IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1370/5/7/20 (T)

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP
(Remote Hearing)

Monday 28th June 2021

Before:
The Honourable Mrs Justice Joanna Smith
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Vattenfall AB & Others

v

Prysmian S.P.A & Others

A P P E A R AN C E S

Sarah Abram and Khatija Hafesji (On behalf of Vattenfall AB & Others)
Anneli Howard QC (On behalf of Prysmian)

Digital Transcription by Epiq Europe Ltd
Lower Ground 20 Furnival Street London EC4A 1JS
Tel No: 020 7404 1400 Fax No: 020 7404 1424
Email: ukclient@epiqglobal.co.uk

Monday, 28 June 2021

(10.30 am)

Housekeeping

MRS JUSTICE JOANNA SMITH: Good morning, everyone. These proceedings are being live-streamed, and of course many are joining on the Microsoft Teams platform. I must start therefore with the customary warning. These are proceedings in open court as much as if they were being heard before the Tribunal physically in Salisbury Square House.

An official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether visual or audio, of the proceedings and breach of that is punishable as a contempt of court.

Hello, everybody. I've got some housekeeping, but I don't know whether you want to introduce yourselves first.

MS HOWARD: Good morning, my name's Anneli Howard and I appear on behalf of the Prysmian defendants. I will allow my learned friend to introduce herself.

MRS JUSTICE JOANNA SMITH: Thank you.

MS ABRAM: Good morning, I'm Sarah Abram and I appear for the claimants with my learned friend Ms Hafesji.

MRS JUSTICE JOANNA SMITH: Thank you both very much indeed. Just a couple of housekeeping matters. The matter is listed for half a day, as I understand it. With remote hearings, it's been sensible in my experience to have a break mid-morning, if we do go to lunchtime. If we go shorter than that, we can obviously take a view as to whether a break is required. So, perhaps you

could just keep your eyes on the clock during your submissions and we'll see where we go.

In terms of the approach I was proposing to take today, I'm very happy to hear from you if you don't think it appropriate, but my experience of cost management hearings is they are best dealt with by taking each issue separately, hearing your submissions on that issue, my making a decision and then moving on. And so that was what I was proposing to do, starting obviously with the issues in relation to the claimants' cost budget.

Then I think the only thing was that I was just going to tell you "thank you" for your skeleton arguments and to say that I have read the documents that you've invited me to read in your individual skeletons.

MS HOWARD: Thank you, my Lady. Just while we're on housekeeping, there was one extra document. I just wanted to make sure it had worked its way into the bundle. There is a new tab 12A, which is an order that has been made in one of the parallel proceedings.

MRS JUSTICE JOANNA SMITH: Right. I don't have that in my bundle, but I'm sure it can come up on the screen -- yes, we will have it, it's just that the bundle I'm working off is one that I copied earlier than that came in, so --

Submissions on disclosure costs by MS HOWARD

MS HOWARD: Fantastic, thank you.

So, my Lady, I will proceed to start. Obviously, you should have the four bundles. There's the bundle 1A, which sets out the cost budgets; the BDRs, as we refer to them colloquially; the orders; then there are two bundles of correspondence; and the authorities bundle. We have tried to pull together

the relevant parts of the CPR and the Tribunal's rules for you in one place.

MRS JUSTICE JOANNA SMITH: Yes, I'm very grateful for that, thank you.

MS HOWARD: It's a pleasure. There are four main issues for determination this morning. The parties have made considerable progress and they have agreed most of the incurred costs and the budgeted costs, but the four outstanding matters really relate to the largest elements of cost for these proceedings.

And if I can just quickly step back, just to give you an overview of where we are on costings. Obviously, we accept these are complex proceedings, they're based in five jurisdictions and there are follow-on elements from the Commission's findings of market-sharing elements. And there are other stand-alone elements as well.

Now, the total value of the claim is estimated by the claimants to be €37 million, and that's based on that Oxera Commission report of the 26 per cent overcharge.

Now, the defendants have set out - since we've only started this process in October last year - we set out our concerns that we actually think the value of the claim, if anything, would be much, much lower. And that is because this is not a price-fixing cartel, there's no presumption of harm, so anti-competitive effects and causation have to be proven, notwithstanding the Commission's finding of object.

But in any event, we think that a 26 per cent overcharge rate is too high. There's no basis for it. And in fact if you look across what I called the other "parallel proceedings" that relate to this same decision, two of those have settled, one was BritNed and there are two other claims: Greater Gabbard and SSE. The estimated overcharge across those claims is between 5 and 10 per cent.

And if you apply those levels, then really the value of this claim is between €6 and €12 million, but that is before there is any element of pass-on, and we anticipate -- and obviously your Ladyship's not being asked to adjudicate that today, but our experts anticipate that because of the regulatory regime that applies, there is going to be a high level of pass-on because the infrastructure costs of buying those cables form part of the regulatory base for the regulated price caps in charges for electricity that are passed on to consumers.

And my learned friend will jump in, and say, "Well, hang on a minute, we also have interest which will then bring the value of the claim back up again". But there is a dispute between the parties as to whether that interest should be compound or, as was the case in the BritNed judgment, where only simple interest was allowed.

MRS JUSTICE JOANNA SMITH: I also noticed that there seems to be a possibility of two additional claims in relation to two wind farms which haven't yet been quantified; is that right, Ms Howard?

MS HOWARD: Yes, we see they are included in the claim, but we haven't got particulars yet for those two. That's correct. So, in any event, we're looking at a claim that, at the moment, is a maximum of €12 million. And your Ladyship will see from the parties' combined cost budgets that the claimants' total budget is over £8 million in costs -- that's at page 22 of the bundle -- and that contrasts with the defendants' budget of £4.7 million -- that's at page 42.

MRS JUSTICE JOANNA SMITH: Yes.

MS HOWARD: Now, we have made considerable progress. We've agreed large chunks of the costs on witness statements and trial preparation, but it's really the disclosure, the expert evidence, and the trial costs for the claimants' costs,

which total over £5 million of that their budget, which we have raised concerns consistently about.

And my learned friend supports their costs budgets on four main grounds. First, they say, "Well, competition laws are very complex"; that's agreed. They say that the claimants have the higher burden of proof because they have to set out their case and prove their loss; we acknowledge that.

They say that there's information asymmetry between the parties because of the secrecies of these arrangements and that the defendants have experience from other regulatory proceedings and litigation across Europe. We acknowledge that. We've taken that into account. We accept that the Prysmian defendants are further up the curve and that a straight like-for-like comparison of the claimants' costs against the defendants' costs is probably not very helpful. And so we're not insisting on parity.

And indeed, if you look at where we've reached at the end of the BDR process, we have agreed, for example, on witness statements. We have moved considerably from our offer that we gave in the BDR to reflect the fact that the claimants have a higher workload to do for witness statements.

We've moved from our position of 290K to 370K, which is twice the figure that the defendants have for that phase of the litigation.

But we say that in the areas of disclosure, experts and trial the disparity between the parties is not that great and does not justify the, frankly, exorbitant costs that are being put forward, both on an incurred and a budgeted basis.

And my Lady, I have three arguments why the disparities at this stage are not going to be that great between the parties.

The first is that we have sought to streamline the disclosure process and to reduce

costs for both parties as much as possible because we have given the claimants at a very early stage access to the Commission decision and the file straight away. So, much of that review should already have been done and have been billed as incurred costs as part of £1.3 million on disclosure that's already been incurred.

And therefore for us that raises a concern because when we look down the line and we see that there are heavy costs, both for future disclosure and in expert reports and preparation for trial, we're thinking: well, if those documents have already been reviewed, and analysed and billed already, there's duplication with those other heads of claim that have been brought forward.

And then we have the claimants' experts, Oxera, who have been instructed in all of these other parallel proceedings, so the disclosure is the same and the experts for the claimants are the same, and therefore they should already have a regression model that's up and running that they just simply have to review the relevant documents for these proceedings, and update and take onboard the disclosure that's been made in the other proceedings.

Now, my learned friend says, "Oh, but there's a restriction in CPR part 31.22 about the use of materials", and yes, we accept that, but that protection has broken down a little bit, firstly, because BritNed has already been ahead in open court, so there is material available there, but also the very fact that the parties have agreed to share the disclosure file and the same data points should make the economic modelling process more straightforward and simple.

And so therefore, we think that the costs, in particular for experts, are excessive and far beyond those that have been raised in other proceedings.

I'll come to that when we deal with the experts in more detail.

MRS JUSTICE JOANNA SMITH: Yes.

MS HOWARD: And lastly, the disparity is not so great because a lot of the focus of these proceedings will be on the Vattenfall supplies, and a lot of that disclosure will come from the claimants both in relation to the value of those supplies, causation effects and also pass-on, so the defendants will also have to be reviewing things for the first time.

So, yes, it may not be parity, but we still think the differences between the parties don't justify the excessive costs that are being put forward.

My Lady, if I now, having done an overview, just take you into disclosure issues.

MRS JUSTICE JOANNA SMITH: Yes. Thank you, Ms Howard.

MS HOWARD: Now, the position has moved on since the parties put their costs budgets and the BDRs – we filed those in May. The latest position is set out in the sixth witness statement of Ms Forster.

MRS JUSTICE JOANNA SMITH: Yes. That's at tab 18. I've got that.

MS HOWARD: That's right. It's paragraphs 20 to 29. And so they've already -- since we raised this issue in October, they've incurred £1.3 million on disclosure already, and that has been incurred in reviewing, I think, 57,000 documents on their part, which they've reduced down to 15,000, which --

MRS JUSTICE JOANNA SMITH: I think 51,665 they've reviewed, isn't it, and reduced it down to 15,700?

MS HOWARD: Yes, that's right. And they anticipate a further £550,000 will be spent, and we offered £327,000 in our BDR. That was on the basis of the previous position before we knew that further costs had been incurred.

MRS JUSTICE JOANNA SMITH: Yes.

MS HOWARD: Now, my learned friend claims that costs management only applies to future budgeted costs and cannot address costs that have already been incurred. And I just wanted to put a marker down that we do not agree with the costs that have been incurred already, and we submit that your Ladyship should look at the costs holistically to ensure that they are consistent with the overriding objective and the general principles of the Tribunal in rule 4, because otherwise the costs management process will be rendered meaningless.

You will not be able to impose any sort of scrutiny to ensure that costs are just and proportionate and --

MRS JUSTICE JOANNA SMITH: Under -- sorry to interrupt you, Ms Howard -- the CPR, I think I have power, don't I, to make a comment about incurred costs?

MS HOWARD: That's right. That's what I was leading to, your Ladyship, because otherwise it creates completely the wrong incentives. I mean, you can just see in this process, we raised this first in October, our application for costs budgeting was resisted by the claimants. We then had to reapply in January. Again, it was resisted and we got this process for formal budgets and then costs management. But by that time -- now we're looking eight, nine months later, time has passed and the costs have been incurred, and the opportunity to impose ex-ante control over them has passed.

So, I do think there is a need for some commentary on the incurred costs to date. And I have four points in relation to the incurred costs and it might be helpful, my Lady, to take up the claimants' costs budget, which is at -- the updated version is at tab 3 and it's page 24 that I wanted to draw your Ladyship's attention to. It's hard to see on screen. I don't know whether your Ladyship

has a hard copy?

MRS JUSTICE JOANNA SMITH: No, I don't. I only have it on screen, but I can enlarge it and I can rotate it, yes. Just bear with me while I do that. Yes.

MS HOWARD: Now, this is, obviously, the old budget before the costs were actually incurred, but your Ladyship will see in row 16, the total amount of costs that were anticipated were £1.4 million, and that's in row 16 and it's the bright yellow columns.

MRS JUSTICE JOANNA SMITH: Yes, I have that. Yes.

MS HOWARD: And obviously £1.73 million of that has been incurred and we assume that it's been on the same basis. But you'll see, my Lady, there's quite heavy involvement there at partner level and senior associate level, and that comprises over £370,000 of that £1.4 million budget. So it's not just a case, as my learned friend suggests, of this being trainees, and paralegals and junior associates; there's quite heavy involvement by partners and senior associates. And even the junior associate rate that we say should not be necessary at the disclosure stage or, if there are documents that warrant more senior involvement, there should be a triage so that that is limited.

My second point, my Lady, is that 57,000 documents is not unusual in this type of litigation. In fact that's fairly slight -- or 51,000 it may be now. That's been reduced to 15,000, so it's seems that the vast majority of those documents were deemed to be irrelevant and not worthy of disclosure.

My third point is that there is a degree of overlap here because my Lady will see there's also costs anticipated for experts at the disclosure stage of £200,000, and also counsels' fees at the disclosure stage, which totals approximately, I think, £50,000.

And there seems to be some overlap there because if that review by the experts relates to the documents on the Commission file or the documents emanating from the parallel proceedings, then there's no real need for the associates to be doing a double review, because firstly, the experts will have seen them already because they're involved in the other proceedings; and secondly, those documents are more relevant to the economic modelling, so you don't really need -- the experts will be able to tell whether they're relevant or not or need to be put in. They don't need to have a double review.

MRS JUSTICE JOANNA SMITH: And we don't have a detailed breakdown to tell us what those expert costs relate to, I think?

MS HOWARD: We've been provided with no material as to what that process is doing. So, we're concerned there that there is a duplication between the various teams of people reviewing them, but also there seems to be duplication with the experts' preparation of their reports, because again, as I'll come to later, that's another very hefty outlay in terms of costs.

And if there's been a review at this stage of those materials, that may be warranted at this stage and we want to make sure there's no double-counting at the later stage.

So, those are my comments on the incurred costs.

On the future costs, my Lady, I have five main objections, some of which carry over. So, first of all, we say that the level of seniority again for the future costs is inappropriate. There's 2,600 hours in total to review what should be, I think, 19,000 documents given by the defendants; that's a total of £255,000 by solicitors.

Thirdly, again there seems to be duplication between the solicitors' review of experts,

who are budgeted for £190,000, and counsel, who are budgeted for £38,000.

And fourthly, again duplication between the experts' review of disclosure and the preparation of their experts' reports.

And fifthly, we don't know -- again, no details have been provided of who is reviewing what or what level of seniority, and whether they've applied a triage to allocate different types of documents to different members of the team or between different levels of seniority.

MRS JUSTICE JOANNA SMITH: Yes.

MS HOWARD: And we submit, in the circumstances where £1.3 million worth of costs have already been incurred, our offer of £327,000 is more than reasonable. And that gives over 25 partner hours, 35 for senior associates, 45 for junior associates and then 250 for trainees and paralegals. That could overlap with counsel. I mean, we're not going to get into micromanaging how they split their budget, but that gives them a budget of £102,000 for solicitor and counsel review.

We've allowed £125,000 for experts and £100,000 for document hosting. And we really feel that that is a reasonable offer that has been rejected, and unless some discipline and control is put in place, there's going to be a real risk that the legal costs are going to outstrip the value of this claim and/or become an impediment to quick and effective settlement.

And that's our concern on disclosure, my Lady. Thank you.

MRS JUSTICE JOANNA SMITH: Thank you very much indeed Ms Howard.

Yes, Ms Abram.

Submissions on disclosure costs by MS ABRAM

MS ABRAM: Thank you very much. So, there were two overarching points made and then specific points in respect of disclosure.

If I may, I'll address the first overarching point on proportionality of costs versus the value of the claim to start with, and then I'll address the points on disparity between the claimants' costs and Prysmian's costs as I go through because they are specific to the particular stages of the litigation.

MRS JUSTICE JOANNA SMITH: Certainly.

MS ABRAM: Thank you. So, starting with proportionality, the point is that the overall scale of costs on disclosure, for example, is disproportionate to the value of the case. And there are three answers to that.

The first is it's said that the maximum value of the claim on my client's case is 37 million euro. Not so. That's just not right. It's not right for a number of reasons, which I apprehend that your Ladyship has already identified from the skeletons.

First, there is a claim in respect of the cables included in two wind farms, and of course there are a lot of cables in wind farms, and that claim has not yet been quantified. And so it's in the proceedings, but it's not in the €37 million.

Also, this is a claim that dates back over 20 years to 1999. Now, of course, there's dispute, as there always is, about the rate of interest and whether interest should be compound or simple, but one can safely say that in a claim that dates back 20 years, interest is an extremely valuable aspect of the claim. So, for those reasons, 37 million euro is nothing like a ceiling for this claim.

The second point that Prysmian make is that the value of the claim is far less than its pleaded value, so it's less than our €37 million plus.

Now, of course they say that. It's totally unsurprising that they say that because to

state the blindingly obvious, if we agreed with Prysmian about the value of our claim, we wouldn't be before the Tribunal today. So, the High Court is faced every day with claims where the claimants says it's worth hundreds of millions of pounds, and the defendants say, "Actually, no, it's worth nothing at all".

And this case is stronger for the claimants than the majority because liability is already established by virtue of the Commission decision. So, the only question between the parties, in substance, is the question of the quantum of the loss that Prysmian's unlawful conduct caused my clients to suffer.

So, certainly the Tribunal couldn't proceed on the basis that the claim was worth less than the claimants allege.

Now, there is a comment in the White Book about the appropriate approach in such cases, and that's in the authority's bundle, so in authorities tab 4, page 121 of the bundle, if you've got it electronically.

MRS JUSTICE JOANNA SMITH: I have got it electronically. My recollection is that it may be sensible not to actually make any order in relation to figures and leave it until later, once the value can be ascertained more clearly, but that's just my recollection, Ms Abram.

MS ABRAM: Yes. So, the point that I was going to make was a slightly different point, but my Lady is of course right in that respect, that it may just be impossible to know what the appropriate value is.

The point I was going to make is on page 121, paragraph 3.15.3, if you see about two-thirds of the way down the page.

MRS JUSTICE JOANNA SMITH: Page 121 of the electronic bundle?

MS ABRAM: Yes, so the authorities bundle.

MRS JUSTICE JOANNA SMITH: Yes, I have it. Yes.

MS ABRAM: I'm grateful. So, the White Book says:

"When assessing proportionality of a claim, the court should take into account its overall value. In some cases, the valuation proposed at the cost budgeting stage by the defendants is lower than the valuation proposed by the claimants. If both valuations are reasonably made the court must perforce accept the claimants' valuation."

My Lady is absolutely right that there are situations in which it's just impossible for the court to know what the value of the claim is, in which case it's safer not to proceed on the basis that the claim has one value than another.

But the point being made there is that if there's reasonable doubt, the court errs in the favour of the claimant because it can do nothing else.

MRS JUSTICE JOANNA SMITH: Yes.

MS ABRAM: And the third point that is made about the value of the claim relates to other sets of proceedings that have been brought in respect of this cartel.

Now, of course the simple point is that the fact that so many claims have been brought in this jurisdiction against Ms Howard's clients in respect of this cartel is rather supportive of the idea that it may have caused a lot of people a lot of damage.

And certainly, the fact that other claims have been settled tells one nothing about the value of -- the true value of the claims or their perceived value by the parties to those claims because of course the terms of the settlement are confidential.

There is one claim that has gone to trial in the power cables cartel, and that's the ABB v BritNed claim, and I really just want to show the Tribunal how different that is from this case to take away any suggestion that that might shed any light on the value of this claim.

The judgment of the Court of Appeal is in the authorities bundle, and it's at tab 2, but if you've got the electronic version, perhaps you could go straight to page 41 of the bundle, my Lady.

MRS JUSTICE JOANNA SMITH: Yes.

MS ABRAM: Now, to introduce the point, so this is a different claim about the same cartel against a different defendant, so ABB as opposed to Prysmian. The point made against me is that there was judgment in the claimants' favour, but it was for less than the sum originally claimed.

Now, BritNed was a very unusual case because it's a claim for damages in relation to an alleged overcharge on one single, albeit a very large, project, which was supplied by this different member of the cartel. And the paragraph that brings that out on page 41 is paragraph 113, the Court of Appeal.

MRS JUSTICE JOANNA SMITH: Yes.

MS ABRAM: And the court says there, summarising what the judge said below, and essentially the judge's conclusions below were affirmed by the Court of Appeal, in his introduction to the quantification of the overcharge, the judge, who was Mr Justice Marcus Smith, accepted BritNed's submission that the cartel represented an extremely serious breach of the competition law, so far as the general effects of the cartel in the market were concerned.

And then he continued, rightly in our view:

"But that is not an issue before me. I am concerned with the much narrower issue of the overcharge to BritNed arising out of a single specific transaction."

So, the Court of Appeal are here recording the finding as to the seriousness of the cartel in terms of the general effects on the market, and noting that the judge's task was to identify the specific effects of the cartel on the one project in

issue, and on the facts of that case the effect was much less than the claimants have contended.

So, the point that I'm making here is that nothing can be drawn from BritNed as to the value of this case. It's very clearly a case that turns on its own particular facts. That's the whole basis for the judgment of Mr Justice Marcus Smith and the Court of Appeal.

So, with that by way of introduction on the proportionality of costs, which I say that my Lady, I'm afraid, just can't take into account when setting costs budgets for any individual phase, I'll address the costs of disclosure, if I may.

MRS JUSTICE JOANNA SMITH: Yes.

MS ABRAM: And there are two points on that: there's incurred costs and there's budgeted costs. So, just to be clear, to disentangle the relevance of incurred costs for what they're worth, I'll show you the relevant bit of the CPR, although I apprehend you may already have looked at it for yourself, my Lady. In the authorities bundle, it's on page 130 of the PDF.

MRS JUSTICE JOANNA SMITH: I had certainly looked at it in the context of another case. I hadn't looked at it in the context of that one, but that was my recollection. Yes, very well, I've got it.

MS ABRAM: So, 3.17, court to have regard to budgets and to take account of costs. And it's 3.17(3):

"Subject to rule 3.15A..."

Now, that's not relevant for this purpose. That's about when the costs changed due to significant developments in the litigation after a costs management order, so we put that to one side:

"... the court -

(a) may not approve costs incurred up to and including the date of any costs management hearing; but

(b) may record its comments on those costs and take those costs into account when considering the reasonableness and proportionality of all budgeted costs."

So, that's the position. So, with that by way of backdrop, I'll address the points that are made in respect of the claimants' incurred costs. And in fact I'm able to inform the Tribunal that in the last hour and a half, the parties have given disclosure in this litigation and that enables us to figure out exactly what the relative costs of the parties, the claimants and Prysmian, are per document disclosed. And in my submission, they're quite interesting as to whose costs are reasonable.

So, I'll set out the facts. The costs incurred by the claimants on disclosure as of 11 June 2021, they stood at approximately £1.3 million, as Ms Howard has said.

MRS JUSTICE JOANNA SMITH: Yes.

MS ABRAM: Prysmian's costs at the same date stood at approximately £460,000. So, effectively, as Ms Howard says, because the timing of that hearing coincides with the giving of disclosure, that means that incurred costs are, essentially, the costs of the disclosure exercise and budgeted costs are the costs of the disclosure review.

Now, my clients have disclosed 15,700 documents, give or take. These are all approximate figures this morning, in this litigation. That is a price, using the £1.3 million, of about 83p per document.

Prysmian, who have been involved in many bits of litigation on this cartel already, have had the benefit of being able to reproduce large amounts of disclosure

they'd already given in other bits of litigation.

So, they've produced four disclosure lists. Three of those disclosure lists simply reproduce disclosure that's been given in previous proceedings. The total number of documents, of relevant documents that aren't parents and aren't place-holders across the four disclosure lists, is about 18,500 -- 18,400.

Interestingly, in the fourth list, which is the one that's new specifically for these proceedings, Prysmian has disclosed just over 2,000 -- 2,062 new relevant documents. So, the rest of Prysmian's disclosure is repackaged from earlier proceedings.

Now, looking at Prysmian's new disclosure in these proceedings, 2,000-odd documents at a cost of £460,000 -- my Lady sees where I'm going -- the per document cost is three times the per document cost of the claimants' disclosure exercise. It's 223p a document, as compared to 83p a document. And so --

MRS JUSTICE JOANNA SMITH: So, Ms Abram, are you saying that there was no need to do any work in repackaging the three lists?

MS ABRAM: I'm not suggesting there was no work at all. Of course there would have been some clerical work. I'm not suggesting that it's simply a click of a button, but with eDisclosure it's not far from a click of a button. It requires engagement by some junior solicitors; it requires a bit of work from the eDisclosure providers; there's bit of admin in getting the documents up and ready to disclose and to provide for inspection. So, I'm not suggesting it's zero cost but it's certainly --

MRS JUSTICE JOANNA SMITH: And presumably, a decision had to be made as to which documents from those previous proceedings were going to be used in

these proceedings, so that's probably the area where some costs will have been incurred.

MS ABRAM: There may have been some costs, my Lady, but I'll show that in fact it was agreed last year before the CMC, before Mr Justice Adam Johnson, how Prysmian would be able to repackage their disclosure from the earlier bits of litigation.

So I'm not, as I hope I'm making clear, suggesting these are penny perfect figures. I'm not criticising Prysmian's disclosure costs; what I am saying is that, given the amount of money spent per new document by Prysmian, it's a bit rich for them to criticise our disclosure costs of doing a much bigger disclosure exercise for the first time. And it's really important to see the 1.3 million and the 460,000 in the context of the fact that we've done much, much more work for the first time and Prysmian's done all this many times before.

MRS JUSTICE JOANNA SMITH: Yes.

MS ABRAM: So, to be clear about the new work that we've had to do, as Ms Howard has frankly acknowledged and I'm grateful for her, the claimants' disclosure exercise has had to span five jurisdictions, so the UK, Denmark, Sweden, Germany, the Netherlands, over more than 20 years; it's necessitated a review of documents in many languages; it's required teams to recover documents from archives. That's complicated due to the passage of time, and indeed it's been so difficult that it's required help and engagement direct with Microsoft.

When we consider the complexities of the disclosure exercise that my clients have had to undergo, it's important to recall that they didn't know in 1999 or 2001 that they were buying cables from cartelists. So, they didn't know that they

had to keep punctilious records of all of their cable purchases because they would need to sue for the overcharge they had suffered 20 years down the line. And of course that's relevant to how difficult it is now to go and recover those records.

Then turning to the specific points that are made in respect of my clients' incurred costs, my clients have been astute to save costs where possible. One of the points made against me is that a lot of the -- a substantial proportion of the incurred costs relate to partner and senior associate time, my instructing solicitors, Stewarts.

Now, the reason for that is that in order to save costs, a lot of the document review was done through contracted out solicitors through the eDisclosure provider, because that could be done more cheaply than through getting Stewarts' paralegals and junior associates to do the equivalent exercise.

And so that, inevitably, has the consequence that within Stewarts the costs are more top-loaded to the senior end in terms of providing direction as to how the eDisclosure provider should do the work. But it's not an indicator that the disclosure review has been done by Ms Forster. Of course it hasn't. Ms Forster has been giving instructions aimed at enabling the review to be done as cheaply as possible.

Now, I --

MRS JUSTICE JOANNA SMITH: Sorry, can we just explore that for a moment? Because we've got a lot of money being spent on the senior associates and partners, Ms Abram, and I understand there would be a need to give direction to contracted out solicitors, but that seems to me the sort of figures we're looking at there to go very far beyond mere direction.

MS ABRAM: Well, I obviously of course can't give evidence but what --

MRS JUSTICE JOANNA SMITH: No.

MS ABRAM: -- but what I can say is that Ms Forster certainly wasn't reviewing the documents. So, what there has been on the claimants' side is a really complex logistical exercise that has required an awful lot of engagement, and that has been done by Ms Forster and by senior associates within Stewarts, trying to help the claimants identify which jurisdictions are relevant; trying to deal with where the relevant repositories of documents might be; dealing with difficulties setting up the eDisclosure provider system, and so on.

And so, in a sense, it's an indicator of how long, how broad, how difficult the exercise has been rather than that Ms Forster has been clicking relevant or not relevant on the document review --

MRS JUSTICE JOANNA SMITH: I hadn't noticed that Ms Forster deals with this particularly in her witness statement; does she explain all of this in her witness statement, Ms Abram?

MS ABRAM: She doesn't explain this in great deal, and the reason for that is because the report only really came into the prominence so far as we were concerned in Ms Howard's skeleton argument, and so that's when it crystallised as a point that was to be addressed.

MRS JUSTICE JOANNA SMITH: All right. Well, I understand the point. Thank you.

MS ABRAM: I'm grateful. So, I've set out some indications about why we say that the comparison with Prysmian's costs is inapt and why, if anything, it favours the claimants even just in raw terms, in terms of the amount of money spent per document. But of course I do appreciate that the Tribunal might take the view that it's just very difficult at this kind of hearing, without full knowledge of

the context of the issues, to reach a view on who's actually right and who is wrong on those points, and why they matter to the relative costs. And of course that will be consistent with just focusing on the budgeted costs, without focusing on the incurred costs so far.

But just for the avoidance of doubt, my clients do feel strongly that it isn't fair to compare the costs of the claimants' disclosure exercise with the costs of Prysmian.

And just to indicate or illustrate the extent to which Prysmian's been able to repackage its earlier disclosure, I just want to give examples of two categories that are absolutely key to this litigation in which Prysmian has had to do nothing more than exactly that.

So, the first is comparator disclosure. So, comparator disclosure is information and documents on the pricing of projects that weren't the subject of the cartel. So, that's the fundamental plank of overcharge analysis, as my learned friend knows.

So, in order to determine what the overcharge is, you compare the price of cartelised against non-cartelised projects. So, this is, effectively, half the overcharge disclosure exercise. And we've agreed that Prysmian should give that disclosure by reproducing their disclosure in earlier power cables cases. And because you've identified interest in exactly what order was made as to disclosure, I'll show your Ladyship that, if I may.

MRS JUSTICE JOANNA SMITH: Yes, I think I've looked at it because I saw that the different categories of disclosure, there were orders about the fact that disclosure could be repackaged in relation to some, but not all. But please do take me to whatever you want to show me.

MS ABRAM: So, in the PDF file of bundle A, it's page 166. If you're working from a paper version of bundle A, it's --

MRS JUSTICE JOANNA SMITH: It's all electronic.

MS ABRAM: It's all electronic, that's fantastic, so bundle A, page 166.

MRS JUSTICE JOANNA SMITH: I have it.

MS ABRAM: So that now -- in my version, it's the page paginated 163 of the bundle, but my Lady may have an older version than I do.

MRS JUSTICE JOANNA SMITH: You want me -- no, it's 166. So, it's seems to be paginated 166.

MS ABRAM: So, in that case, could you, please, go back three pages to page 163?

MRS JUSTICE JOANNA SMITH: Sorry, yes.

MS ABRAM: It's certainly not your Ladyship's fault.

MRS JUSTICE JOANNA SMITH: Yes.

MS ABRAM: So, the section I'm interested in starts halfway down the page, "Overcharge O", and it identifies claimants' disclosure, defendants' disclosure. Of course we are interested here in defendants' disclosure, so the second half of the page, and under "Scope (B), so just over the page:

"In respect of the Prysmian defendants (i) all power cable projects and sales listed in Annex B ..."

So, they're the projects in suit for the purpose of these proceedings:

"(ii) see category O9 below in relation to the categories of disclosure ordered in the SSE and Greater Gabbard proceedings."

MRS JUSTICE JOANNA SMITH: Yes.

MS ABRAM: So, if one then goes down to the category O9, which is I think on page 169 of the bundle you're working from.

MRS JUSTICE JOANNA SMITH: Yes, I have that. I've got that highlighted already. I'd seen that.

MS ABRAM: So, all documents disclosed by the Prysmian defendants in the SSE and Greater Gabbard proceedings in response to the Value of Commerce and Overcharge categories, further to a particular order of Mr Justice Jacobs.

So, the Prysmian defendants will, obviously, have known exactly what those documents were because they'd already given disclosure of them, and all they had to do was produce them for those proceedings. Although I'm not suggesting that that's a zero cost activity, it certainly can't be equated with conducting a disclosure exercise.

MRS JUSTICE JOANNA SMITH: Yes.

MS ABRAM: And the second point is disclosure on capacity. Again, we did that by -- we agreed that the defendant should do that by repackaging disclosure given in earlier proceedings. And capacity disclosure is important because often in these cases, defendants argue that the cartel didn't affect their prices or didn't affect them as much as is alleged because their rivals didn't have the capacity to take up the supplies and -- that the defendants gave instead. And again, disclosure on that issue will be given by repackaging documents from earlier cases.

Now, what I want to convey is that these are not just details, these are critical limbs of the disclosure which Prysmian would ordinarily have to spend substantial costs on. And so comparing the claimants' costs with those of Prysmian would entail penalising my clients for their own reasonableness in agreeing that Prysmian could repackage their earlier disclosure, and that just wouldn't be fair.

MRS JUSTICE JOANNA SMITH: Yes, I understand that.

Now, the point I made earlier about the need to review documents used in other proceedings, actually looking back at this, it seems to give the lie to that point because this is actually talking about all documents disclosed in those earlier proceedings, so there's no review exercise at all.

MS ABRAM: No.

MRS JUSTICE JOANNA SMITH: It is, as you say, a repackage.

MS ABRAM: That's absolutely my understanding. Now, of course I accept that Prysmian might have produced other documents in those same proceedings, which it would have to segregate from these ones --

MRS JUSTICE JOANNA SMITH: Some of which may be disclosable and some of which may not.

MS ABRAM: Quite so, yes. But of course it's not the same as going out to five different countries, finding repositories 20 years old; going through the filing cabinets, identifying which documents are relevant in five different languages. They are all there and ready to go; they just need to be sieved out.

I'm not criticising Prysmian's incurred costs of disclosure, but I'm making the point that ours aren't unreasonable by contrast.

So I want then, having addressed the incurred costs point to address the reasonableness of the budgeted costs, because that really ought to be the focus the exercise.

So, as you're aware, madam, the task of the tribunal is to approve the total sums of costs for each phase of the proceedings. So, it's not about specific hours to be spent or hourly rates at which work can be done, but of course it is important for the tribunal to know what it's proposed that the time and money

should be spent on, so it makes sense to break the remaining costs relating to disclosure into three categories.

The first is the time costs of solicitors and counsel in reviewing the disclosure; second is expert fees in respect of disclosure; and the third is the eDisclosure provider costs.

MRS JUSTICE JOANNA SMITH: Yes.

MS ABRAM: Now, they together amount to £550,000, give or take, but one needs to look at them separately, so I'll start with time costs, if I may. We have sought a costs budget of about £290,000 to review Prysmian and Nexans' disclosure for solicitors and counsel combined, so it's £255,000 for solicitors and about £38,000 for counsel.

Now, in our skeleton we gave a ballpark estimate for what this would imply for the per document costs of the review exercise, but since disclosure has now been given, I can improve on that and tell the Tribunal what the costs in fact would be.

So, a rough total of about 22,000 documents had been disclosed by Prysmian and Nexans combined, so about 18,500 by Prysmian and 3,500 by Nexans. That, on our budget, would be a cost of £13.18 to review each document. I don't want to pretend to an excess of exactness here, these are rough figures but just to give the Tribunal a guide.

If one bases the costs on an hourly rate of £200, which is my learned junior's hourly rate, and as will be familiar to your Ladyship, that's the lowest of all team members, the junior junior's hourly rate. That would imply spending less than four minutes on each document that Prysmian and Nexans has disclosed.

In my submission, that's plainly a reasonable figure and it's plainly a reasonable

amount of time to expect to spend on each document.

Now, beyond the quantum there are two specific criticisms of the budgeted costs of time for the future. The first is that there should be no budget for involvement of counsel. Ms Howard didn't press this point orally. In my submission, it's not a good point because Ms Hafesji's rate is the lowest of all the team members, so it's actually cost efficient for her to be involved.

And further, it also often makes sense in terms of familiarisation with the documents and with the issues for counsel to have some involvement.

The second point that's made against me is, again, that the budget envisages too much involvement at senior solicitor level, so partners and senior associates.

Now, that's something of the red herring, given the sum -- the work sum, that I've set out to the Tribunal because --

MRS JUSTICE JOANNA SMITH: Yes, because you would say: I'm interested in the total figure, not in how it breaks down or who is doing what?

MS ABRAM: Exactly, and if it's four minutes for Ms Hafesji, then it might be two minutes for Ms Forster. In a sense, that's our problem. That's us that are spending less time per document, if we choose to allocate the documents to people who are more senior and therefore cost more money per hour. So, I say that shouldn't be taken into account.

So, that's the costs for solicitors and counsel review. The next head of costs is expert costs for review of disclosure. Now, we have budgeted about £190,000 of future costs under this head, and Prysmian has offered £125,000 on the basis that that's their equivalent costs, that's what they expect to find.

MRS JUSTICE JOANNA SMITH: Sorry, they offer £125,000?

MS ABRAM: They do. There's a table --

MRS JUSTICE JOANNA SMITH: Yes, can you just remind me how much they were offering in relation to the time costs?

MS ABRAM: Well, I'm confused by that now, my Lady, because before this hearing Prysmian were offering £200,000 in respect of time costs. Ms Howard, in oral submissions, seemed to go back to an earlier position that Prysmian had articulated was £100,000, so I'm unsure what their current position is.

MRS JUSTICE JOANNA SMITH: All right. Well, Ms Howard will help us with that in due course. Okay, so on the expert costs, the defendants are offering £125,000 as against £190,000.

MS ABRAM: That's right. There's a table summarising this on page 6 of our skeleton, actually, under paragraph 26.

MRS JUSTICE JOANNA SMITH: Yes.

MS ABRAM: Now, until this hearing, it had been common ground that the experts would need to review the disclosure, and the only question was: what budget was reasonable to do so? In fact Prysmian had already incurred costs for their expert to review the disclosure as well, just as the claimants have.

In her submission, my learned friend seemed to suggest that this wasn't a reasonable activity, which is curious given that Prysmian intends to do the same and that their offer is based on their equivalent costs.

In my submission, it's obviously sensible and necessary for the experts to look at documents that are produced to see those that are relevant to the economic analysis and to use them to plug in to the economic analysis.

There were various claims made about duplication of expert work. There's no basis for those claims. The costs budget has been carefully and properly prepared in coordination with Oxera, who are well-known highly regarded and highly

experienced experts. There's no basis for alleging that there's duplication in this costs budget.

Now, again, another sum: Prysmian's own costs underlying the reasonableness of the claimants' costs estimate. So, to compare Prysmian's budgeted costs for expert review of disclosure against the claimants' budgeted costs, they're very much in the same ballpark.

So, the claimants have disclosed about 15,700 documents, so £125,000 -- Prysmian's figure -- of expert fees is just under £8 a document. Based on the job the claimants have to do, so 22,000 documents disclosed, £190,000 of expert fees is about £8.64 per document.

So, in other words, the claimants' proposed costs of this exercise are actually spookily similar to the defendants' proposed costs of the exercise, given the higher number of documents that the claimants have to review. There's no disparity at all, even if one is comparing the two together.

MRS JUSTICE JOANNA SMITH: Yes, I follow.

MS ABRAM: Then, the final head of costs is on eDisclosure provider. I'm afraid I'm wholly unclear what Prysmian's position on the costs of the eDisclosure provider is. We've budgeted £65,000. We've got no information about what Prysmian's equivalent cost is.

Our future costs include: access to the review database; loading documents; hosting fees; project management fees. All the ordinary familiar costs and they have been carefully estimated in co-operation with the eDisclosure provider. Prysmian don't seem to say they're unreasonable, so in my submission they should be allowed in full.

That's all I wanted to say about disclosure, my Lady.

MRS JUSTICE JOANNA SMITH: Thank you very much indeed, Ms Abram, that's most helpful.

Ms Howard?

Submissions in reply on disclosure costs by MS HOWARD

MS HOWARD: Sorry, I'm just off mute.

My understanding is that the latest position is set out in paragraph 28 of my skeleton, which sets out the offer that we made on 9 April, which gave a total of £102,000 for solicitors, £125,000 for experts and then we also allowed £100,000 for document hosting fees. And in correspondence we've also offered, I think, £200,000 for time costs. That is at page 44 of bundle C. Perhaps I should just take you there.

MRS JUSTICE JOANNA SMITH: Sorry, just so I know what figures I'm dealing with, time costs, the amount claimed is £290,000 and you have offered --

MS HOWARD: £102,000 in the BDR, it was £102,000 and £65,000.

MRS JUSTICE JOANNA SMITH: But has that subsequently increased, Ms Howard?

MS HOWARD: I think there's a total amount -- sorry, I'm just trying to take instructions on subsequent correspondence. I think we've offered £200,000 in respect of time costs in correspondence, and that's at page 44 of bundle C. I'll just bring that up for you.

MRS JUSTICE JOANNA SMITH: Thank you.

MS HOWARD: It's tab 113 and on page 44.

MRS JUSTICE JOANNA SMITH: Oh, yes, I have it. This is Mcfarlanes' 14 May letter, isn't it?

MS HOWARD: That's right.

MRS JUSTICE JOANNA SMITH: Yes, I looked at this.

MS HOWARD: So, we increased the offer from £102,650 up to £200,000.

MRS JUSTICE JOANNA SMITH: Yes. Okay. And then on the expert costs, the claim is for £190,000 and you're offering £125,000?

MS HOWARD: That's right.

MRS JUSTICE JOANNA SMITH: Yes, and then for the eDisclosure provider, the claim is for £65,000 and I thought you just said to me that you had set aside £100,000 for that.

MS HOWARD: My instructions were we've set aside -- but I think that may cover not just the hosting, but the eDisclosure as well, but I'll just check.

MRS JUSTICE JOANNA SMITH: So, how does that relate to the £65,000 in the claimants' budget?

MS HOWARD: I'm just going to -- sorry, I'm just awaiting instructions on that.

MRS JUSTICE JOANNA SMITH: Not at all.

MS HOWARD: The £100,000 was covering other things as well, but I've got instructions that we are happy to go with the £65,000 and accept that for the hosting.

MRS JUSTICE JOANNA SMITH: Thank you.

All right. So, the two areas in dispute relate to the expert costs and the time costs?

MS HOWARD: That's right, and if I might just come back with a couple of points in response, my Lady.

MRS JUSTICE JOANNA SMITH: Yes, of course, Ms Howard. Of course.

MS HOWARD: Just to make clear that -- I mean, my learned friend's package is very nice, with lots of dazzling figures of how much this is per document, but really, it's not the number of documents, it's the work obviously that's been

taken to generate the actual documents that have been disclosed.

And my clients and their solicitors have also had to work in five jurisdictions; they've also had to go through archives going back 20 years; and they've also had to work in multiple languages, so that in that respect --

MRS JUSTICE JOANNA SMITH: But not in the context of this case insofar as they've already provided that disclosure in other cases and that disclosure has just been repackaged for the purposes of this case.

MS HOWARD: So, obviously there are two elements to this case, one is the economic regression modelling where you're looking at comparisons of what the prices were charged for the supplies in suit in this case, and what might have been charged in other scenarios, whether that's against non-cartellised products or whether it's against different time periods.

So, there is a tranche of data that relates just to these projection suits, which may have nothing to do with the economic analysis. It may be factual; it may be invoices; it may relate to the negotiations that were going on between the parties both before the tender and after the tender. It may not just be this data dump, as I might call it, of the data that goes into the economic modelling --

MRS JUSTICE JOANNA SMITH: I follow that, but as Ms Abram has pointed out, that is a relatively small percentage of your overall disclosure; is she right about that, one list out of four?

MS HOWARD: That's the end product and that's why I say it's a bit distortive just to look at the number of documents that have been -- and she will say on the other side, of course that's the same process that's happened to her. But obviously, there is a distilling process. We've had the Annex B supplies that

have been -- I think that's been amended eight times so far in the course of this litigation. And at the very early stages, there was hardly any identification about the value of the products -- of the supplies, and so we have had to go back again, similarly to the subsidiaries and different jurisdictions, and try and counter or see what our interpretation of what the value of those supplies were; what the conditions of the tender process was; were there negotiations leading up to the tender or discounts offered after the tender.

So, there has been a similar exercise of distilling the documents that are available in different jurisdictions and going back through archives.

So, you know, we have said we are not expecting it to be parity, because yes, the claimants do have the burden of proof, but I think doing a straightforward analysis of claimants against defendants is not helpful. Indeed it's ironic that leading up through all this debate, the claimants have been saying, "You can't compare our costs with your costs because it's different", and now they're turning round and doing exactly that, and I don't think that's helpful.

We accept that they've had to do extensive researches, but so have we. And I think in terms of the data from the parallel proceedings, it's not just a question of pushing a button and sending that data across, because obviously the data in those disclosure lists were in defined categories, so there has to have been some assessment of whether they fell into those defined categories relating to the VOC, for example, in the overcharge.

So, there has had to be some review to make sure they are falling within the categories and relevant. So, that was my first point.

My second point is we don't think it's appropriate just to do a broad brush and say: this is the total amount of money and you don't have to trouble yourself with

looking at how that is spent between different team members.

We're not taking an issue with the juniors, paralegals, trainees, obviously that's a necessary part of disclosure, but we do take objection to the top-heavy involvement of partners and senior associates. And contrary to my learned friends, we did make this very, very clear in our BDR back on 9 April in 2021.

And if your Lady looks at page 28 of bundle A, you will see in the appropriate section dealing with disclosure that we say, and I'm just going to quote from it --

MRS JUSTICE JOANNA SMITH: I've got it.

MS HOWARD: Four lines down, that “The number of partner and associate hours in particular is excessive” and it's 830 hours. So, we made that very, very clear at an early stage. And if you're just going to apply a broad brush approach and say that's the total pot of money, what's the whole point of preparing these very expensive Precedent H costs budgets, which are supposed to give an accurate and realistic reflection of how you're going to spend that money? It means that whole process is rendered meaningless if you can just turn around and say, "Well, just ignore what we put there and we're just going to deal with a broad brush sum which we can spend as we like".

So, I think kind of detailed arguments of saying, "Oh well, it's so many minutes for a junior or so many for a senior", no, there has to be some accountability.

And my last point is that we don't accept that the senior hours that have been spent, I think it's over 430 hours by a partner and a senior associate, have been spent apparently giving the instructions to the eDisclosure provider. That just does not stack up.

MRS JUSTICE JOANNA SMITH: Yes. Well, I've got some sympathy with you over that, Ms Howard. But that largely affects the incurred costs of course in

relation to this, doesn't it -- you're on mute, I think.

MS HOWARD: Sorry. We do say that the incurred costs reflect the basis on which the anticipated costs are being budgeted, and therefore should be taken into account in deciding whether their estimates for solicitor time costs and experts are appropriate going forward, and we consider them to be excessive for the amount of work that is involved.

MRS JUSTICE JOANNA SMITH: Yes.

MS HOWARD: And I think the problem is, just to conclude, we think there's a sort of assumption that the experts need to see each and every single document, when not all of those documents would be relevant for economic regression modelling. And likewise, the solicitors -- or counsel need to see each and every document, when actually some of them, because they've been reviewed multiple times over, could just go straight to the end, but there is still duplication between the two.

Ruling on disclosure costs (extracted)

MS HOWARD: I'm grateful. Thank you, my Lady.

MRS JUSTICE JOANNA SMITH: Ms Howard, we then go on to experts, I think.

MS HOWARD: That's right. Did you your lady want -- I'm just thinking about the time for the transcript writers. Shall we start now and then we'll take a break -- just so I know how to apportion --

MRS JUSTICE JOANNA SMITH: Shall we take a break at ten to 12, perhaps? Would you like to start?

MS HOWARD: Yes, that's fine. Thank you, my Lady.

MRS JUSTICE JOANNA SMITH: Thank you.

Submissions on experts' costs by MS HOWARD

MS HOWARD: So, the position on experts is covered in our skeleton at paragraphs 30 to 36. The claimants have incurred the £307,633 with the 200,000 that they've already also spent on expert review of disclosure, and they anticipate that a further £1.7 million will be spent, so the total bill for experts in these proceedings will be over £2 million.

MRS JUSTICE JOANNA SMITH: And this is on one expert; is that right?

MS HOWARD: This is on the economic regression modelling, yes.

MRS JUSTICE JOANNA SMITH: Yes.

MS HOWARD: Sorry, we've only got approval for one set of experts.

MRS JUSTICE JOANNA SMITH: Yes.

MS HOWARD: And my Lady, you'll have my position on the value of the claim in comparison. Now, we do accept that the claimants have the burden of proving their case, and we have got an order for sequential reports so that they have to go first.

MRS JUSTICE JOANNA SMITH: And they also have a reply as well, don't they, so you don't have a reply report?

MS HOWARD: That's right, they have a reply. But we don't understand -- I think the supplemental report is estimated at £600,000 and we don't understand the basis for that to be so high in reply.

But we don't understand, even though they have to go first, why there is such a large differential when the claimants' experts have already been instructed in the parallel proceedings. So, Oxera -- there may be different individuals within Oxera, I think there was a different expert who was instructed in National Grid

and Scottish Power, but Mr Noble is instructed, I think, in the Greater Gabbard and the SSE proceedings, and they should have a developed economic regression model from those other proceedings, which they can then populate with the data that's relevant for these proceedings.

And obviously the data that we have disclosed is the same. And my Lady, this is where I wanted to take you to, the new order that's been submitted at tab 12A of the documents.

MRS JUSTICE JOANNA SMITH: Yes, I have that on paper.

MS HOWARD: Because that is the new order for -- in the parallel Greater Gabbard and Scottish Power proceedings -- sorry, in the SSE proceedings. These are on a similar track to those proceedings, and again there's similar data in disclosure. So, they have the benefit of the National Grid and Scottish Power data; they also have the Greater Gabbard and Scottish -- because they're being heard together, the Greater Gabbard and SSE proceedings are being heard together. So, they have those four sets of data and you'll see in the annex that the budgeted costs for expert reports for those proceedings are estimated at -- have been ordered at £500,000.

Now, my learned friend will say, "Well, that's a simpler case, it's only a two-week hearing". Obviously, there are time differences between them, but we still say that shows that there is a vast difference between experts in the other parallel proceedings and the costs there compared to the budget in this case.

MRS JUSTICE JOANNA SMITH: Why are those proceedings only two weeks and these are five? What is it about the expert evidence that is going to make this a much longer trial?

MS HOWARD: So, there are, I think, a larger numbers of supplies in this case, so

there's a total of 275 supplies. Now, we don't know which projects they relate to, whereas the SSE ones are a lower number of projects and they are mainly based in the UK, whereas these -- it's fair that these proceedings do involve more than one jurisdiction. So, yes, there will be more complicated issues, but we do -- given that these are the same experts in both sets of proceedings -- it's Oxera -- we do think that this shows that a bill of £2 million in this case is excessive.

MRS JUSTICE JOANNA SMITH: Yes, and can you remind me what you've offered the claimant in relation to this figure?

MS HOWARD: Yes, it's -- so the latest position is at 34 of my skeleton, so in the BDR we offered experts' fees of £350,000, which will bring them into parity with Prysmian's.

MRS JUSTICE JOANNA SMITH: Yes.

MS HOWARD: And then we've made an allowance -- because solicitors will need to liaise with the experts and counsel as well, we've given an allowance of £92,320 for solicitors and counsel fees of £35,000.

So, I think in total the amount we've offered for expert evidence is £477,320 in the BDR, but that's obviously not been agreed.

MRS JUSTICE JOANNA SMITH: Yes.

MS HOWARD: I'm just going to check whether there's any updates.

So, our concerns with the expert fees is that, again, you know, they've already incurred, I think, £218,000 and they've already -- that's on their report to date. They've already also on top of that had £200,000 for the disclosure phase. And if we have -- we are concerned that there is an element of -- obviously, I can't give you an evidence that there's duplication because we haven't been

given any evidence as to how this money is being allocated, but there does seem to be an excessive amount of time allowed for the production of reports.

We don't know, for example, how many are in the expert teams and how, again, the level of seniority between partners and associates within the expert firm is being allocated.

MRS JUSTICE JOANNA SMITH: Yes.

MS HOWARD: But we do say that this is excessive compared to the costs of the defendants' experts, which is £550,000.

MRS JUSTICE JOANNA SMITH: So, the total spend that the claimant is proposing on experts, the experts' stage, is roughly three times your spend?

MS HOWARD: Yes.

MRS JUSTICE JOANNA SMITH: Yes.

MS HOWARD: And we do accept, before my learned friend jumps back and says, "Well, they've got the harder task and they've got to review all this material from scratch --"

MRS JUSTICE JOANNA SMITH: She will jump back and say all of that.

MS HOWARD: She will, and she'll say they've got the burden of proof and they've got to set out their case first. We do accept -- and that's why we've said, you know, we're not saying it has to be absolute parity, but we do say it has to be kept in proportion and we don't see, for the reasons I gave in my overview, that the differences between the parties justify a charge of this magnitude.

MRS JUSTICE JOANNA SMITH: Yes.

Okay. Well, I wonder whether -- sorry, Ms Howard, was that everything --

MS HOWARD: I don't think I have anything -- I'll come back and reply if there's anything else.

MRS JUSTICE JOANNA SMITH: Well, I wonder whether now would be an appropriate moment just to break for ten minutes. So, it's nearly ten to 12, so shall we rise until 12 o'clock. Thank you very much everybody.

(11.50 am)

(A short break)

(12.00 pm)

MRS JUSTICE JOANNA SMITH: Hello, everyone.

MS ABRAM: Hello.

MRS JUSTICE JOANNA SMITH: Ms Abram?

Submissions on experts' costs by MS ABRAM

MS ABRAM: Thank you. So, the parties' rival positions under this head are summarised at paragraph 28 of my skeleton argument on page 9.

I just want to be clear about the basis on which Prysmian's position is put forward because the express basis in their BDR for putting forward the offers that are listed at paragraph 28 was that it would bring the claimants' costs --

MRS JUSTICE JOANNA SMITH: Parity.

MS ABRAM: Exactly, parity, and Ms Howard has accepted that's not appropriate. And so the question is not whether these are the right estimates because Prysmian concede that they're not, the question is how much higher the appropriate levels ought to be.

MRS JUSTICE JOANNA SMITH: Ms Abram, let me just say, if it helps you, it does seem to me that the costs that you are currently estimating, together with the costs that have been incurred, look very, very substantial by comparison with the defendants'.

And I do understand what you've said about the fact that your experts are not in the same position as the defendants' experts, but two of them have been involved in previous proceedings and I need to hear from you to justify why your costs are going to be so very much more, because at the moment I'm not with you as to the sort of figures you're proposing.

It's all very well having a Rolls Royce service and your client is entitled to pay for that, but at the moment it's not clear why the defendant should have to pay for that in the event that a costs order is obtained against them.

MS ABRAM: I'm very grateful for that indication. So, to cut straight to that chase then, it's common ground that Prysmian have already got an oven-ready analytical approach to assessing overcharges in these cases, because Prysmian have fought some of these cases, either nearly to trial or to an earlier stage, so they already know what their model is.

The claimants, we just don't start with that advantage and we have done our best to save costs by instructing Oxera, but it's important to be clear about the extent to which that does and doesn't give us an advantage.

Mr Noble, our testifying expert, does have, thanks to the other cases, knowledge of the infringement; knowledge of the market; knowledge of some aspects of the regulatory context, although this case is different to some extent because of the number of jurisdictions involved.

Ms Howard came close, I think, in her opening submissions at the beginning of the day to say: well, actually, look, 31(22) and the confidentiality undertakings in other cases --

MRS JUSTICE JOANNA SMITH: Has broken down.

MS ABRAM: -- is sort of a dead letter now. Of course that's not right, that can't be

right because they are matters of mandatory law and they stem from obligations, mandatory obligations, that Mr Noble owes to his other clients in the other cases, which he can't simply just forego in this litigation. And so Mr Noble and his team are rightly scrupulous about those matters and we would expect nothing less.

In terms of the structure of the team, Mr Noble has had some involvement in some of the other cases. One other of his team members has had some involvement in some of the other cases. The thinking there is to harness the efficiencies of knowing about the infringement, and the market context and the matters that may permissibly be matters derived from nonspecific information without risking a breach of confidentiality.

That's, clearly, a matter of the foremost importance. So, in a sense we're not starting from scratch, but we're not starting from far off scratch.

MRS JUSTICE JOANNA SMITH: Well, Ms Howard -- sorry to interrupt -- says you should have developed an economic regression model which you can populate; is that right or not?

MS ABRAM: Well, that model can't be developed on the basis -- can't be simply ported across from another case, because if one thinks about how one develops an economic regression model -- Mr Noble is involved, for instance, in Greater Gabbard, I don't have any knowledge of that case -- but imagine there is an economic regression model that has been developed for Greater Gabbard for use in those proceedings on behalf of that claimant, it would be wholly improper for Mr Noble to say, "Well, I'm just going to take that spreadsheet, it's effectively a big fancy spreadsheet, and bring it across to this litigation with the implied confidential information that it will have about

Greater Gabbard's costs and Greater Gabbard's business, and the disclosure that's been given in those proceedings".

And I discern from Ms Howard's body language that she's unhappy for the point to be characterised in this way, and that is because she shouldn't ever suggest that that should be done in these proceedings because it would, plainly, not be proper.

So, a new model will need to be put together in this case, on the basis that the disclosure given in this case -- and I am not suggesting that it will have nothing in common with the model that may have been used by BritNed's expert, for instance, in BritNed v ABB, in the same way that every competition case there as a degree of commonality in how one assesses overcharge if one uses regression analysis.

So, of course, in that sense, it's useful to have Mr Noble because he's so expert in competition cases, in just the same way as -- he might be expert in the maritime car carriers cartel or the CRT cartel, it's not just this cartel versus no cartel.

So, I'm accepting some advantage, but not a great advantage. And also, it is important to understand that my clients may be facing two distinct overcharge analyses from the defendants because Prysmian have got the right to put in, of course, their own regression analysis, their own approach. And Nexans, the Part 20 defendants, have also got leave to put in expert evidence on overcharge --

MRS JUSTICE JOANNA SMITH: Insofar as it doesn't overlap with Prysmian's, yes.

MS ABRAM: Yes, and in a sense that makes my point because the risk is that one faces two completely different approaches from defendant experts.

MRS JUSTICE JOANNA SMITH: Or they may take the view that they each agree and they don't need much in the way of their own expert evidence.

MS ABRAM: They may, but two points on that, my Lady. First, Nexans fought terrifically hard for leave to put in their own expert evidence, and I don't criticise them for doing so. That was agreed in correspondence before the CMC that was ultimately vacated, but that was a matter of great importance for them.

And second, the Tribunal certainly couldn't safely proceed on the basis of an assumption that Nexans won't be putting in --

MRS JUSTICE JOANNA SMITH: I entirely understand that. How much of your budget is assuming that Nexans will be putting in its own detailed analysis that has to be addressed at some length by your experts?

MS ABRAM: It's not a question of half of the budget. That's -- because that's not how these things work and for a number of reasons, I just want to be clear with the court about that.

Nexans' leave to put in expert evidence relates to overcharge and the other limbs of economic analysis pass on an interest at points on which Prysmian only will be putting in expert evidence. So, I don't want to put the point too high, so it's a substantial chunk but not half of the budget.

MRS JUSTICE JOANNA SMITH: So, a quarter or more?

MS ABRAM: I can't seek to reverse engineer the budgets that the experts have put together.

MRS JUSTICE JOANNA SMITH: Okay.

MS ABRAM: But the feature of sequential exchange is also really important. At the October 2020 CMC, Ms Howard for Prysmian understandably fought very

hard for sequential production of expert evidence on the basis that it would achieve a cost-saving.

Now, of course it does achieve a cost-saving for the defendants because it enables the defendants only to engage with the issues on which they disagree with the claimants, because it means that not everyone has to address all of the issues. It doesn't assume any saving for the claimants because we still need to address all of the issues, and we also have to reply, as my Lady's pointed out --

MRS JUSTICE JOANNA SMITH: Can you just assist me as to -- I'm sorry, I haven't paid attention to this: is there scope for the experts to meet in advance of putting in their report, so potentially they can narrow the issues at this stage rather than only becoming narrowed when the claimants' report is served?

MS ABRAM: Yes. So, there is something of a tortured history of experts holding meetings in the competition cases. In some cases it's helpful and in other cases it's not, and I'll show your Ladyship the order that was eventually made after the hearing before Mr Justice Adam Johnson. It's in bundle A on page 57 of my version, which I think is also 57 of your Ladyship's version.

MRS JUSTICE JOANNA SMITH: I'm just going to have to rotate it.

Yes, so I have that.

MS ABRAM: Paragraph 22.

MRS JUSTICE JOANNA SMITH: Yes:

"Following exchange of the claimants' expert report in reply, the experts shall hold a discussion."

So, there's no direction for experts to hold discussions in advance of reports, for example?

MS ABRAM: There's not, although what there is in this case is some quite clear and quite helpful guidance as to the issues on which expert evidence will be given. So, that's paragraph 20, just the page before.

MRS JUSTICE JOANNA SMITH: Yes. Yes, okay. I mean, I'm not tasked with reviewing the directions that have been imposed on the parties, but it does seem to me that were it the case that you had a direction that required the experts to discuss in advance of any reports being prepared, that might enable the experts to narrow the issues a bit. And certainly -- I sit in the TCC, and that's certainly something we do there as a matter of course. But in any event, that's probably not for today and I don't know the extent to which that's realistic in a competition case. So --

MS ABRAM: I think in some cases more than others, my Lady, and in fact I'm relatively hopeful that the issues will be quite clearly identified in this case because it is, in a sense, a well-trodden path, the cartel's damages case on this type of law.

MRS JUSTICE JOANNA SMITH: Okay.

MS ABRAM: So, just to finish off on the comparison with Prysmian's cost budget. Just one final point to flag. We were surprised by how low Prysmian's cost budget for their experts was, and the reason for that is the experts need to take into account, you've seen it in our skeleton, nine --

MRS JUSTICE JOANNA SMITH: Nine jurisdictions.

MS ABRAM: -- nine regulatory regimes. Some of them are multiple for one jurisdiction. It's an awful lot of material. Of course it's for Prysmian to know whether they've included all those costs, but certainly it seems low to us. So, there may be that factor as well.

MRS JUSTICE JOANNA SMITH: I mean, there is already good authority about the fact that the parties mustn't play games; they mustn't decrease their estimates in order to try and attack the other side's estimate on the basis it's far too high. I mean, Prysmian will be stuck with that budget, and I can only assume that they have carried out a proper analysis in relation to that. So, I'm not, Ms Abram, going to infer that because it's quite low by comparison with yours, that means they haven't done a proper analysis.

MS ABRAM: I'm not at all suggesting they are trying to game the system, that's not my submission, but I'm making the disinterested submission, I suppose, that we were genuinely surprised that this could be done with that amount of money.

MRS JUSTICE JOANNA SMITH: Yes.

MS ABRAM: On GG, the other point that's put against me is the cost of experts in Greater Gabbard and SSE --

MRS JUSTICE JOANNA SMITH: Yes.

MS ABRAM: -- in which £500,000 was approved by Mr Justice Jacobs. There are a lot of differences between that case and this one. I'm only privy to what's available from public information, but that -- as we understand it, that's a UK-only claim, not a five-jurisdiction claim.

As Ms Howard says, there are much fewer purchasers in GG and SSE. That's reflected by the fact it's a two-week hearing. Here, and my Lady may need to hear submissions on this in the trial -- in respect of the trial costs, but our expectation was that the experts alone would be giving evidence for almost two weeks. It's a much lower value case. We think, we understand, that it seems to be together, the two claims are somewhere between 10 and

20 million in GG and SSE. So, for all these reasons, it's just not a helpful point of comparison, we would say.

But that leaves the question of what our costs ought to be, the positive question. Taking the two points in turn, there is the expert costs and then there's the time costs.

So, the expert costs, what I would say about those is that the budget has been prepared after anxious consideration with Oxera, a highly experienced firm of economists. Mr Noble is a highly regarded expert, who is a recurrent name in cases and this Tribunal, and knows what exactly is required for expert evidence. Our budget for expert fees, just putting aside the time costs, is little more than two and a half times Prysmian's equivalent budget.

Now, I say that supports the reasonableness of the claimants' budget when one bears in mind that the claimants have to deal with two sets of defendants' cost cases; the claimants have to go further first and cover all issues, whereas the defendants don't have to do likewise; the claimants have to apply; the claimants and the Tribunal have, essentially, no visibility whatsoever over Nexans' position.

I fear that Ms Howard may have dropped off.

MRS JUSTICE JOANNA SMITH: It does look as if she has. Thank you, Ms Abram, maybe if you just pause there for a moment and we'll see if she can re-join.

COURT CLERK: Just to let you know, we've turned the live stream off for the moment and we're just getting in touch.

MRS JUSTICE JOANNA SMITH: Thank you very much indeed.

MS ABRAM: Hello.

MS HOWARD: Hello, it’s Anneli Howard. Apologies.

MRS JUSTICE JOANNA SMITH: Are you having trouble?

MS HOWARD: I just thought I'd dial back before it is restored.

MRS JUSTICE JOANNA SMITH: Would you like us to pause and wait for it to be restored or are you happy to continue as we are now?

MS HOWARD: I've just got another message -- sorry, I think my internet seems to have dropped, but if we continue on the phone and then I can -- if it restores, I'll join back in on the Teams link.

MRS JUSTICE JOANNA SMITH: Are you sure that you're happy to do it that way?

MS HOWARD: I think so because I don't think we should hold things up.

MRS JUSTICE JOANNA SMITH: All right. Okay.

MS HOWARD: Apologies for this.

MRS JUSTICE JOANNA SMITH: No, no. Well, I don't want you to feel in any way disadvantaged, Ms Howard, but as long as you're content to proceed in that way, then that's probably what we should do.

MS HOWARD: I think that's fine and if it is restores -- it was having problems this morning, but it's quite temporary. I think it's just blippy with maintenance works or something. I will join back on screen as soon as I can when it's restored.

MRS JUSTICE JOANNA SMITH: Okay. Well, let's proceed on that basis.

Ms Abram, just before you start, I just need to turn on the power to my iPad, which is about to run out.

Yes, Ms Abram, I'm so sorry.

MS HOWARD: I may have missed a little of Ms Abrams' argument.

MRS JUSTICE JOANNA SMITH: I was just going to ask her to go back, but tell me where you got to with her submissions.

MS HOWARD: I got to the point where she said the experts were due to give evidence for approximately two weeks.

MRS JUSTICE JOANNA SMITH: Yes. Okay, so in fact I think, Ms Abram, you need to go back to where you started dealing with the reason why the expert costs would be more for your clients because I think that was the next point you came on to make.

MS ABRAM: Yes, that's right. So, I think I was concluding on Greater Gabbard and I was about to say what's our positive position. So, starting with the expert costs as opposed to the time costs, the claimants' budget has been prepared after anxious consideration with Oxera, which is a highly experienced firm of economists, well-practised in acting in cartel damages claims. Mr Noble is a highly regarded expert, who is a recurrent name in cases in this Tribunal; he knows exactly what expert evidence in these cases entails.

So, stepping back and looking at the claimants' experts costs compared to those of Prysmian, our budget is a little more than two and a half times Prysmian's budget just for expert fees, setting aside the time costs.

I say that supports the reasonableness of the claimants' budget. If one bears in mind that the claimant has to deal with two sets of defendant cases, the claimant has to go first and cover all issues, so the defendants won't have to do likewise; the defendants don't have to reply; the claimants do; and the claimants and the Tribunal importantly have got, essentially, no visibility over Nexans' position and what their case will be.

A specific criticism, the only really specific criticism that's made of my expert fees is that our budget at a little over £600,000 for reply reports is too high in proportion to the budget for primary reports.

But of course the reply reports are going to be our first and only opportunity to engage with Prysmian's and Nexans' expert evidence on quantum. We've got no visibility, the Tribunal has no visibility at present over what that will require or how distinct the two cases will be. And so it's appropriate, I say, to work on the basis that it will be a heavy exercise.

That's the expert costs and then moving on to the time costs, now, I note again that Prysmian's offers of time costs are based on their own anticipated time costs for this stage.

Now, it's no wonder that Prysmian don't expect their solicitors or counsel to have to spend a lot of time reviewing Prysmian's expert reviews because they've seen in substance most or all of it before. They got almost to the door of court in the National Grid claim before it settled, and the Greater Gabbard and SSE trial is to be listed to be heard next summer, so about six months before this one.

A fairer comparison actually, if one could draw one, would be the amount of time that Prysmian's solicitors and counsel teams spent on the expert reports in the National Grid cables claim before it settled, but the Tribunal doesn't have that information, so the Tribunal can't draw a straight line between Prysmian's budget and the claimants' budget. One has to try and extract from the comparison meaningful information more indirectly.

So, if one starts with the counsel costs, the claimants' estimate is around £62,000 and that's about 1.8 times the fees which Prysmian expect their counsel team to spend. And that seems wholly proportionate, in my submission, without even taking into account the Prysmian team's greater familiarity with the case because the claimants are going to have to be addressing the cases of

Prysmian and Nexans, so one's in around the same ballpark there.

If one turns to solicitors' time, the claimants' estimates are based on their solicitor team incurring 775 hours on this exercise, and that's about four times the number of hours to be spent by Prysmian's team according to their cost budgets. And bearing in mind that this is the first time that the claimants have litigated these issues against the fifth time for Prysmian, not including the regulatory investigations, and that the claimants also need to regress not Nexans' case, in my submission the relative proportions are entirely credible.

That's all I wanted to say on experts, my Lady, unless I can help further.

MRS JUSTICE JOANNA SMITH: No, that's very helpful, thanks indeed, Ms Abram.

Ms Howard, are you still there?

Submissions in reply on experts' costs by MS HOWARD

MS HOWARD: Yes, I am. Thank you very much. I just had a couple of points in reply, if I may.

MRS JUSTICE JOANNA SMITH: Yes.

MS HOWARD: Thank you. I just wanted to correct a point I made in opening about the involvement of Mr Noble in the other proceedings. I thought he was instructed the on BritNed proceedings, but actually he wasn't, but he was instructed in National Grid and Scottish Power, and he is instructed in Greater Gabbard v SSE, so he is involved in four of the other five parallel proceedings. And his team member, Mr Richard Wang, is also instructed in Greater Gabbard v SSE.

If you need a reference for that, it's our same letter at tab 113 of the bundle of 14 May, and it's at page 45 of bundle C.

So, their experts are involved in four out of the five, and therefore we do think that even though the precise details of the economic modelling may not have been fine-tuned at this stage, there will be a developed methodology because of the learning from those previous cases as to how to approach the level of overcharge and pass on, and dealing with the regulatory regimes. And we think what is also important is that this case relates both to underground and submarine cables, and so there are overlaps between these proceedings and those other proceedings, so the methodology will be set out already for both submarine and underground cables.

The second point I wanted to make is on sequential reports, and my learned friend said there was absolutely no cost savings for the claimants; it was purely a cost saving for the defendant. That is not the case. The reason why Mr Justice Trower awarded sequential reports was because we were led by the experience that had happened in the BritNed proceedings where there were simultaneous exchange of reports, which then resulted in a catastrophe at the joint experts' meeting and in the joint statement of experts.

And when it actually came to trial in BritNed, the court remarked that the experts -- it was a very unsatisfactory situation because the experts had not had time to agree or disagree. And by the time it came to trial, there was still no clear statement as to what they agreed or disagreed with.

So the cost savings, it may not be in that initial level of the report, but certainly for the joint meeting and the joint statement, and indeed in the preparation to trial, there should be considerable cost savings for both parties, not just the defendants.

MRS JUSTICE JOANNA SMITH: Yes.

MS HOWARD: My third point was on the, apparently, low costs of the defendants' experts. Now, that is based on our experience of the National Grid proceedings and Scottish Power proceedings, which as my learned friend said, settled literally as they started trial. So, they had incurred the costs on those cases on their expert reports. They're also budgeting and incurring costs on the parallel Greater Gabbard v SSE reports, and so that cost estimate is an accurate and realistic estimate based on their experience in the other proceedings.

But it's also been conditioned by the streamlined process we've taken to both disclosure and the sequential report, which is also to the claimants' benefit as well.

Then the last point that I wanted to make was on the Nexans involvement because obviously, as my learned friend has said, they are allowed to put in evidence relating to the overcharge, but we do not expect that to be in the same degree as the Prysmian evidence, because obviously they are participating in the proceedings as a Part 20 party, as an additional claimant, and it's really to protect their interests in the follow-on Part 20 proceedings, contribution proceedings, so they are not appearing as a co-defendant as such, and their involvement is limited to their supplies.

So, just to help your Ladyship, Nexans has been attributed with 56 out of the 275 supplies in suit, and I think there are nine supplies under the umbrella context supplies. So, it's a much more limited range of projects that Nexans will be dealing with in their expert evidence, and obviously limited only to overcharge.

So, to conclude, we say that we still consider that the time costs of the experts of the total of £1.7 million is excessive and is not just -- even though there is a

disparity with the parties and the tasks they need to do, as my learned friend argued, this is a well-trodden part, and that's not just in the competition proceedings but also in this particular Commission decision, with there being so many parallel proceedings that Oxera has been involved with all of them and has had oversight of them all, we consider that does not justify the experts' bill of £1.7 million and nor does it justify the solicitors' time cost of 570 hours.

And we consider that the offer we've made in our BDR is reasonable, especially in light of the fact that their experts have already incurred £427,000 in preparation of their reports and on disclosure already, and we don't consider that a further heavy outlay is justified.

MRS JUSTICE JOANNA SMITH: Thank you very much indeed, Ms Howard.

MS HOWARD: Thank you. I apologise for the remote delivery.

MRS JUSTICE JOANNA SMITH: No, no, not at all. It's always very difficult, so you're doing very well. Thank you.

Ruling on experts costs (Extracted)

MS HOWARD: I'm grateful. My Lady, can I just clarify if the £1 million is in total, or is that confined just to the experts or does that include --

MRS JUSTICE JOANNA SMITH: That includes the solicitors and counsels' time as well.

MS HOWARD: I'm grateful.

MRS JUSTICE JOANNA SMITH: So, effectively I'm allowing a further £1 million for solicitors, experts and counsel fees.

Right, Ms Howard, this takes us then to the trial, doesn't it?

Submissions on trial costs by MS HOWARD

MS HOWARD: Yes, it does. I would hope to deal with this point quite briefly.

MRS JUSTICE JOANNA SMITH: Yes.

MS HOWARD: And you'll see that I've set out my arguments in my skeleton --

MRS JUSTICE JOANNA SMITH: Yes.

MS HOWARD: -- at paragraphs 37 to 40.

MRS JUSTICE JOANNA SMITH: Yes, and I've got this onboard. We have a situation where we have a large number of solicitors all attending for ten hours every day for five weeks, by comparison with your rather more staged approach on a rota basis.

MS HOWARD: That's correct. I mean, most heavy trial litigation, especially when there's live transcripts, it's very unusual to have partners sitting there for the whole of the time and all the associates often, because they need to be doing things in the background anyway back in the office to help prepare for the case overnight.

So, we just think that there's no justification for having five earners attending for over 1,120 hours for £465,000. And we think by contrast, given that we're litigating the same issues, the claimants' approach, where they've adopted a rota for half of that amount of time and half of the budget is much more proportionate.

MRS JUSTICE JOANNA SMITH: Yes. So, just help me with what the -- the claimants' proposing a budget of in total -- I'm just trying to find the figures, I'm sorry, Ms Howard.

MS HOWARD: I've got this on a little spreadsheet. I think it's £872,000 for trial.

MRS JUSTICE JOANNA SMITH: And the offer that you have made to them?

MS HOWARD: We've made an offer of solicitors' fees of £307,500, and we've just said: look, have the same amount for the experts to attend of £50,000 as we have and we should try and sort out an agreed number of days that the experts should attend trial, as they don't need to be there for all of it.

MRS JUSTICE JOANNA SMITH: They certainly don't.

MS HOWARD: They only need to be there for bits that are relevant to the evidence they're going to give.

MRS JUSTICE JOANNA SMITH: Yes, it's been suggested by Mr Abram that the expert evidence may last for two weeks.

MS HOWARD: Yes.

MRS JUSTICE JOANNA SMITH: But that's something that, obviously, needs to be agreed between the parties.

MS HOWARD: I don't think we've had a chance to agree that yet.

MRS JUSTICE JOANNA SMITH: I understand, but I can certainly see no reason for the experts to be over and above the time that is being spent for the expert evidence.

MS HOWARD: That should be right because most of the witness evidence will be factual and --

MRS JUSTICE JOANNA SMITH: Well, they can read it in the transcript if they're interested.

MS HOWARD: And there will be Livenotes anyway, so --

MRS JUSTICE JOANNA SMITH: Yes. All right, so your offer as against the £872,000 is what, just over £350,000?

MS HOWARD: £50,000, yes.

MRS JUSTICE JOANNA SMITH: Yes. Okay. Thank you.

Ms Howard, was there anything else you wanted to say about that?

MS HOWARD: No, not at this stage, thank you.

MRS JUSTICE JOANNA SMITH: Okay. Ms Abram.

Submissions on trial costs by MS ABRAM

MS ABRAM: It if I may, I'll break down the two particular figures that are in dispute because most of the trial costs are actually agreed. So, the two disputes are solicitors' hours on the trial. We seek about £487,000 for that; Prysmian offer £307,000.

MRS JUSTICE JOANNA SMITH: Right.

MS ABRAM: That's the first dispute. The second one, the expert fees, Prysmian offer £50,000; we seek £61,000. So, that's a very small differential.

So, on solicitors' costs, the question about whether the four solicitors are going to be at the trial all day is a side show. The question is whether this trial will occupy four solicitors for ten hours a day. So, it doesn't really matter whether they'll be sitting in the trial for six hours a day or doing other bits of work.

And in my submission, and with the benefit of experience of doing these cases, it's clearly the case that this five-week trial is going to occupy four people full time. It will require substantial input during the trial period. There'll be bundles; there'll be correspondence; they'll be advising the client; supporting the work of counsel; finding documents; assisting witnesses; liaising with the experts, and so on and so on.

MRS JUSTICE JOANNA SMITH: I don't have difficulty with that in relation to, for example, the senior associate or the associate, who may well be doing all those things. I have rather more difficulty with it about the partner because it's

not clear to me that a partner is going to be spending ten hours a day on a five-week trial.

MS ABRAM: Yes. I take that point, my Lady, although on the other point there may be late nights and weekend work, so it's not --

MRS JUSTICE JOANNA SMITH: Of course, it's swings and roundabouts to a certain extent.

MS ABRAM: It is, to some extent. Of course it's really difficult to know now how much time will be spent. If one looks at Prysmian's estimate as the yardstick, Prysmian has budgeted for about two-thirds of the number of hours of solicitors' attendance compared to the claimants, and I would say it's perfectly plausible that the claimants will reasonably and proportionately require one and a half times the amount of solicitor attendance of Prysmian, given that the claimants will be dealing with two cases against them. So, if one looks at it by reference to Prysmian's hours, I say that our overall hours are reasonable, and certainly they shouldn't be knocked down from £487,000, which is the cost implication, to £307,000.

The experts' costs is a very narrow dispute. We have estimated our expert's costs of trial based on the idea the experts will be there for eight or nine days and will be cross-examined for that time. Prysmian say it should be £50,000, but they haven't actually said how many days that relates to and so the Tribunal is somewhat fighting in the dark because you have an estimate from me and no corresponding estimate from Prysmian.

Of course, if they say, "Well, we're only going to want to cross-examine Mr Noble for a day", then his estimate will be commensurately decreased. But I note that Mrs Howard hasn't made that submission, so in my submission, it's a small

gap and we've based our estimate on some actual workings which my Lady can see, so I ask your Ladyship to approve that estimate.

MRS JUSTICE JOANNA SMITH: Ms Howard, do you want to reply to that?

Submissions in reply on trial costs by MS HOWARD

MS HOWARD: Just very quickly. Sorry, I'm just taking instructions.

MRS JUSTICE JOANNA SMITH: Yes.

MS HOWARD: Yes, my Lady, obviously you're focusing in on the parts that are not agreed by the parties today, but obviously large chunks have been agreed and one of those is trial preparation where the parties have agreed £1.25 million for the claimants' costs. And so we consider that a lot of the issues of attending on witnesses and dealing with documents should also be covered in that trial preparation phase. We still don't see that, particularly the partners and senior associates, need to be fully occupied for ten hours a day for five weeks because a lot of that prep should already have been done.

The second point that my learned friend made was that they're effectively dealing with two claims at once. We don't accept that the Prysmian defendants can simply sit by and ignore the Nexans element of the trial because obviously there is a concept of joint and several liability in competition law and for the main claim it will be the Prysmian defendants that bear the primary liability and then they have to recover it against the Nexans defendants in the Part 20.

MRS JUSTICE JOANNA SMITH: Yes.

MS HOWARD: So obviously they do need to defend their interests if there is any conflict between Prysmian and Nexans at trial and to deal with that, so they are effectively dealing with two claims as well and we don't think that point

justifies the differential between the parties.

We would simply reiterate that, you know, the parties are under a duty to try and conduct these proceedings in a proportionate manner that saves unnecessary expense and we don't consider particularly the senior involvement for ten hours a day, particularly for a partner who will be dealing with other matters at the same time is justified.

Ruling on trial costs (Extracted)

Submissions on counsels' fees by MS ABRAM

MS ABRAM: I'm very grateful. I think on the last issue it's me that goes first, because it's a question of Prysmian's costs. So, as my Lady's seen, that is Prysmian's proposed costs of brief fees and refreshers for trial.

MRS JUSTICE JOANNA SMITH: Yes.

MS ABRAM: The position as summarised in our skeleton argument, page 11, the table under paragraph 37, I'm sorry, there's a mistake in this table. The fees for the refreshers are the wrong way round. So it should say that the claimants' refreshers are £282,000 and Prysmian's are £309,000. So I'm sorry about that.

MRS JUSTICE JOANNA SMITH: That's all right.

MS ABRAM: Thank you.

So, my Lady, you'll see that the total of Prysmian's brief fees for trial are about a million pounds more than Vattenfall's equivalent figures and the main driver of that difference is the brief fee for leading counsel. So you'll see, madam, that my learned leader's brief fee is a little over £300,000 and that of

Ms Davies is over £1.5 million.

Now, of course Prysmian are entitled to instruct whomever they see fit at whatever price they're prepared to pay and of course Ms Davies, who is a complete star of the English Bar, is entitled to charge whatever the market will bear but it doesn't follow that those costs are reasonable or proportionate for the purposes of assessing the costs that my clients might be required to pay if Prysmian were to win.

There's authority on this question, so I should show your Ladyship the case. It's just an example of many cases that hold the same thing. It's at authorities bundle-tab 3 and the page I want in the bundle, if that's the easier way to go to it, is page 94.

MRS JUSTICE JOANNA SMITH: Yes, I have it.

MS ABRAM: So this is a ruling on costs in the Deutsche Bank v Sebastian Holdings litigation. It's a ruling of Master Gordon-Saker which applies pre-existing case law. The facts don't really matter but, just for the context, the claimant had won a trial, the claimant had been awarded their costs and an issue arose regarding the reasonableness of their counsels' brief fees.

The relevant passage starts at paragraph 57 on that page. So if I could just ask your Ladyship to read paragraph 57.

MRS JUSTICE JOANNA SMITH: Certainly.

MS ABRAM: Thank you.

MRS JUSTICE JOANNA SMITH: Yes.

MS ABRAM: And if you cast your eye down to paragraph 59, just to complete the point, the learned master endorses the test that's been set out since 1964.

MRS JUSTICE JOANNA SMITH: Yes.

MS ABRAM: So in my submission Prysmian's costs for counsels' brief fee and refreshers should be limited to those agreed by the claimants. That would still be more than £1.1 million. It's ample for a two counsel team for a five week trial.

I'd make three specific points about what's reasonable.

MRS JUSTICE JOANNA SMITH: So when you say to those agreed by the claimants, you're suggesting effectively that I should limit it to the same figures that you've agreed for your counsels' fees?

MS ABRAM: Yes, the £875,000 plus £282,000. Yes.

MRS JUSTICE JOANNA SMITH: Yes.

MS ABRAM: So for three reasons. First, Mr Robertson's brief fee is a good guide for the Tribunal to what costs it's reasonable for Prysmian to incur on leading counsel. Mr Robertson, is, as you'll be aware, one of the foremost English competition silks. His brief fee is about a quarter that of Ms Davies and that demonstrates that Prysmian could reasonably be represented at trial with very high quality expert representation at a far lower price in the terms of Master Gordon-Saker in the Vik case.

MRS JUSTICE JOANNA SMITH: Yes.

MS ABRAM: Second, Ms Howard is herself in silk. She is an immensely experienced competition practitioner of nearly 20 years call. She was previously a solicitor. She could plainly conduct the trial as lead advocate for Prysmian. Her brief fee is a little over £300,000, so it's commensurate with mine and in the same ballpark, provides a good indicator as to the level that's reasonable. Third, our proposal that Prysmian's allowable counsel fees should be at the same level as our own equivalent fees is generous because

of this point that we will need at trial to advance our own case and address two opposing cases whereas Prysmian will only have one opposing group, so it's to be expected that the claimants' counsel team will be more heavily occupied in the run up to and at the trial than Prysmian's counsel.

MRS JUSTICE JOANNA SMITH: Thank you very much, Ms Abram Ms Howard?

Submissions on counsels' fees by MS HOWARD

MS HOWARD: Thank you. I just have four points to make on our fees.

Firstly, I would reiterate that sauce of goose and gander applies with the Rolls Royce element. If the claimants wanted to instruct their Rolls Royce experts then similarly obviously the Prysmian defendants are allowed to instruct their choice of counsel --

MRS JUSTICE JOANNA SMITH: And nobody's suggesting otherwise.

MS HOWARD: I know but --

MRS JUSTICE JOANNA SMITH: The question is whether the other side should be paying for it.

MS HOWARD: That's right and I've got four points to justify that. Firstly we have taken a decision to have a smaller counsel team, so we have one silk and one junior rather than the two juniors that the claimants have.

I never thought I would apologise for taking silk but my role has not changed in that I'm still acting as a junior to Ms Davies and in fact I haven't changed my charge out rate. So my rates I'm pleased to say present eminent good value for money, they are commensurate to the claimants' senior/junior and I expect I'll be doing the work --

MRS JUSTICE JOANNA SMITH: I don't anticipate that it's your rates that are the

problem, Ms Howard.

MS HOWARD: But I anticipate that, as a result of having one junior rather than two, we will be allocating work between ourselves, between myself and Ms Davies, so that she would be taking on probably a larger role than she would as a leading -- because of not having a second junior.

The second point is obviously that we have both been instructed --

MRS JUSTICE JOANNA SMITH: A second junior would have been an enormous amount cheaper than asking her to do all sorts of things she might not ordinarily do.

MS HOWARD: Well, it's not that, it's the costs of getting somebody else to read up and get into this case, particularly when there are parallels between this case and the other four sets of proceedings. So obviously Ms Davies and myself have been instructed in National Grid and Scottish Power and the Greater Gabbard and Greater Gabbard and SSE is still ongoing, so there are parallels between the two and we need to ensure there's continuity and consistency between those sets of proceedings and in view of that it's not worth paying new counsel to read in when we are familiar with those issues.

We also submit that it reflects the allocation of tasks between counsel and solicitors in our case. Obviously we've had a lower estimate for solicitors in preparation for trial and attendance at trial and that's because counsel will be involved and lastly I would repeat the point I made about the Nexans litigation. My learned friend says they've got to address two claims at the same time. Well, obviously we also have to address the Nexans issues insofar as they impact on our joint and several liability and the relationship between the main claim and the part 20 contribution proceedings.

MRS JUSTICE JOANNA SMITH: Yes. Ms Abram, did you want to reply to that?

MS ABRAM: Nothing by way of reply.

Ruling on counsels' fees(Extracted)

MS ABRAM: I am very grateful. That's as to both brief fees and refreshers, as I understand it.

MRS JUSTICE JOANNA SMITH: Yes.

MS ABRAM: I'm very grateful.

MRS JUSTICE JOANNA SMITH: Is there anything else that we need to deal with? No.

MS HOWARD: Thank you very much. We'll draw the order up for you.

MRS JUSTICE JOANNA SMITH: Yes, if you could draw up the order and obviously you'll need to resubmit the costs budgets so that they reflect the revised figures that I have identified. That would be very much appreciated and thank you both very much indeed for your very helpful submissions, both in your skeletons and orally today and, Ms Howard, I'm very pleased to see that you were able to at least to get back towards the end.

MS HOWARD: Thank you for bearing with me.

MRS JUSTICE JOANNA SMITH: Not at all. All right. Thank you very much indeed everyone.

MS ABRAM: Thank you.

MRS JUSTICE JOANNA SMITH: Good morning.

(12.53 pm)

(Hearing concluded)