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5 **IN THE COMPETITION**  
6 **APPEAL TRIBUNAL**

Case No: 1347/5/7/20

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8  
9 Salisbury Square House  
10 8 Salisbury Square  
11 London EC4Y 8AP

12 Friday 29 April 2022

13  
14 Before:  
15 **THE HONOURABLE MRS JUSTICE COCKERILL**  
16 (Chairwoman)

17  
18 (Sitting as a Tribunal in England and Wales)

19  
20  
21 **BETWEEN:**

22 **JAGUAR LAND ROVER LTD AND OTHERS**

Claimants

24  
25  
26 v

27  
28 **MOL (EUROPE AFRICA) LTD AND OTHERS**

Defendants

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

33  
34 Colin West QC and Andris Rudzitis (instructed by Hausfeld & Co LLP appeared on behalf of  
35 the Claimants)

36 David Bailey (instructed by Arnold & Porter Kaye Scholer (UK) LLP and Baker Botts (UK)  
37 LLP appeared on behalf of the First to Seventh Defendants)

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

Friday, 29th April 2022

(10.30 am)

**MRS JUSTICE COCKERILL:** Thank you very much. Good morning, everyone. Let me just remind you these proceedings are taking place on the Microsoft Teams platform and I must therefore start with the customary warning that these are proceedings nonetheless in open court just 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 audio or visual, of the proceedings, and breach of that provision is punishable as a contempt of court.

I am sure that everybody has listened to that carefully and will observe those rules.

Thank you very much. Good morning.

**MR WEST:** Good morning. May it please you, Madam, my name is Colin West, QC. I appear this morning with Mr Rudzitis on behalf of the Claimants. My learned friend Mr Bailey appears for the WWL and MOL Defendants. As the Tribunal is aware, there is another defendant, "K" Line, which is not represented today, with the consent of all parties.

**MRS JUSTICE COCKERILL:** Yes.

**MR WEST:** This is the second CMC in this matter, which is a cartel damages claim arising out of the RoRo cartel. As the Tribunal is aware, the parties have made substantial progress in agreeing the directions to be given, subject to the Tribunal, but there remain a small number of outstanding matters, which are all points concerning the categories of disclosure to be ordered.

I apologise for the fact that the parties were not able to put before you an agreed composite draft order with the skeleton arguments. However, happily I believe

1 that only one of the composite draft orders with which the court was provided  
2 is a document we need to look at, and that is the one which was attached to  
3 Mr Bailey's skeleton argument, which is in a sense a subsequent iteration.

4 **MRS JUSTICE COCKERILL:** Yes.

5 **MR WEST:** That appears in tab 4 of the bundle at page 5.14, starting at page 5.14.

6 **MRS JUSTICE COCKERILL:** Uh-huh.

7 **MR WEST:** I would suggest, Madam, that you take that document out of the  
8 bundle so that you can have it in front of you as we're going through if we  
9 need to look at other documents in relation to the points that arise.

10 **MRS JUSTICE COCKERILL:** Don't worry, Mr West. That has already been done.

11 **MR WEST:** I am very grateful.

12 Since the skeletons were lodged, the parties have continued to try to narrow the  
13 dispute and some further progress has been reached on that, as I will now  
14 report.

15 Although there are many advantages to virtual hearings, one disadvantage is I can't  
16 simply hand up a document, so I hope these documents have reached you.  
17 We have tried to get them to you this morning. They may not -- aha. Thank  
18 you very much. There is also an e-mail from Mr Bailey, but if you haven't got  
19 that, I can simply explain that Mr Bailey communicated the point at 4.9 (b) of  
20 the schedule to the draft order is not pursued by his clients, so that has gone.

21 **MRS JUSTICE COCKERILL:** Right. Yes.

22 **MR WEST:** Then, just looking at the table which, Madam, you have, I believe that  
23 one or two further points have also gone as a result of that, because these are  
24 concessions by us.

25 **MRS JUSTICE COCKERILL:** Yes.

26 **MR WEST:** At 4.6 of the draft order, that is now agreed, subject only to the removal

1 of the (ii), which is not necessary anymore anyway.

2 **MRS JUSTICE COCKERILL:** Uh-huh.

3 **MR WEST:** 4.8 is also agreed, subject only to the addition of the words "to the  
4 extent not covered by 4.4 (e) above". Our position was it was duplicative, but  
5 as long as that wording is added we are happy with that.

6 **MRS JUSTICE COCKERILL:** Yes.

7 **MR WEST:** The other point is 4.4 (c). We are happy with that wording as long as it  
8 is moved to now becoming 4.4 (a) (iii), because otherwise there is a bit of  
9 an ambiguity about which costs it is referring to.

10 **MRS JUSTICE COCKERILL:** Uh-huh.

11 **MR WEST:** In relation to two other categories where the defendants' position was  
12 that these categories were too wide, we have suggested sampling. I am not  
13 sure if that's acceptable to my friend. No doubt we shall hear in due course. If  
14 the court does order sampling in relation to any particular categories, then the  
15 Claimants say it would be necessary to make provision in the body of the  
16 order for the Defendants to explain how the samples had been arrived at.  
17 That was done in the Daimler case and we suggest simply lifting the relevant  
18 wording from the Daimler order.

19 **MRS JUSTICE COCKERILL:** Yes.

20 **MR WEST:** So, Madam, by my calculations, we have only nine points remaining.

21 They are all quite short points. It might make sense just to run through them  
22 before we turn to the detail.

23 There is a point about the end date for data disclosure. Should it be 2019 or 2021.

24 There is a point about disclosure of documents concerning settlements by Ford.

25 There is a point which I won't try to summarise on paragraph 1.3.

26 There is a point about the disclosure by the Defendants of information concerning

1 their margins, as to whether that should just relate to the Claimants'  
2 commerce or should go more widely.

3 There is a point which we have suggested resolving by sampling, concerning the  
4 construction of price terms by the Claimants.

5 The other point we have suggested resolving by sampling is concerned with  
6 disclosure of strategy documents by the Claimants.

7 There's a point about the provision of explanations by the Defendants in relation to  
8 their accounting documents.

9 The disclosure by the Defendants of information concerning their competitors' market  
10 positions.

11 The point about disclosure of documents concerning the Claimants' capacity  
12 utilisation.

13 **MRS JUSTICE COCKERILL:** Yes.

14 **MR WEST:** That as far as I am aware is it.

15 It may make sense for Mr Bailey to respond once I have addressed you on each of  
16 these short points rather than wait.

17 **MRS JUSTICE COCKERILL:** I think that is certainly the best way, because it is the  
18 best way of keeping track of where we are and the best way of getting  
19 an answer that makes some degree of sense.

20 **MR WEST:** I am very grateful.

21 So the first point is the end date for disclosure of data. This arises in a number of  
22 places. One of those is paragraph 1.1 of the schedule, where, Madam, you  
23 see the alternative wordings of 2021 and 2019 respectively.

24 The first point I would make about this is although Mr Bailey says -- he, of course,  
25 represents both WWL and MOL, although those are separate parties. He  
26 says their position is that it should cut off in 2019. But if, Madam, you look at

1 the joint expert statement, which is in tab 20 of the bundle, at paragraph 17  
2 (a), which is page 138. It is actually not 17 (a), but number 11 in this table.

3 You will see the statement in the first column is:

4 "To allow for a during/after comparison the overcharge information described in this  
5 section should be provided for the period ... to 31 December 2021."

6 If you go along to the column which records the position of Dr Raphaël De Coninck,  
7 who is instructed by WWO, one of Mr Bailey's clients -- I am not sure if it is he  
8 or she -- it is probably he, Dr Raphaël, he says, "I agree". So WWL's expert  
9 agrees with us about this, which is my first point.

10 Mr Bailey's submission, as I understand it, is that a five-year clean period should be  
11 sufficient. He also has a point about Covid.

12 As to his five-year clean period, it is not clear that there will be a five-year clean  
13 period, if there is a cut-off in 2019, because we don't know when the overhang  
14 period would have ended. The Claimants have pleaded that it lasted at least  
15 two years.

16 There is a point about whether this information is useful, because it coincides with  
17 Covid, but Mr Bell, the Claimants' expert, at least considers that it may be  
18 possible to adjust for the effect of Covid, just as one adjusts in other  
19 regression analyses for extraneous factors.

20 Mr Bailey cites the Vodafone case, Mr Justice Birss, as he then was, in the Vodafone  
21 case, which is tab 2 of his authorities. The proposition for which he cites that  
22 is really that there is a law of diminishing returns when one comes to  
23 disclosure. More disclosure may enable a greater degree of accuracy, but  
24 there comes a point at which the cost of the exercise is not worth a candle.

25 As I understand it, he is not saying it will actually cost any more to produce the  
26 additional two years of data. This is material held on databases. It is simply

1 a question of identifying the parameters within the database which will then be  
2 printed or, more likely, saved on to a USB stick and sent to us.

3 In fact, I would say, read properly, the authority he cites is supportive of our position.

4 Tab 2 of the authorities bundle -- Madam, you may be familiar already with the  
5 quotation where Mr Justice Birss says:

6 "[M]ore data is indeed likely to be better, so that more disclosure may produce  
7 a more accurate estimate."

8 The qualifications about "Well, it may not be worth a candle", however, in my  
9 submission do not arise here.

10 So for those reasons we would ask that the cut-off date be set at 2021.

11 **MRS JUSTICE COCKERILL:** Mr Bailey, I think you are muted.

12 **MR BAILEY:** Can you hear me now, Madam?

13 **MRS JUSTICE COCKERILL:** I can, indeed.

14 **MR BAILEY:** I am grateful.

15 May it please the Tribunal, in relation to the temporal scope issue, our concern is  
16 a short but significant point, that the pandemic era data for 2020 and 2021  
17 really won't give the experts what they are looking for. It is common ground  
18 from the joint expert statement that what they want is data for a so-called  
19 clean period, that's to say a period of undistorted and normal competition,  
20 and, of course, life was anything but normal during the pandemic. That is  
21 a point that is made by MOL's expert, Dr Bagci, which can be found in row 11,  
22 to which my learned friend referred on page 139.

23 Now, my learned friend says against me that all the other experts have, if I can put it  
24 colloquially, a ferocious appetite for more data. We have two answers to that.

25 The first is that the position of the experts is a bit more nuanced than simply "give me  
26 more data". If one looks in the joint expert statement at page 139, although

1 The Claimants' expert, Mr Bell, supports a date range going to 2021, he does  
2 in the second paragraph specifically note and acknowledge that from 2020  
3 onwards the purchases of RoRo services will have been affected by the  
4 pandemic, and goes on to say that therefore the information will be, in his  
5 words, of less use.

6 He does, I have to accept, then say there may be value in that information insofar as  
7 it can be controlled for. Although, he does not actually say what controls there  
8 might be.

9 Mr Bell and Dr Bagci are not alone in that regard, because although Dr Majumdar, in  
10 the joint expert statement, does not deal with the point, he does in his expert  
11 letter.

12 Just for completeness, so that the Tribunal can see everything the experts had to  
13 say on the matter, if I could ask you to turn, please, to page 102 in the bundle,  
14 at tab 18, at footnote 2, there is a reference by Dr Majumdar, where he says:

15 "I note that the pandemic may impact on inferences drawn from data for 2020 and  
16 2021."

17 He then says:

18 I accept that "whether this matters, can be determined in light of the data."

19 In my submission, what that shows is that three of the four experts acknowledge the  
20 data will be potentially distorted, and we say there is no need to try to tinker or  
21 manipulate or adjust that data to overcome its imperfections, in circumstances  
22 where there will be, at the very least, five full years of a clean period of  
23 conditions of normal competition.

24 Madam, the final point we make is that if for whatever reason the clean period to the  
25 end of 2019 is not sufficient, then it will be open to either side, once this initial  
26 tranche has been provided, on 25th July, to apply for additional disclosure.



1 Indeed, Madam, that actually is the practice of this Tribunal. If one just goes to the  
2 authorities bundle and in particular the authority in the Trucks litigation, which  
3 is to be found at tab 3, and if I could just take you to one paragraph, please,  
4 which is to be found on page 79.

5 **MRS JUSTICE COCKERILL:** Yes.

6 **MR BAILEY:** Paragraph 46, Madam, you will see there that what the Tribunal was  
7 explaining was that:

8 "Further disclosure will proceed by stages and not all at once ... "

9 Then they say:

10 "It doesn't mean that you set the stages now."

11 Rather, what actually happens is that you have your initial disclosure, the parties and  
12 their experts review it to see its sufficiency, and, in my submission, in light of  
13 the pandemic whether it is appropriate and reliable. Then, in light of that,  
14 having seen that data, one can then frame subsequent targeted requests.

15 We say that would be a suitable, proportioned approach for dealing with data on  
16 transaction and costs data.

17 **MRS JUSTICE COCKERILL:** Thank you.

18 **MR WEST:** Very briefly, Madam, if my friend has completed his submissions, in my  
19 submission, it shouldn't be a question of how many experts one can call up on  
20 each side. In any event, Dr Majumdar is for "K" Line, who are in all probability  
21 no longer going to participate and certainly not here.

22 I entirely accept that in certain circumstances it may be appropriate to provide limited  
23 disclosure and see where one gets to, but where the disclosure concerns a  
24 statistical analysis, we won't be in any different position at the end of that  
25 initial process, because the position of the experts will still be that if we can  
26 get more disclosure, it would be better. They will certainly not be coming

1 along and saying, "What I have been able to do so far is not good enough",  
2 because the possibility may be that there is not any further disclosure at that  
3 stage, and that would therefore be a rather dangerous thing to say.

4 Where one is concerned with disclosures for the purposes of statistical analysis, this  
5 suggestion of a two-stage approach has only a very limited force I would  
6 submit.

7 **MRS JUSTICE COCKERILL:** Thank you very much. I was recently doing a case  
8 where an expert candidly admitted that in their expertise they were rather like  
9 wedding photographers. One more is always good. I think there is an element  
10 of this here. More disclosure is always good, from the expert's perspective,  
11 but one has to keep an eye on proportion, particularly in relation to the kinds  
12 of cases where you are going to have to have an awful lot going on on both  
13 sides.

14 Looking at what we are shooting at here, we are shooting at getting an adequate  
15 clean period for the purposes of getting a robust overcharge analysis. If it is  
16 possible to get effectively five years' clean period, I have difficulty in seeing  
17 that it would be proportionate to ask for more.

18 In those circumstances, when there is no particular reason to suspect that there is  
19 going to be a problem with getting a sufficient period of clean data that there  
20 may be a problem in relation to overhang, I am with Mr Bailey. We should go  
21 for the shorter period of time now. If when you get the data there is a long  
22 overhang, there is an issue as to the length of clean period that is coming up,  
23 then we can come back and address.

24 This is also intensified by the fact that it is not like the extra period looked for is  
25 a period without its own complications. Covid is only going to introduce  
26 an extra degree of complication into the analysis. So if we can do without it,

1 let's do without it.

2 **MR WEST:** Thank you. Madam.

3 The next point is the Ford Motor Company's settlement documents.

4 **MRS JUSTICE COCKERILL:** Yes.

5 **MR WEST:** This arises at two places in the draft order. The first is paragraph 1.2 (d)  
6 of the schedule and the other place is 4.9.

7 **MRS JUSTICE COCKERILL:** Uh-huh.

8 **MR WEST:** So 4.9 is concerned with documents to be given by the Claimants. 4.9  
9 (a) this is, and 1.2 (d) with the corresponding documents to be provided by the  
10 Defendants.

11 As I understand it, the suggestion is that Ford, which owned Jaguar Land Rover for  
12 part of the relevant claim period, has settled claims arising out of the RoRo  
13 cartel, and that part of the benefit of that settlement that may have passed to  
14 the current Claimants, therefore resulting in a factual mitigation of loss, and  
15 that's what they are asking about or asking for disclosure in relation to.

16 I have two points on that. Our first point is that this has not been pleaded and, in the  
17 usual way, a party raising an argument of mitigation, of a pass on or collateral  
18 benefit, or anything of that nature is supposed to plead it. This is not a case  
19 where the Defendants can say: "Well, we can't plead it, because we don't  
20 know anything about it", because you will see at 1.2 (d) the Defendants are  
21 going to disclose settlement agreements they entered into with Ford. So they  
22 do know about it and they know the scope of the release, and no doubt they  
23 know the volume of commerce to which the settlements relate. So they are in  
24 a position to plead this, if they wish to raise it, but they haven't done, so far  
25 anyway. This is a point that should be looked at as and when it's actually  
26 raised properly in the case.

1 We also say it's a misplaced request. If one looks at my friend's skeleton argument,  
2 which is in tab 6 of the bundle, at paragraph 54 on page 7.12, what is said  
3 there is that:

4 "The Defendants understand that Ford Motor Company entered into settlements of  
5 global claims relating to RoRo services purchased by it."

6 If one looks at what the Claimants are seeking in this case, it is explained at  
7 paragraph 55 (c), in response to some requests for explanations by the  
8 Defendants. So at page 320.14 of the bundle.

9 **MRS JUSTICE COCKERILL:** Yes.

10 **MR WEST:** In the second paragraph, beginning about halfway down, you see the  
11 words "Jaguar Cars" on the right of the paragraph, about halfway down.

12 **MRS JUSTICE COCKERILL:** Uh-huh.

13 **MR WEST:** "Jaguar Cars Ltd and Land Rover each issued procurement rate  
14 agreements [this is during the period of Ford's ownership] for the shipment of  
15 their respective vehicle brands", and here are the key words "and were the  
16 relevant paying entities, including during the period of Ford ownership, with  
17 respect to procuring RoRo services."

18 So we don't see the link between the claim that we are pursuing here and what  
19 Mr Bailey is asking about, which is settlements by Ford in relation to the  
20 purchases which it made of RoRo services. No doubt this would all be made  
21 clear if it had been pleaded.

22 So we say this application for disclosure is currently premature. That's all I propose  
23 to say on that.

24 **MRS JUSTICE COCKERILL:** Yes.

25 **MR BAILEY:** In relation to paragraph 1.2 (d) and 4.9 (a), if I may start with the  
26 Claimants' pleaded case, because my friend is concerned about the

1 pleadings, and I think it would be useful for you to see briefly the amended  
2 claim form. There are two paragraphs. They are to be found at tab 7 on  
3 pages 17 and 18. This is really the genesis of this request for disclosure. It is  
4 paragraphs 33 and 34. We take two propositions from this.

5 The first is, as my learned friend says, between October 2006 and June 2008 there  
6 were various framework agreements that were used for the provision and  
7 purchase of RoRo services that Ford entered into on behalf of the first  
8 Claimant. That, therefore, brings in the relevance of Ford, which at the time  
9 was the Claimants' parent company.

10 Then, if one turns to page 18, paragraph 34, just in the last sentence, it says that it is  
11 the first Claimant that is paying for the RoRo services, under those framework  
12 agreements, some of which were entered into by it and some supposedly  
13 passed on to various of the other Claimants.

14 My Lady, if one could then turn in the bundle to page 147.1, this is a table that the  
15 Claimants prepared and updated, and it lists out the contracts and the  
16 requests for quotations that are said to be material to this claim. There are  
17 a total of 14 of them.

18 The point I make is that six of the 14, so nearly half, were tendered by the Ford  
19 Motor Company. So in those circumstances, in preparation for this CMC, the  
20 Defendants found and checked various confidential assessments that were  
21 entered into between Ford and the Defendants, and that gave rise to the  
22 concern that there may have been settlement payments made in relation to  
23 certain of these contracts.

24 Now, my learned friend says against me that this is a point that is not currently  
25 pleaded, and, of course, I accept that. I make two points about it.

26 The first is that both sets of Defendants do, in their pleading, reserve the right to

1 plead further to loss following disclosure, and this will be an example of that.  
2 But, in any event, if that's not satisfactory, the Defendants are prepared to  
3 undertake to the Tribunal to plead in short order this self-contained point  
4 within a matter of the next two weeks, so that the point actually is crystallised  
5 in the defences. That therefore addresses my learned friend's pleading point.

6 My learned friend's other point relates to the question of the terms and scope of the  
7 settlement agreements. Of course, I can't give evidence about those  
8 confidential agreements. One of the reasons why the Defendants are willing  
9 to disclose into the inner confidentiality ring these agreements is precisely so  
10 that the Claimants can see their terms, that they were entered into on behalf  
11 of Ford, and I am instructed also the wholly-owned subsidiaries, which would  
12 include Jaguar Land Rover.

13 Then what we wish to do in return is just ascertain whether any settlement payments  
14 were then made to Jaguar Land Rover in relation to any of the losses claimed  
15 in these proceedings, and, if so, that would go to quantum and there would  
16 have to be credit given for it.

17 In my submission, this is an appropriate line of enquiry, and if the pleading needs to  
18 be, as I would suggest it should be, amended, we can and will do that in short  
19 order. Those are my submissions on this.

20 **MRS JUSTICE COCKERILL:** Thank you.

21 **MR WEST:** Two brief points by way of reply. My friend's proposal is sensible but it is  
22 the wrong way around. He should plead his case first and we will then look at  
23 the pleading and consider any requests for disclosure sensibly, in light of that  
24 pleading, and the Tribunal has seen that the parties are being sensible about  
25 this.

26 My second point is on confidentiality. That's a little difficult to understand. These are

1 allegedly settlements under which my clients were the beneficiaries. So it is  
2 somewhat difficult to see how they can be said to be confidential vis-a-vis my  
3 clients.

4 In any case, there is a confidentiality ring order in place to preserve any such  
5 confidentiality.

6 **MRS JUSTICE COCKERILL:** Well, I am with Mr West on this. I can entirely see that  
7 there may well have to be some disclosure on this in due course, but it needs  
8 to be pegged to the pleaded case. Everybody needs to understand what the  
9 pleaded case is.

10 So I'm going to say it should be pleaded out so that if there is disclosure sought, we  
11 can get it aligned with the rest of the disclosure. I anticipate that the parties  
12 ought to be able to agree something once that is pleaded. If it is not, it can  
13 come back on the papers as a discrete issue to get that point aligned.

14 **MR WEST:** I am grateful. The next point is paragraph 1.3 (c).

15 **MRS JUSTICE COCKERILL:** Yes.

16 **MR WEST:** To put this in context, one needs to see what (a) and (b) talk about. This  
17 is concerned with cost data to be provided by the Defendants in relation to  
18 RoRo services. Madam, you will see that in the first instance what we really  
19 want under (a) is cost data in relation to services provided to the Claimants in  
20 relation to each individual shipment, if that's available. If it is not, we move on  
21 to (b), and that's broken down, instead of by shipment, by route. We only get  
22 to (c), which is the live point, if neither of those categories are available.

23 Here the dispute is whether the Defendants should provide costs data relating to  
24 automobile manufacturers generally, which is our position in this draft, or  
25 costs data in relation to routes on which the Defendants provided services to  
26 the Claimants, if I can summarise the position.

1 Now, this is one of the points on which a compromise proposal has been advanced  
2 in our table.

3 Madam, if you are able to look at that, the first point in our table, the proposal is in  
4 the third column there. You will see that what we propose is to split this into  
5 two further back-up categories, the first of which is costs data relating to RoRo  
6 services provided by the Defendants for all OEMs, but limited to routes  
7 involving the shipment of vehicles from the UK. Then, finally, only if that is  
8 also not available, do we get into the provision of costs data to all OEMs  
9 without limitation.

10 The reason we have proposed routes involving the shipment of vehicles from the  
11 UK, rather than the Defendants' proposed wording about routes on which the  
12 relevant Defendant provided services to the Claimants, is that there may be  
13 difficulties in defining what exactly is meant by a route. Is Southampton to  
14 Baltimore the same route as Portsmouth to Baltimore, or if it is Southampton  
15 to Baltimore with a stop in Halifax, Nova Scotia?

16 To get round those difficulties, we propose simply that the routes be defined as  
17 routes involving the shipment of vehicles from the UK.

18 I don't know if this is acceptable to my friend. My clients proposed it only last night  
19 and we suggest and I submit that that is a reasonable compromise.

20 **MR BAILEY:** My Lady, we were notified of this proposal at 9 o'clock last night. We  
21 have done our best in a very short period of time to take instructions. Our  
22 clients are actually located on the other side of the world. So it is somewhat  
23 unsatisfactory to get it at the last minute, but what we are pleased to say is  
24 that the Defendants do agree with the proposed direction in 1.3 (c), so that is  
25 now agreed between the parties.

26 So far as the Second to Seventh Defendants are concerned, they also have no



1 objection to paragraph 1.3 (d), but the First Defendant does object to what  
2 might be referred to as the fourth fallback category, 1.3 (d).

3 My Lady, if I can just briefly develop that submission, you will have seen in the  
4 skeleton argument that it is common ground there is zero value of commerce  
5 between the Claimants and the First Defendant.

6 Moreover, the Claimants' expert does not consider information from MOL is  
7 necessary in order to establish any overcharge.

8 My Lady, we respectfully endorse the approach that was taken by Mr Justice Bryan  
9 to a similar issue in the Daimler proceedings that also arose out of the RoRo  
10 cartel.

11 If I can just refer you to a part of his judgment dealing with this issue, that's to be  
12 found at page 270.91.

13 Under the heading "Transaction data relating to other OEMs", we pick it up at the  
14 end of paragraph 92. What the judge says there is:

15 "If there is sufficient information in relation to Daimler", or in this case JLR, "it [simply]  
16 won't be necessary to seek disclosure in relation to all OEMs."

17 He then makes the point, which we say applies just as much to MOL, that:

18 "If you were to order disclosure in relation to all OEMs", as envisaged by  
19 paragraph 1.3 (d) "that's going to cause expense", in this case to MOL, "in  
20 circumstances whereby it is not clear [...] that the material will ever be needed  
21 [by the experts] for trial."

22 Then, my Lady, if one goes down to paragraph 97, we respectfully agree with the  
23 judge that:

24 "It would be wrong in principle to order [that type] of disclosure at a time when the  
25 expenditure might be wholly wasted" and that it is not yet clear whether that  
26 material would be necessary.

1 So what we say is consistent with the Tribunal's approach to disclosure is that one  
2 should proceed with disclosure in the form of 1.3 (a), (b) and now the agreed  
3 (c), and then we would say that once that has been provided, the parties and  
4 experts take time to digest that material and work out if it is sufficient, and  
5 then, of course, as indeed Mr Justice Bryan also underscored, if it's not  
6 sufficient, then the parties could come back and seek further disclosure in  
7 relation to all OEMs.

8 So we are not trying to shut the door on this, but we do want to try to proceed as  
9 proportionately as we can.

10 **MRS JUSTICE COCKERILL:** Thank you.

11 **MR WEST:** Madam, I understand the point is now just limited to whether MOL  
12 should have to give this information. That point overlaps with what I think is  
13 the next point, so it may make sense to take them together.

14 The next point arises on 2.1, and is really a very similar point about whether the data  
15 and documents to be provided in relation to margins and revenues should be  
16 limited to margins and revenues on services provided by the Defendants to  
17 the Claimants. One sees it is really the same point. That's how the  
18 Defendants are trying to limit this, whereas we are saying that we need data  
19 going beyond the specific commerce between the Defendants and the  
20 Claimants. So it may make sense for me to explain why it is that we are  
21 seeking that at this stage.

22 **MRS JUSTICE COCKERILL:** But in relation to your new (d), which is the only live  
23 point on 1.3, it is contingent, isn't it? It is only if 1.3 (a), (b) and (c) material is  
24 not available. You are not actually seeking (d) now.

25 **MR WEST:** That is correct. So it would only arise in relation to MOL if they -- they  
26 won't have (a) or (b), because they didn't -- well, hold on. They didn't provide

1 services to the Claimants during the cartel period. They did provide RoRo  
2 services to the Claimants during the period governed by this paragraph, which  
3 runs all the way to 2019, following the Tribunal's earlier ruling. So MOL would  
4 potentially have information falling within (a) and (b) and potentially new (c).  
5 But you are right, (d) would only arise if that were not the case.

6 **MRS JUSTICE COCKERILL:** In which case you are not actually seeking anything  
7 against MOL under (d) at the moment, and (d) effectively operates as  
8 a backstop.

9 **MR WEST:** We are not seeking anything except by way of fallback, that's correct.

10 **MRS JUSTICE COCKERILL:** In which case, it seems to me there is something to  
11 be said for having it in there, you know, just so that the parties know what the  
12 stages are, it being understood that at the moment you do anticipate getting  
13 something under (a) and/or (b) and/or (c) from MOL, and it is only if there is  
14 effectively no return or no effective return on (a), (b) or (c) that you turn then  
15 to (d).

16 **MR WEST:** Indeed. I would gratefully adopt that suggestion.

17 **MRS JUSTICE COCKERILL:** In which case, having said that, and having sort of put  
18 down that marker for you, Mr Bailey, I would be minded to have it in there.  
19 Then you have got a consistent order across all the Defendants, but  
20 an understanding that you are not charging off to do (d) in relation to MOL.

21 **MR BAILEY:** My Lady, on that understanding, yes, MOL is content to proceed  
22 with ...

23 **MRS JUSTICE COCKERILL:** On that basis, let's move on to 2.1, where Mr West  
24 was going anyway before I interrupted him.

25 **MR WEST:** Yes. I am sorry for that wrong turning.

26 **MRS JUSTICE COCKERILL:** Not at all.

1 **MR WEST:** So the principal reason why we seek margin information going beyond  
2 the particular services provided by the Claimants to the Defendants concerns  
3 the umbrella commerce in the case.

4 You were shown by Mr Bailey, earlier on, the table, at I think it is tab 20A of the  
5 bundle, of contracts entered into which are material to the claim.

6 **MRS JUSTICE COCKERILL:** Yes.

7 **MR WEST:** The Tribunal will see that in most cases the counterparty was one of the  
8 Defendants, but not in all cases. There are also some contracts in issue which  
9 were awarded to non-defendants, such as a company called, if you go over  
10 the page at 11 and also at 10 on the same page, a company I think  
11 pronounced Höegh and also Grimaldi. We sue in relation to that commerce,  
12 even though the contracts were with non-cartelists, or at least  
13 non-addressees, under the umbrella theory, whereby the umbrella of the  
14 cartel also extends over non-cartelists, to the extent that it allows them to  
15 raise their prices for products and services of the same description, simply  
16 due to the weakening of competition in the market. There is well-established  
17 authority to the effect that if the Claimant can prove that the prices it paid for  
18 products or services provided by non-cartelists were inflated by the cartel,  
19 then the cartelists were liable for those losses.

20 So we sue in relation to those purchases, and some of them are on different routes  
21 to the routes which were supplied by the Defendants, routes to, for example,  
22 South Africa and Brazil, as one sees on this table at the right-hand side.

23 The question is how we are going to investigate that question. In order to investigate  
24 it, the Claimants' expert's position is that the Defendants should give  
25 disclosure of commerce, not only on the routes with the Claimants but in  
26 general, so we can see whether there was a cartel effect on these other

1 routes.

2 So it is not a question of this being something that is nice to have but not necessary  
3 and we can come back if we see the first round of disclosure does not give us  
4 what we need. The first round of disclosure, if it is limited to the Claimants'  
5 routes with the Defendants, will not address the question of these umbrella  
6 losses in relation to which we are claiming.

7 Another reason mentioned by the Claimants' experts for seeking this material is that  
8 if it shows that there was a cartel effect on these other routes, it makes it more  
9 difficult for the Defendants to say that any change in margins between the  
10 cartel period and the post-cartel period was due to some idiosyncrasy relating  
11 to Jaguar Land Rover.

12 In the Daimler case, which we have been using to an extent as a template, again this  
13 material was ordered, in the sense that the court did not limit the order in this  
14 respect to commerce with the Claimants.

15 The order I think is at tab 33. It is page 265, paragraph 2.5. So here, this is WWL,  
16 which is one of my learned friend's clients, being ordered to provide data  
17 contained in the STRATA database, being the best available evidence relating  
18 to the margins and revenue of any RoRo business operated by the WWL  
19 Defendants, to the extent available for the period at issue in that case.

20 So the margins and revenue data which was ordered in that case was not limited to  
21 commerce with the Claimants in that case, Daimler, although it does seem to  
22 have been limited to the STRATA database, and that was on the basis that  
23 WWL's counsel in that case, I think it was Mr Kennelly or possibly Mr Holmes,  
24 who were the two counsel involved, said that on instructions that was the best  
25 available evidence for this data, and that's indeed recorded in the order.

26 If we are using that as a template, I would say the equivalent approach should be

1 taken here of not limiting the disclosure to the particular routes with the  
2 Claimants.

3 **MRS JUSTICE COCKERILL:** Yes. Thank you.

4 **MR BAILEY:** My Lady, in relation to paragraph 2.1, on the two points raised by my  
5 learned friend, the point about umbrella, and then I will deal in turn with the  
6 Daimler proceedings. This morning is the first time that we have understood  
7 that the purpose of this category is to help the experts in their analysis of  
8 umbrella sales. If that is the concern, then the Defendants would have no  
9 objection to reflecting the corporate entities that are listed in paragraph 2.2 of  
10 the draft order, that is to say NYK, Höegh , Grimaldi, those being the entities  
11 that are not sued in these proceedings, and referring and including them in  
12 paragraph 2.1. That would create a symmetry between these two categories  
13 and I think would also, in my submission, address my learned friend's and  
14 their expert's desire to deal with sales to non-cartelists. That's the first point.  
15 We make that as a sort of constructive proposal, in response to what the  
16 Claimants have just said.

17 In relation to Daimler, whilst it is true that various similar issues have arisen between  
18 this and those proceedings, I think it is right that I just draw your attention to  
19 the fact that the scope of the Daimler action for damages was actually  
20 somewhat different to the scope of JLR's claim.

21 If I could just take you to one paragraph in Mr Justice Bryan's judgment,  
22 paragraph 25, which is to be found at page 270.78. I apologise for the  
23 somewhat convoluted page references, Madam.

24 **MRS JUSTICE COCKERILL:** It is okay. I am navigating fine.

25 **MR BAILEY:** What you see here is that the judge is summarising Daimler's claim,  
26 which was actually more extensive than JLR, because it also alleged cartel

1 conduct beyond the findings of the European Commission, but relevant for  
2 present purposes is that you will see that the judge also says:

3 "A proportion of Daimler's claim [concerned] RoRo services between non-EEA  
4 ports."

5 So completely outside of Europe. In other words, it was truly a claim in respect of  
6 global sales. Of course, that then informed the way in which the parties, and  
7 indeed the judge, made a direction in relation to margins at a global level.

8 So we say it is not exactly a direct read-across to this case, which is concerned only  
9 with routes on which Jaguar operated from the UK to various destinations.

10 With that in mind, the tweak I just made, we would respectfully suggest that would be  
11 the appropriate way to proceed on margins and revenue.

12 Then, as I have said before, insofar as that's not sufficient for the experts, then, of  
13 course, there would be a further opportunity for them to explain why and what  
14 else might be necessary. But we would sort of advocate that as a middle  
15 ground.

16 **MRS JUSTICE COCKERILL:** Thank you.

17 **MR WEST:** Madam, I am sorry if I had not made my position clear on this before.

18 The reasons set out in the schedule to our skeleton were quite summary in  
19 nature. Our justification was the data is necessary at a global level to assist  
20 the experts' analysis of the overcharge and to understand the factors that  
21 affected the pricing of RoRo services aside from the cartel.

22 In any case, I just had a word with Mr Bell, our expert, and he is happy in the first  
23 instance with Mr Bailey's proposal that disclosure be limited, as I understand  
24 the proposal, to the Höegh and Grimaldi routes, in addition to the Claimants'  
25 routes in the first instance.

26 **MRS JUSTICE COCKERILL:** That is obviously a sensible approach. I am grateful

1 to the parties, both sides, for taking such a constructive approach, (a) for  
2 thinking of the accommodation and (b) for accepting its good sense.

3 **MR WEST:** The next point is on 2.5, disclosure by the Claimants of documents  
4 showing how they constructed price terms.

5 **MR BAILEY:** I hesitate to interrupt. I just hope this might be of assistance. I can  
6 confirm that in relation to the proposals made by the Claimants last night, the  
7 Defendants are happy to agree the proposed directions on paragraph 2.5, and  
8 also on paragraph 2.7. I only interject just to sort of save time and to assist my  
9 learned friend in that respect.

10 **MR WEST:** Needless to say, I am very grateful --

11 **MRS JUSTICE COCKERILL:** So am I.

12 **MR WEST:** -- for that. That means we are very much on the home straight in that  
13 case.

14 4.4 (b) is the next point.

15 **MRS JUSTICE COCKERILL:** Yes.

16 **MR WEST:** I am afraid I am going to endeavour to use Mr Bailey's arguments  
17 against him here. This is about explanations relating to cost categories, where  
18 he is seeking an order now that we provide the explanations of the cost  
19 categories in our disclosure documents concerning accounting and costs,  
20 before he has actually seen the documents, and in my submission that again  
21 is the wrong way round.

22 We have agreed to supply the documents, including vehicle prices and costs broken  
23 down by costs category, if available. If, for whatever reason, he cannot  
24 understand the relevant references or the column headings or whatever it  
25 may be, he can, of course, ask us, and we will provide explanations, if  
26 required. It does seem to be rather topsy-turvy to require us to provide



1 explanations where they might not be necessary. That was all I was proposing  
2 to say.

3 **MR BAILEY:** My Lady, in relation to paragraph 4.4, if again I could start on  
4 a positive note, the Defendants are content to agree the Claimants' latest  
5 proposal that would thereby remove what is paragraph 4.4 (c) on page 5.25 of  
6 the draft order, and instead we would agree with the proposal relating to what  
7 is now paragraph 4.4 (a) (iii). So that is now agreed, which means to say that  
8 the point between us is solely in relation to paragraph 4.4 (b) on page 5.25.

9 Previous experience in cases of this kind shows that it is often helpful for the experts  
10 to have a short explanation of the technical data, or here the cost category.  
11 The reason for that is that it allows them to move more quickly to interrogate  
12 the data. The risk without such an explanation first – it is not meant to be  
13 topsy-turvy – it is rather that it will then mean there will have to be a process  
14 of to-ing and fro-ing, as the experts and parties try to ascertain what each cost  
15 category covers.

16 To be clear, what we have in mind is something telegraphic, not lengthy, but it is  
17 designed to help the experts get to grips with the cost categories in question.

18 If I may just refer - I realise I am going to it quite a lot, but the judgment is very useful  
19 in this respect.

20 **MRS JUSTICE COCKERILL:** As Mr Justice Bryan's judgments so often are.

21 **MR BAILEY:** Indeed, Madam. It is at page 270.85. It is not an identical point,  
22 because there the judge was concerned with explanations relating to various  
23 electronic databases.

24 At paragraph 62, we say that at least the underlying logic ought to apply, that so far  
25 as there is an explanation that allows the experts to understand JLR's cost  
26 categories and, more specifically, to what extent it includes what's relevant

1 here, RoRo shipping costs, then the experts will be helped by that, and it will  
2 actually streamline and make the process more efficient.

3 We respectfully agree with the judge, and one could include this in the order, that  
4 there really should be a short and not a lengthy explanation. We hope that  
5 that, as explained in paragraph 63, helps the experts with their process. That  
6 is why we have suggested this approach. Thank you.

7 **MRS JUSTICE COCKERILL:** Yes. Mr West, anything further?

8 **MR WEST:** I don't think there is anything further apart from just to say there isn't  
9 anything in the joint expert statement on which the Defendants' experts say  
10 they need this information at this stage.

11 **MRS JUSTICE COCKERILL:** Yes. I am not minded to order explanations to be  
12 provided with the disclosure, because there may well be cost categories  
13 which are blisteringly obvious, but I think it would be sensible to try to set up  
14 now some kind of process whereby that clarification can be provided. One  
15 way is for the experts to meet with relevant people within a short period after  
16 the provision of the disclosure to have a Q&A session. I would actually  
17 commend that as being less likely to lead to confusion. But I think you ought  
18 to put something into the order to provide for either a timetable for questions  
19 to be asked about disclosure categories, cost categories, and short answers  
20 to be given, or for there to be a meeting on it, because, you know, I don't want  
21 you to be doing unnecessary work, but I don't want the experts to be  
22 floundering.

23 **MR WEST:** I am grateful. I think that takes us to the last point, unless there are any  
24 miscellaneous points after that, which is capacity documents to be provided  
25 by the Claimants – paragraph 4.7.

26 **MRS JUSTICE COCKERILL:** Yes.

1 **MR BAILEY:** I am sorry to interrupt. I just wanted to check. There was a point on  
2 paragraph 4.5, sub-paragraph (b) on page 5.2. I don't know if that's still a live  
3 issue but I thought I should raise it. There is a bit of red ink referring to "and  
4 their competitors".

5 **MR WEST:** I am grateful to Mr Bailey. That's indeed still a live point and it is a very  
6 short point. We say the Claimants would not hold information relating to the  
7 volume or value of their competitors' sales, save insofar as they had obtained  
8 that from publicly available sources and, insofar as they did so, those publicly  
9 available sources are the proper source for that information and ought to be  
10 available to the experts as well. That's the appropriate source from which this  
11 information should be obtained, rather than asking the Claimants to provide  
12 their understanding, insofar as they have one, of their competitors' market  
13 positions. That was all I propose to say on that point.

14 **MR BAILEY:** Madam, in relation to the question of market shares, the reason why  
15 we are seeking disclosure of this information is actually set out helpfully by the  
16 Claimants' own expert.

17 If one goes to tab 15 at page 113 of the CMC bundle, this is a letter from Mr Bell, the  
18 Claimants' expert. You will see this is a section discussing the approach to  
19 pass on. You will see there is a heading "The principled analysis". If one picks  
20 it up at paragraph 37, what he says is, in order to supplement his pass on  
21 assessment, he would apply economic principles. He refers to the so-called  
22 market structure evaluation. Essentially, what that does is look at the number  
23 of firms in the market, their shares, the structure of the market, and then use  
24 economic theory to make a prediction about the extent and rate of any pass  
25 on.

26 Then, at paragraph 38, he refers to the data information that he expects will be

1 relevant for this evaluation. At sub-paragraph (b) he refers to data on market  
2 shares of competitors, including JLR, that are, on the geography, most  
3 significant for the claim.

4 As my learned friend says, he does, in the last sentence, refer to the fact that this will  
5 be in the public domain, but he also says it is potentially held to some extent  
6 by the Claimants for commercial strategy purposes.

7 We would say that, as a matter of commercial common sense, that would be so,  
8 because they might gather that information as part of market intelligence, for  
9 monitoring their competitors. So we say, insofar as they maintain they don't  
10 hold it, they should at least carry out reasonable searches to verify that. We  
11 don't have anything at the moment that sort of confirms this one way or the  
12 other, but it is relevant, according to the Claimants' expert, for the pass on  
13 analysis.

14 So we say at the very least a reasonable search should be done for that information.

15 Thank you.

16 **MR WEST:** I hope my position was not that the Claimants don't hold it but rather  
17 that to the extent they hold it, they would have obtained it from publicly  
18 available sources, since it is difficult to see how else they could have obtained  
19 it. This, therefore, may be another example where it is appropriate to proceed  
20 in stages. If the experts cannot obtain this material from publicly available  
21 sources, and they wish instead to have some understanding of what the  
22 Claimants thought the position was, then they should bring the application  
23 back at a later stage.

24 **MRS JUSTICE COCKERILL:** I think that is the approach which I would prefer,  
25 because there is no obvious way of saying where such information, which is  
26 gathered from public domain sources, is likely to be held. The experts are

1 going to be looking anyway. There is a risk of duplication and increasing  
2 costs unnecessarily, when the sort of snapshot produced by what one party  
3 has done may well not be terribly informative for the purposes for which it is  
4 needed.

5 So let's see what the experts can do from publicly available information, and if there  
6 is a problem, a database has gone or something, and one needs to look and  
7 see what has been captured, then that can be looked for then. Yes.

8 **MR WEST:** I am grateful. I think this is – I hope – now the last point, capacity.

9 **MRS JUSTICE COCKERILL:** Capacity.

10 **MR WEST:** Paragraph 4.7. So this is the Claimants' production and distribution  
11 capacities and capacity utilisation. The Claimants' position on this point is that  
12 the Claimants' capacity and capacity utilisation is relevant insofar as, and only  
13 insofar as, it affects the Claimants' pricing. This is all to do with pass on, of  
14 course. Insofar as it affects the Claimants' pricing, it's already captured under  
15 paragraph 4.4, I believe it now is. Perhaps it is 4.5:

16 "documents that relate to how the Claimants determine and adjust their prices over  
17 time and the factors that they consider when doing so."

18 That's under (a).

19 The point that it is only relevant insofar as it affects the Claimants' pricing is  
20 supported by what Mr Bell says in the joint expert statement, page 143 of the  
21 bundle, tab 20, bottom of row 15:

22 "I would note that plant capacity and plant capacity utilisation measures would be  
23 relevant to the extent that these are factors used in JLR's price setting  
24 process for the geographies considered."

25 So insofar as this material is relevant, my friend's clients will get it anyway, but it is  
26 difficult to see how, for example, reports just saying that the particular factory

1 is operating at a certain level of capacity is otherwise relevant, if it doesn't  
2 feed into pricing or indeed any other relevant issue in the case. So that's my  
3 submission on that point.

4 **MR BAILEY:** So, my Lady, in relation to paragraph 4.7, the reason we say this is  
5 relevant is that it will help identify potential control variables of econometric  
6 analysis, in other words, factors that could affect RoRo prices, quite apart  
7 from the infringing conduct.

8 My Lady, if one looks at the joint expert statement, to which my learned friend just  
9 refers -- it is on page 133, row 15 -- it is striking that both Dr De Coninck and  
10 Dr Majumdar specifically identify capacity utilisation and distribution capacities  
11 as being relevant control variables, and, as my learned friend says, at the  
12 bottom of Mr Bell's column on page 143 he also accepts that plant capacity  
13 and utilisation would be relevant, albeit that he says only to the extent used in  
14 JLR's price setting.

15 My response to that is that the problem with saying that only category 4.5 deals with  
16 capacity is that insofar as JLR did not for whatever reason consider capacity  
17 in setting prices, it doesn't follow, as the economists' further comments make  
18 clear, that capacity couldn't or didn't affect prices. As a matter of sort of  
19 commercial reality, if JLR had limited capacity to make more cars during the  
20 cartel, there would be a shortage of supply, and that in itself, just basic supply  
21 and demand, means there's upward pressure on the RoRo prices,  
22 independently of infringing conduct. That's why it becomes relevant to  
23 consider it as a control variable.

24 So we say that this actually is something that is relevant to the experts' analysis, not  
25 necessarily completely covered off by paragraph 4.5, and so we invite you to  
26 direct this disclosure. Thank you.

1 **MR WEST:** Yes. Just on a point of clarification, we are not talking here about the  
2 prices of RoRo services which were supplied by the Defendants, but the  
3 prices of cars supplied by JLR. I am not quite sure what mechanism my  
4 friend is suggesting. JLR obviously set the prices of its own cars and it either  
5 took account of capacity or it didn't. I am not quite sure how capacity in the  
6 market could have affected JLR's prices unless JLR took it into account in  
7 setting those prices.

8 So for those reasons I say there isn't actually another ground of relevance apart from  
9 that which is already captured in 4.5(a).

10 **MR BAILEY:** I am grateful. I just would like to confirm and clarify that, yes, we are  
11 talking about JLR's vehicle prices and not RoRo prices.

12 **MRS JUSTICE COCKERILL:** Yes. Well, on that basis I am not currently persuaded  
13 that there is a separate ground of need for it. It is at best speculative at this  
14 point, and I'm struggling to see quite how it works. So I think not at this point.  
15 It may be something which can be revisited in due course.

16 **MR WEST:** I am grateful. In terms of miscellaneous sweep-up points, I said at the  
17 outset that 4.8 -- I anticipated 4.8 would be agreed. We now agree it with the  
18 addition of the words "to the extent not covered by 4.4(e) above". I don't think  
19 Mr Bailey has formally said whether he accepts that or not.

20 **MR BAILEY:** I am pleased to confirm the Defendants agree that wording.

21 **MRS JUSTICE COCKERILL:** Excellent. Well, that covers everything then I hope.  
22 You are all happy with where the draft order goes in the light of the points we  
23 have argued and decided this morning, are you?

24 **MR WEST:** We are.

25 **MRS JUSTICE COCKERILL:** Yes. I would like to thank the parties for continuing to  
26 work together in such a constructive way, bringing the CMC estimate down

1 from the full day to the half day to being done in just over an hour.

2 **MR WEST:** Record time.

3 **MRS JUSTICE COCKERILL:** Startling efficiency all round.

4 **MR BAILEY:** I am very grateful, my Lady.

5 **MR WEST:** Many thanks.

6 **MRS JUSTICE COCKERILL:** Thank you very much. You will send across the final

7 version of the order?

8 **MR WEST:** Yes.

9 **MASTER COOK:** Thank you. I wish you all a very pleasant long week-end.

10 **MR WEST:** Likewise.

11 **MR BAILEY:** Thank you.

12 **(11.37 am)**

13 **(Hearing concluded)**

14

15