8 So that's obviously carved out:

9 "(i) documents communicating general price increases, including covering emails,  
10 memoranda of similar, and providing an explanation for those increases.

11 "(ii) any other directions or instructions given by the claimants' pricing directors or  
12 pricing team as to the level of pricing required in order to cover the claimants'  
13 costs."

14 So in my submission there are clear differences. The disclosure order in July is of  
15 policies and guidelines used in pricing by specific department. These are the  
16 documents that provide the framework by which FCA makes decisions on  
17 prices, but what we now seek is documents that show the framework being  
18 applied in practice, instances of actual price increases, including price  
19 increases which were connected to costs. And the disclosure order in July  
20 does cover the instructions to increase prices that are given to the  
21 salespeople who were actually in the market and agreeing prices for the sale  
22 of FCA's products. So we need the practical application of these high level  
23 policies guidelines and that is the missing part.

24 And as your Lordship put to Mr Woolfe, as set out in paragraph 54 of Ms Whiteford's  
25 first statement, the material mentioned in that paragraph, it really cannot be  
26 burdensome. It identifies a particular rather specific category of description of

1 document and my learned friend, with respect, didn't really seek to push back  
2 very hard on that particular point.

3 Now my learned friend did mention, "Well, we've given our 49 documents on  
4 paragraph 5(e)", but what he has conspicuously avoided dealing with is our  
5 point that the entirety of their disclosure on all paragraphs on schedule 2 is  
6 the 16 emails. And for the non-email documents we have reviewed under  
7 paragraph 5(e) they do not shed any light on the internal FCA deliberations in  
8 respect of these price and cost matters.

9 On category 3, my Lord, three points: first of all, if we go back to paragraph 59 of  
10 Ms Whiteford's statement -- it is confidential, I'm not going read it out, but  
11 what is clear and what is important is the scorecard -- they do deal with cost  
12 savings being targeted by FCA. That is obviously relevant to material on the  
13 question of pass-on and mitigation and of course buyer power more generally.

14 Mr Woolfe mentioned in the general as possible terms the alleged burden. But  
15 again, the way forward is clearly using limited custodians and agreed  
16 keywords. We will cooperate with FCA and so far they have not sought  
17 to propose a single custodian or a single keyword and that really isn't good  
18 enough.

19 My learned friend assumes that scoring in these scorecards and the other  
20 information we seek would not be relative. That may or may not be true, but  
21 certainly there's no basis for assuming his, only disclosure of the documents  
22 will tell us that.

23 Finally, my Lord, on category 4, first of all we say that this material in principle falls  
24 squarely into the heavy burden category (distorted audio) judgment in  
25 Sainsbury's, and as I said, my Lord, multiple other similar requests have  
26 basically been made in the Trucks litigation as well. So every defendant

1 following Sainsbury's in these types of cases is in the process of interrogating  
2 claimants on mitigation on pass-on, which is entirely unsurprising, and indeed  
3 in the hearing last week in Trucks in which I was involved, a number of these  
4 requests were simply consented to. So there was cooperation between the  
5 parties and not the getting on a high horse as we see with FCA.

6 On paragraph 5(d), my Lord, as I indicated there has been a single document  
7 disclosed. It's an Excel spreadsheet, it is uninformative, we are very happy  
8 obviously to provide that to your Lordship, it won't be very illuminating, I'm  
9 afraid.

10 Mr Woolfe made a number of faint complaints about our pleading but our case on  
11 pass-on mitigation is not complicated and is adequately pleaded. We say that  
12 FCA was able to mitigate any overcharge by putting pressure on other  
13 suppliers. We and they know this is potentially a strong point. As we saw  
14 from the email in 2008 which I showed you, this is exactly what one sees  
15 occurring in relation to a de minimis increase in raw materials, you see the  
16 company looking high and low as to creative ideas for the offsetting of this raw  
17 material price increase. So there we have real world evidence during the  
18 period of infringement where FCA is engaged in a significant exercise across  
19 the organisation to try and deal with his costs increased. And the suggestion,  
20 therefore, all the other years of the infringement there is nothing of any similar  
21 nature it really beggars belief.

22 And again finally, my Lord, on the question of burden, we have had no engagement  
23 whatsoever on the question of custodians or keywords. And my learned  
24 friend, he had an interesting choice of words, he says "whatever the volumes  
25 required". So it is clear on the FCA side they have literally no idea whether  
26 these requests would actually involve the large number of documents. They

1 simply haven't addressed their minds to it, which is why the proportionality  
2 point with respect doesn't go very far.

3 He made a faint point about lateness being relevant (distorted audio) category.

4 There's obviously no suggestion the trial timetable would be impacted. This is  
5 an enormous claim of £80 million. FCA has one of the largest litigation firms  
6 in the world behind it, we are not litigating against a poor grandmother, they  
7 can do those things if they are proportionate and required.

8 My Lord, that is all I wish to say on the four categories. If your Lordship can just give  
9 me a minute to check with those instructing me as to whether I've missed  
10 anything and then I will conclude. If your Lordship will just give me a second.

11 **MR JUSTICE JACOBS:** Of course, yes. **(Pause)**.

12 **MR O'DONOGHUE:** My Lord, there is deafening silence which I take to be a good  
13 sign.

14 My Lord, thank you very much.

15 **MR JUSTICE JACOBS:** Thank you very much.

16 **Further submissions by MR WOOLFE**

17 **MR WOOLFE:** My Lord, I'm sorry, can I trespass on your patience for just a couple  
18 of moments.

19 Mr O'Donoghue said in very strong terms, very, I would submit, unmeasured terms,  
20 that our disclosure was a mess.

21 Now, that is not something that has been advanced previously as the basis for this  
22 application. The basis of the application that is being advanced that on their  
23 view they are entitled to raise it at this stage and they say the material is  
24 relevant.

25 Now, it is true that in Mr Balmain's first witness statement he does say this point  
26 about 16 emails, which he seems to be very exercised about. I don't know

1 why emails have become the metric of whether or not we have given relevant  
2 disclosure, but he raises that point, this is true, as to the general context of  
3 saying that we have limited material. What has not been said before is that  
4 somehow FCA's disclosure is a mess and therefore further disclosure is  
5 needed.

6 If such an application was being made, one would expect the advocate raising it to  
7 point the court to a series of correspondence where queries have been raised  
8 with matters stretching back to when disclosure was given in November.

9 Mr O'Donoghue has not done that because such disclosures were not raised about  
10 very many aspects of FCA's disclosure. I think we wrote to them promptly in  
11 November with some queries about their disclosure and queries about many  
12 things set out in Ms Whiteford's evidence at -- I am galloping, your Lordship --  
13 at length that was not necessarily very interesting. They wrote to us about the  
14 RFQ disclosure in January. And they have not been writing to us saying, "Oh,  
15 this is missing, that is missing", querying matters. And this is simply not the  
16 basis on which the application was advanced previously.

17 So I do take strong exception to the work of my instructing solicitors and my clients'  
18 disclosure being described as a mess, with the inference that it somehow  
19 failed to meet the order which you set down in reply submissions.

20 On that one point we say one point that perhaps requires clarification: I'm instructed  
21 we did give disclosure in respect of five RFQs. That is because that was all  
22 the material we could find. One of the reasons that we were so keen to get  
23 the RFQ disclosure was because we thought more of this would sit in the  
24 hands of the Defendants than in ours, and that was everything we were able  
25 to find.

26 So it's not that we have given five and can't be bothered to give more; that is

1 everything we have. They could if they want give more disclosure from their  
2 side on that point.

3 One point: I am instructed -- I was not there but I am told by those instructing me  
4 who were there that mitigation disclosure was not conceded in Trucks  
5 because there's a strike-out hearing on that point. It may be I misheard the  
6 point that my learned friend was making, but I understood him to say that the  
7 point was conceded in Trucks and my instructions were that it's not. However  
8 that is on instruction, I myself wasn't there so I can't help you significantly on  
9 that.

10 **MR O'DONOGHUE:** My Lord, can I just make a very brief reply to that, please.

11 **MR JUSTICE JACOBS:** Yes. Just pause a second. There's no decision imminent  
12 in Trucks, is there? Or is there something coming out this week? I was told  
13 something else was coming in -- was it Post Office that you were saying is  
14 going to come out --

15 **MR O'DONOGHUE:** My Lord, in Royal Mail v British Telecom the written  
16 judgment -- I think it's released in draft form this week and therefore should be  
17 out next week, which deals among other things with issues of pass-on.

18 **MR WOOLFE:** I understood it to be coming out on Friday, but again ...

19 **MR O'DONOGHUE:** My Lord, that is why I suggest -- it's obviously a matter for  
20 your Lordship, it may be appropriate to see what that says.

21 **MR JUSTICE JACOBS:** What is raised in that which are common to this case? Are  
22 you in this case, Mr O'Donoghue?

23 **MR O'DONOGHUE:** My Lord I'm not. I think my junior is but not for the relevant  
24 party. My Lord, my understanding is that it concerns pass-on, essentially the  
25 meaning of the high level principles set out in Sainsbury's on pass-on  
26 mitigation, I think it does also relate to questions of disclosure, but I may be

1 wrong on that. But it only elaborates on the principles on pass-on mitigation  
2 set out in Sainsbury's so it's certainly relevant for that reason.

3 **MR JUSTICE JACOBS:** Whose judgment is it?

4 **MR O'DONOGHUE:** Mr Justice Roth.

5 **MR JUSTICE JACOBS:** Right. Maybe it is sensible -- to be honest, I was not going  
6 to give an instant decision today anyway, and it may be sensible if something  
7 is going to be said by Mr Justice Roth for me to look at that even if I eventually  
8 conclude it doesn't really assist particularly because each of these cases,  
9 I think, raises specific questions about what is required in the context of the  
10 particular disclosure prior which had previously been ordered and what had  
11 been given and so forth. But I can see that it may be sensible to --

12 **MR O'DONOGHUE:** My Lord, I just wanted to mention that for completeness just so  
13 that your Lordship was aware. I didn't want to be accused of hiding  
14 something under a bushel. I'm not involved but I understand it certainly  
15 concerns pass-on.

16 **MR JUSTICE JACOBS:** In Trucks there's no decision coming out this week; is that  
17 right?

18 **MR O'DONOGHUE:** That is the Trucks case.

19 **MR JUSTICE JACOBS:** That is the Trucks case, okay.

20 **MR WOOLFE:** Trucks is a sort of super-group with members who join and leave.

21 **MR JUSTICE JACOBS:** Right okay. So is there another Trucks case that you were  
22 referring to, Mr O'Donoghue?

23 **MR O'DONOGHUE:** Yes. Sir, I was involved last week in another Trucks case and  
24 pass-on disclosure has been applied for by a number of defendants, and  
25 I think the resolution of those applications is also pending.

26 **MR JUSTICE JACOBS:** Right. I mean, I had a debate last July with you about

1 pass-on disclosure. That was what it was all about. That's what led to -- it  
2 wasn't what it was only about but it led to the order which I made.

3 **MR O'DONOGHUE:** My Lord, in part. But the judgment came the day before the  
4 CMC. We have been digesting and amending it. We've had other disclosure,  
5 including the matters I've shown your Lordship, which suggest that the  
6 pass-on of costs, in particular pressing on the suppliers, is a feature of this  
7 case. That is a new dimension to this case.

8 So my Lord, in my submission it is something which is probably more in flux than  
9 something which was capable of being resolved back in June or July.

10 **MR JUSTICE JACOBS:** Sorry, I interrupted you, Mr O'Donoghue, you said --

11 **Further submissions by MR O'DONOGHUE**

12 **MR O'DONOGHUE:** Just on the disclosure. We raised the 16 emails from the very  
13 outset of Mr Balmain's evidence. They've never come back on it. We learn  
14 for the first time in Ms Whiteford's statement that they had a policy of  
15 automatically deleting emails and scrubbing laptops for departing employees.  
16 That was signed with a statement of truth. I took your Lordship to the EDQ for  
17 that very reason, which is -- not only is that not mentioned in the EDQ, but in  
18 fact they say, well, we didn't have any automatic policies in relation  
19 to deletion.

20 Now, both those things cannot be true. So we have raised a number of specific  
21 complaints about the disclosure, and in my submission, given the scale of this  
22 litigation, the facts speak for themselves.

23 I have never seen a case in 25 years where a decade of disclosure, or indeed any  
24 disclosure, leads to 16 emails. There is something radically wrong. And there  
25 are plainly gaps and we are trying to plug them as best we can. But of course  
26 there is an asymmetry of information.

1 In a sense, what your Lordship sees in the couple of documents I've shown you  
2 are -- it is revealing, but of course they are snippets, because we obviously  
3 don't know what we haven't seen. But the more we see the more we strongly  
4 perceive that there are significant gaps in what has been disclosed.

5 In particular, the internal deliberations, we have been given nothing, or next to  
6 nothing, that is critical evidence, because all the outward-facing stuff -- I  
7 mean, in a sense they could be bluffing us, but what they are really thinking  
8 internally in an unvarnished forum is critically important. And we have  
9 nothing.

10 And of course, on the question of pass-on and mitigation through a reduction and  
11 other costs we have been given no disclosure. So there is plainly, even on  
12 that narrow point, a significant gap.

13 **MR JUSTICE JACOBS:** Okay. Thank very much.

14 I think in a sense you made all those points to me in opening and in reply so I think  
15 probably I should call the debate to a halt now.

16 As I say, I will not give an instant decision. But I mean, I will give a decision  
17 relatively quickly. In normal circumstances I would have hoped to give it this  
18 week, but I think it probably is sensible if there is a decision of Mr Justice Roth  
19 which is going to come out on Friday -- it will be published, is that right?

20 **MR WOOLFE:** That is my understanding. That's my understanding.

21 **MR JUSTICE JACOBS:** Could I ask the parties to make sure that's sent to me.

22 **MR O'DONOGHUE:** My Lord, of course.

23 **MR JUSTICE JACOBS:** And then I can look at it and consider -- I hope to have  
24 written something before then anyway, but I will consider whether it needs any  
25 change in the light of what Mr Justice Roth has said.

26 All right. Thank you very much to both of you for your submissions. I don't want any

1 further submissions unless I ask for them. It's become quite common now for  
2 people to send in unsolicited further submissions afterwards. Please don't do  
3 that. Just send me the Trucks case on Friday, without any further submission  
4 attached to it. I will work it out for myself.

5 If either of you wishes to make a further submission as a result of the Trucks case  
6 then you must apply for permission to do that, giving reasons as to why it's  
7 necessary. But otherwise I think I'll just look at it myself and see what it says.

8 **MR O'DONOGHUE:** My Lord, it may turn out to be a damp squib. We just don't  
9 know. I wanted to mention it just for completeness.

10 **MR JUSTICE JACOBS:** Thank you very much indeed.

11 I think if you get a decision from me next week sometime that's not going to cause,  
12 I don't think, any significant problems in terms of the timetable for trial. And in  
13 fact any decision which I make as to any further disclosure which I might  
14 possibly order, will obviously be tailored so as to ensure that there is no  
15 disruption to the timetable for trial.

16 **MR O'DONOGHUE:** My Lord, yes. I think your Lordship picked up the point, we, as  
17 matters stand, have one witness, so it's not as if reply evidence is going to  
18 trouble them too much.

19 **MR JUSTICE JACOBS:** Right. I had an order the other day, I think it was agreed,  
20 which extends time for service of factual witness statements --

21 **MR O'DONOGHUE:** Yes, my Lord. It's one of ten days on the Claimants' request.  
22 So on any view the bulk of the work has been done.

23 **MR JUSTICE JACOBS:** When is it going to be exchanged?

24 **MR O'DONOGHUE:** On 17 May, my Lord.

25 **MR JUSTICE JACOBS:** So next Monday.

26 **MR O'DONOGHUE:** My Lord, yes.

1 **MR JUSTICE JACOBS:** It will be exchanged prior to my decision.

2 **MR O'DONOGHUE:** Indeed. And the bulk of the work has been done in any event.

3 Must have been done. If someone is saying they are only starting today, they  
4 are not going to get a very good mark for their homework.

5 **MR WOOLFE:** My Lord, there is then a three-week gap to reply statements.

6 **MR JUSTICE JACOBS:** Right. All right.

7 Thank you all very much indeed. And thank you to the CAT organisation for hosting  
8 this so well.

9 **(3.09 pm)**

10 **(The hearing concluded)**

11

12