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5 **IN THE COMPETITION**

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

6 **APPEAL**

7 **TRIBUNAL**

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

13 Friday 26 November 2021

14
15 Before:
16 The Honourable Mr Justice Jacobs
17 (Chairman)
18 Professor John Cubbin
19 Eamon Doran

20
21 (Sitting as a Tribunal in England and Wales)

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25
26 **BETWEEN:**

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28 Stellantis N.V. (formerly Fiat Chrysler Automobiles N.V.) & Others

Claimants

29
30 v

31
32 NTN Corporation & Others

Defendants

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34
35
36 **A P P E A R A N C E S**

37
38 Phillip Woolfe (instructed by Willkie Farr & Gallagher (UK) LLP appeared on behalf of the
39 Claimants)

40 Robert O'Donoghue QC (instructed by White & Case LLP appeared on behalf of the
41 Defendants)

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Friday 26 November 2021

(10.30 am)

(Proceedings delayed)

(10.43 am)

THE CHAIRMAN: Right. The live stream is on, is it?

MR O'DONOGHUE: Sir, yes, it is.

Housekeeping

THE CHAIRMAN: Good morning, everybody, sorry for the short delay, I think there were some technical problems at counsel's end somewhere.

These proceedings are being live streamed, and of course a number of people are joining on the Microsoft Teams platform. I must therefore start 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, where the Tribunal is actually sitting. An official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anybody else to make an unauthorised recording, whether audio or visual, of the proceedings and a breach of that provision is punishable as a contempt of court.

Let me start by thanking the parties for their written arguments and for narrowing to some extent the issues which arise.

I think it may be helpful, unless either counsel wishes to stop me at this stage, just to tell you what the Tribunal is thinking in relation to the timetabling issues. Then you can make whatever points you want if you're unhappy with what our provisional views are.

1 Let's leave aside questions of confidentiality -- I am not sure that necessarily
2 arises -- and let's leave aside the point about the joint experts' statement and
3 the supplemental report and the arguments around that.

4 Just looking at the timetabling issues, first of all, as far as the appeal is concerned,
5 and its impact on the trial, at the moment there's nothing for the Tribunal to say,
6 really, or to decide.

7 I think we can give an indication that if the Court of Appeal were to allow permission
8 to appeal and then to reverse our decision taken in the summer, a question
9 would arise, potentially, as to what happens to the January hearing. I think it's
10 fair to say that we will need a certain amount of persuasion that the January
11 hearing should not go ahead anyway, because it seems to us that there are all
12 the issues in the case, which are unrelated to the question of mitigation by cost
13 reduction, which is the subject of the appeal.

14 I don't ask anybody to address us on that now because it's all, at the moment,
15 academic. If there is going to be an application to adjourn in the light of
16 whatever the Court of Appeal says, we'll deal with that then. So I don't think
17 that debate is worth having.

18 Secondly, just as far as the timetable is concerned, obviously the case has narrowed
19 to some extent and you are not really vastly in disagreement as to timetabling
20 how long it's going to take. A couple of points the Tribunal would mention.

21 First of all, hot tubbing of experts.

22 What we think is this: we think that, in the first instance, both counsel should be
23 allowed to cross-examine the experts as they think fit, in the usual way, for the
24 one to two days that you've estimated.

25 It may well be that, when that has finished, the Tribunal would like to have some time
26 to do some hot tubbing with the experts, once it's understood what the experts

1 are saying, what the areas of dispute are. The Tribunal might need a little bit
2 of time to get its thoughts together on precisely what it's going to ask, so it may
3 be that we don't go straight into that after cross-examination has finished.

4 We will, I think, probably, mentally at least, build that idea that we will have, perhaps,
5 half a day or a day, including a bit of time for the Tribunal, for hot tubbing at the
6 end of the ordinary cross-examination.

7 As far as start date is concerned, can I just explain one thing. The Tribunal would
8 actually -- at least I would -- be grateful if we could start on the Wednesday of
9 the week beginning the 17th.

10 The reason is I have a case in the Commercial Court which has had to adjourn for
11 various reasons and we will not finish the evidence in that case until the end of
12 term now. The best dates to do closing submissions in that case would be 17
13 and 18th. That would mean losing a couple of days from our case, but the
14 Tribunal could make up that time on the first Friday, so we could start on the
15 Wednesday and sit on the Friday of that week. I know Mr O'Donoghue wants
16 to start the following week and he can address me on that.

17 That would be to some extent a compromise between the positions of the parties and
18 it would suit me if that is possible. I think there is enough time that we have in
19 this case to finish it within the four weeks or the five weeks and the Tribunal
20 could, if necessary, make itself available on other Fridays, not every other
21 Friday, but if there was a shortage of time for some reason we could use
22 a Friday which we're not using at the moment.

23 The length of skeleton arguments and timing. We don't at the moment have a view as
24 to timing of the skeletons. I mean, I can see, and I haven't discussed this with
25 my colleagues, that there may be something to be said in view of the fact you
26 are going to be in the Court of Appeal, to give you a little bit more time to do the

1 skeletons, but whether it's before Christmas or whatever, you can address us
2 on.

3 As far as length is concerned, we would be happy to give you 30 pages,
4 Mr O'Donoghue, I don't think we are very keen on anything much longer, no
5 doubt if we gave you more pages you would occupy them. Equally, if we gave
6 you fewer pages you would be more succinct.

7 Bearing in mind you will have a chance on the current timetable to put in some closing
8 submissions as well. I think a combination of 30-pages opening and however
9 long we ultimately decide for closing should be sufficient.

10 But you can address me -- both counsel can address us on all of these points in due
11 course.

12 We don't have any view at all on Opus versus Epiq, I don't think you need us to resolve
13 that, I would have thought you were capable of resolving that; we don't have
14 any views on that. Epiq, I have not had, I don't think, as a document
15 management platform. I have certainly had Opus, and they are certainly
16 satisfactory, and I have certainly had Epiq doing transcripts of hearing and they
17 are satisfactory too, so we don't have any views on that. If you need us to help
18 on that, we will obviously try to, but I don't think you really need us to.

19 On timetabling, the request for simultaneous translation of the evidence of Mr Linati,
20 the defendants' witness. We are very, very unkeen on simultaneous translation
21 indeed.

22 What you can do, Mr O'Donoghue, if you really want to, is to have a translator who is
23 on standby, in the sense that the witness can give evidence and, if there's some
24 particular problem, on a question or explaining how he wishes to answer it, he
25 can call on the services of the translator. I mean, this happens all the time in
26 Commercial Court cases with witnesses who speak English perfectly well and

1 we have interpreters on standby, who earn their money and say nothing during
2 the entire day.

3 I am dubious as to whether it's necessary to have any of these people at all, but given
4 that Mr Linati gives his witness statement in English, and obviously he does
5 speak English, he could, I think for the benefit of everybody, give his evidence
6 in English, and if there's a problem, call on the services of a translator if NTN
7 want to have one available.

8 Witness sources. I think this isn't a timetabling issue but I think, Mr Woolfe, it would
9 be helpful if your witnesses were to say who they had spoken to and to explain
10 what their positions are before the case starts. I think there is quite
11 a reasonable argument which Mr O'Donoghue has put forward in support of
12 that and I think it would shorten the hearing and put people in the position where
13 they know what the factual position is. But you can address me on that. But
14 that was our view on that.

15 I think hearing bundles, Mr Woolfe, if you can tell us when those are going to be ready,
16 whether they can be accelerated a little bit? But we don't have a strong view
17 about that.

18 So I have done a lot of talking, but it may shorten the arguments and you can decide
19 what points you really want to make and try and persuade us that any
20 provisional views I have expressed should be changed.

21 Mr Woolfe, do you want to go first?

22

23 **Submissions**

24 **MR WOOLFE:** Thank you, Sir.

25 You won't be surprised to hear on the appeal we have nothing to add, we entirely
26 would support the provisional view that you have expressed, Sir, for the

1 reasons, essentially, that you have given.

2 On the timetabling issue, essentially I think that would involve -- we can reallocate the
3 timetable to the date when we know the sitting date. We have no trouble with
4 starting on the first Wednesday, as you say, and I think we mentioned the
5 possibility of building in that time for concurrent evidence.

6 I think my learned friend has indicated he won't need as much time for the witnesses
7 as we had allowed, a day less I think than we had allowed. We can therefore
8 take out a day of his cross-examination time, build in a day of concurrent
9 evidence. I think that just finishes within four weeks.

10 Seeing as we are starting a couple of days late, we will catch up one day. We would
11 suggest the current five-week window is maintained, thus that if it needs to spill
12 into the fifth week the whole trial does not get disrupted.

13 Having a hard stop when it's unnecessary to do so, we think would be unhelpful.

14 That's our submission on timetable.

15 As regards the length of skeletons, we entirely endorse the Tribunal's position. It
16 struck us that, in a sense, it's either short, succinct skeletons that we would like,
17 which would help the Tribunal sort of boil down the issues, or much longer
18 written submissions. We think 50 pages rather falls between the two, so we
19 are perfectly happy with 30 pages Sir.

20 I do not think you want to decide the length of written closings now, but we would
21 suggest that those would need to be more substantial to fit the evidence, but
22 we can address that when we come to trial.

23 As regards simultaneous translation, I was going to say exactly what you said, Sir,
24 which is simultaneous translation is very disruptive and undesirable because
25 the witness is listening to somebody else other than counsel. It wasn't
26 explained whether or not Mr Linati would also be speaking in Italian, having that

1 simultaneously translated for the Tribunal and counsel. If that is the case,
2 there's a significant barrier between the witness and the court.

3 If it wasn't being translated, it's unclear why he would need translation of the questions
4 but not to speak, which is very confusing, because, normally speaking, people
5 can listen better in a foreign language than they can speak it, because it's easier
6 to do so.

7 We would endorse the Tribunal's sort of practical approach of having a translator on
8 standby if it is necessary. However, if it is necessary and Mr Linati does
9 struggle in English, then we would want an explanation of how he came to give
10 his witness statement in English.

11 Finally, on the witness sources point, we have heard what the Tribunal has said. We
12 can provide that information. We would suggest we need a little bit of time just
13 to pull it together by paragraphs so that it can be done robustly. The point was
14 raised relatively late on in the process, so we need some time to do that, Sir.

15 As regards bundles, as you said, I think the existing date should remain. Both sides
16 have an interest in getting these -- both counsel, anyway, have an interest in
17 getting bundles as swiftly as possible. In a sense if we all make best
18 endeavours to get them done as soon as we can, that should be satisfactory.

19 On the final point, Opus, that's actually agreed. We have now agreed to use Opus.
20 I can fill you in on exactly what they are providing if you want the information.

21 **THE CHAIRMAN:** You can tell us in brief summary if you want.

22 What about dates for skeletons?

23 **MR WOOLFE:** We would prefer the skeletons come before Christmas, a day or two
24 extra we're perfectly happy with, but we think it better for the parties to be
25 preparing after Christmas with full sight of each other's cases, as set out and
26 boiled down in the skeleton argument, and, if they're short, it shouldn't be

1 a problem to do them before Christmas.

2 **THE CHAIRMAN:** The current date is the 17th; is that right?

3 **MR O'DONOGHUE:** That's correct.

4 **THE CHAIRMAN:** Before Christmas, so that could be, what, 23rd or something like
5 that?

6 **MR WOOLFE:** The last day of term is the 21st, Sir, so 21st or 22nd, sometime around
7 then would be sensible, we think, Sir.

8 **THE CHAIRMAN:** Okay.

9 Mr O'Donoghue, do you want to address us on any points that you still feel strongly
10 about?

11 **MR O'DONOGHUE:** Sir, I don't have a lot to add, you will be glad to hear. On the
12 appeal, I agree there isn't much point having a hypothetical debate, so I am not
13 going to go to that.

14 In terms of the start date of trial and the timetable, things have moved on in two
15 respects. First of all, in the light, Sir, of your indication that you would like to
16 start on the 19th, there's a halfway house between what we were originally
17 seeking and the start date we propose. We are certainly content with that.

18 Our main difficulty, Sir, as you will have apprehended, is skeletons, because with the
19 Court of Appeal hearing on 14 December and skeletons coming three days
20 later, we particularly, as appellant in that case, will be heavily fighting on two
21 fronts.

22 Sir, as you will recall from practice, the last few days before skeletons are lodged tend
23 to be pretty frenetic, so we think on any view the 17th is completely unworkable
24 and -- not only causes a lot of brutality, but actually will not help, ultimately, the
25 Tribunal because the end product, I suspect, will be less good than had we had
26 more attention to devote to the skeletons.

1 So we certainly suggest that the date should be shifted.

2 We would have a strong preference that these are lodged on 10 January. That would
3 be our primary position, essentially for the reason I have given.

4 There's quite a lot to digest and we will be substantially diverted by this appeal and,
5 as appellants, we will have to take the lead in many respects, and that will divert
6 us from trial preparations with the best will in the world.

7 If, Sir, you are not persuaded of that, we would suggest 23 December as an
8 alternative.

9 Then, Sir, on trial bundles, again, it's one of the disconnects between counsel and the
10 law firms that the counsel obsess about trial bundles and often the law firms do
11 not quite understand what all the fuss is about.

12 You will recall from experience that having to mark up references twice, in the absence
13 of a bundle, and not actually have the material arranged in a proper way, is
14 extremely disadvantageous and inefficient in terms of preparation. We have
15 suggested this trial bundle needs to be ready a week today, 3 December. We
16 were sent the index -- yesterday, I think -- we've already sent two letters
17 commenting on the index. From our perspective, we would be very surprised
18 and disappointed if the trial bundle, at least in electronic form, cannot be ready
19 for a week today. We would seek a direction to that effect.

20 Sir, I am in your hands. If I can wrap up the various issues, then Mr Woolfe can
21 respond if he needs to.

22 **THE CHAIRMAN:** Yes.

23 **MR O'DONOGHUE:** On sources, we did raise this point a number of weeks ago -- we
24 say this is a legal requirement that should have been complied with at the time
25 the statement was served. The information on the source is important because
26 we will then have to go back to our witness, particularly Mr Linati, and verify the

1 sources with him and have a further discussion with him as to who exactly are
2 these people and are they the right people. That will all take time, so we would
3 seek an order that that is provided pretty promptly. We say seven days.

4 If Mr Woolfe needs more, he can make his case, but this is information that, first of all,
5 should be readily available to hand and, second, should have been provided
6 weeks ago.

7 In my respectful submission, at this stage, having dragged their heels, the claimants
8 are not entitled to any indulgence from the Tribunal. Indeed, at one stage we
9 were told a couple of weeks ago that this would be resolved by the time of this
10 pre-trial hearing. Then, effectively, there was a volte face which says we are
11 now sticking to our original position.

12 This is something which has been at the very least well in contemplation within the
13 claimants for some time and they need to get on with this and get us the
14 information. It cannot be difficult to locate this information and, in a sense, if
15 they cannot locate the information quickly it's rather troubling because Mr Aceto
16 says in both statements, and Ms Biancheri, "I have spoken to [various]
17 colleagues", and he must know who these people are because he says he
18 spoke to them.

19 There shouldn't be any great mystery to this, and to some extent it is concerning that
20 this issue still is live at this stage, it should have been resolved weeks ago. We
21 would suggest very little indulgence at this stage on that particular issue.

22 So Opus was our proposal. If they're content with that, we're in agreement.

23 On hot tubbing, obviously that is a matter for the Tribunal. It may cause some
24 additional trial time, so be it, we have plenty of slack in the current timetable to
25 accommodate concurrent evidence. If we need to spill into Week 5, well that
26 can be done, we're all available. We still think we can finish in four weeks, we

1 will try to do so, but there is slack at the back end to deal with any spill over.

2 Sir, I think those are the essential points on the issues you have raised.

3 **THE CHAIRMAN:** Right.

4 Mr O'Donoghue, you're happy to sit on the first Friday, which would involve you
5 cross-examining the witnesses -- or the claimant's --

6 **MR O'DONOGHUE:** Sir, yes, if we have to sit on certain Fridays, we can certainly
7 deal with that.

8 **THE CHAIRMAN:** On the current timetable, that would be in the first week, you would
9 have done openings and probably finished the claimant's evidence. We would,
10 in a sense, have caught up, even though we had lost the first couple of days?

11 **MR O'DONOGHUE:** Sir, yes, we could do that.

12 I would be ready, Sir, if that's your question.

13 **THE CHAIRMAN:** Good, let's proceed on that basis.

14 Mr Woolfe, do you want to say anything? There's not very much between you actually.

15 I do not think we want to hear submissions about dates for skeletons, the
16 Tribunal will discuss that and will let you know.

17 Trial bundle, can you make efforts to have it made available a week today?

18 **MR WOOLFE:** We can certainly make efforts. The order should not be amended
19 from the 10th, because there may be practical issues that are hit, and,
20 fundamentally, it's more important the bundle index is done correctly.

21 In terms of laying out the issues in the skeleton, it's not going to be a great deal of
22 work cross-referencing this skeleton argument to underlying documents,
23 everybody has the witness statements and the expert reports already. It's not
24 a great deal of work to find the relevant paragraphs in the witness statement
25 that you want to refer to, or the expert report.

26 On the current timetable there will be -- if the bundle is available on the 10th but the

1 skeletons are not due until sometime shortly before Christmas -- the best part
2 of two weeks to insert references. We think that is sufficient. That's our
3 position.

4 If I can just address two other sort of timing matters.

5 As regards providing the information regarding the witnesses' sources, this is a very
6 busy period of time for the witnesses and for the business generally, at the end
7 of the year. It's not that the witness cannot -- struggle to find the information,
8 but there are a series of paragraphs with this conversation that are mentioned,
9 and that needs to be done robustly and for a member of our legal team to sit
10 down with the witnesses and do it. To that extent, we would say perhaps 14
11 days, 10 December, would also be sensible for that.

12 I think the only relevance Mr O'Donoghue is putting this forward for is so that they can
13 look in the disclosure to see if the names of these people who Mr Aceto in
14 particular spoke to are mentioned and find cross-examination material.

15 **MR O'DONOGHUE:** Sir, that isn't right. As I said, we want, in the first instance, to go
16 back to our witness and understand are these the relevant people from his
17 perspective, because unlike Mr Aceto, Mr Linati was there for the entire period
18 involved in the supply of bearings. Mr Aceto was not, so he knows who he dealt
19 with, so we will need to crosscheck very carefully the information we are
20 presented with against what Mr Aceto says, so that is the first task, and that
21 may well also lead to disclosure issues. That is not correct, with respect.

22 **MR WOOLFE:** Sir, this is the first time, I think, it's been mentioned about disclosure
23 issues arising out of this -- from my learned friend's skeleton --

24 **MR O'DONOGHUE:** I am not saying that.

25 **THE CHAIRMAN:** The Tribunal has to decide whether we should go with seven days,
26 which Mr O'Donoghue has suggested, or 14 days, Mr Woolfe, which you are

1 suggesting. I don't think we're going to be assisted too much by a lot of
2 argument about that, I think we can work that out for ourselves and we will give
3 you a time.

4 **MR WOOLFE:** Thank you, Sir.

5 Then the only other point that might need to be attached, we would like an explanation
6 of why Mr Linati's witness statement is in English if the feeling is that he needs
7 a translator.

8 We would suggest the Tribunal should direct that to be provided by letter, perhaps in
9 the same period of time, 14 days --

10 **MR O'DONOGHUE:** Sir, I did not address you on that, forgive me.

11 **THE CHAIRMAN:** I have not spoken to my colleagues, but I think that -- let's see how
12 things go on this. You can ask questions of Mr Linati. If someone wants to
13 suggest to him that he doesn't need the translator, you can put that to him in
14 cross-examination or whatever. I don't think I am going to order letters and so
15 forth. It's a satellite point, so let's not have that.

16 I am looking at my colleagues, I don't think they are going to violently disagree.

17 **MR WOOLFE:** In that case, Sir, I will not push that point.

18 **MR O'DONOGHUE:** Just to clarify, Mr Linati does read and write English, that's why
19 he gave his statement in English. The only reason we put forward a translation
20 possibility was if there were particular linguistic issues that turned out to be
21 important. It was never suggested that there was some sort of inherent difficulty
22 with him giving his evidence in English, so it was in a very limited context. We
23 will see in January how we fare.

24 **THE CHAIRMAN:** I think that's how we should proceed. I am not going to order any
25 letters.

26 Okay, I think probably it's best now -- we'll give you a decision on the points which are

1 outstanding, but I think we might want to quickly discuss that offline. Let's deal
2 with the other points first.

3 Are there any issues arising in relation to confidentiality anymore, Mr Woolfe?

4 **MR WOOLFE:** As I understand it, the original set of points that were raised in respect
5 of confidentiality -- the reason why it's put on the agenda -- those have all been
6 resolved, they are in respect expert reports and a certain set of documents.
7 Those have been agreed between the parties. On Monday of this week we
8 received a further letter from my learned friend's instructing solicitors asking for
9 confidentiality to be lifted over a further set of documents identified. We are
10 taking instructions on those, we have not been able to get instructions yet that
11 those are not confidential. It's to do with whether or not things are still being
12 done in a certain way, is the concern, and therefore why some historic
13 documents may still be confidential. That needs to be checked quite carefully,
14 we are endeavouring to do so.

15 We suggest that the Tribunal shouldn't need to be troubled with this right now, we will
16 check, we will give a response and hopefully that will resolve the matter, as it
17 did before. If it doesn't, the issue can be dealt with later.

18 I think my learned friend's concern was to do with, in particular, going in and out of
19 closed session at trial. In a sense, that can best be resolved by working out the
20 relevance of the documents later and can be addressed at trial, if necessary,
21 when the Tribunal sees the documents. But we would suggest we will
22 endeavour to deal with it swiftly and be cooperative about this.

23 **THE CHAIRMAN:** Can you give me a time -- I know this is a new point to some extent
24 because other points were dealt with. When are you going to respond to the
25 defendants?

26 **MR WOOLFE:** Sir, I suggest 14 days for that as well. It may well be possible to be

1 done sooner, but if it needs to be done before the start of trial so that
2 Mr O'Donoghue knows "do I need to go into closed session with this document",
3 14 days is a month before trial, that shouldn't be a problem, Sir.

4 **THE CHAIRMAN:** Mr O'Donoghue, I don't think there's anything we need to resolve
5 right now, is there, apart from timing? This is a relatively new point in terms of
6 particular documents, as I understand it, so the other side want some time to
7 see whether they can de-designate. We can come back to this if we need to at
8 the start of the case, can't we?

9 **MR O'DONOGHUE:** I think that's probably correct, Sir.

10 Just to put my cards on the table, so there are 17 documents, all of them are pretty
11 ancient, the ones which have any sort of currency at all are at least six years
12 old and, on the face of it, they fall outside the five-year period for claiming
13 confidentiality, so they're pretty stale.

14 If Mr Woolfe is going to put forward some other reason, it needs to be a pretty good
15 one, in my submission. I just want to lay down that marker.

16 On the face of it, these are ancient history and he needs to come up with a reasoned
17 justification for each document because, Sir, one of the great oddities of
18 competition practice -- I mean people do commercial trials all the time and all
19 kinds of sensitive information and confidential information is discussed in open
20 court.

21 There's no particular magic in these cases, particularly in a case where the relationship
22 is purely vertical, they are not competitors, why the same general approach
23 should not apply. We have set out in our skeletons some of the recent rulings,
24 where there's effectively been a crackdown of what has been an abuse of this
25 possibility.

26 We say the basic rules are very clear and Mr Woolfe needs to come up with

1 a compelling explanation why this stale material should be shielded from the
2 public.

3 **THE CHAIRMAN:** You have put down your marker on that, but we are not actually
4 being asked to decide anything now so I will not say anything about that.

5 Mr Woolfe, I don't think it needs to go in the order but you will respond within 14 days
6 to the latest letter and if you can respond more quickly, that would be good.

7 If there is any outstanding issue we'll resolve it at the start of the trial, but I suspect
8 that that issue is likely to go away.

9 Good, all right. I think the only -- I have forgotten what's on the formal agenda, but it
10 rather grew ...

11 **MR WOOLFE:** There was a disclosure issue, which has been settled.

12 **THE CHAIRMAN:** I understand that.

13 **MR WOOLFE:** Then I think the only remaining issue, having dealt with confidentiality
14 and witness sources, is --

15 **THE CHAIRMAN:** The experts' report.

16 **MR WOOLFE:** Actually before we get to that, there was one point that my learned
17 friend rightly flagged in his skeleton about trial. I am not sure you need to
18 resolve anything, but that is arrangements for remote hearing in the event that
19 witnesses are not able to travel from Italy, it would affect Mr Linati and Dr Rosati
20 on my learned friend's side and all of our three factual witnesses. I don't think
21 there is anything to resolve, I understand the Tribunal has all the technical
22 facilities in place, both instructing solicitors have offices in Italy, I think Milan
23 and/or Rome where solicitors can go if necessary. I wanted to raise that point
24 so it wasn't lost in the mix, I don't think it is anything the Tribunal needs to
25 resolve now about it.

26 **THE CHAIRMAN:** I think what we can say is that if it turns out because of Covid, or

1 whatever, that there are problems then I can't see why witnesses can't give
2 evidence by video link or on the platform that we are using or whatever you
3 want to call it. We will deal with that problem if it arises in that way, I don't think
4 the parties need to worry that there will be any difficulty, I am sure you are both
5 agreed that if there are problems that witnesses will be able to give evidence in
6 that way.

7 **MR WOOLFE:** In that case, I think it is Dr Rosati's annex and the joint experts'
8 statement.

9 **THE CHAIRMAN:** Shall I tell you what the Tribunal thinks about this?

10 We have had a look at this, we have all had a look at the reports, or the joint report.

11 I think we haven't looked at the underlying original reports or the supplemental
12 reports, but we have seen the debate that's developed.

13 Of course we will listen to what you want to say, but it does seem to us that there is
14 going to be a considerable amount of what, at the moment, seems to be fairly
15 dense economic evidence, which will no doubt become less forbidding and
16 dense when the Tribunal has read into the case.

17 But it does seem to the Tribunal that the experts should be allowed in effect to say
18 whatever it is they want to say, provided that can be done fairly.

19 There are two points which seem to be developing in the skeleton arguments, there
20 may be more which are live.

21 One of them, as I understand it, is that there's been some editing of Dr Rosati's
22 comments in the columns in the supplemental report. We don't at the moment
23 think that there should be any editing. If Dr Rosati wants to make various points
24 in his responses, we think he should be allowed to do so.

25 There's a lot of ground that's going to be covered in the cross-examination, I'm sure,
26 and we think it's sensible that if people have points, they should be allowed to

1 put them in writing.

2 In a sense, that feeds into the Dr Rosati supplemental report, if you want to call it that.

3 I am not sure it's productive to have a debate as to whether it's a supplemental
4 report or an elaboration of answers which he has given as part of the joint expert
5 process.

6 We think at the moment that the fair thing to do is this, that we don't think there's
7 anything sensible about trying to omit that but Mr Hughes should have a chance
8 to respond to it, if he wants to respond, and that should be the last written
9 document that is produced on the expert side. There should be time for him to
10 do that, we think there is time for him to do that, he's obviously deeply immersed
11 in the facts of this case and I don't know how long it would take him to put in
12 any response that he wants to put in.

13 That was how we were proposing to approach it in a fairly pragmatic way, you could
14 say, no doubt there would be points made on either side.

15 Mr Woolfe, do you want to argue against that approach?

16 **MR WOOLFE:** Not arguing against per se, but there are certain sort of points of
17 context. I would just like to briefly explain the problem, which is to go slightly
18 further than I think perhaps is anticipated, because it plays into how it is to be
19 dealt with.

20 It is a substantial document. There are two problems.

21 The first problem is one we have addressed in our skeleton, which is there are a series
22 of regression analyses in it. Some of them, certainly the first one, seem to be
23 entirely new.

24 The very first one in the expert report, in the annex -- I just call it that for
25 neutrality -- that is core bundle, tab 13.3, is Dr Rosati has done some work as
26 he says to test the RFQ effect on carrying over parts prices.

1 It is important to understand he has done this on NTN's data, that's what's been
2 presented. Mr Hughes had previously done a regression analysis, which
3 separately looked at the carry-over parts. These are parts where there's a new
4 RFQ, but the specific bearing has been -- there's a new billing process, but the
5 same identical bearing has been used before, that's a carry-over part.

6 Mr Hughes had done some work on that, he had a separate variable in his model for
7 them, but his work is done on FCA's data. What Dr Rosati has done is carry
8 out a regression analysis we have not seen before on NTN's data, and has
9 done some other work to identify which are the carry-over parts.

10 These are not just NTN sales to FCA, we are into NTN sales to all of its customers,
11 that's what NTN's data set is. So he has done some work to identify carry-over
12 parts within that and that is an entirely new regression. That is a substantial
13 piece of work on which we need to respond and I think the Tribunal understands
14 our concern on that.

15 The point of elaboration on regression analyses is that there will be a mathematical
16 model on each of these whether on Excel or I think there is another program
17 that economists use called Stata, or something.

18 Mr Hughes has not been provided with the underlying models for any of these. Now
19 with the original expert statements they provided each other with their models,
20 all that has done is an annex with these tables and we don't have access to
21 those models. Therefore, if Mr Hughes is to be allowed to reply, he needs first
22 to receive the models used for each of these regressions. You understand why,
23 it's a fairly substantial piece of work and why our concern about this coming in
24 so late in the process -- in terms of procedure before trial and at the end of the
25 joint expert statement process -- without the chance to comment and no
26 visibility of how this was done. Perhaps if I can emphasise our concerns.

1 In terms of if the Tribunal is minded to let this in and allow Mr Hughes a chance to
2 reply, that needs to be built into the process, we need very quick disclosure of
3 the models and data underlying this and then a sufficient period of time for
4 Mr Hughes to respond.

5 The second point is not a modelling one, but a point coming in out of sequence in the
6 process, which is section 5 of the annex, which starts on page A272.128,
7 page 11 using the internal numbering of the annex.

8 What Dr Rosati does -- this relates to the inclusion of what's called a time trend in
9 Mr Hughes's model, or possibly inclusion of both the time trend and GDP level.

10 At paragraphs 28 to 30 Dr Rosati summarises, in a sense, what he had said
11 previously about this, which is to do with the results differ if you take out the
12 time trend or switch it from a linear time trend to a quadratic time trend et cetera.

13 What he then goes on to do over the course of paragraphs 32 through to the end of
14 the section is present an entirely new argument as to why no time trend should
15 be included in the model. The inclusion of the time trend is an important part
16 of Mr Hughes's model, we don't shy away from that, we say it's an important
17 part of Dr Rosati's approach that he doesn't use one.

18 I will not go into it in any great depth, but what I think he is saying at the graph on
19 figure 4 and paragraph 34 is that, within the Hughes model, GDP level and
20 linear time trend are closely inter-related and, 35, you can instead use the linear
21 trend in what he calls "detrended GDP".

22 At figure 5 on page .130 he presents detrended GDP, which he shows between the
23 red lines is higher in the infringement period.

24 And at paragraph 37, essentially is saying Mr Hughes cannot disentangle the effect of
25 the fact that detrended GDP is higher during the retention period than outside
26 it.

1 That's a new argument, we don't see that anywhere in Dr Rosati's existing reports.
2 Mr Hughes included a time trend and linear GDP in his first report, it's in his model and
3 he sets it out in a table of what his explanatory variables are, they are in there.
4 This argument should have been in Dr Rosati's report, if it was put in, second
5 his reply report, that's the proper place and then it could have been discussed
6 in the joint experts' statement. It's not even raised at the start of the joint
7 experts' process, it was put in by this annex at the end without any discussion.
8 We do say that is very problematic. Mr Hughes can respond to it in writing, the result
9 however is the Tribunal will be deprived of the chance of what would happen in
10 the joint expert process on this very point. We do say it's very problematic that
11 this was done in this way and we do think there's cause for an explanation.
12 I think if the Tribunal is minded to allow it in and to give Mr Hughes a chance to
13 respond, I think I would need to take instructions on the amount of time that
14 would be needed to respond so I might need to take a short break in order to
15 do that, Sir.
16 Those are my submissions.
17 **THE CHAIRMAN:** Right, okay.
18 We want a break anyway to discuss some timing issues, so we can certainly give you
19 that.
20 Mr O'Donoghue, I don't think you need to really address us on how to proceed.
21 I appreciate that you no doubt have points that this has arisen because of the
22 expert process and points being made by Mr Hughes, but I don't think the
23 Tribunal could get to the bottom of exactly how this has arisen in any sensible
24 way.
25 I think the focus of the Tribunal is: can this really be dealt with fairly to the other side
26 by giving Mr Hughes a chance to respond? As I understand Mr Woolfe's

1 submissions, he says well Mr Hughes can respond but it will require a certain
2 amount of time. I think the one thing you can help us on, Mr O'Donoghue, is
3 the provision of the data and the models which underlie some of this material.
4 Are you in a position?

5 **MR O'DONOGHUE:** That will not be an issue. I would hope we can get them today,
6 latest Monday.

7 **THE CHAIRMAN:** There is no issue about providing the data --

8 **MR O'DONOGHUE:** No, there is no bottleneck there.

9 **THE CHAIRMAN:** Is there anything you want to say, Mr O'Donoghue, in the light of
10 what I have said?

11 **MR O'DONOGHUE:** Two very brief points.

12 First of all, I think, Sir, in the pragmatic indication you have given it is inherent in the
13 nature of this process that it is dynamic and iterative. Both experts are doing
14 their level best to try and assist the Tribunal to reach the right conclusion. This
15 approach, frankly, of Mr Hughes throwing his toys out of the pram, it is not
16 cooperative or helpful.

17 In cases of this kind, it is entirely common for supplemental annexes of reports to be
18 accompanying the joint report. Just to give you the reference, Sir, in BritNed,
19 authorities bundle-tab 4, there were a whole series of supplemental annexes
20 and reports that accompanied the joint report and the President of the CAT in
21 that case found them extremely helpful, because there are multiple references
22 to these annexes in the judgment itself. It's paragraph 378, footnotes 92 to 97.
23 This was very rich material that was incredibly useful to the High Court in that
24 case. It's entirely normal in this process that things will be elaborated,
25 expressed in a different reactive way, that they will evolve, but all this is
26 ultimately intended to assist the parties and the Tribunal.

1 I mean at one stage it was suggested, for example, that we or Dr Rosati should be
2 subject to sanctions. This has become completely overblown, it is a pragmatic
3 question --

4 **THE CHAIRMAN:** I do not think Mr Woolfe is pursuing that, so let's not get into this.

5 **MR WOOLFE:** I am not suggesting that. If I have inadvertently given that impression,
6 I'm sorry.

7 **MR O'DONOGHUE:** We have never suggested that if Mr Hughes wanted to respond,
8 subject to the question of timing, that that would be an issue. That is clearly the
9 way forward, there is plenty of time before trial to accommodate this and it's in
10 everyone's interests that all cards are on the table.

11 This, in my submission, has been a storm in a tea cup, it's not a grown-up way to
12 approach complex litigation.

13 **THE CHAIRMAN:** Mr Woolfe, I am not sure we are going to be assisted by you
14 responding to that.

15 **MR WOOLFE:** I have to say that Mr Hughes I think would object to being said he was
16 throwing his toys out of the pram, when he is presented with a new analysis at
17 the end of what is meant to be a cooperative discussion.

18 On his behalf I do take exception to that.

19 You are not asking for any ruling on that, Sir.

20 **THE CHAIRMAN:** Before we take a break to discuss the relatively few points we have
21 to decide on timing and you, Mr Woolfe, take instructions on timing as far as
22 Mr Hughes is concerned.

23 Are there any other points anyone wishes to raise?

24 Mr Woolfe, first anything else from your side?

25 **MR WOOLFE:** No, Sir.

26 **THE CHAIRMAN:** Mr O'Donoghue?

1 **MR O'DONOGHUE:** Sir, just one point before Mr Woolfe consults with his clients.
2 I mean obviously Mr Hughes needs to be able to respond, but it is somewhat linked to
3 what was the date for skeletons, because we would wish to incorporate in the
4 skeleton his response. There needs to be a sufficient gap between his
5 response date and the skeleton so that both sides can in their skeletons
6 address the Tribunal on the up-to-date position. So that sort of buffer, the
7 linkage between those two dates is practically important. Because there is not
8 much point us having a skeleton that is unable to deal at least meaningfully with
9 a response by Mr Hughes.

10 **THE CHAIRMAN:** I am not sure, I think there's enough in this case for you to be able
11 to do a sensible 30-page skeleton. I mean, the points which are raised are no
12 doubt points which are going to be looked at in the trial, but I think the skeleton
13 will be looking at things at a somewhat higher level. I agree that you ought to
14 see Mr Hughes's response before your skeleton goes in, that I do agree with.

15 **MR O'DONOGHUE:** Perhaps the fairest way of putting my point then is that it's
16 a supplemental reason for why we would respectfully suggest skeletons on
17 10 January.

18 **THE CHAIRMAN:** Could I ask you something, Mr Woolfe, I meant to ask you about
19 skeletons which is this.

20 Does it make a huge difference -- maybe you can come back to this, discuss it with
21 your team -- in view of the fact people tend to take a break over Christmas if
22 the skeletons were to come in early in January, not necessarily the 10th, in
23 other words you are suggesting -- I think your main thing is you would like to
24 keep it at the 17th, but you are saying 22nd or 23rd, there's a danger of salami
25 slicing this --

26 **MR WOOLFE:** Whether it's a day or two here or there is not important.

1 I think the reason we want it before Christmas is you get to see the other way how
2 they are putting their case, and some people do work over the Christmas
3 period, there are working days between Christmas and new year and
4 immediately after the new year as well. You want to be able to see the other
5 side's case and lay down lines of work that are going to be going on. I have no
6 doubt that my leader would like to see the other side's case and tell me a series
7 of things which I am going to have to be doing. Getting that in advance, it does
8 affect the preparation time.

9 **THE CHAIRMAN:** Okay, so it's not like all your team is going off to the Caribbean
10 between Christmas and new year?

11 **MR WOOLFE:** No, sir, although we certainly hope you are having some days of rest
12 in that period.

13 **THE CHAIRMAN:** I think then, thank you very much. We'll leave this meeting and
14 come back in ten minutes, at quarter to.

15 Does that leave you enough time, Mr Woolfe, for you to take instructions and anyone
16 to raise any other points?

17 **MR WOOLFE:** That should be fine, sir, thank you.

18 **THE CHAIRMAN:** Fine, all right.

19 **(11.31 am)**

20 **(A short break)**

21 **(11.45 am)**

22 **THE CHAIRMAN:** Mr Woolfe, do you want to just tell us when you can do the
23 response report from Mr Hughes?

24 **MR WOOLFE:** Yes.

25 On the basis of the need to get the skeletons done before Christmas and the need to
26 get the expert report in before that -- Mr Hughes wanted more time, we

1 persuaded him that it can be done by the 17th. If the skeletons were pushed
2 to after Christmas we would ask for a bit longer than that, because it does
3 involve some constraints on his part but that can be done by the 17th if that's
4 necessary, to get it in a few days before the skeleton deadline, sir.

5 **THE CHAIRMAN:** Okay. Fine, thank you very much for that.

6 The Tribunal had a chance to discuss the timing, there were very few timing issues,
7 on various assumptions. We think that if the report from Mr Hughes -- which
8 must be the last written document from any expert in this case -- comes in on
9 the 17th, that 23 December for skeletons is appropriate.

10 We think it is appropriate that the parties should have the skeletons before Christmas.

11 We appreciate that they are in the Court of Appeal, but it's not the heaviest of
12 appeals, although it's an important one, of course, and we think that skeletons
13 can be produced with a short delay.

14 For the reasons which I explained earlier, the response report from Mr Hughes is not,
15 as we see it at the moment, the centrepiece of the case so as to require a further
16 postponement of the skeletons. It is important that the other side should see
17 the case that's finally being advanced by Mr Hughes responsive to the latest
18 points, but provided they do that before they put their skeleton in, we think that
19 that is sufficient.

20 As far as timing of the information, or the sources of information in the witness
21 statements of the claimants are concerned, we'll give until 7 December, close
22 of business, 4 pm, for that information, which more or less splits the difference
23 between the parties.

24 I don't think there's any other issue that we needed to resolve. What I was going to
25 do was to ask counsel whether they will be able to just put in a draft order which
26 reflects all the decisions today, insofar as they need to be recorded in an order,

1 matters such as the revised start date and the revised dates for the responsive
2 report and so forth.

3 **MR WOOLFE:** Certainly, sir.

4 **THE CHAIRMAN:** Good, all right.

5 Mr Woolfe, are there any other matters that your side wishes to raise?

6 **MR WOOLFE:** No, sir, thank you.

7 **THE CHAIRMAN:** Mr O'Donoghue, anything from your side?

8 **MR O'DONOGHUE:** Sir, on confidentiality obviously we can either incorporate this in
9 the order or have an undertaking from Mr Woolfe, but either way it needs to be
10 recorded somewhere.

11 **THE CHAIRMAN:** On what point was that, confidentiality?

12 **MR O'DONOGHUE:** On the 17 documents where they would consider confidentiality.

13 **THE CHAIRMAN:** I think what I said was that it need not go into the order, but
14 Mr Woolfe's clients are going to respond within a maximum of 14 days to the
15 letter, which I think was sent on Monday. I don't think it's necessary for there
16 to be a formal order to that effect, I think we can proceed on the basis of that
17 response will be given.

18 **MR O'DONOGHUE:** Sir, on the bundles, can we at least have some best endeavours
19 to get this by 3 December?

20 **THE CHAIRMAN:** As I understand it, the Tribunal thinks the bundles can remain as
21 they are, on the 10th, but on the basis -- I don't think this needs to be in the
22 order -- that Mr Woolfe's solicitors will exercise best endeavours to get them
23 earlier if possible.

24 **MR WOOLFE:** Thank you, sir, and no earlier specific date attached to that, but it could
25 be as soon as it can reasonably be done.

26 **THE CHAIRMAN:** Realistically it's never going to be, I think, before 3 December, but

1 if it can be there or thereabouts, or at the beginning of the following week, I think
2 that would be good.

3 **MR O'DONOGHUE:** It is not simply about references in particular -- what's of interest
4 to me is the disclosure documents and where they will be located. It's not
5 simply a question of putting in footnotes here and there, it's having the material
6 organised in a logical manner.

7 **THE CHAIRMAN:** Have the parties agreed on the contents of the bundles,
8 Mr Woolfe?

9 **MR WOOLFE:** Well, sir --

10 **MR O'DONOGHUE:** Yesterday we had sent two letters reacting to that, so that is well
11 at hand.

12 **THE CHAIRMAN:** Okay. You should have before the bundles are physically
13 produced in pdf form, or whatever, an index which tells you which documents
14 are going to go in and I still think that if -- if you have the bundles by the 10th,
15 and you don't have to have your skeleton in by the 23rd, given that each side
16 has a reasonably substantial team, people should be able to identify cross-
17 references and understand what documents are actually in, in that time, so as
18 to put in a reasonable skeleton.

19 I bear in mind that you each want a day to open the case orally as well and these
20 cases are, of course, iterative, they move, anything that you didn't put in your
21 skeleton you can tell us in opening on Day 1 and I am sure that you won't run
22 out of things to say in your 30 pages.

23 Right, good.

24 I look forward to seeing all of you on -- what is it, 19 January?

25 **MR O'DONOGHUE:** Yes.

26 **MR WOOLFE:** Thank you for your time, sir.

1 | It's still rather early, being the end of November, but I wish everybody on this call
2 | a good Christmas.

3 | **THE CHAIRMAN:** Thank you.

4 | I am sure the Tribunal wishes everyone the same. Thank you very much.

5 | **(11.52 am)**

6 | **(The hearing adjourned)**

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