IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1435/5/7/22 (T)

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 07 June 2022

Before:
Justin Turner QC
(Sitting as a Tribunal in England and Wales)

BETWEEN:

PSA Automobiles SA & Others **Claimants**

v

Autoliv AB & Others **Defendants**

A P P E A R AN C E S

Colin West QC and Sean Butler (On behalf of PSA Automobiles SA & Others)
Charlotte Thomas (On behalf of Autoliv AB)
Sarah Ford QC and David Bailey (On behalf of the 'ZF Defendants')
Daniel Piccinin (On behalf of Tokai Rika Co. LTD)

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Tuesday, 07 June 2022

(10.30am)

MR WEST: May it please the court, my name is Colin West QC and I appear today with Mr Sean Butler for the Claimants in this matter. For the First to Fifth Defendants, Autoliv, Ms Charlotte Thomas appears. For the Sixth to Tenth Defendants, or ZF, Ms Sarah Ford QC leads Mr David Bailey. For the Eleventh Defendant, Tokai Rika, Mr Daniel Piccinin appears.

This is the first CMC in these proceedings which were commenced as long ago as December 2020 in the Chancery Division before being transferred to this court by an order of the Master in March of this year.

The Competition Appeal Tribunal sent out an agenda for today although I think it is probably fair to say that is a rather pro forma document. Really more helpful is that the parties have prepared composite draft orders showing the wording which is agreed and what is not agreed, and those are at tab 6 of the hearing bundle. Tab 6 itself is the case management composite draft order and then at tab 6A is the composite draft confidentiality ring order. But there is only one item of substance on the confidentiality order but there are a handful of points which are not agreed on the case management order. I think it is fair to say that one of those has loomed rather larger than the others and it is probably the longest point, so I propose to address that first, and that is disclosure and, in particular, disclosure of documents on the files of other Competition Authorities, that is Competition Authorities other than the European Commission. The Claimants are seeking disclosure of relevant documents within this category and that is paragraph 4.5 of the draft order in the red. That is opposed by the Autoliv and ZF Defendants, and partially opposed and partially agreed by the TR Defendants whose alternative wording appears here in green.

I think it is common ground and relatively standard that at the first CMC in cartel damages claims for the defendants to be ordered to produce a less redacted version of any relevant Commission or CMA decision together with documents from the Commission or CMA file, and that is broadly agreed here although there are one or two minor disputes which I will come back to, but the more hotly disputed area concerns documents from the files of other Competition Authorities.

As the Tribunal may know, the Claimants have identified a number of precedents where such disclosure has been ordered, which I would just like to briefly show you. The first is in the Emerald Supplies case, which is tab 30 of the authorities bundle, in particular at paragraphs 42 and 44 of this order. In these proceedings the Claimants brought the claim I believe only against British Airways, which was one of the cartelists and obviously subject to the jurisdiction, and British Airways then brought in all of the other ones by means of Part 20 proceedings. So paragraph 32 concerns BA and it says in the second line: "BA shall only be required to search for documents within the body of contemporaneous documents BA provided for the United States Department of Justice in the course of its investigation or prosecution of BA and its employees." So BA was ordered in the first CMC to give disclosure of documents it had supplied to that particular Competition Authority in the US. Then the Part 20 defendants are addressed at paragraph 44. Each of them were to disclose and provide inspection of contemporaneous documents they submitted to the foreign competition authorities excluding privileged or leniency material as set out in annex 2, and annex 2 is at page 1153 of the bundle. You will see that it includes regulators in Australia, South Korea, Canada, Brazil, USA, Switzerland, South Africa and New Zealand.

THE CHAIRMAN: There is no principle or law set out there. I do not know what evidence was before the Court. The principle is sort of more practiced in South Africa and I do not have evidence before me, or anything like that.

MR WEST: No, but it was suggested against me that this approach is "wholly unorthodox", and I am showing that, in fact, it is certainly not unprecedented and, of course, the reason why the Claimants are particularly interested in competition regulators' file documents is twofold. Firstly, those are likely to be the most relevant documents in relation to the operation of the cartel or other infringements. That is precisely why the competition authorities would have required them to be produced, or why they would have been submitted by the Defendants. Secondly, of course, these are existing files of documents that have already been collated together. So there is no question of sending the Defendants off to carry out searches. One does not need disclosure reports or electronic document reviews. The documents are already held in an accessible format, and are no doubt sitting there on a computer file, and so disclosure can be carried out in a relatively straightforward way from those documents. In a sense, the issue here that we are grappling with is whether there is reason to believe that there will be relevant documents on those other regulators' files above and beyond what is on the Commission file, and my clients' position and strong belief is that that is highly likely. If I can explain why that is --

THE CHAIRMAN: Yes. Before you do, I mean, with respect to the Department of Justice and Brazilian Competition Authority, do I have any evidence about what they may or may not have been provided with and are they referred to in your pleadings?

MR WEST: In relation to the Department of Justice, which is the US regulator, we now have evidence in the form of a letter from Tokai Rika which explains that

there are 700 documents which it submitted to the DoJ which specifically refer to my clients or their relevant brands. Perhaps I could just show you that letter. It is at tab 84K of the hearing bundle, page 305.23. I think the bundle has been split into two. 305.24, over the page. This is a letter from Steptoe & Johnson. In a previous letter Steptoe had said they anticipated there being at least several hundred such documents that it submitted to the DoJ, which contained the search terms previously agreed between us, and those search terms have references to the Claimants or the Claimants' brands under which they sell motor vehicles: Citroen, Peugeot, and so on. Their updated preliminary estimate is that there are around 700 such documents. They have not carried out any review for relevance. Tokai Rika's position is that there are 700 documents it submitted to the US DoJ which specifically reference my clients or their brands.

THE CHAIRMAN: Right.

MR WEST: In relation to South Africa --

THE CHAIRMAN: Just take this in stages. So I am right that the DoJ is not specifically pleaded?

MR WEST: The Department of Justice proceedings are not specifically pleaded, that is correct, because --

THE CHAIRMAN: And the sum total of the evidence is what I have in 84K.

MR WEST: That is correct, because neither of the other Defendants have told us. The position taken in the skeleton arguments, certainly by Autoliv, is that the Tribunal should conclude that it is likely that the Commission file is comprehensive and that there are not any documents on other regulators' files which are not on the Commission file. It is not completely clear why the Tribunal are being asked to accept that as a submission rather than being told what the

position actually is, because, of course, the Defendants know the answer as to whether there are other documents on those other regulators' files which are not on the Commission file. The Claimants do not know and the only way we can find out is by being given a list of the documents, which is the disclosure which we are asking for. It is true to say the DoJ is not specifically pleaded by the Claimants although, of course, the infringements are pleaded, and what we do not also know is whether the facts underlying the DoJ infringement were the same facts as those underlying the Commission infringements or whether they were in some way separate infringements. What we do know, however, is that the undertakings involved were the same, including Autoliv, ZF as they are now, Tokai Rika and others. The products were the same, OSS products, and the time period was the same. So, although we have not specifically pleaded the DoJ investigation, it appears to concern the same underlying conduct, the same infringement, albeit under US law rather than EU law. The Defendants for their part do plead the DoJ investigation. What they say is that the DoJ investigation put my clients on notice of the existence of the infringement so as to start time running for limitation purposes. So, they say, on the one hand time started running under section 2 of the Limitation Act because the DOJ announced that it was investigating it and then reached plea agreements with a number of defendants, but on the other hand, they are seeking to submit to yourself today, sir, that the DoJ documents are completely irrelevant and have nothing to do with the infringement --

THE CHAIRMAN: I recall that, but just remind me where it is in the documents.

MR WEST: Yes. It is in the Autoliv and ZF defences which are at tabs 13 and 14. Paragraph 65A of the Autoliv Defence. So paragraph 65C of the Autoliv Defence. And paragraph 9D of the ZF defence.

THE CHAIRMAN: Right.

MR WEST: So far as South Africa is concerned, that is pleaded in the Particulars of Claim beginning at paragraph 29 tab 12 page 63.

THE CHAIRMAN: Yes.

MR WEST: I am just going through this. In 2012, the SACC entered a complaint which was subsequently amended in 2016. Paragraph 30: This indicates the SACC was in possession of information which suggested that the cartel included supplies to PSA, thus the amended initiation statements delivered in part, and the information indicated the respondents may have engaged in price fixing of the market division by allocating customers as well as products and collusive tendering, etc., etc., supplied to OEMs such as – and then it is PSA, which is one of the Claimants.

Then just reading down, Autoliv then settled that complaint in 2017. That is paragraph 33. 34: PSA brought a disclosure application in South Africa in response to which the Competition Commission supplied it with an index to the documents on its file (paragraph 35) which included five documents Autoliv had disclosed relating to Autoliv's business with PSA. Again, PSA is one of my clients. That disclosure application is being resisted by Autoliv which has submitted an affidavit which once again is at paragraph 38. One of the grounds for resistance is that PSA would have been to use the documents obtained from the files as evidence prior to but for use in the initiation of damages proceedings. That is said to be a ground for not disclosing it.

Again, none of the Defendants before you today have actually adduced any evidence to say that this material is on the Commission file. They ask you to infer that it is likely to be – the Commission file is likely to be comprehensive but, of course – I am repeating myself – they know the answer.

Sir, we say that is a very full and sufficient basis to justify an order for this relatively limited disclosure of easily available documents. A point is taken that it is said that this is a large task. Tokai Rika, as I said, say there are 700 documents, so that is not a point that it takes, but the others, ZF and Autoliv, say that they submitted between 40,000 and 50,000 documents to the DoJ. That, of course, refers to the total quantity of documents which they would have to review and not the number of documents which would ultimately be held to be relevant to this claim, which would be some sub-set of those documents. But, in my submission, it is not a disproportionate exercise to review those documents in the context of a claim which is of the size of this claim.

THE CHAIRMAN: Help me with (inaudible). So looking at the draft order, the bit in green which is I think the Eleventh Defendant's position, the Eleventh Defendant is indicating there it would be prepared to disclose documents which were provided by it to the US Department of Justice and there is limitation where those documents refer to any trademark set out. What do you say about that, not just as against the Eleventh Defendant, but if that were the contemplated order against the other Defendants?

MR WEST: The way this came about was that before this hearing was listed my clients sought to engage with the Defendants to arrange some form of early disclosure prior to the first CMC. The ZF and Autoliv Defendants did not engage with us on that but Tokai Rika did and they said that they were prepared to give us early disclosure but only in relation to documents which specifically named the Claimants or their brands, and that proposal then progressed to an extent before being overtaken when this hearing was listed. Now that we are before the Tribunal, my submission is that the disclosure should not be limited to these specific keywords. Instead, the disclosure that we are seeking is disclosure of

relevant documents from the body of documents submitted to the various regulators. The reason is, of course, that there may well be relevant documents, even if they do not specifically refer to the Claimants or their brands. The claim is, of course, not limited to a claim which asserts that there was a cartel specifically directed against the Claimants. We also run a case of umbrella damages, which asserts that even if the cartel was not specifically directed at the Claimants, the effect of the cartel in lessening the degree of competition in the market would also have led prices to harden against OEMs, even if they were not specifically targeted.

THE CHAIRMAN: But you get that, do you not, from the Commission documents?

MR WEST: Well, you may get some of it.

THE CHAIRMAN: As I understand it, the problem with the Commission documents is that Commission investigations were not focused on the supplies to your clients. And that is the reason why Commission documents may be insufficient for you to fully develop the evidence for your case and for present purposes we will assume that is the reason for them looking to other competition authorities. So that is the reason for looking, say, to documents filed at the Department of Justice, you are interested in documents that are focused on your clients, which is the bit that is missing from the Commission. But the submissions you seem to be making seem to be now saying, “We request everything from the Department of Justice, because they might all be relevant.” But I am just particularly interested in the gap that is missing --

MR WEST: Yes.

THE CHAIRMAN: -- from the documents that were given to the Commission and how one could describe classes which would assist you. I mean, this is a very obvious way of doing it by reference to trademarks. I would just like to broaden

out the debate and hear from you what alternative proposal there is as opposed to just providing 50,000 documents or reviewing 50,000 documents.

MR WEST: We are not seeking specific disclosure of all of the documents. We are seeking disclosure only of relevant documents within that cache of documents. That is our proposed wording. At the end of little 4.5 it says there is a right to redact or withhold material on one of the grounds set out at 4.1(a) above. And 4.1(a) above includes irrelevance. So anything which is leniency, settlement, privileged or irrelevant we do not get and we are not asking for.

THE CHAIRMAN: But that includes -- that requires a manual review, does it not, of 50,000 documents?

MR WEST: It will require some form of review, but it could be assisted by keywords and those would have to be determined. My primary position is that we do not think just these keywords are necessarily sufficient. Of course, if the Tribunal were to request that, we would certainly agree or we would certainly welcome an order that at the very least at this stage there would be disclosure of documents with these keywords. We are going to come on in a second to the fact that there are some new claimants being added, so the equivalent for those claimants would also have to be added in.

THE CHAIRMAN: I agree. But let us leave that on side for a moment, I appreciate that. But in terms of other keywords that you would be interested in, or you would propose, you have not got them in any form today?

MR WEST: I do not, I am afraid.

THE CHAIRMAN: No. Okay.

MR WEST: I was just going to show you the pleadings to give you an indication of the size of this case, which is going back to the particulars at tab 12 and, in particular, the end of those, page 72. The affected value of commerce on the -

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THE CHAIRMAN: Can you give me the paragraph number?

MR WEST: Yes. Seventy-nine I was going to go to.

THE CHAIRMAN: Yes.

MR WEST: This is the affected value of commerce for PSA and is the value of OSS components they purchased from the Defendants at the material time and we can see it is over €2.5 billion worth of OSS components. I mean, that is just PSA. There is then a separate value of commerce for Vauxhall/Opel. And just applying some preliminary overcharge estimates set out in the table at the top of page 73, one arrives at damages figures -- well, you can see at paragraph 81 very, very substantial numbers. This is obviously all contested, but when any submission may be made to you about proportionality I would ask the Tribunal just to bear in mind that this is a very large claim potentially. That leads me onto a separate point which is run by ZF in relation to this category, which is they say that they are prohibited from giving us the Brazilian or South African documents because of local law.

THE CHAIRMAN: Yes. I mean, at the moment, you have not made out your case to bring them to me. Are you going to do that or --

MR WEST: I do not have any material to put before you in relation to the Brazilian documents, although I would submit if these search terms are going to be run on the South African and DoJ documents, it would be a simple matter for the equivalent searches to be run on the Brazilian documents and we would then know that there are documents in there referring to the Claimants which we have not been told so far. But the material that we have from the Brazilian investigation is very highly redacted, so we do not know very much about it. So just turning to the illegality objection, shortly before the skeleton arguments

were filed the ZF Defendants filed a witness statement from their solicitor, Mr Firth --

THE CHAIRMAN: Yes.

MR WEST: -- which is at tab 9A of the bundle, which seeks to make the point that disclosure of this material would be contrary to local laws in South Africa and Brazil. So no equivalent point is taken in relation to the US.

THE CHAIRMAN: Yes.

MR WEST: So, for Brazil it is paragraph 13.

THE CHAIRMAN: Yes, I have read this.

MR WEST: And paragraph 18 for South Africa.

THE CHAIRMAN: Yes. Okay.

MR WEST: The first point I have to make about this is it is a rather remarkable contention which is being advanced here. What is being said is that this prohibition under a local law applies to contemporaneous documents belonging to ZF.

THE CHAIRMAN: Yes.

MR WEST: So if there was an email, for example, sent by ZF to Autoliv arranging a cartel meeting, nevertheless it cannot now be disclosed simply because a number of years later it was sent to the Brazilian regulator as part of its investigation.

THE CHAIRMAN: Yes. I do find that surprising.

MR WEST: So do we, sir. So that is the contention which is apparently being put forward and it may be said --

THE CHAIRMAN: - - the opposition have a very different view of the documents produced by the respective Competition Tribunals in this country, that might be -- one could certainly contemplate restrictions on the use of those documents,

including the South African index, to which you refer and so forth. That certainly could be contemplated. But your submission, as I understand it, is it does not really -- insofar as we can have a valid opinion in here, it does not make any sense that a document which is your document which you provided to the Competition Authority should then be restricted from being used for other purposes, including before this Tribunal. That is your point, is it not, as I understand it?

MR WEST: That is correct. Then finally, we see that as a matter of generality it may well be more likely that there will such a prohibition in relation to the documents of the type that you identified, sir. But there is not actually any evidence about that. The evidence which was advanced is that it applies to all of the documents, this alleged prohibition. It may be submitted to you that as a result the Tribunal should exercise its discretion to refuse to order disclosure of these documents because it is said that it would put ZF in breach of the local laws. Autoliv has said it is not running this point. It sent us a letter this morning, which may not be in the bundle, but they have said this is not a point they are running.

THE CHAIRMAN: Right. Okay. I had not appreciated that.

MR WEST: Toyoda Gosei, for their part, have not put in any evidence, but their position is that they have access to a portal of documents on the Brazilian Competition Authority's file but they are prohibited from disclosing documents from that portal. So there may be documents on that portal from ZF and Autoliv and I can entirely see that in the first instance it would make sense to get those directly from ZF or from Autoliv rather than for Toyoda Gosei to get them from the portal and get us the documents in that way. There is not any evidence from Toyoda Gosei about that; that is perhaps something of a sideshow, but this is a point that has been run by ZF and, of course, it has never been the law

in this jurisdiction that illegality under foreign law is a trump card which means that the court should not order disclosure here, disclosure as governed by lex fori which is the law, of course, of England. The leading authority is in the bundle. It is the Bank Mellat authority, tab 28, bundle 2 of the authorities. Could I just ask you to read the first three paragraphs which are an introduction to the issue.

THE CHAIRMAN: Yes, I have read those.

MR WEST: And then just jumping to paragraph 53, he briefly mentions how one addresses evidence of foreign law in this jurisdiction, and he says that foreign law is a question of fact to be proved by a duly qualified expert in the law of that foreign country and the burden of proof rests on the party seeking to establish the position.

THE CHAIRMAN: (inaudible)

MR WEST: Indeed. At paragraph 55 there is an interesting paragraph which makes the point that this issue really arises on inspection rather than disclosure because, of course, at the stage of disclosure one sees they are listing the documents. So the question of whether one has to actually produce it by way of inspection may engage questions of foreign law, unless, I suppose, it is being said that the foreign law prevents the document even being listed.

Then the protocols are set out at paragraph 63 in six little bullet points. Can I ask the court to read that?

THE CHAIRMAN: (Pause) Yes.

MR WEST: So that is the approach and the test, if one can put it that way.

Going back now to Mr Firth's statement, the first point I make, of course, is that Mr Firth is not and does not claim to be a Brazilian or South African lawyer. So on one view none of this is admissible at all. What he says instead is that he has

been told by local lawyers what the rules are but he also says at paragraph 4 in the final sentence: “References to information supplied by other law firms are made without any waiver of privilege.” So he does not actually supply any communications with them and we cannot see detail of what they have advised. He also explains that the lawyers he has spoken to, Bowmans and Tozzini are the lawyers who are representing ZF in the relevant local investigations in South Africa and in Brazil, so they are not independent experts either. Mr Firth does not produce the text of the foreign laws, although part of those texts is now in the bundle so we can see them in a second.

My submission is that none of this really amounts to anything and it was all, of course, sent to us three hours before the skeleton arguments were due and precisely two business days before the hearing, and so in the time available the Claimants had only very limited time to respond to it, but Mr Bolster has given a short statement in response, so far as he has been able to do so in the time available, at tab 10A. At paragraph 5, he addresses the Brazilian material and the regulations are annexed to the statement at tab 10B in translation. So the court can see that the second article is the one that Mr Firth relies on as prohibiting disclosure. One can see it does not prohibit disclosure of everything but sets out various categories of prohibited disclosure, including, for example, at (B) industrial secrecy, and (C), disclosure which could represent a competitive advantage, and so on and so forth. So we do not know which of these heads is said to apply to the documents in question here, but Mr Bolster also draws attention to the third article which provides an exception in the following cases, and (ii) is --

THE CHAIRMAN: Where is this?

MR WEST: The third article at the bottom, 47.21.

THE CHAIRMAN: Can we start that bit again? I apologise; my fault.

MR WEST: Of course. Tab 10B, so this is two articles of the CADE Resolutions. The second is the prohibition on disclosure, and my point was that it is not blanket; in fact, it sets out various categories, and Mr Firth does not explain to us which categories are said to apply to which documents. Mr Bolster draws attention to the third article, which is an exception to the prohibition, and at the second indent one of the exceptions is in the case of a specific court order which, of course, would be what is happening here, where this court would be ordering the Defendants to produce the material. That is as far as we have been able to get with Brazil.

With South Africa, the relevant Act is in tab 44 of the authorities bundle, page 1312 of the bundle. The provision which Mr Firth relies upon is section 69. It says: "Breach of confidence. It is an offence --"

THE CHAIRMAN: Which page?

MR WEST: 1312 of the bundle.

THE CHAIRMAN: 1312 at the bottom in the big bold --

MR WEST: That is right.

THE CHAIRMAN: Right, 1312.

MR WEST: Section 69. This is the section Mr Firth relies upon. "It is an offence to disclose any confidential information concerning the affairs of any person or firm [and here is the keyword] obtained --"

THE CHAIRMAN: (inaudible) trying to address and I am not going to make rulings on South African law while sitting here with no expert evidence. If you are trying to persuade me (inaudible).

MR WEST: Well, it is my learned friends who are trying to persuade you to different --

THE CHAIRMAN: That is as may be. I think you can make very many points on this, but the evidence is extremely thin and rather unsatisfactory hearsay, but I cannot do this from first principles based of a - -

MR WEST: - - Can I come to my proposal regarding how we deal with this? But just to finish this point, on its face, this refers to confidential information obtained in carrying out any function under the Act or as a result of initiating a complaint or participating in any proceedings. That clearly would not apply to a party's own pre-existing contemporaneous documents. It has not obtained those in either of those ways; it already had them.

The other point Mr Bolster just makes on this Act is that there is a whole section in 44 about confidential information which sets out a procedure requiring claims to be made for confidential treatment in relation to material submitted to the Commission.

THE CHAIRMAN: He is not qualified in South African law.

MR WEST: He is not, but this is written in English and to an extent, he makes sense of it.

THE CHAIRMAN: Fine. I have to say you are not making progress on persuading me as to what South African law is.

MR WEST: Well, it is more my learned friends who are meant to be doing that, as I understand it.

THE CHAIRMAN: You can make that point.

MR WEST: The point is simply that Mr Firth nowhere says that any of the documents we are talking about here had any confidentiality claims made over them under this provision.

So the question is how are we supposed to address this material. We have a late statement from Mr Firth, which my clients have not had a proper opportunity to

respond to, and so as a result we made a proposal yesterday to the Defendants as to how this should be addressed, which was that if this point is really pursued the court has to adjourn this question of foreign law to a hearing to be listed within the coming weeks, and to set down a timetable for the provision of foreign law evidence so the matter can be properly considered. That was rejected by all of the Defendants. The letter from ZF in particular is relevant. That is at 84M, page 305.27. "We do not agree that issues relating to your clients' request for documents provided to or by the Brazilian and South African competition authorities should be adjourned. These issues should be determined by the Tribunal based on the submissions and material before it during tomorrow's hearing in the ordinary course." Precisely what, sir, you said you were not prepared to do.

THE CHAIRMAN: Yes. (inaudible)

MR WEST: And we would say we do not accept criticism of the lateness of their evidence. They say our draft directions were supplied 3.5 weeks before the deadline for skeleton arguments and it has taken them that long to liaise with the local lawyers.

Now, in a sense that may well be correct, but it does not really help answer the question of how my clients are supposed to respond to that material in two business days when they were saying it took us three weeks, perfectly reasonable.

So my submission is really there are two ways of addressing this. One is for the Tribunal to adjourn this issue notwithstanding that the Defendants and ZF in particular say you can deal with it now. The other is to look at Mr Firth's statement and for the Tribunal to conclude that it does not amount to a case to answer at all under foreign law, in which case there is no need for my clients to

answer it. I would also submit that is the case for the reasons I have given. It is inadmissible, it is not provided by independent experts, it does not waive privilege over the advice that has been obtained, and if one looks back at the guidance in the Bank Mellat case, that makes clear that the English courts' jurisdiction and discretion depends not only upon what the foreign law provides but whether, in practice, those sanctions are applied, in particular where disclosure is given pursuant to an order of a foreign court. Mr Firth says nothing about that. He does not give any examples of when both the sanctions to which he refers have ever been applied in any previous case. We know from the Emerald Supplies order that an order was made for disclosure in that case of documents from both the South African and Brazilian Competition Authority files. No one ran an illegality point on that occasion and, so far as we are aware, no proceedings were brought as a result against anybody. And so my primary submission is that the Tribunal can conclude now that that material simply does not raise a case to answer, but if the Tribunal is not prepared to come to that conclusion, then my clients must be afforded an opportunity to apply.

That is all I was proposing to say about this category of disclosure. There are very minor bits --

THE CHAIRMAN: Shall we deal with this first, this category, and then we will come back to (inaudible).

MS FORD: Sir, in terms of the principles that the Tribunal should apply in the first stage of the application, we have cited the Ryder case, which is in the authorities bundle at tab 19. The relevant principle starts at page 478, starting at paragraphs 34 and 35. This is the Tribunal itself summarising the approach it takes to disclosure. Paragraph 34: "The CAT does not usually make orders for standard disclosure. Instead orders are tailored to what is proportionate in

the individual case. In a case subject to the fast track procedure under rule 58, there may be disclosure only of specific documents. In a damages claim, such as the present, disclosure can be extensive, and may give rise to dispute between the parties, but remains subject to close case management by the CAT. Even in cases where broad disclosure is required, it is possible to lay down some broad principles that are applied by the CAT…" and it goes on to do so. I draw your attention in particular to point (2): "Disclosure will be confined to relevant documents. Relevance is determined by the issues in the case, derived in general by reference to the pleadings, although in appropriate cases disclosure can be in relation to matters not specifically pleaded." Then slightly duplicative, point (6) "Ordinarily disclosure will be by reference to specific pleaded issues and specific categories of documents. (7) Disclosure will only be ordered and the order will be framed to ensure that it is limited to what is reasonably necessary and proportionate bearing in mind a number of aspects, the most important of which are: (a) the nature of the proceedings and the issues at stake; (b) the manner in which the party bearing the burden of proof is likely to advance its case on those issues; (c) the cost and burden of providing such disclosure; (d) whether the information sought can be obtained by alternative means or be admitted; and (e) the specific factors listed in r. 4(2)(c)."

Those principles in my submission direct one then to look at the way in which the Claimants have pleaded their case, and that is in the Particulars of Claim, CMC bundle tab 12. If we start at page 60 --

THE CHAIRMAN: Give me the internal page number.

MS FORD: It is tab 12 in the CMC --

THE CHAIRMAN: The internal page number, please.

MS FORD: I am sorry. Page 7. In fact, if we look back at page 6 there is a heading

"The European Commission decisions" and the Tribunal will see that the Claimants rely on two of the Commission's decisions, which are defined as OSS1 and OSS2. Paragraphs 20 to 23 are pleading the OSS1 Decision. None of the ZF Defendants is an addressee – again, this is one decision. The Tribunal can see from the table that the OSS1 Decision is concerned with conduct affecting sales of products to Toyota, Suzuki and Honda, not to the Claimants. If we go to paragraph 22 of the pleading, it is pleaded that although the OSS1 Decision was concerned with sales of OSS products to Japanese car manufacturers, it was concerned with such sales to Japanese car manufacturers' production facilities in the EEA. So that is the focus of the claim in respect of the OSS1 Decision. Paragraphs 24 to 27 then plead the OSS2 Decision. The Sixth to Eighth Defendants, which are the ZF Defendants, are addressees of the OSS2 Decision, and the Ninth and Tenth Defendants, which are also part of the ZF undertaking, are not addressees of the Decision. The Tribunal can see from the table that summarises this Decision that it is concerned with conduct affecting sales of products to VW/Porsche and BMW/Mini, again not to the Claimants in this case. Then 25 sets out the addressees and 27 then pleads that the OSS2 Decision concerns supplies to production facilities throughout the EEA and to sales covering the whole territory of the EEA. Paragraphs 29 to 38 Mr West has already shown you. Those are the paragraphs that plead the proceedings before the SACC. Then we come to a section on internal page 11 headed "The facts giving rise to the claim." What is pleaded in these paragraphs is a series of cascading possibilities, which are pleaded in the alternative, and they are in my submission pleaded in extremely vague terms. So if I start with paragraph 39, it is pleaded: "Over a period which extended from at least as early as 6th July

2004 until at least as late as 30th March 2011, defined as the cartel period, the undertakings to which the addressees of the Decision belonged or any two or more of them in combination entered into and thereafter implemented one or more agreements or concerted practices to prevent, restrict or distort competition in the supply of OSS products to Automotive AMs including PSA and Vauxhall/Opel or either of them, as well as Toyota, Honda, Suzuki, Subaru and the other named brands."

Just pausing there, the primary allegation in this paragraph is that notwithstanding that the Commission decisions were concerned with conduct and supplies in respect of entities which did not include the Claimants, nevertheless it is alleged that there was somehow a cartel which encompassed supplies to the Claimants.

If we then turn to paragraph 43, we then see the first alternative way in which the case is put, and that is if, for reasons of which the Claimants are currently unaware, any cartels concerning OSS products had to be or were in fact limited to supplies to individual customers, nevertheless it is contended that there were separate cartels between all or at least two of the undertakings to which the addressees of the decisions belonged concerning supplies of OSS products to BSA and Vauxhall/Opel or either of them. So the alternative case is even if some of the cartels were focused on entities other than the Claimants, nevertheless some of them were not. One then gets a second alternative case pleaded at paragraph 44. In further alternative it is essentially said even if none of the cartels were actually concerned with supplies to the Claimants, then nevertheless it is pleaded there was an umbrella effect.

Then in 45 it is clear that the pleaded case which is being advanced is concerned with the EU, so we have the Claimants, which are all companies incorporated and

having their operations in the EU, the cartels pleaded above, it is alleged, were implemented in the EU or produced direct substantial and foreseeable effects in the EU, they appreciably affect the trade within the EU, and they rely on the Commission's findings.

One then has the plea of the applicable law, paragraph 46. It is said: "The cartels pleaded above constituted breaches of Article 101", so EU law is what is relied on.

That is the pleaded case on the basis of which disclosure of these foreign regulatory documents is sought. On any view in my submission, it is pleaded in extremely vague terms with very limited particularisation, and that in itself in my submission should give the Tribunal pause in terms of directing wide-ranging disclosure on the back of that sort of limited pleading.

In my submission, it is clear from the pleadings that the foreign regulatory documents that are sought are of very limited, at best peripheral, relevance to the allegations that are being advanced. None of the ZF Defendants against which the Claimants have chosen to bring these proceedings are parties to the proceedings before the foreign regulators, so there is no commonality of defendants as between these proceedings and the foreign regulatory proceedings.

As you, sir, have already canvassed with Mr West, the Brazilian proceedings and the DoJ proceedings are not even pleaded at all and, in fact, it goes further because they were originally mentioned in the claim form and then the references were struck through. If I can show the Tribunal that --

THE CHAIRMAN: (inaudible)

MS FORD: It is tab 11 of the CMC bundle. This is the amended claim form and if the Tribunal turns to page 51 within this tab, paragraph 8, it says: "The Claimants

will rely upon and refer to the decisions at trial herein for their full terms true meaning and effect, together with" – and the struck through language refers to other Competition Authority proceedings, decisions of plea agreements and jurisdictions outside the EEA which make findings of similar, unlawful anticompetitive agreements or concerted practices in relation to OSS components. These will include plea agreements filed with various Defendants and Co-Cartelists with the US Department of Justice and decisions/investigations by the Brazilian Administrative Council for Economic Defence."

So not only were they not pleaded, but they appear originally to have been pleaded and then taken out again.

THE CHAIRMAN: But then the irony is, as I understand it, you are now relying on the DoJ proceedings for the purpose of limitation.

MS FORD: Well, sir, we have relied on publicly available documents and so the paragraph that Mr West took you to in our Defence referred to a news report which reported matters going on with the DoJ.

THE CHAIRMAN: But does it suggest a nexus?

MS FORD: In my submission, the availability of publicly available documents does not then justify and should not allow what we essentially describe as a fishing expedition.

THE CHAIRMAN: It does meet the suggestion that what is going on in the US is not relevant because it concerns different parties and different law and different matters.

MS FORD: In the sense that we rely on it for the purposes of limitation, but one then has to look at what is the pleaded case and I am going to come on to make some more submissions on the distinction between the case that is pleaded

here and some of the ones that Mr West relies on in which there has been disclosure of foreign regulatory material. It is important to emphasise that the foreign regulatory investigation itself I do not think will be concerned with suspected anti-competitive behaviour impacting their respective jurisdictions, and I have shown the Tribunal that the Claimants' pleading is very clearly concerned with alleged defects within the EEA.

The next point to emphasise, which may have fallen off the radar because of the order in which matters have been raised, is that the Claimants are already getting the Commission decisions, the access to the file documents as they have been defined in the draft order and the additional access to file documents, so these are the documents that have been collated for and/or by the European Commission itself in respect of alleged defects within the EU, and so in circumstances where the Claimants are getting disclosure of those documents, in our submission it is difficult to see why they need to look at documents which are provided to or originate from non-EU regulatory investigations as well --

THE CHAIRMAN: The reason, and the answers made clear – it may be a bad reason but the reason is that the Commission was not concerned with sales to the Claimant company and its decisions are not going to directly address that point, or I imagine so.

MS FORD: It is certainly the case that the Commission's findings of infringement were not concerned with the --

THE CHAIRMAN: No.

MS FORD: And we pointedly rely on that. We say for that reason the claim is speculative.

THE CHAIRMAN: Yes, but on the one hand you are relying on it; on the other hand you are saying that the Claimants have all they need from the Commission

documents.

MS FORD: Well, the Claimants have what the Commission had --

THE CHAIRMAN: Yes.

MS FORD: Essentially.

THE CHAIRMAN: But that is, as I understand it, what takes this slightly out of the norm is that you cannot just go to the Commission documents and expect to find everything relating to the – the bulk of the materials relating to the dispute there, precisely because sales to the Claimants were not subject to investigation, so that is why the case is – in this case there is a reason for looking to other Competition Authority decisions or documents filed in the Competition Authority because they are directed to the activities in respect of the Claimants.

MS FORD: Well, certainly the distinction is more a geographical one, rather than a distinction on the basis of which entities were concerned by the investigation and that distinction, I think, comes through very clearly when one looks at the other cases that are relied on by the Claimants to seek to justify seeking this sort of disclosure in this sort of case. They have relied on Emerald and Daimler, and in both of those cases, the allegations that were being advanced there had a very obvious extra-EU dimension

THE CHAIRMAN: Yes, I mean unless you want to, you do not need to address me on that. I think we have got what we need there, that is all I have to say.

MS FORD: Sir, I do get something positive out of my submission.

THE CHAIRMAN: Oh okay, very well, yes, I am sorry about that.

MS FORD: It is not simply a responsive point. If I can show you, for example, the Emerald judgment, starting in authorities bundle, tab 15. I am simply referring to these judgments as publicly available sources of information about the nature

of the allegations that were being advanced in this case.

THE CHAIRMAN: Of course, yes.

MS FORD: So first of all, paragraph 17 in this judgment, it is headed 'Regulatory Decisions' and records, 'In support of their case, the Claimants seek to rely upon a number of decisions of foreign competition authorities/regulatory courts against BA, as well as omissions in proceedings before such regulators or courts.' So that is the first point. A number of regulatory decisions were relied on. The next judgment in the bundle, tab 16, this is another Emerald judgment and what is recorded there is the nature of the allegations that were being advanced. Paragraph 15 refers to a worldwide cartel. Paragraph 16 refers to a global cartel and paragraph 17 then says, 'The claims related to alleged overcharges on air routes between large numbers of territories across the entire world', and it goes on to comment on the EU/EEA routes, but it (inaudible) from that there were non-EU/EEA routes in issue as well. So this is not, unlike the claim in the present case, this is not a claim which is limited to the territory of the EEA. This is a claim which involved worldwide routes. Then if we turn on to the following tab, tab 17, paragraph 115 within this judgment, of course the fact that one of the arguments that was being relied on by the claimants in this case was allegations of interfering with business by unlawful means and conspiracy to injure using unlawful means and the unlawful means relied on in respect of those torts was both infringement of EU/EEA competition laws and breaches of various other foreign national competition laws, which again then requires reliance on what happened in jurisdictions outside the EEA. If you look at the Daimler case, which is the other case on which reliance is placed, this is authorities tab 20, starting at paragraph 11 within this judgment, we see that the allegations here, Daimler claims that these alleged unlawful agreements

encompassed Ro-Ro services on various routes around the world, including but not limited to routes between ports in the EU/EEA. Then paragraph 14, 'In seeking to establish the Defendant's participation in the price fixing cartel, the start of the cartel, Daimler relies on, amongst other matters, various foreign regulatory materials, namely other decisions and actions of criminal and competition authorities around the world.' So my submission is that these cases where this sort of disclosure has been directed have a very clear extra-EU dimension and in those circumstances, one can see why it might be concluded that foreign regulatory materials were relevant to be disclosed. That extra-EU dimension, in my submission, is simply not present in the same way on the Claimants' pleaded case in these proceedings, and to the contrary, it has been made very clear that what is relied on is an offence within the EEA, alleged offence. Finally, we do say that there are specific obstacles to disclosure in particular jurisdictions and, sir, you have been shown Mr Firth's evidence in relation to Brazil, where he is --

THE CHAIRMAN: You do not need to address me on Brazil.

MS FORD: I am grateful. Turn then to the South African Competition Commission. The position there is that the Competition Commission itself has objected to the use of either the SACC's complaint or any documents in the South African proceedings anywhere in the world and Mr Firth has exhibited the letter from the SACC's legal representatives.

THE CHAIRMAN: Can you just show me that, sorry? Where will I find it?

MS FORD: It is tab 9B, page 46.20.

THE CHAIRMAN: Yes.

MS FORD: And so this letter is from the SACC's legal representatives and it is saying, 'We refer to the above matter and your correspondence with the Competition

Commission on 20th October 2021. It is our instruction from the Commission that we object to the use of the initiation statements or any other document which forms part of its record of litigation proceedings in South Africa or anywhere in the world by yourself, or any other person, as there is ongoing investigation and litigation by the Commission in South Africa. The use of the initiation statements or any other information or documents would be detrimental to the ongoing Commission and Tribunal proceedings initiated by the Commission.'

THE CHAIRMAN: Yes. It is a matter of common sense. You know, if I produce my financial records, invoices or something, to the South African Competition Commission, I assume it is not the case that I have to then stop all financial trading because I can no longer rely on my accounts or even my invoices? It cannot -- for me be read this broadly, as it seems to make no sense and the reference to the initiation statements, those are witness statements from, as I understand, the Competition Authority, I believe, and that makes perfect sense, but I think you are reading it more broadly and say that they are internal documents of the Claimants' that can never be used presumably for any purpose, in commerce, in -- or is it just in relation to proceedings before this Tribunal? What is it that is being said?

MS FORD: Well, I do not seek to put any gloss on the words in the letter, but Mr Firth has set out what he has been told by Bowmans who are the law firm that has the conduct of the SACC investigation on behalf of TRW, which is the (inaudible) undertaking, and that is in his witness statement, tab --

THE CHAIRMAN: Yes, well I have got that but I mean, we do not seem to have helpful materials. I mean, if this is an important point, which it might be, I do not have the materials to decide this. I mean, I can take a robust view relying on the

authority that has been referred and that look, I just do not -- I can take a robust view on this as a matter for the UK and so forth, and plough ahead. I understand that, but insofar as I want to have regard to it at all, and get to the bottom of it, I have not got the materials before me to do that, today, have I?

MS FORD: Sir, I think that is fair. In relation to the authority that you were referred to, the Bank Mellat case, at tab 28. We can look at the summary of principles that you were taken to, it is paragraph 63, 1106.18.

THE CHAIRMAN: I must say, look, I am reluctant -- I understand it may be appropriate to take a robust view of these things, when one has all the relevant materials before you, but I am just reluctant --

MS FORD: Sir, I certainly understand and I would submit that it is important. Even if the Tribunal feels that it is unable to take a final decision, the existence of a risk is a very relevant factor that should be taken into account in the exercise of discretion and paragraph 63 subparagraph 3 emphasises that whether or not to make such an order is a matter for the discretion of the court. An order will not likely be made where compliance would entail a party to English litigation breaching its own foreign criminal law, not least with considerations of comity in mind.

THE CHAIRMAN: I understand the submission.

MS FORD: Mr West has advanced some criticism of the timing of the evidence we have sought to rely on to advance this point. We do not accept that that criticism is fair. We only received the Claimants' --

THE CHAIRMAN: No need to address me on timing -- for present purposes, I am prepared to accept that this is all in time and these things happen.

MS FORD: Sir, the only reason I labour the point is because it does go to the extent to which you are able to put weight on matters which are at a level of risk, as

opposed to the ability to determine it at this stage, but I do submit that there is clearly a prima facie risk, and that is a factor that should be taken into account in determining the --

THE CHAIRMAN: What do you say about the suggestion that this be heard -- this narrow point be heard on another day? This could go on for months, it could go on for two weeks. You file some evidence and it may be the point just goes away in that time because on further enquiries, you will discover there were some crossed wires in the communications, or maybe you discover there is a very serious point there and you are able to put in better evidence of foreign law and what the consequences are of me taking the Bank Mellat approach and what the consequences of your proposed approach would be. What do you say to that?

MS FORD: Sir, Mr West has shown you our letter in response to that suggestion. We have indicated we do not favour kicking this matter off any further. We would ask --

THE CHAIRMAN: I know you are not in favour, but I am asking you, what you have got to say about it?

MS FORD: We would ask the Tribunal to determine this issue today as, sir, you will appreciate with the submission I have made, there are a number of reasons, forceful reasons, in our submission, why these documents should not be disclosed, which are not entirely dependent on the foreign law point.

THE CHAIRMAN: Of course, I understand that. I am not suggesting -- I am not asking you to say the whole point again, just asking you to speak on this narrow legal point.

MS FORD: Sir, in my submission the way in which the question is posed gives the answer, in the sense that it is a very narrow legal point and, in terms of

proportionality, in our submission, it would be appropriate to determine this disclosure issue today, in the light of all the material, rather than narrowing this point off and taking it for another day. I just address briefly the points that Mr Bolster has made in his witness statement. He has referred to a further provision which is in the Brazilian relevant legislation. He has not made any enquiries of Brazilian external counsel as to whether that --

THE CHAIRMAN: You don't need to address me on this.

MS FORD: Finally, you were shown the provisions of the Competition Act, which concern confidentiality. In my submission, the submission --

THE CHAIRMAN: What act is that?

MS FORD: South African Competition Act, and it was suggested that this could all be resolved by means of some sort of confidentiality ring. That does not, in my submission, resolve the concern which is being advanced here, which is that the SACC itself has expressly objected to the use of these documents in the context of their leniency and settlement procedures and Mr Firth has set out his understanding based on what he has been told by South African counsel, that consequences might arise if that objection is disregarded.

THE CHAIRMAN: Yes. It depends on the interpretation of the letter. If you are correct in your interpretation, there may be consequences. Further enquiries may show that your reading of this letter is incorrect.

MS FORD: Well sir, that is why I seek to rely on what Mr Firth has been told because, of course, it is not either my reading or his reading. It is his understanding based on what he has been told by local counsel and it is paragraph 18 of his statement, and he records there, 'I have been informed by Bowmans that the ZF Defendants are prohibited --

THE CHAIRMAN: He had not named who he has spoken to very satisfactorily, has

he really?

MS FORD: But he has spoken to the law that has conduct.

THE CHAIRMAN: Yes, but we do not know -- we do not know who he has spoken to at the firm, how senior they are, what materials they consulted, what experience they have in this area. We just do not know.

MS FORD: It is not in his statement, we can provide that information if it would assist the Tribunal, but I do say --

THE CHAIRMAN: No, I do not want to take it on the fly.

MS FORD: I do say that this material clearly raises a prima facie risk of problems in relation to foreign procedure and that is a factor that the Tribunal should be weighing in the balance, but it is a further factor.

My primary submission is that disclosure is not merited in any event, in the light of the nature of the claim that is pleaded and applying the conventional test of proportionality, reasonableness in the light of the approach the Tribunal normally takes and given that the Claimants will have access to all the Commission documents.

THE CHAIRMAN: So forgive me -- you have been rather sort of spiked, to some extent, by the Eleventh Defendant, at least with respect to the Department of Justice, has come up with a proposal, and what do you say about that? If there was -- as I understand your position, sorry, some of these positions, there are potentially 40,000 to 50,000 documents.

MS FORD: Sir, our position is 50,000. It is paragraph 11 of Mr Firth's statement where he sets this out.

THE CHAIRMAN: Right, I am grateful, yes. Okay. 50,000 documents. In terms of a search limited to certain search terms, what do you say about that? Presumably that would not be burdensome?

MS FORD: Well, I cannot make the submission it would not be burdensome. The point being made in Mr Firth's 11th paragraph is that there are 50,000 documents, but the DoJ's document request was broad and the documents produced likely included a significant number of documents that were not relevant to the alleged infringement being investigated by the DoJ. I do reiterate that these are proceedings which are not themselves pleaded, and which concern geographical locations which are fundamentally not in issue in these proceedings.

THE CHAIRMAN: I understand your submissions, yes. Thank you. I just wonder if I was against you on that and wanted to order some limited disclosure, whether you have any specific feelings about what disclosure should be ordered.

MS FORD: I can take instructions as to whether or not there are any additional thoughts from those behind me. (Pause) Sir, our position is that if the Tribunal were minded to direct key word searches, then those key words would sensibly be the brands that the Claimants are concerned with. So, we see the force of that, if that were the way forward. Of course, the Tribunal appreciates my primary submission, that disclosure from this jurisdiction in general is disproportionate.

THE CHAIRMAN: Ms Thomas.

MS THOMAS: Thank you. For the First to Fifth Defendants, I obviously will not seek to duplicate everything that Ms Ford has helpfully submitted to you. I just wanted to pick up on a point made in the course of argument, I think, for the sake of argument, where it was posited that the problem with the Commission documents may be that the Commission was not focused on the claimants' brands and that is obviously why the Claimants are interested to see what foreign regulators might hold.

THE CHAIRMAN: Yes.

MS THOMAS: My submission, which I think supports Ms Ford's submission, is that everything plausibly relevant will have been provided to the Commission and it should not be forgotten that, in this regard, the First to Fifth Defendants, and indeed the Sixth to Tenth Defendants, are going further than the usual order, in that they have agreed not only to provide disclosure from the Commission's Decision and the Commission's Access to File Documents, but also from all documents they provided to the Commission. So what has been agreed already travels significantly further than the standard order, which counsel for the Claimants referred to.

THE CHAIRMAN: So, just help me. It is unclear to me why the Commission did not directly consider the Claimants' -- sales to the Claimants.

MS THOMAS: I am grateful.

THE CHAIRMAN: And I am not sure I can put my finger on materials that help me with that. I am assuming it is not because the Commission looked at it and said there is no -- there is simply nothing going on here, because then you would have applied to strike out the claim. So, I assume some other explanation.

MS THOMAS: Well, in our submission, that is the answer and there may or may not be a strike out application in due course. I think what I can most usefully take you to, sir, is paragraph 24 of my skeleton argument. This is tab 8 of the main bundle.

THE CHAIRMAN: Sorry, (inaudible).

MS THOMAS: Sorry, tab 8, paragraph 24, which is page 45.8, or internal page 8. So the position is, as you have of course appreciated, that the Commission found six distinct cartels relating to five distinct OEM brands. It made those findings after an eight-year investigation.

THE CHAIRMAN: Sorry, what am I meant to be reading?

MS THOMAS: I am setting the context, apologies. It made those findings after an eight-year investigation into the industry, and it is correct that after that eight year investigation it did not make any finding of infringement in respect of the Claimants' brands, but what we have sought to explain at paragraphs 24 and 25 is the nature of the documents that the Commission would have received in the course of that eight-year investigation. So paragraph 24 makes the point that I have just made, which is that the Defendants have agreed to go further than the usual order, in providing all of the documents they have given to the Commission and not merely the documents on the Commission's file and the distinction between that is addressed at paragraph 25(a) of the skeleton, which extracts the rules for access to the Commission file and explains what the Commission file is and what it constitutes.

THE CHAIRMAN: Yes.

MS THOMAS: And it explains that, you can see in the second sentence of that paragraph, the Commission obviously receives a large number of documents, some of which may, following a more detailed examination, prove to be unrelated to the subject matter of the case in question. Such documents may be returned to the undertaking from which those have been obtained. Upon return, these documents will no longer constitute part of the file. So the Commission takes in a large number of documents, it identifies documents which it considers to be unrelated because, of course, it does not consider them to be relevant to any finding of infringement.

THE CHAIRMAN: You have been talking to me about what the Commission does in the generality. I was more interested in the specifics.

MS THOMAS: So in this specific case, many of the Defendants, including the First to

Fifth Defendants, were leniency applicants, and so what that meant is that when the Commission began to investigate this industry, it did not simply receive requests tailored to, for example, give me your documents relevant to BMW. They appreciated that the Commission was investigating the entire industry and they were aware that all other Defendants were also making their leniency submissions and it was in their interests, and indeed it was a condition of their leniency application that they provide all plausibly relevant documents which may pertain to any infringement. So they were not simply responding to disclosure requests from the Commission, saying we are investigating a cartel about BMW. They provided all documents that could be relevant to any plausible leniency submission, and that was a condition of the leniency applications which they made and which were granted.

THE CHAIRMAN: Right, so more specifically, where do I see evidence or documents that support the position that documents relating to sales to the Claimants were submitted to the Commission?

MS THOMAS: Well, paragraph 25(b) of the skeleton sets out the position as principle, which we know happened in this case because the Defendants were granted leniency, and so it can be inferred that they complied with all of these requirements.

THE CHAIRMAN: Well that is an inference I am not prepared to draw.

MS THOMAS: I am grateful.

THE CHAIRMAN: I am looking for something a bit more specific.

MS THOMAS: I do understand that but what I am trying to deal with is the primary submission that the problem was that the Commission was not investigating sales to the Claimants and that is not an assumption that can be drawn either in the Claimants' favour.

THE CHAIRMAN: Right, so we simply do not know the extent to which the Commission looked at sales to the Claimants?

MS THOMAS: Well, my submission is that because they were leniency applicants, they received an extremely full file and looked at everything. I can offer a further point which I was going to come to later when dealing with the SACC, but it may deal with a concern that is in the back of your mind, which is that in the time available, the parties obviously have not, as the Claimants seem to suggest they ought to have, been able to effectively do the disclosure exercise and ascertain what exactly is out there, but we have, as of this morning, been able to confirm the position in respect of what was given to the SACC and I can confirm, on instruction, that nothing was given by Autoliv to the SACC that was not also given to the European Commission, and the reason for that is precisely what I have been explaining which is that in order to get the benefit of a leniency application from the European Commission, one provides everything possible to the European Commission, so that one cannot be --

THE CHAIRMAN: Did you say everything that was provided to South Africa was provided to Europe? What about -- Ms Ford, do you have a position on that?

MS FORD: I would have to seek instructions on that.

THE CHAIRMAN: Yes, sure.

MS FORD: Sir, we are not in the position to provide an indication on that either way at this stage.

MS THOMAS: The significance of that point, so far as Autoliv's documents are concerned, is that you have been taken to the Particulars of Claim, where the Claimants plead reliance on the SACC and this is at, I believe, tab 12, page 64, internal page 10.

THE CHAIRMAN: Sorry, internal page 10, yes.

MS THOMAS: So this is the Claimants' pleading, where of course the SACC is the only regulator, other than the European Commission whose relevance is actually pleaded by the Claimants and the point made here, and the reason why the Claimants have obviously found some interest in the SACC documents, is that this is the only place where they have been able to find any mention of their own brands in any of the foreign regulator documents.

THE CHAIRMAN: Yes, I (inaudible) that.

MS THOMAS: Yes, so this is at paragraph 30. The point here is at paragraph 35, the Claimants plead reliance on the index, which they say included five documents that Autoliv, so my clients, had disclosed to the SACC during the SACC's investigation relating to Autoliv's business with PSA. So this is the one area, these five documents provided by Autoliv to the SACC, where the Claimants have been able to identify anything at all which they think might possibly have been provided to a foreign regulator and not to the Commission, but we have now investigated the position and are able to confirm that those documents were provided to the Commission.

THE CHAIRMAN: Okay, so it does not matter to you whether disclosure is ordered as against the SACC because you will be providing those documents anyway?

MS THOMAS: Well, it does matter because it seems to require us to do a wholly unnecessary disclosure exercise. We are not required to disclose --

THE CHAIRMAN: You have already determined that they are the same documents, so why does it require any work? Beyond confirming that, why does it require any work?

MS THOMAS: Well, I think the first point is one of simply proportionality, which is if you know that they are the same documents, it seems very bizarre to order us to search two identical document repositories. We simply do not see the need

for that.

THE CHAIRMAN: Well, sorry (inaudible), you know you have done that already. You would not need to redo it. You need to confirm, double check, that that is indeed the case but then it would not involve any extra work at all, would it?

MS THOMAS: And it would require no further disclosure, because we are not obliged to disclose copies of documents under the CAT rules?

THE CHAIRMAN: Absolutely, absolutely, yes.

MS THOMAS: Well, in that case the Claimants are asking for a pointless order, so I think we struggle with (inaudible) --

THE CHAIRMAN: Well, it is a pointless order based on something you said on instructions today. As of yesterday, it was not pointless at all.

MS THOMAS: Well, I do appreciate that. The point is being made then in support of my primary submission, which is that as a matter of irresistible inference, in particular because of the leniency context and because the Commission is the only regulator that is investigating a breach of EU law, there is no reason at all to think that foreign regulators hold any relevant documents that the Commission does not already have. That is the key point.

THE CHAIRMAN: All this – but you have not shown me any materials to confirm it. You have talked in very general terms, but you have not shown me any materials that confirm that, beyond your -- what you have said on instructions. You now understand that they are all the same, or at least everything that was disclosed in South Africa was already disclosed to the Commission. There is nothing else, apart from those helpful instructions, there is nothing else I can -- that assists me on this point as to whether or not there is a benefit to looking at documents that were filed with other regulators.

MS THOMAS: What I rely on is the leniency rules themselves, which we know were

followed in this case because the Defendants were granted leniency.

THE CHAIRMAN: I understand that point, but what I do not have material to assist me on is whether the leniency rules in this particular case, given the nature of the way the complaint develops and the Commission investigation has developed, necessarily required you to disclose all documents relating to supplies in the industry, including to the Claimants. That is the bit I am missing.

MS THOMAS: The position is that the leniency rules required and incentivised the Defendants to provide everything relating to the industry, including the Claimants, because the Claimants are a part of the industry that was being investigated.

THE CHAIRMAN: Yes, yes. What about the US then?

MS THOMAS: I think, so for the US and for foreign regulators in general, the point really is that the Claimants are seeking to almost reverse the burden of proof in a test which depends on proportionality --

THE CHAIRMAN: Can we just start with the practicalities. Is everything in the US going to be the same as everything in Europe?

MS THOMAS: It is not --

THE CHAIRMAN: I mean to say, everything disclosed to the Commission, will it have also been disclosed in the US and vice versa, or not?

MS THOMAS: It would not be because the US takes quite a different approach procedurally. It takes the approach of making very wide ranging subpoenas …

THE CHAIRMAN: Yes.

MS THOMAS: … which require a large number of documents to be disclosed.

THE CHAIRMAN: Yes.

MS THOMAS: So because of the leniency rules in Europe the applicants will have filleted and identified documents they think the Commission are going to be

interested in, and provided them to the Commission. The Commission equally, using its very broad investigatory powers, will have requested and received relevant documents from the Defendants. The US jurisdiction, however, takes a different approach by making very broad subpoena requests for a broad category of documents. That is why we end up with these very large numbers of documents, 45,000 or so, but based on the procedural context there is absolutely no reason to think that anything relevant was provided to the US that was not also provided to the Commission.

THE CHAIRMAN: Right. But again this is subject to your point on leniency … Yes. (Inaudible).

MS THOMAS: Yes, and therefore based …

THE CHAIRMAN: … leniency.

MS THOMAS: Therefore based on a test of proportionality, the Claimants are the ones who need to satisfy you that there is any sense at all in such document searches relating to foreign regulators in these circumstances, the circumstances being the foreign regulators, just like the Commission, have not made any findings of infringement with respect to the Claimants' brands, the proceedings concerned breaches of EU law and the breaches of EU law in this industry have been comprehensively investigated by the Commission over the course of its eight year investigation, and finally - a point on which we do place emphasis - that the Defendants have been more cooperative than they needed to be by agreeing to provide documents given to the Commission and not many documents --

THE CHAIRMAN: So you get brownie points.

MS THOMAS: It is a point that plainly goes to proportionality.

THE CHAIRMAN: Right.

MS THOMAS: Because it is a point that we have already gone further than the usual order by agreeing to provide all documents provided to the Commission.

THE CHAIRMAN: In terms of the same question, what is the problem with doing the search that is contemplated by the Eleventh Defendant as against your US documents?

MS THOMAS: It is not proportionate to do so, sir.

THE CHAIRMAN: Why is it not proportionate?

MS THOMAS: Because we know that the relevant documents were searched and already given to the Commission.

THE CHAIRMAN: Right.

MS THOMAS: They note that although the Eleventh Defendant has been cooperative in so far as it has run the search with the brand names, a task that we have not yet done over this 45,000 document repository, they have not said that any of those are relevant, they have confirmed in fact they have not --

THE CHAIRMAN: I am asking you, I am asking you why is it not proportionate to do the search? Because one might say actually it is not a very difficult thing to do, to electronically search those documents.

MS THOMAS: The two reasons given by the Claimant in my learned friend's opening submissions for why they are interested in documents held by regulators is that: (1) documents gathered in by regulators are likely to be most relevant to a cartel; and (2) it is an existing file of documents already collated, and so they say easier to run searches over. The trouble is that the first point, we submit, goes away once it is appreciated that the Commission is the one that has investigated --

THE CHAIRMAN: Yes, but with the greatest respect you are not really answering my questions.

MS THOMAS: Yes.

THE CHAIRMAN: Why is it not proportionate from the point of view - are you saying that that suggests that there is a lot of work involved? Effort, or expense? That is the proportion I am trying to focus on.

MS THOMAS: I do appreciate, yes.

THE CHAIRMAN: On the other side of the scales, I appreciate the relevance,because you talk about relevance.

MS THOMAS: Yes.

THE CHAIRMAN: But in terms of the effort, why is it a lot of work or effort or expense to search these terms against the 50,000 documents and then produce a subset of documents for review?

MS THOMAS: I obviously do not want to repeat myself, but the test for proportionality must be if it seems at all necessary or worth it in the first place.

THE CHAIRMAN: Yes.

MS THOMAS: As to the actual work that is required, it is a depository of 45,000 documents.

THE CHAIRMAN: Yes.

MS THOMAS: Those instructing me were not instructed in the States so it is a file that they are going to have to investigate themselves and deal with. The Claimants of course have not satisfied themselves with the brand names, they have said they want a full search with further search terms, as you will have appreciated, so the Claimants have not said that they will content themselves merely with the brand names. Tokai Rika told us they found some 700 documents with the relevant brand names. We do not know how many we will find. That repository of documents will require a manual review to see if they duplicate what was sent to the Commission, to see if they are relevant at all; if they are relevant, to

see if they are confidential or privileged and take appropriate steps. It is an exercise which simply is not necessary based on what we know about what has gone to the Commission already.

THE CHAIRMAN: Anything else?

MS THOMAS: Two final points, if I may. The first thing is just to note we have obviously heard what ZF have been saying about the illegality of disclosing documents from the Brazilian and South African regulators. We have not sought to rely on matters of this distinct point in respect of proportionality of disclosure but we do not want to disable ourselves from relying on it if, on taking further instructions, we do think it necessary to withhold documents from inspection for those purposes. So we just think it is something that can be addressed further down the line. We note there already are criminal proceedings afoot in South Africa in respect of these proceedings, so it is not an unreal concern that the regulators might seek to take action there and it is one that we obviously will want to investigate, should anything relevant at all be turned up from any searches we are ordered to undertake.

The final point is one made in my skeleton, which is that the Claimants do have the option of coming back to you of course. This is only the first CMC in these proceedings.

THE CHAIRMAN: Yes, I understand.

MS THOMAS: They can investigate what they receive from the Commission, which as we say is very likely to be comprehensive. If they have any reason at all to think that there may be something else out there, they can come back to you at the second CMC or before, with a reasoned, motivated specific disclosure request. That would be much more in line, not only with the usual order but also actually with the procedure that is envisaged by the CAT rules, which

envisages the primary disclosure consideration be given at the second CMC. So as a matter of proportionality, sir, is the point, it is not proportionate for that reason also to order disclosure now. Thank you, sir.

MR PICCININ: Sir, I am Daniel Piccinin and I appear for the Eleventh Defendant, Tokai Rika. Sir, I agree with everything Ms Ford said, in particular that the starting point for any discussion about disclosure, or indeed case management more generally, needs to be the pleadings. But I have a slightly different or further point to make about the pleadings, that goes beyond what Ms Ford says, and it frames everything that I am going to say today about actually all of the documents and the agenda. So, if I may, I would just like to develop that at this point.

The position is that these pleadings are in a dire state, sir. The approach that seems to be taken, and to be fair to my learned friends this is an approach that for years has been fashionable in competition claims, seems to be that it is acceptable to make bare allegations of cartel conduct that are not supported by anything. It is also acceptable to make bare allegations of causation of market-wide harm, and I will come to what I mean by that in a moment, that are not supported by anything at all, any factual evidence, and to turn up at a CMC and say: “Please give me disclosure of anything that is relevant and easy to find.” We say that is just a wrong approach in law, and when we look at the authorities - there is one authority I want to take you to, sir, the Forex case - we will see that that is not right and it is not permissible.

So just to clarify why I say they are in a dire state. The first point is that there is no adequate basis that has been pleaded at the moment for any infringement that could have given rise to direct harm, that is concerning supplies to the Claimants. Secondly, there is no adequate basis for the plea of what we would

call market-wide harm, which is causation of loss to the Claimants arising from collusion in relation to supplies to someone else. So really all of the disclosure that is being sought today, all of it, is properly to be characterised as a fishing expedition.

THE CHAIRMAN: Yes, but I mean, one can use those terms, and of course there is a scale as to the size of the pond one is fishing in no doubt, but you are not applying to strike out this claim …

MR PICCININ: No, sir.

THE CHAIRMAN: … you are conceding that disclosure should be given.

MR PICCININ: Yes, sir.

THE CHAIRMAN: Obviously disclosure has to be given in order that the Claimants can properly plead a case, so why are we discussing this?

MR PICCININ: The reason why I am discussing this is to explain the particular approach to disclosure that we are taking …

THE CHAIRMAN: Right.

MR PICCININ: … which is narrowly targeted at the particular deficiencies that arise on the pleadings …

THE CHAIRMAN: Right.

MR PICCININ: … and then it is also relevant to all the other topics that we are about to come to.

THE CHAIRMAN: Right, okay.

MR PICCININ: I am not going to repeat what Ms Ford has said about the pleadings, but I do just want to show you a little bit, if I may.

THE CHAIRMAN: All right, yes.

MR PICCININ: So, sir, if we could start by just taking a look at one recital of the Commission Decision, the OSS1 Decision.

THE CHAIRMAN: Yes.

MR PICCININ: Just to see - this is the only Decision that concerned my clients at all - just to see what it is that has actually been found. That is in the authorities bundle at tab 1 at page 12. It is recital 36.

THE CHAIRMAN: They seem (inaudible) and shuffle themselves.

MR PICCININ: Oh, dear.

THE CHAIRMAN: So … (Pause)

MR PICCININ: Have you found it, sir?

THE CHAIRMAN: No. Right, yes, I have, yes, that has appeared - extraordinary. Right, okay, I am done.

MR PICCININ: Thank you. Sir, it is recital 36, which says that:

"The overall aim of each of the four cartels that are the subject of this Decision was to respect the incumbency principle and to coordinate on prices. This aim was pursued by coordination of responses to specific RFQs and exchanges of commercially sensitive information on requests from OEMs which were not related to a specific procurement event, with a view to coordinating the relevant competitor's conduct."

So that is RFQs and requests from particular OEMs. Then the Commission gives an example - this is an example of those further requests:

"… OEMs generally requested annual price reductions… These reviews related to particular OSS equipment currently being supplied to the OEM (for which production had already started) and took place during specific periods of the year."

Then we go on to a different topic:

"The relevant Parties coordinated their positions in an attempt to submit a response to the OEM. Occasionally, some Parties also discussed the coordination of

possible price increases -"

THE CHAIRMAN: Sorry, where are you?

MR PICCININ: The last sentence.

THE CHAIRMAN: Oh, yes. Yes.

MR PICCININ: "Occasionally, some Parties also discussed the coordination of possible price increases to be passed on to the relevant OEMs,"

again to the relevant OEMs,

"due to increases in cost of raw materials."

THE CHAIRMAN: Yes.

MR PICCININ: Sir, the point that I make about that is that all of that is specific to particular requests coming from individual OEMs, or occasionally to particular requests from the Defendants that related to supplies to particular OEMs. There is no finding here of any kind - or no suggestion of any kind - of generalised discussion of what prices should be in the sector more generally. So that is the finding that the Commission --

THE CHAIRMAN: So there was collusion in respect to certain customers only.

MR PICCININ: Sorry, certain customers …?

THE CHAIRMAN: Customers only.

MR PICCININ: Yes, that is all that the Commission found. What the Commission is saying here is that everything that it found was infringing met this description, which was that it related to particular OEMs and indeed particular products being supplied to particular OEMs.

THE CHAIRMAN: Right.

MR PICCININ: You understand, sir, that the products we are talking about here today are different in comparison to many cartel cases, they are not interchangeable widgets. A seat belt, for example, is specific not just to a particular vehicle but

to a particular position in a particular vehicle, and --

THE CHAIRMAN: I do not know that, do I?

MR PICCININ: Sorry?

THE CHAIRMAN: I do not know that, do I?

MR PICCININ: In that case, sir, perhaps I should just show you, in the Particulars of Claim just to see how the Claimant puts it.

THE CHAIRMAN: Yes.

MR PICCININ: It is paragraph 10. Then it makes a point about particular positions, but they do explain that these are bespoke products. That is on page 58 of the bundle. Are you there, sir?

THE CHAIRMAN: Which paragraph was it?

MR PICCININ: It is paragraph 10(i).

THE CHAIRMAN: Yes.

MR PICCININ: On page 4. Okay. So:

"OSS components are typically bespoke, customer-specific products. In order to select the suppliers, the Claimants would typically issue a request for quotation … An RFQ might be issued for a new contract (for a new vehicle, a new version of an existing vehicle, or a new platform) …."

So the Claimants themselves say that they are bespoke products. So, sir, if we could go on to --

THE CHAIRMAN: So - sorry, I do not want to take you out of your path too much …

MR PICCININ: No.

THE CHAIRMAN: … but - so you say the documents relating to the Claimants would have been submitted to the Commission?

MR PICCININ: Sir, perhaps if we can just - to answer that question as best I can, if we can just go back to the Decision and I can just show you how the Decision

came about.

THE CHAIRMAN: Okay.

MR PICCININ: So if we can go back to the authorities bundle at page 9. It is page 8 of the Commission's Decision.

THE CHAIRMAN: Okay.

MR PICCININ: Sir, there is a heading that says: "Procedure". Do you see that, sir? So these Commission decisions, I do not know if you have looked at any others before, they all have a familiar structure.

THE CHAIRMAN: Yes.

MR PICCININ: The point of the procedure section is to explain, as you might think, what happened with the investigation: how did it start; and what did the Commission look at. So it is not the case - you might have thought that the Commission decided to investigate Japanese OEMs in Europe, who may have been the subject of OSS collusions and went out and asked people about it. That is not how these things start. How it started was with an immunity application by my client Tokai Rika in relation to collusive contacts relating to suppliers of seatbelts to Toyota. So that is all it was at the beginning. Then you can see what happened in the next paragraph, the title of which is that Takata applied for immunity in relation to a number of OSS products and provided information on contacts with several competitors. You can see what the Commission did: gave them immunity in relation to airbags for Toyota vehicles and seatbelts for Suzuki, and seatbelts and airbags and steering wheels to Honda. Then over the page you can see that the Commission then carried out dawn raids and authorised inspections. At the bottom --

THE CHAIRMAN: Which paragraph is that?

MR PICCININ: That is recital 21.

THE CHAIRMAN: Yes, okay. Yes.

MR PICCININ: Then, as is traditional, following the dawn raid, Autoliv applied for immunity - and so, again, at that point you are going to need to start fessing up and providing everything you can. Then you can see that Toyoda Gosei, the Twelfth Defendant, joined in with their own application for immunity.

Now, I cannot tell you what was in any of these applications for immunity because they were all protected, but it certainly would have been of the utmost interest to the Commission if there were a European OEM who had been the subject of any collusion. That goes without saying. This is the investigation which the Commission then conducted and the Commission then, you can see in recital 24, in 2016, so years later, after considering all of this material, the Commission then formally initiated proceedings with a view to engaging in summary discussions.

I should clarify as well, sir, that summary discussions are not what they sound like. So they are not a commercial settlement where you trade off one thing against another. The Commission has no power to agree not to find an infringement in relation to things that the Commission considers do constitute an infringement as a sort of settlement ploy. The Commission puts its objections to you and then you can make your observations on it, then you settle and a decision like this is what you get.

THE CHAIRMAN: But this (inaudible) claims.

MR PICCININ: The particular submission that I am going to make - I now want to come back to the pleading to show you what is actually alleged, but the submission that I want to make is that there is nothing in the Commission Decision, or that of the investigation that is designed therein, to provide any basis for the allegation that has been made.

I am not applying for strike out because if I do that it is just going to be said that this is premature and they should at least have the limited documents that we are offering. So I do not want to waste time with a strike out application at this stage, but I am trying to justify why we are taking the narrow --

THE CHAIRMAN: I am sorry - again, sorry, keep interrupting you.

MR PICCININ: No, that is fine.

THE CHAIRMAN: Ms Thomas says: look, do not worry, do not get too excited about the disclosure you are given today because there will be another opportunity, but as I understand it, you are saying: well, no, you can have disclosure today, we can then see if you can plead your case and then we may be applying to strike you out.

MR PICCININ: Yes, sir.

THE CHAIRMAN: So there may not be a second opportunity.

MR PICCININ: That is right, sir.

THE CHAIRMAN: Yes, okay, just so I understand.

MR PICCININ: The authorities, you will see --

THE CHAIRMAN: Yes, yes. I am just …

MR PICCININ: Sir, you have to have a proper basis for making - you know this, sir …

THE CHAIRMAN: Of course.

MR PICCININ: … for making an allegation.

THE CHAIRMAN: Sure.

MR PICCININ: And I need to know what that basis is before we can even talk about disclosure.

THE CHAIRMAN: Sure.

MR PICCININ: So if we just go back to page 65, so it is internal page 11 of the Particulars of Claim.

THE CHAIRMAN: Sorry, page …?

MR PICCININ: Sir, the Particulars of Claim …

THE CHAIRMAN: Yes, I can see, yes.

MR PICCININ: Internal page 11. Sir, Ms Ford showed you this before and she showed you paragraph 39. Just focusing on the last three lines:

The allegation is of collusion that restricted competition in the supply of OSS products to automotive OEMs that included

and then there is a number of specific OEMs listed there: PSA, Vauxhall/Opel and then the ones that are actually the subject of the Commission Decision.

The submission that I am making is that there is no support in the Commission decisions for the allegation that there was a single cartel of that kind. On the contrary, the Commission Decision was inconsistent with that allegation because the Commission decisions found six separate cartels with various specific date ranges, and so just for example - the date ranges and parties - just for example, sir, the Commission did not find that my client is liable for harm that was caused by what I call the Toyota airbag cartel, because there is no finding that my client was a party to the Toyota airbag cartel. Nor has the Commission found that my client is liable for harm caused by any of the cartels in the OSS2 Decision, and we were not a party to that Decision at all. Yet that is what is being alleged here in paragraph 39. So my point is that the Commission materials do not provide any basis for that, and obviously nor do they provide any basis for the allegation that there were cartels concerning supplies to PSA and Vauxhall/Opel.

So, sir, the only other thing that you find in the Particulars of Claim in support of that allegation is the SACC material, but my learned friend Ms Thomas has already addressed you on that. They had the index to the file there, they considered it

all, and perhaps we should just look at that again in the pleading. It is paragraph 34. Sir, PSA actually has the index to the file. Paragraph 35, they have reviewed that index and they have identified five documents that Autoliv disclosed to the SACC relating to Autoliv's business with PSA. Now, if they saw anything else in the index that related to PSA it is reasonable to assume that they would have said so. But that is it. As Ms Thomas said, that material has already been given to the European Commission in these investigations; and I think Ms Thomas did not say but she has possibly pleaded, unless I have got this wrong, that Autoliv has since settled with the SACC - that is paragraph 4(d) of her clients' Defence, page 77 of the bundle - and settled on terms that, as I understand it, do not involve any finding of infringement relating to the claimants. Ms Thomas is nodding. So that is …

THE CHAIRMAN: Right. So what has that got to do with you?

MR PICCININ: What that has got to do with me, sir, is that I am just going through the Particulars of Claim trying to find any basis for the allegation that has been made against my client, and I am not finding it.

THE CHAIRMAN: You say that the extent of the pleading was the five documents as against First to Fifth Defendants.

MR PICCININ: That is right, it --

THE CHAIRMAN: And it does not bite on you at all.

MR PICCININ: No, that is right.

THE CHAIRMAN: Okay.

MR PICCININ: It does not bite on any of them really, because it does not seem to have led anywhere. As I understand it, the investigation is over as far as Autoliv is concerned.

THE CHAIRMAN: That investigation, yes.

MR PICCININ: Yes. But there is no other investigation that has been pleaded, sir. So I keep saying there is nothing here, and you say: "Yes, what about the rest?" but, sir, what rest? We have got the pleadings here, but there is nothing.

So, sir, going back to the actual pleading infringement, we can see at paragraph 42, that is on internal page 12, page 66 for those working on the external numbers. At paragraph 42 it said that the agreements were arrived at by means of contact exchanges which the Claimants cannot particularise. There is just nothing there, there is no basis for that allegation at all then, because --

THE CHAIRMAN: As I understand - you may need to recap - the pleading is poorly particularised but, as you reminded me, you are not seeking to strike out.

MR PICCININ: No, that is right, but I am saying that we need to target our disclosure at --

THE CHAIRMAN: The pleading.

MR PICCININ: … at materials that will address this problem. So likewise, I do not need to repeat, there is no basis for what is said at --

THE CHAIRMAN: You have offered to provide disclosure in relation to the Department of Justice.

MR PICCININ: That is right, sir, and I will come on to that, if I may.

THE CHAIRMAN: Yes.

MR PICCININ: And explain why we did that.

THE CHAIRMAN: Of course (inaudible) any more on the pleading while I am - sorry - distracting you.

MR PICCININ: Yes, just paragraph 44, which is the alternative case. This is the plea of what I call market-wide harm, which I am going to get on to. What we say is that that is also, sir, a fact-free zone. There is no explanation at all for what the

causal mechanism might be by which collusion in respect of seatbelts supplied to Suzuki --

THE CHAIRMAN: Yes, I understand that, a poorly particularised case is not good enough.

MR PICCININ: That is right, sir.

THE CHAIRMAN: Yes.

MR PICCININ: Sir, if I could just show you the Forex Decision.

THE CHAIRMAN: Yes.

MR PICCININ: Briefly. The reason I want to do that is because that is now legal authority in this Tribunal on market-wide harm. It is at tab 27. It starts at page 699, but it is page 874 that I would like to go to.

THE CHAIRMAN: Okay, I am there.

MR PICCININ: Sorry, I think I gave a bad reference, it is page 784, paragraph 176.

THE CHAIRMAN: 784. Okay.

MR PICCININ: Sir, you can see the heading:

"Causation of action damage in market wide harm cases."

THE CHAIRMAN: Yes.

MR PICCININ: Sir, at 176 the Tribunal says that generally speaking causation is not difficult, it is a low bar, but it is nevertheless an important control in ensuring that meretricious claims are not brought. In paragraph 177 it goes on and explains the reason why causation is usually a relatively low bar, in a case of an individual transaction case, and that is because when the cartelists collude in relation to a particular transaction the innocent party to that transaction will be dealing with those cartelists in an environment that is not a properly competitive one. That is the actionable harm that is the subject of the claim, it explains over the page.

But then in paragraph 178 it makes it more concrete by saying that if the claim therefore identified a particular transaction that was the subject of a particular anticompetitive information exchange, for example, and so that transaction took place in a distorted competitive environment, that would do for the allegation of causation of harm.

So in our case, if Suzuki brought a claim for damages relating to particular seatbelts that the Commission found were the subject of the Suzuki seatbelts cartel, that would do the trick.

But just going over to paragraph 182 --

THE CHAIRMAN: Sorry, I am not sure I follow that.

MR PICCININ: So the point is that if Suzuki brought a claim against us and they said that they suffered loss because there was collusion on one of their requests for quotation that was actually the subject matter of the Commission Decision --

THE CHAIRMAN: Yes.

MR PICCININ: -- then causation would be straightforward.

THE CHAIRMAN: I understand that.

MR PICCININ: But going onto paragraph 182, which is over the page, you can see that he is talking about the pleadings in another (inaudible) case which were different and he says in the first sentence it is not clear whether those ones were about specific transactions or market-wide harm. The reason I want to show you that was to explain what he means by market-wide harm and it is five lines down. He says: “By this we mean a loss sustained as a result of competition law arrangements that is not linked to specific transactions (which are called direct harm) but which affects the market generally and which can be described as a form of indirect harm or a loss resulting from umbrella effects where other dealers innocent of any infringement nevertheless increase prices

to the wider market because of someone else's infringement. So we then have a detailed discussion of the pleadings in these other cases, which do not matter for our purposes. If we can go on to page 796, we can see the heading is "Pleading cases of market-wide harm".

THE CHAIRMAN: (inaudible).

MR PICCININ: Yes.

THE CHAIRMAN: Okay. I am there.

MR PICCININ: We can see the heading is "Pleading cases of market-wide harm". Then there are some general points about pleadings. I think we can take this quite quickly, sir, because I am sure you know why pleadings are important, not just in all cases generally, but in competition law cases in particular, as at paragraph 198. He then acknowledges the point that was always made in these cases, which is that there are information imbalances between the Claimants as against the Defendants. But over the next paragraphs the Tribunal explains that you need to consider those claims with more specificity than that, and if the issue is causation rather than infringement then the Claimants need to explain how it is that more disclosure is needed to plead their case on causation. Then just looking down at paragraph 204, just over the page, it says that it is not appropriate for a party in individual proceedings, like these ones, to assert a causative link without articulating that causative link in a pleading. A bare, unparticularised assertion is not enough: it has to set out all the material facts on which they rely for their claim and defence. If we can just skip over a couple of pages, to paragraph 207, you can see that it is, of course, right that the pleader is entitled to significant and sympathetic latitude on how the case is put because pleading market-wide harm is difficult and unusual. Over the page, even then it is critical that it be done properly. Then at paragraph 208, it makes

the point that if it is deficient, obviously, it will be struck out. Then there is the same point over again at 209. At 210, it is wrong to commence proceedings in the hope that material will turn up later.

THE CHAIRMAN: Right. But you have not applied to strike out.

MR PICCININ: That is right, sir, and I have explained why as well.

THE CHAIRMAN: Okay. Okay.

MR PICCININ: So if we can just go on to page 825, just to cut to the chase. So he is talking now specifically about pleas of market-wide harm, and is trying to articulate what is good enough and what is not good enough. It says in the middle of the page, in subparagraph 2, that he does not consider that market-wide harm can be pleaded at a level of economic theory alone. Then, in subparagraph 3, he gives two examples of what he could do. One is a plea of statistical relationship between the infringement and loss and the other one, which may or may not be good enough or doable in a particular case; the other one is to articulate the links in the causal chain, the mechanism by which the collusion has been established and actually said to cause this loss. And so we say that is the kind of thing that needs to be done here. There needs to be some kind of particularised case as to how collusion to supply seatbelts to Suzuki in 2008 caused PSA to suffer a loss on airbags in 2004. That sounds quite difficult. But that is what needs to be done. There needs to be a specific pleading of particular RFQs and an explanation of how the particular infringements that have been found caused them to suffer loss.

So, the point of showing you all of this, sir, (and you will be relieved, I think, to hear I am done with Forex now) is really to identify what needs to be done here because at the moment the pleading is inadequate. We have an allegation of infringement in relation to cartels that would have caused direct harm, or could

have caused direct harm to the Claimants, but there is no factual basis for that at all. Indeed, there is not even an actual basis to say that anyone else is investigating that currently. We then have an entirely fair allegation of infringement in relation to the six cartels found by the Commission, but we have no adequate pleading of how those cartels could have caused market-wide harm.

Now, I accept that if the Claimants are to improve their pleading of the standalone infringement, their primary case, then they are going to need some disclosure and, as you say, I am not standing on ceremony. I am not here saying that they cannot have any disclosure, just that it needs to be very tightly drawn in the way that we have proposed. Specifically, what they will need, and this is all they will need, is documents showing collusion in relation to supplies of OSS products to them. So they do not need all documents showing collusion in relation to supplies to someone else. That is not going to help them on their primary case, which is that there was collusion in relation to supplies to them. And if they can do that, then it may be that they do not need this plea of market-wide harm, and so with the paragraph 44 plea then we do not need to worry about any of that. But if they are going to retain that plea, then they are going to need to do better, they are going to need to produce a series of assertions of fact that are capable of being tried by the court or this Tribunal.

THE CHAIRMAN: Right. But none of this -- this is all very helpful in terms of background.

MR PICCININ: Yes.

THE CHAIRMAN: But does that not actually direct me to what disclosure I should order today?

MR PICCININ: Sir, that takes me to my proposal on exactly that. So, against that

background, we could have applied to strike out, but we did not. Instead, we have tried to be constructive.

THE CHAIRMAN: Yes.

MR PICCININ: Indeed, we actually reached agreement with the Claimants on disclosure before the CMC was listed. They agreed to receive less than what we are currently offering to them and to replead on that basis before the CMC.

THE CHAIRMAN: Right.

MR PICCININ: So I just want to show you that. I am not going to show you all of the correspondence, because I do not want to waste time. But if we could go to just the back end of the correspondence so you could see the agreement, that is at tab 65, which is page 272.

THE CHAIRMAN: Yes.

MR PICCININ: There is a letter from Hausfeld dated 4 April. Just going over the page, you will see the heading Tokai Rika, so that is me. We can see, in that paragraph 5, they thank us for confirming that as of that date in April we remained willing to provide the early disclosure which we had previously offered and it says, "Including all of the other documents which we provided to the Commission which refer to the Claimants," and there is a date for disclosure that is given. And they said they noted our proviso that the listing of a CMC had to allow sufficient time between inspection and CMC for re-pleading to take place which they also agreed with. And then they said parties can discuss --

THE CHAIRMAN: Sorry. I am just -- so --

MR PICCININ: Yes.

THE CHAIRMAN: They are asking for all documents provided to the Commission.

MR PICCININ: That is right. Sorry. All documents provided to the Commission which referred to the Claimants. So they were not requiring that we give them any

other documents than we gave to the Commission.

THE CHAIRMAN: Okay.

MR PICCININ: So we are going to give the CD-ROM that the Commission gave us, the documents on the CD-ROM that the Commission gave us, and we are also going to give them the documents that we gave to the Commission that referred to the Claimants, and that is it.

THE CHAIRMAN: Right.

MR PICCININ: Now, they agree with that and just said that if the CMC gets listed at an unfortunate time, then we can deal with that. Then the correspondence continued over the page with our letter in response.

THE CHAIRMAN: (inaudible)

MR PICCININ: Sorry? It is paragraph 3, in which we ask them to confirm that if the CMC was listed too early then they would apply to relist it, to give enough time for the repleading to take place first, and we explained why that was fundamental, because we need to be having all these debates about disclosure, any further disclosure beyond what we are offering, and case management generally against the background of a proper pleading.

Then we can go on to page 276, and we can see there the response, and you can see in paragraph 2 they agreed to that. Then you can see, in paragraph 3, they gave us a list of brand names which we had asked for to carry out searches, and I just want to note here that they include GM as a brand name, and we are happy to search for that and we have searched for that, and that is how we get to the – it is on the basis that all of these search terms that we get the 700 documents in the US. But the reason I mention that is that GM are not actually claimants, but we do know that they manufacture quite a lot of cars in the US and none of those are the subject of this claim. So it certainly should not be

thought from the fact that we have had some possible hits that there is a US investigation that is concerned with the Claimants, with Vauxhall and Opel in the UK. That is not an inference that it would be appropriate for you to draw, sir.

I should just say, sir, as well, that it is envisaged that if all of this had been done, we would be here at the first CMC making a strike-out application.

THE CHAIRMAN: Yes. You can reserve your position on that, of course, yes.

MR PICCININ: Yes. So, sir, it is regrettable that they took the approach, they took the listing of the CMC as an opportunity to renege on that agreement which was reached. I do not really take a point about that, other than the reason I want to show that it was agreed is just to provide a sort of basis for saying that it is a reasonable thing to do.

THE CHAIRMAN: Yes, I understand.

MR PICCININ: So ultimately you are going to want to --

THE CHAIRMAN: Sorry, there are so many parties with different positions. Just remind me, what is your position as to what should be --

MR PICCININ: That is exactly what I was coming to, sir.

THE CHAIRMAN: Yes.

MR PICCININ: What we say is that we should have, first of all, the confidential version of the two Commission decisions.

THE CHAIRMAN: Yes. Take me through the order as we go.

MR PICCININ: Yes, sir. The confidential version of the Commission Decision is at page 43.2. It is paragraph 3.1 of the order. That is all agreed, subject to the dates which I do not have any position on. That is all concerned, as you can see from the heading at 3, with the process of producing --

THE CHAIRMAN: 3.3 (inaudible)

MR PICCININ: The confidential Decision. So that is the first thing. The second thing is 4.1 down to 4.3, which is also agreed.

THE CHAIRMAN: (inaudible)

MR PICCININ: That is the CD-ROM of the documents that the Commission gave to all of us when it decided to pursue settlement negotiations with us to settle the investigation, so these are the documents that the Commission identified as relating to the objections. So there is no dispute about any of that. The question is what else. Then at 4.4 we can see the additional Commission File Documents.

THE CHAIRMAN: We will come back to that.

MR PICCININ: Sir, I might as well show you what I say there.

THE CHAIRMAN: I have not heard the Claimants on this.

MR PICCININ: It is the same thing, sir. It is limited to the same search tools, that is the point. Then at 4.5 you have the DoJ documents. The reason --

THE CHAIRMAN: And you are prepared to disclose – well, you are agreed, are you not, that --

MR PICCININ: I am agreeing.

THE CHAIRMAN: Yes.

MR PICCININ: But, sir, I do not want that to be banked, and this is partly why I am able to be (inaudible), sir, as something that they can just have on its own and then you will go back to 4.4 and look at that separately, because all of this was part of a coherent package that we put forward for a particular purpose.

THE CHAIRMAN: I understand.

MR PICCININ: Yes. So the coherent purpose is that they then have a universe of documents that occur to them which can enable them to plead whatever they are able to plead for a (inaudible) claim, and that is what we say it is sensible

to offer.

I should say as well, sir – perhaps I should show you the letter of 13th May at page 305.4. I think it is tab 84B. This is the position in relation to the overseas documents. You can see at paragraph 3 that we gave a substantial number of contemporaneous documents relating to the DoJ. We got nothing back from the DoJ. In the next paragraph, you have Canada, which we have not heard a word about, but we gave the same thing to Canada.

THE CHAIRMAN: Is the DoJ investigation completed?

MR PICCININ: It is completed, sir, many years ago. Sir, I am not for a moment suggesting that these documents are likely to be relevant or have anything European about them that adds anything to anything that went to the European Commission. Not for a moment. I am just trying to be practical and reach agreement with the Claimants really. That is why we made this offer.

Then paragraph 5, sir, in relation to South Africa. We have provided no contemporaneous documents to South Africa in relation to OSS and they have given nothing to us. Then likewise in relation to OSS.

THE CHAIRMAN: Sorry. (Pause) You provided no documents to South Africa?

MR PICCININ: No contemporaneous documents, no South African documents. There has obviously been correspondence.

THE CHAIRMAN: Yes, but no pre-existing documents.

MR PICCININ: No, relating to OSS.

THE CHAIRMAN: But you are subject, are you (inaudible) parties, but you are subject to that investigation.

MR PICCININ: Yes, sir.

THE CHAIRMAN: But just not in respect of OSS.

MR PICCININ: Sorry, there is no OSS investigation against us in South Africa.

THE CHAIRMAN: Thank you.

MR PICCININ: But there is (inaudible) this occasion. Not in relation to OSS.

THE CHAIRMAN: Not in relation to OSS.

MR PICCININ: The key point in talking about disclosure, sir, is that we have not given anything to them in relation to that, and nor have we received anything, so as far as I am concerned (inaudible) South Africa.

Then in relation to Brazil, again, we have --

THE CHAIRMAN: You do not have to address me on Brazil.

MR PICCININ: In the letter we therefore proposed to them that there be no order in relation to South Africa or Brazil relating to us but then when we give them the material that you have just seen we have offered to give them in relation to --

THE CHAIRMAN: (inaudible)

MR PICCININ: It would depend on the terms of the order, sir. We would (inaudible) include correspondence or anything like that. So we say there is just no basis for any wider order to be made because there is nothing in the pleadings.

THE CHAIRMAN: I understand.

MR PICCININ: Unless, sir, you have any questions.

THE CHAIRMAN: No, I am grateful. I just want to ask about this point that Ms Thomas made that everything that went to South Africa the Commission has. I suppose there are two points. First of all, you have only identified five documents in your pleading, but leaving that aside is there any reason to believe that documents relating to your client would not have been submitted as part of the leniency package, if I can put it that way, to the Commission? The trouble is I have got no evidence from either party. Maybe there is some sort of …

MR WEST: Sir, we have only just been told that and in my submission the way forward is already provided for in our address, which regards disclosure in relation to

other competition authorities only if the documents are not otherwise encompassed --

THE CHAIRMAN: I understand, but Ms Thomas puts it to me, she says: look, we all know how leniency works, prima facie one would have expected everything that is relevant in the EEA case to have been - they would have fessed up and it would all have gone in, and there we are, there is no need to start going off to other jurisdictions. On that specific question of approach and how leniency works, what is your position on that?

MR WEST: We do know this Decision is rather unusual in being limited to certain OEMs and it is also a settlement Decision, and so we were obviously not party to any of this at the time. But in my submission the way forward is for what Ms Thomas says to be formalised in the form of a disclosure statement, which is what we have asked for. So if they sign a disclosure statement that says: "We do not have any other documents in relation to South Africa or any other foreign regulator, which you do not already have --

THE CHAIRMAN: She did not say any other foreign regulator, she did not say any other foreign regulator --

MR WEST: In relation to South Africa.

THE CHAIRMAN: … she said quite specifically South Africa.

MR WEST: Then that would be --

THE CHAIRMAN: But, sorry, so she is making two points, and they are perhaps distinct. One is that you are going to get everything that went to South Africa, that is her first point. Her second point is there is no prima facie reason for believing that the documents disclosed to the Commission would have not included relevant documents relating to your clients. As I say, the difficulty is I have no evidence from either side on this, and Ms Thomas puts it to me very

firmly as an obvious starting point and I am asking you whether you agree that is an obvious starting point.

MR WEST: As I say, we simply do not know. It is slightly surprising that it has come out so late in the day because --

THE CHAIRMAN: But she's putting it as a general matter of practice before the Commission, you are familiar with that, and if you are seeking leniency you, prima facie, you fess up and you will disclose not only in relation to certain car manufacturers, you will disclose in relation to all in respect of which there may or may not have been collusion.

MR WEST: I am not in a position to confirm that but it ought to be evidenced in my submission what Ms Thomas has said, and the obvious way to do that is to have a disclosure statement with a signature on it saying it is a nil return because you already have the documents from the Commission file.

THE CHAIRMAN: Right, but you did not put in any evidence on this application either.

MR WEST: We do have our evidence relating to documents which are specific or referred to PSA on the South African file, and it is the first time today we have heard that actually they were already on the Commission file. That is not something --

THE CHAIRMAN: That can be dealt with in short witness statements, and if it is incorrect it can be corrected. But that is a narrow point. There is the greater point, which is that when you are seeking leniency from the Commission, prima face the expectation is that you will disclose all possibly relevant documents relating not only to the specific manufacturers named in the Commission report but relating to other manufacturers as well. You are not, as I understand it, disagreeing with that.

MR WEST: With respect, that is a submission, and as I said in opening we do not

regard it as satisfactory to be asked to take that as a matter of submission when the Defendants know what the facts are and they can tell us, as Ms Thomas has now done in relation to the South African Tribunal and can be appropriately evidenced, either in statements, a witness statement or disclosure statement.

THE CHAIRMAN: Let me put it another way. You are not putting to me that it is unlikely that documents relating to your client have been filed with the Commission.

MR WEST: We simply do not know. We do know that the Commission did not proceed to make any findings of infringement against my clients; we were not party to the reasons behind that. And it is common in competition proceedings for the litigation to be somewhat broader than any Commission Decision out of which it arises. We saw that, for example, in relation to the Daimler proceedings. So it is not the case that parties always accept that the infringement found by the Commission is definitive and that the infringement did not go any further than that found by the Commission.

THE CHAIRMAN: What is the South African position? So we know the South African position with Ms Thomas's clients is there is not anything extra. With the Eleventh Defendant there is not anything. Where are we on the Sixth to the Tenth Defendants? Have you pleaded any specific documents for an expectation - sorry, Eleventh Defendant has taken me through the pleading. You have not pleaded anything on which to get a toehold for disclosure as against the Sixth to the Tenth Defendants.

MR WEST: Of course, one cannot have a unilateral cartel. If there is cartelisation between undertakings it has to involve --

THE CHAIRMAN: Sure. No, I am just asking a pleading question at the moment. There is nothing specific that bites against the Sixth to the Tenth Defendants.

MR WEST: This is the catch 22 situation we find ourselves in, sir.

THE CHAIRMAN: I know that. I am just asking - I am not … But I am right, am I?

MR WEST: We cannot get disclosure unless we plead it, but we cannot plead it unless we --

THE CHAIRMAN: No, but you have pleaded something against the First to the Fifth Defendants. You have pleaded the list --

MR WEST: Yes, we …

THE CHAIRMAN: … and the five documents and you have not done the same against the Sixth to the Eleventh Defendants questions.

MR WEST: That is correct, we have not put anything specifically pleaded. Can I just show you, I was going to show you very briefly in reply the sort of difficulties that claimants do come across in these types of situations. The document is at tab 8 of the authorities bundle.

THE CHAIRMAN: Yes.

MR WEST: This will not take very long. What one sees - this is the Brazilian Administrative Procedure opening documents, and between the two hole punches one sees that it is concerned with anticompetitive --

THE CHAIRMAN: Sorry, mine has not got hole punches.

MR WEST: In the middle - I am not sure what “Ementa” means in Portuguese, but it says:

“Administrative procedure. Alleged anticompetitive conduct in the international market for airbag modules,”

So this goes in part to my friend Ms Ford’s point about geographical distinctions between the investigations. But if one looks over the page at paragraph 6 it says the clients potentially involved in inappropriate conduct are, redacted. So this is the sort of material we have and clearly we cannot plead that we are the

subject of this investigation without having seen it. And then it is said: unless you have pleaded it you are not allowed to see it. So this is the catch 22 situation in which we find ourselves on this application.

The other document I was briefly going to show you just in relation to the question of the geographical distinctions of the investigations was in the Commission's OSS1 Decision itself, at tab 1 of this bundle, paragraph 51. The Brazilian investigation concerns an international cartel and this one is at paragraph 51:

"The geographical scope of each of the four cartels --"

THE CHAIRMAN: Sorry, sorry, can you start again.

MR WEST: Page 16, paragraph 51.

THE CHAIRMAN: 16 internal.

MR WEST: Yes, of the authorities bundle 1.

THE CHAIRMAN: 16 internal.

MR WEST: Yes. 16 printed in bold.

THE CHAIRMAN: Sorry, 16 printed in bold.

MR WEST: Yes, I am sorry, page 16.

THE CHAIRMAN: How does the page start?

MR WEST: 22 May 2010, in bold.

THE CHAIRMAN: Yes, got it.

MR WEST: So one sees at the next paragraph, 51:

"The geographical scope of the four cartels was EEA-wide…while the contacts took place mainly in Japan, the arrangements included the entire EEA territory."

So here the cartel conduct itself did not even take place in Europe, it took place in Japan.

THE CHAIRMAN: Sure, sure.

MR WEST: So in my submission we are not dealing with separate geographical

infringements which are confined to specific places, these infringements, on the face of it, all appeared - or the investigations all appeared to concern the same underlying infringement conduct.

THE CHAIRMAN: I am conscious of the time. Do you want to carry on after lunch?

MR WEST: I have very little to say by way of response. Ms Ford referred to there being no commonality of defendants, in her case between these proceedings and the overseas regulatory proceedings, but I do not understand - I may be wrong, but I do not understand it to be her clients' position that that means that her clients do not have possession or control over any of the documents that we are seeking. If that is their position no doubt they will make that clear in the disclosure statement.

In relation to key words, we do have a list of key words relating to the FCA claimants' brands. We have not come on to whether the FCA claimants should be added. But that is effectively the equivalent of the list that we provided for the PSA and Vauxhall Opel brands, which we can hand up if that is the order that the Tribunal decides to make.

I can address you very briefly on the Forex decision but in my submission, it is totally irrelevant. That was a case where there was a class action proposed in relation to manipulation of the Forex markets by a small number of banks. It was a small number because the class action was limited to a follow-on action, so it could only be brought against those banks which had been found to infringe by the Commission, which was, I think, a total of six or seven. The question they had great difficulty answering is: how had those claimants who traded with other banks suffered a loss by reason of that infringement? What was said was that although the claimants had purchased FX instruments from other banks, those banks had themselves traded with the defendants and the defendants had

passed on the higher bid ask spreads to the market as a whole. That was very difficult to believe because the inter-dealer market through which the cartel overcharge would have to pass was a competitive market. So if the defendants who were infringing had tried to pass on increased costs, it would simply have been competed away. So they could not find out any relevant mechanism by which the clients who had purchased from banks which had not been in the infringement could possibly have suffered a loss by reason of the infringements. Here we are alleging that the Claimants purchased directly from the cartelists. All of the value of commerce concerns purchases we made from the cartelists. The mechanism in my submission is much easier to alight upon: even if there was not a cartel specifically directed at us, there was undoubtedly cartel conduct between these Defendants in relation to requests for quotations issued by other OEMs on which the Defendants were undoubtedly colluding all the time throughout this relevant period, and so it is not much of a stretch to believe that the lack of competition which derived from those cartel contacts would also have bled into sales to other OEMs. So it is a completely different case from the Forex type of case and a much more obvious mechanism for how the umbrella effects could have arisen.

Sir, that is all I was proposing to say by way of response. We do urge that you order disclosure in relation to at least the DoJ and South Africa, at least in the form of the specific key words referring to the Claimants and their brands, and also the new claimants and their brands, of preferably we say in relation to relevant documents within those caches in general. My Lord, I see the time.

THE CHAIRMAN: Very good, thank you. So I suggest I'll give judgment at half past two. Half past two, would that be all right?

(13.06)

(The short adjournment)

RULING

(14.30)

THE CHAIRMAN:

(1) This is a claim for damages relating to agreements or concerted practices concerning the supply of occupant safety systems including seatbelts, airbags, steering wheels, etc. The claim was issued on 22nd December 2020 in the High Court and transferred to the Competition Appeal Tribunal on 1st March 2022.

(2) The First to the Third Claimants are members of the PSA Group. The First Claimant manufactures Peugeot and Citroen vehicles. The Fourth Defendant became part of the PSA Group in 2017 and manufactures Vauxhall and Opel brands. The First and Fourth Defendants manufacture in the UK.

(3) There is an application to join additional Claimants pursuant to a merger between PSA and the Fiat Chrysler Group, but as yet the pleaded case does not include the case in respect of those potential Claimants.

(4) The First to the Fifth Defendants are members of the Autoliv Group which designs and manufactures and sells OSS products. The Second Defendant was an addressee of both the OSS1 and OSS2 decisions. The Third Defendant was an addressee of the OSS1 decision and the Fourth Defendant the addressee of the OSS2 decision. They are represented by Ms Thomas and instructed by White Case.

(5) The Sixth to the Tenth Defendants are members of the ZF TRW Group. The

Tenth Defendant was involved in the design, manufacture and sale of OSS parts in the UK. The Sixth to the Eighth Defendants were addressees of the OSS2 decision. They are separately represented by Ms Ford and Mr Bailey, instructed by Macfarlanes. The Eleventh Defendant is an addressee of the OSS1 decision and has been represented today by Mr Piccinin.

(6) This is the hearing of the CMC. The case as currently pleaded against the Defendants is not well particularised. The key allegations are as follows. The Claimants allege breach of Article 101 of TFEU and in the alternative Article 53 of the EEA agreement. The case makes reference to the Commission having adopted two decisions dated 22nd November 2017 and 5th March 2019. The first of those is Decision AT. 839881, Occupant Safety Systems Applied to Japanese Car Manufacturers, and the second one is AT. 8440481, Occupant Safety Systems Two supplied to Volkswagen Group and the BMW Group (OSS1 and OSS2).

(7) It is pleaded that the conduct with which the OSS1 Decision is concerned includes exchange of commercially sensitive (information including information concerning pricing and costs) the allocation of supplies and coordination on prices. These contacts took place by various means including in person meetings (whether bilateral or multilateral) telephone discussions and email communications.

(8) The OSS2 Decision is said to establish two further cartels concerning the supply of OSS products, and it is pleaded that the conduct with which the OSS2 Decision is concerned includes the exchange of commercially sensitive

information (including in relation to costs and pricing) as well as contrary coordination behaviour concerning the supplies in question. The aims pursued by the parties included resisting customer request for reduced pricing, producing uncertainty as to the parties' respective negotiating positions and in some cases preserving the status quo. The discussions were governed by a common intention to restrict competition in respect to the relevant supplies.

(9) Neither of these Decisions concerns dealings with the Claimant companies, or at least on their face do not. Further, the Decisions were Settlement Decisions meaning the parties under investigation did not contest the allegations in return for a discount on the fine. As a result, the Decisions contained fewer details and less evidence than if there had been full proceedings.

(10) Reference is also made to proceedings before the South African Competition Commission (SACC) in particular to an amended complaint which was adopted in 2016. The undertakings which are subject to the amended complaint include the automotive TRW and Tokai Rika.

(11) The SACC's amended complaint indicates that the SACC was in possession of information which suggested that the OSS cartel included supplies to PSA, and reference is made to the SACC's amended initiation statement of 21st November 2016 which states: "The information held by the Commission indicated that the respondents in the original complaint and the respondents in the amended complaint made allegation of price fixing market division by allocating customers as well as products inclusive tendering in respect of OSS supplied to OEMs, such as…". Then a list of manufacturers is given which

includes Peugeot SA. It continues: “The respondents, being competitors in the market for the manufacture and supply of OSS to OEMs concluded various agreements and all parties to concerted practices to fix prices that they would quote, divided markets and tendered collusively in response to Requests for Quotations (RHQs) issued by OEMs, including but not limited to…”, and then a list is given again including PSA.

(12) It is pleaded at paragraph 34 of the Particulars of Claim that in response to an application brought by PSA on 7th October 2020, the SACC supplied PSA with an index of documents forming its record of investigation into its amended complaints against the OSS cartel. It is pleaded “the index included five documents that Autoliv had disclosed to the SACC during the SACC’s investigation in relation to Autoliv’s business with PSA” and that “PSA has made an application to the Competition Tribunal of South Africa for disclosure of the five documents listed in the index. As at the date hereof, that application has not yet been determined.”

(13) Then at paragraph 40 it is pleaded that “prior to disclosure herein, PSA is unable to provide full particulars of such agreements or concerted practices, and thus reserves the right to provide further particulars in due course. However, PSA alleges at this stage that they involved at least the following anti-competitive elements: (i) exchange of confidential information between the competing undertakings, including information on costs and prices; (ii) the allocation of customers and supplies; and (iii) coordination on pricing.”

At paragraph 41 it is stated: “The coordination alleged concerned responses to

RFQs; attempts by PSA to seek price reductions during the term of the supply contract; and attempts by OSS product suppliers to seek price increases on grounds such as changes in raw material prices in connection with the tendering processes as pleaded in paragraph 10 above." It is alleged that "the said agreements or concerted practices were intended to and did have the effect of increasing the price of OSS products supplied by the parties to automotive OEMs (including PSA and Vauxhall/Opel above)…".

(14) There is then an alternative allegation at paragraph 43. "Alternatively, if… any cartels concerning the OSS products had to be or were in fact limited to supplies to individual customers, PSA contends that there were separate cartels between all or at least two of the Undertakings to which the Addressees of the Decisions belonged concerning supplies of OSS products to PSA and Vauxhall Opel (or either of them)." Then in paragraph 44: "In the further alternative, even if there was no cartel concerning supplies of OSS to PSA and Vauxhall Opel, the effects of the cartel established in the Commission's Decisions (as the findings of the SAC pleaded above, so far as relevant) would have been to increase the prices charged by cartelists and suppliers to OEMs other than those which were the targets in the particular cartels by attempting to lessen the degree of competition in the market in general and thereby to increase prices in the market."

(15) It is apparent from the pleading as it stands that there are few specific allegations, no particulars of specific agreements or concerted practices, and the Claimants require documents to be able to plead their case fully. It might be said that the Claimant is fishing around for a case, but the Defendant parties do

not object to the approach of certain disclosure being provided in order for the Claimants to have an opportunity to plead their case more fully.

The Defendants agree that disclosure be provided of the OSS decisions with specified redactions, and other provisions for non-party addressees to object. It is also agreed that disclosure be provided with access to file documents and documents to which the relevant addressees were given access by the Commission. There are, however, disputes as to further categories of documents to which I will now turn.

(16) I am reminded of the relevant legal principles. Under the CAT rules I am required to limit disclosure to that which is necessary to deal with the case justly and I have been reminded of the guidance in *Ryder v Man* [2020] CAT 3. I also bear in mind that we are at this stage concerned with disclosure at a relatively early stage of the proceedings. The Defendants have indicated that they may apply to strike out the claim once the disclosure has been provided and a further, more detailed pleading has been produced - depending on what that pleading alleges.

(17) I have heard argument concerning particular categories of documents supplied to other Competition Authorities. As I have stated the particulars of claim makes reference to proceedings before the SACC, to which I have referred. There is also a request in respect of documents provided to the Brazilian and US Competition Authorities. The classes sought more specifically are set out in a helpfully provided composite draft order. The categories sought – this is sought by the Claimants – which is in dispute, is that, the First to Eleventh Defendants shall disclose by list and provide inspection of all documents that (a) were

provided by them to any other Competition Authority (not otherwise encompassed by the access to file documents for additional Commission file documents) including to, *inter alia*, the US Department of Justice, Brazilian Competition Authority and the South African Competition Commission in the context of investigations by those Competition Authorities into anti-competitive conduct in the market for OSS; and (b) were provided to or obtained by one or more of those Competition Authorities from the person who is not a party and which are in their possession and control; and (c) were provided to a Defendant by one or more of those Competition Authorities, in particular by means of any processes equivalent to the access to file process before the European Commission but including any technical notes achieved by CADE, subject only to the right to redact or withhold material at the request of the First to Eleventh Defendants on one of the grounds set out in paragraph 4 above". Then there is a reference to providing a description identifying any other Competition Authority of the documents which have been redacted or withheld by the First to Eleventh Defendants.

(18) That is disputed by the Defendants save for the Eleventh Defendant which has offered to disclose by list providing inspection of all documents in their possession, custody or control, provided by it to the US Department of Justice ("DOJ") in the context of the investigation by the DoJ into anti-competitive conduct in the market for occupant safety systems where those documents refer to any PSA (inaudible) Opel, Peugeot, Citroen DS, GM and/or Vauxhall, subject to the same caveats.

(19) I heard submissions from the Eleventh Defendant that this was put forward as

part of a more general offer to try and settle disclosure at this stage, and this is not necessarily a self-standing offer.

(20) The Claimants contend that a reason for giving disclosure of documents in these classes is the fact that the Commission documents do not refer to sales relating to the Claimants. That is a double-edged submission given the Claimants' approach to this case and the inferences it seeks to draw from the Commission documents. Further, in this somewhat topsy-turvy world the Defendants imply that the documents from the Commission will be sufficient for the Claimant to plead its case, although, of course, they say there is no case to plead.

(22) It is highly unsatisfactory in my judgment that on a disputed issue of disclosure such as this I have been provided with no evidence on which to assess the relevance of the documents sought or by which to assess proportionality. During the course of argument, and I am focusing now on the South African documents, Ms Thomas on behalf of the First to the Fifth Defendants submitted that the starting point is an expectation that when seeking leniency from the Commission all the relevant documents would have been provided, because that is what leniency requires, and that the documents provided would not have been limited to the specific manufacturers to which reference is made in the judgments. She submits that if there had been a case to answer with respect to other manufacturers, relevant documents would have been disclosed. She supports this position by saying that the five documents which have been identified in the Claimants' pleading as having been identified in the South African index have, in fact, been provided to the Commission.

(23) Mr West on behalf of the Claimants metaphorically shrugs and submits that we do not know that, but he did not advance, a positive, or in any way emphatic, case that the expectation would be that documents supplied in support of the leniency would be of narrower scope.

(24) In respect of the South African class, the position therefore is that I have no evidence of a reason why there should be relevant documents beyond the five documents that have been identified and no evidence in relation to proportionality. In the circumstances, I am not prepared to order broader disclosure. I shall, however, in the light of Ms Thomas's submissions, require the five documents that have been identified in relation to the South African proceedings to be listed with the Commission documents, which I understand they will be. Whether that requires a distinct order or not, I might hear further submissions on.

(26) For completeness, I should also mention that a dispute has arisen with respect to legality. There is a witness statement from Mr Firth of Macfarlanes for the Sixth to Tenth Defendants, who raises a question of the legality of providing documents, and it is accompanied with an exhibit which is a letter from attorneys to the SACC, which on one reading may be indicating that any documents filed with the Commission cannot be used for other purposes – I am paraphrasing the letter – and therefore there would be a prejudice to the Defendants if they were disclosed in these proceedings. I have to say, I find that unlikely, insofar as that evidence relates to documents which originate from the Defendants, and the evidence lacks precision on the point. Had I decided

to order disclosure of this class of documents, I would have stayed that order pending further evidence and argument on legality. Given that I am not ordering disclosure it does not matter.

(27) US documents. Again, the starting point is that no evidence as to the relevance of the US documents over and above disclosure of Commission documents has been provided. US proceedings are not part of the claim. The Claim Form as originally issued did have reference to US proceedings. Paragraph 8 originally pleaded: "the Claimants will rely upon and refer to decisions at trial for their full terms true meaning and effect, together with other Competition Authority proceedings decisions and plea agreements in jurisdictions outside the EEA. These will include plea agreements filed by the various defendants, co-cartelists, with the US Department of Justice and the decision/investigation by the Brazilian Administrative Council for Economic Defense." That allegation was deleted by amendment.

(29) Again, somewhat bizarrely in this topsy-turvy world, the US proceedings have now been referred to by First to the Fifth Defendants in the context of a limitation defence. Reliance is placed, at 65(c), on an announcement on 8th July by the Second Defendant that a subsidiary had received a grand subpoena from the US Department of Justice for documents and information as part of a long-running investigation into possible anti-competitive behaviour among certain suppliers to the automotive industry. There is a similar allegation from the Sixth to the Tenth Defendants which is at 9D. That does suggest that what went on in the US might well overlap with investigations that took place in Europe, but that does not of itself, in my judgment, provide a reason for giving disclosure.

(30) I also have in mind that according to the Sixth to Tenth Defendants, 50,000 documents – a very large number – have been filed with the US Department of Justice. Consideration was given to use of search terms so that these documents could be searched – see paragraph 4.5(A) of the Draft Order. It is not clear to me that enough consideration has been given to whether those search terms would produce the relevant documents which are required, and again I have no evidence in relation to proportionality. In those circumstances, I decline to make an order for disclosure in respect of the US filed documents.

(31) The same applies in relation to documents filed with the Brazilian Competition Authority. Again, there is no evidence in relation these or any other or non-European Competition Authorities sought.

(32) As I have already said, this is the first round of disclosure and this does not preclude the Claimants from seeking broader disclosure in due course, should they consider it appropriate to do so.

(33) That does leave open the question of the Eleventh Defendant. The Eleventh Defendant had offered to give disclosure of a class of US documents in paragraph 4.5(A). This offer was as part of an attempt to settle disclosure in the round. I am not going to order the disclosure in accordance with 4.5(A). Obviously, that does not prevent the Eleventh Defendant from offering it, but I am not at this stage compelling the Eleventh Defendant to do so.

(14.59)

THE CHAIRMAN: I hope I covered everything on those categories. Mr West, is there

anything else on that category that I have not dealt with?

MR WEST: I do not believe so, no.

THE CHAIRMAN: What next?

MR WEST: There is one other item on disclosure which relates to the other Commission file documents, where the dispute is only with Tokai Rika. This arises under paragraph 4.4 of the draft order.

THE CHAIRMAN: Hold on a second. Yes.

MR WEST: So I am afraid we are in a rather topsy turvy world again here, because the other Defendants have agreed to provide all of those documents, subject to the exceptions for leniency and so on, but Mr Piccinin's clients seem to limit disclosure of this category in reference to the same key words as we saw previously under 4.5.

THE CHAIRMAN: Yes.

MR WEST: As I say, that is not a point run by the other Defendants and we are talking here about Commission file documents, so these are directly relevant to Europe and, as we have we have been told previously, ought to be comprehensive, and so it is a very --

THE CHAIRMAN: Let's try and hear from Mr Piccinin first on this.

MR PICCININ: Yes, sir --

THE CHAIRMAN: You are very isolated on this point, Mr Piccinin. (Inaudible)

MR PICCININ: Only to this extent, sir. What we do not want to be providing is disclosure of material that is not shedding light on the infringements that have actually been found by the Commission and also not shedding light on any infringement concerning the Claimants, suppliers to the Claimants. Now, Mr West said in his opening submissions that of course there is provision in the draft order already, and he is right to say this, for the Defendants to redact or

remove on the grounds of irrelevance. The difficulty that we have is understanding what is meant by relevance in the context of this very broad plea. Now, I think we would be content to join my very learned friends on this topic if we were not required to provide disclosure of documents that relate to, if I can call them third OEMs, you know, OEMs that are neither the Claimants nor the OEMs that are actually named in the Commission decisions – because, you will appreciate from what has been said about leniency applications and the process that that went through, that it is not necessarily the case that everything on the pile is limited to one thing or the other and there is just no proper basis for my learned friend to require sight of those sorts of documents. It is not going to advance matters.

THE CHAIRMAN: Right.

MR PICCININ: That is why I made the submissions that I made. I am not going to repeat them, sir, but that is why I took you through what the position on the pleadings is and where the gaps in this case are. The Claimants do not need to go establishing that there was a cartel in relation to suppliers to Ford, for example. I am just plucking a name from the air.

THE CHAIRMAN: Yes, well -- yes, anything else you want to add?

MR PICCININ: No, sir. Those are my submissions.

MR WEST: That ought to be covered by the redactions for relevance, if my friend's point was really that these documents are --

THE CHAIRMAN: Just (inaudible).

MR WEST: Yes it is the reference to paragraph 4.1 above. So there was a right to redact or withhold material at the request of the Defendants.

THE CHAIRMAN: Sorry, hang on (inaudible).

MR WEST: So this is our drafting of 4.4.

THE CHAIRMAN: Yes, (inaudible).

MR WEST: 4.1(a) contains the exceptions which are listed in (i) to (iv).

THE CHAIRMAN: (Inaudible)

MR WEST: Yes.

MR PICCININ: If it is accepted that -- my concern was that paragraph 44 of the Particulars of Claim would encompass that sort of material because of the very vague way it has been pleaded, but if my learned friend is content to accept that what I have just described would be irrelevant material, then I think we are happy with that.

THE CHAIRMAN: Well, I am not sure I am -- I do not particularly want to horse trade on that basis because it is too vague and abstract, but irrelevant material is excluded by applying CPR Rule 36(1), irrelevant material does not have to be disclosed and no doubt we could spend a lot of time arguing on certain that are close to the line, whether they are relevant or not.

MR PICCININ: That is fine, but as long as that marker has been put down, so Mr West knows what he is not getting.

MR WEST: I do not think I am accepting that a document that refers to Ford is necessarily, for that reason, irrelevant, but if it actually is irrelevant, then clearly it is.

THE CHAIRMAN: Quite. I am not asking you in any way to go beyond what the words of the order say, Mr West.

MR WEST: There is also a dispute as to dates, but it will probably make sense to come back to that.

MR PICCININ: If we did that, it might just make it easier, another way through it is if we could redact the name Ford, which is obviously not relevant itself to the pleadings. I am just trying to avoid a situation, sir, where we get to the next

CMC and we have provided disclosure and there are redactions and Mr West says he does not understand what he has been given or not given.

THE CHAIRMAN: I am not prepared to hypothesise situations on the fly like this, because they're often actually knotty problems. My view at the moment, subject to anything else you say, is that the order is a reasonable one. There is a provision for relevancy and I do not see any more obvious difficulty with this than there is any other case where you have to decide what is relevant and irrelevant.

MR PICCININ: Yes, I understand that, sir.

THE CHAIRMAN: And obviously if there are issues, we will have to argue about them on another day, yes. Mr West, is that satisfactory?

MR WEST: It is. There is also a dispute as to dates, but I suggest it makes sense that we come back to that at the end.

THE CHAIRMAN: Yes, if we are not at the end, yes.

MR WEST: Not quite, although the points are much, much shorter now. The confidentiality ring order is the order behind tab 6A.

THE CHAIRMAN: Yes, (inaudible).

MR WEST: I am happy to say the issue under paragraph 1.4 has gone away. My clients are happy with that change.

THE CHAIRMAN: Right, okay.

MR WEST: So the only substantive point is 6.2, which is again a short point. What is said by ZF is that it is burdensome to require them to identify the specific information within any --

THE CHAIRMAN: (Inaudible) I am not attracted to this point.

MS FORD: Sir, perhaps I can just clear away something that has been suggested in my learned friend's skeleton argument. It has been suggested that we are

assuming that the starting point will be that substantial volumes of documents will be designated as confidential more or less indiscriminately. That is absolutely not the case. There is no dispute between us as to the applicable principles governing confidentiality and there is no intention on our part to designate matters as confidential indiscriminately. The point we are raising is a purely practical one arising out of the requirements of 6.2. You will have seen, sir, that what it does is in relation to each document which is designated as containing confidential information, it has to be marked up by putting square brackets around the confidential information and then highlighting the confidential information in relation to each document that is disclosed as being confidential. Our concern is that if that exercise has to be done for every document, it is going to prove a time consuming and onerous exercise, not just for the Defendants but for both parties. It is not standard practice for confidentiality rings in these sort of proceedings to include a requirement for every individual piece of confidential information to be separately identified in this way. The objections that the Claimants have raised to this proposed amendment appear to us to be focused on the regulatory documents that have been the subject of the dispute this morning, and the likely disclosure of regulatory documents, but it is important to remember that the intention behind this confidentiality ring is that it will encompass all documents that are, in due course, disclosed that require confidential treatment, and so that would include, for example, documents which might go to issues of causation and quantum and they might be documents which are likely, by their very nature, to contain, or be largely or entirely confidential material and a process whereby it is necessary to work through and mark up every single such document, in those circumstances, in our submission, is unnecessary and is wasteful of time and

costs. Even in relation to the Access to File Documents, in our submission there can be no blanket assumption that because of the age of those documents, they do not contain any commercially sensitive information. We simply say we cannot form a view as to their appropriate designation until we review them. What we are proposing is a pragmatic approach at this stage. So there is a mechanism in the order whereby parties can request amendment of a designation if they see fit. That is paragraph 6.5 of the order, which is not in dispute and we say, insofar as it becomes necessary to identify the particular elements of confidential information, for example if there is a desire to share particular documents outside the confidentiality ring, to take instructions, then we suggest that at that stage confidential information could be identified on an ad hoc basis. The simple suggestion we make is that that sort of ad hoc, pragmatic approach is a more sensible and more proportionate approach than requiring the marking up of every single document from the outset. That is simply the point --

THE CHAIRMAN: Do you have any idea how many documents we are talking about?

MS FORD: I do not think we do, no, because of course the parties intend that there be at least a second round of disclosure, that is going to be including things like causation and quantum, compound interest. One might expect that, in particular, to be almost blanket confidential financial information and that sort of thing. I am not in a position to say how many documents this potentially engages, but for that reason, in my submission, it might be better to take an ad hoc and pragmatic approach, rather than to simply require every single document to be marked up.

THE CHAIRMAN: Yes, okay. No, I am against you at the moment, I am afraid, but there is much to be said for focusing everyone's mind on what is truly

confidential from the outset, rather than storing it all up for later in the proceedings, when positions have been assumed. If there are serious practical problems due to the volume of documents and the specificity with which you consider this is required, then obviously you can reapply for further directions.

MR WEST: Sir, there is one other really very tiny point on this draft, which is at paragraph 8.1, which is concerned with destroying confidential information at the end of the case, and the point is simply whether that should be done insofar as "technically possible" or insofar as "technically feasible". My clients have proposed "feasible" on the basis that they should only be required to do what is practically possible, rather than what may be technologically possible with (inaudible) of time, effort and technological understanding, but I do not propose they have too much time, but that is a dispute.

THE CHAIRMAN: In the context of destroying the documents, I cannot at the moment understand what the difference between "possible" and "feasible" would be. In other contexts, I could see there would be a difference but when it comes to (inaudible) feasible to destroy a document.

MR WEST: I suppose it would be electronically stored documents that we are really concerned with here and how difficult it is to remove those from where they may be stored in back up form.

MS FORD: Sir, this was simply a suggestion to ensure consistency with wording that was used in Part C, paragraph 10 of the undertaking which accompanies the order.

THE CHAIRMAN: Sorry, (inaudible).

MS FORD: It is page 43.27.

THE CHAIRMAN: Yes.

MS FORD: This is the undertaking that is to be provided by inner confidentiality ring

members and paragraph 10 uses the words 'technologically possible' and so the amendment was simply to ensure consistency with the use of the word possible in this context. That was the thinking behind it.

THE CHAIRMAN: I see, (inaudible). Yes, I think in the absence of a clear distinction between "feasible" and "possible", I am content for it to be "possible". If it's not feasible, no doubt a further application could be made when we have some specific facts to hang it on.

MR WEST: I am very grateful. We then have the question of addition of further claimants.

THE CHAIRMAN: Yes.

MR WEST: Which is paragraph 6 of the draft and here again, Mr Piccinin is isolated, because the other Defendants agree to this process whereby, in effect, these additional claimants from the Fiat Chrysler Automobiles Group are added to the claim form and then we plead and, of course, all of the Defendants have the right to object to the amendments to the Particulars of Claim. So this paragraph is just concerned with adding the new entities to the claim form, and it is really a question of mechanism because those claimants have an absolute right to start new proceedings which stop the limitation clock running as at today, but that would require us to serve the Defendants abroad and then apply to consolidate that claim with this claim, which would be a very inefficient way to proceed.

THE CHAIRMAN: You are saying you are not going to take the limitation point and you are going to treat it as having been brought on the date of this order.

MR WEST: Indeed.

THE CHAIRMAN: And you are the exposed party again here --

MR PICCININ: I understand. Although, to be fair, my clients are in a bit of a different

position here, in that we do not understand the claim that it is said that these claimants are going to bring against my clients.

THE CHAIRMAN: You are going to see a pleading?

MR PICCININ: Well, sir, that is really the point at which permission should be granted for them to join and that is the date on which the limitation date should crystallise. They do need to articulate what the claim is.

THE CHAIRMAN: Sorry, the limitation date should crystallise from when the claim is issued, surely?

MR PICCININ: That is right, but at the moment, what claim? What application? All we have got is a line item in a draft order and I can show you a letter that has been sent that purports to explain their claim, but it is not even, to my mind what --

THE CHAIRMAN: Yes, I understand. But just on the timing, I appreciate we are going to go back and talk about timings, but the timing for the pleading is --

MR PICCININ: Yes, so if we just get the order up, it is 7.1 is the timing for the pleading. Of course, it does not have to be that timing, but at the moment the proposal is to do everything in one go.

THE CHAIRMAN: I mean, if they have got no case, then the question of limitation is not going to arise, and if they have got a case, why can they not amend and put it in?

MR PICCININ: Well at the moment, sir, they have not articulated it.

THE CHAIRMAN: I know they have not.

MR PICCININ: So the reason it matters, or it might matter, I don't know. I don't even know what the law for this thing is, and it may be that it matters for limitation purposes, whether it is added today, which is what they proposed in paragraph 6.2 of the draft order, or whether it is added six weeks from now or when they

have actually put together a properly thought through draft, and I am afraid --

THE CHAIRMAN: Don't they have to serve their Particulars of Claim when they issue their claim form?

MR PICCININ: Well, sir they have not even given me something that can be called a claim form. That is the issue. Sir, can I just show you what I mean by that? It really will not take long. If we look at page 292 of the bundle, it is tab 77.

THE CHAIRMAN: Tab 77.

MR PICCININ: I do not like to stand on ceremony, sir, but it is a somewhat profound point in this particular case. Sir, this is a letter from Hausfeld dated 18th May and if you just go over the page to the relevant bit, which is at D in the middle of the page, 292.

THE CHAIRMAN: Sorry, D on page 292, yes.

MR PICCININ: That's right. So, they say that the proposed additional claimants who are, let's just call them Fiat, purchased OSS products directly or indirectly from Autoliv and ZF and then they say that, as a result of the cartel arrangements entered into by Autoliv and ZF, these purchases resulted in loss to the proposed additional claimants for which they are entitle to claim damages in the proceedings and those claims are pursued on a joint and several liability basis against all of the First to the Eleventh Defendants. That includes my client. Then that is even though, just going over the page and looking at F, you can see that they do not say that they have bought anything at all from my client and they do not propose to sue in respect of any suppliers.

THE CHAIRMAN: Sure but you are now telling me that they have got no case, so limitation is not a problem.

MR PICCININ: No, what I was going to do was ask a series of questions about what their case might be. I am not saying that they do not have one. They might

have one, but I need to know what it is in order to --

THE CHAIRMAN: You will when you get a pleading.

MR PICCININ: But sir I -- perhaps you should have a look at the rule, the relevant rule as well, under which there is --

THE CHAIRMAN: But just tell what your -- what are you concerned about? Of course you need a proper pleading.

MR PICCININ: Yes.

THE CHAIRMAN: We are all agreed on that, and as I understand, you do not object in principle to their joining this action at some point. You are just saying --

MR PICCININ: Well I might. I need to understand what they would be joining the proceedings to do.

THE CHAIRMAN: If they have a case.

MR PICCININ: If they have a case that is of the same kind that is pleaded by the existing Claimants, then I would agree with that, but what they are not entitled to do is obtain a litigation tactical advantage --

THE CHAIRMAN: No, I fully understand that but why do we have to determine what might be a knotty problem of limitation today? Why can we not -- I am sorry, you are suggesting that claim pursued by the additional claimants should be treated as having been brought no earlier than the date of this order and then if you want to say that the claim was not perfected until you got a Particulars of Claim, you can argue that in due course, if it ever becomes relevant.

MR PICCININ: Sir, that is fine. That was the thing we wanted --

THE CHAIRMAN: Yes, I understand, I understand. Does anyone else have an objection to that?

MR WEST: Well, sir, what we are trying to avoid is my clients suffering prejudice because they have joined this action, as opposed to starting new proceedings

today. They could start new proceedings today by issuing a claim form with just the details in this letter. One does not need detailed particulars to issue a claim form.

THE CHAIRMAN: Well, maybe it could be struck out, as just not having enough in it. So you cannot just issue a claim form with a strikable action and then come back six months later and go right, now my house is in order, I am going to issue another claim form, without there being consequences of the Limitation Act. I think that is Mr Piccinin's point. So I am not deciding this today. I am just saying let's not decide this today and we can have this argument, if it becomes relevant, on another occasion.

MR WEST: So would the position be that --

THE CHAIRMAN: We are talking about a two week -- (inaudible) is it a month or something, but really quite a short period of time, which could be very important for the purposes of limitation, but it could equally be of no importance, whatsoever and just as a matter of --

MR WEST: Can I just make sure I understand the proposal? So the proposal is if the claim form is regarded as a proper claim form, which is not strikable, then it would be regarded as having been issued today, but if it is strikable, is that the --?

THE CHAIRMAN: No, if the -- my suggestion, and it is only a suggestion at this stage, is that rather than have an order which fixes today as the date for the limitation to be fixed, it says it should be no earlier than today and if there is a need to argue it, whether it should be today or whether it should be when you issue your claim form, not issue your claim form when you serve your Particulars of Claim. That matter can be open to all the parties to argue in due course. Have I got this wrong? I understand your point is that as the Eleventh Defendant you say,

I may want to take a limitation point in due course, I do not know, and because you are not in a position to issue the claim form today, he says, he may be right about that, he may be wrong about that, but we are talking about a period until which you file your Particulars of Claim. So the only question is that it is reserved, that question of whether limitation should run from today or when the Particulars of Claim are served is reserved.

MR WEST: Sir, I am not sure I completely understand what that question would turn upon.

THE CHAIRMAN: It is not entirely clear to me what that question would turn upon.

MR WEST: It does seem potentially to prejudice these additional claimants as compared with an order which joins them as at today, in circumstances where they could simply issue a claim form as at today.

MR WEST: It depends. The Eleventh Defendant says you are not in a position to plead a case today. So if you came along with an application to amend today, it would be open to the Defendants to say well, that is not a pleadable case, you cannot have permission to amend, so that is -- and you cannot have permission to add them, so that is -- so the quid pro quo of you being able to put them in today because that makes things a little more straightforward, you do not have to come back, is that the limitation point is reserved, if there is one.

MR PICCININ: And it may be, sir, that there is no limitation issue one way or the other, in which case we can just forget all of this and move on.

THE CHAIRMAN: Of course.

MR PICCININ: We will have to see.

THE CHAIRMAN: But you are not in a position to plead your case today. You are not in a position to make a proper application to amend to have these parties put in today because you do not have any material to do it, that is why --

MR WEST: Well, if the question is whether we are in a position to plead a claim form, amendments to the claim form simply adding the claimants, perhaps the solution is that we should prepare such a claim form now.

THE CHAIRMAN: Of course, you can go back to chambers and issue a claim form tomorrow to preserve your position and I am not saying that will succeed or that will not succeed in preserving your position, but I cannot --

MR WEST: If Mr Piccinin is saying that he requires us to go through the process of issuing a new form and serving --

THE CHAIRMAN: Well, unfortunately you have got three Defendants here, so I think the preferred course is what I propose, that we say that the limitation is going to be no earlier than the date of this order and whether it should be later will be a matter for argument another day.

MR WEST: The problem is what would that argument be about? Would it be setting up difficulties for ourselves in the future?

THE CHAIRMAN: No, I think it is -- unless someone in the courtroom knows that there is a real issue here, which is a possibility, but if there is not, the chances of it mattering seem to be vanishingly small.

MR WEST: I understand Your Lordship's position. We will consider whether we ought to produce a claim form overnight and try to cut the (inaudible) in that way.

THE CHAIRMAN: Would you have any objection to the claim form being produced overnight?

MR PICCININ: I mean, no sir, I would consider any claim form that is served to us.

THE CHAIRMAN: Then what happens? So we have the parties joined to these proceedings, the claim form issued. Is somebody then going to jump and complain there is a duplication of proceedings and that it is an abuse?

MR WEST: This would be an amended claim form, so we would amend the claim

form to include these parties.

THE CHAIRMAN: You would amend the claim form.

MR WEST: The question then, I suppose, for Mr Piccinin would be does he consent to the amendments to the claim form?

MR PICCININ: Yes. I have been told that in the draft order, at 6.3, there is provision for the service of an amended claim form within 14 days of the order, but at the moment I just do not know what I am being asked to consent to, other than that I --

THE CHAIRMAN: You know what you are being asked. You are being asked -- before this conversation, you were being asked to consent to the order at 6.2.

MR PICCININ: Yes, and I cannot do that because I do not know what the claims are. I just do not understand what the claim is for. I mean, I have some questions about them that they could answer, but they have not. So, I mean, the proper way to do this is to turn up at court with a draft amended claim form. I just do not understand why the fact that they did not is being laid at my door, rather than Mr West's. As I say, I really do not like to stand on ceremony. I just find myself here because of the irregular way in which the Claimants are proceeding.

THE CHAIRMAN: Is there any prejudice to you, Mr West, if we adjourn the question of whether the claimants are joined until after you have produced your --

MR WEST: I would anticipate not.

THE CHAIRMAN: You would say well then you may hit a limitation problem.

MR WEST: Well, it depends how long the delay is between today and obtaining permission to amend because obviously the limitation clock is running in the meantime.

THE CHAIRMAN: So does the clock not stop when you make the application?

MR WEST: I do not believe it does. It is when the parties are joined.

THE CHAIRMAN: It is the date when they are actually joined.

MR WEST: Indeed.

THE CHAIRMAN: You are producing a claim form on the -- sorry you are providing the amendments 24th June, so we are talking about less than two weeks.

MR WEST: Correct.

THE CHAIRMAN: Why does it take you to 24th June? Why can you not put in --?

MR WEST: Well, if this order had been made, the delay in the meantime, would not matter, although the 24th June is the draft amended particulars, rather than the claim form.

THE CHAIRMAN: Yes, I appreciate that, but I assume you need substance in both.

MR WEST: Yes, but in order to stop the limitation period running, all we need is the claim form and we then have less time pressure in order to prepare the amended particulars because that is not relevant for limitation purposes.

THE CHAIRMAN: So sorry, Mr Piccinin, if the claim form is issued, is amended tomorrow, I have then got to make an order. Is there any reason why you cannot put in the claim form tomorrow?

MR WEST: I do not believe there is.

THE CHAIRMAN: Right.

MR PICCININ: Well, sir, if that is right, that is what they want to do that and we can consider it when it is done. I do not know what it is going to say.

THE CHAIRMAN: So if I make the order in 6.1, and 6.2 reads: “No earlier than the date of this order,” and you undertake to issue a claim form, amended claim form, if I give you permission to do that.

MR PICCININ: To say what? Someone needs to - we should look at the rule book, I think, sir, just so that we can see what it says.

THE CHAIRMAN: Okay.

MR PICCININ: Sir, it is in the authorities, tab 10, page 211.

THE CHAIRMAN: Which page?

MR PICCININ: Sorry, it is Rule 38(4). Sir, I am distracting from the question of limitation because (inaudible) on any prior limitation date, but it needs to then be desirable to add or substitute the new party so the Tribunal can resolve the matters in dispute in the proceedings, that is (a), which obviously does not apply.

Or: "(b) there is an issue involving the new party and the existing party that has been connected to the matters in dispute in the proceedings and it is desirable to add the new party so as to resolve that issue."

What is the issue between the Claimants and new claimants and my client? I just … At the moment I do not know whether it is alleged that my clients were involved in any collusion relating to these new claimants, for example. Is that alleged? If that is not alleged --

THE CHAIRMAN: Is this the same complaint that you have made about the entire case?

MR PICCININ: Sorry, sir?

THE CHAIRMAN: Are you not making the same complaint you are about the entire case?

MR PICCININ: No, it is worse than that.

THE CHAIRMAN: It is worse.

MR PICCININ: Sir, because I do know that it is alleged that my clients were involved in collusion in relation to supplies to the Claimants, as in the ones who are currently in the room.

THE CHAIRMAN: Yes, but assuming we refer to the Claimants now, at least this

amendment is made and then the pleading does not change other than there are more claimants…

MR PICCININ: If the company had said that is what it was, I could consider it. I honestly do not know whether that is what they are going to say. Someone needs to sign a statement of truth alleging that my clients, who never supplied anything to Fiat, were involved in collusion in relation to Fiat. Is someone really going to sign that statement of truth? I would be a bit surprised, sir. So if it does not say that, what is it going to say? I do not know. None of this is my fault, sir.

THE CHAIRMAN: I am not saying it is anyone's fault.

MR PICCININ: That is why --

THE CHAIRMAN: I am trying to progress matters.

MR PICCININ: So am I, sir, which is why I was attracted by the proposal that you very pragmatically put forward, if I may say, sir. Mr West complains of prejudice but the prejudice is of his making because he has not done the work.

THE CHAIRMAN: Right, so what I am going to order, unless anyone has anything they wish to add, I am going to order paragraph 6.1 to 6.2 with the amendment "shall be treated as having been brought on a date no earlier than on the date of this order." I am not today deciding any questions of what the relevant period for limitation is, and I understand the parties have, or at least the Eleventh Defendant, has reserved its position on that. My direction is that the amended claim form should be filed and served within 14 days, I will leave that as it is, and given what has been said about limitation it may be advisable to - or out of an abundance of caution, it would be advisable to serve it earlier than that.

MR WEST: I am very grateful. A very brief point over the page at paragraph 7.5, there is an issue about whether there should be permission for service of a rejoinder.

Just explain this point. Limitation was raised of course in the Defence, and in the Reply the Claimants pleaded that the claims were governed by foreign laws with different limitation rules and also pleaded section 32 of the Limitation Act under English law. The Defendants wish to respond to those pleas, that is why they wish rejoinders. What the Claimants are going to do is to incorporate that material in their Particulars of Claim when they (inaudible) material about foreign law and section 32, so that can then be addressed in the Defence. So we say there is not any need for a provision about rejoinders, although of course the Defendants can apply for it later if they still want it. So that is that.

THE CHAIRMAN: I am not minded to order rejoinders at this stage. If there is a good reason for serving rejoinders, an application will be viewed sympathetically.

MR WEST: Then in relation to experts, we have suggested a process which has been used in a number of other cases whereby in the lead up to the second CMC the parties' experts are to exchange methodological statements explaining how they intend to go about addressing issues of quantum and causation. That will then enable the parties and the Tribunal at the second CMC to adopt a more informed approach as to what further disclosure --

THE CHAIRMAN: (Inaudible) I just think that this may be eminently sensible in due course but it just seems premature at the moment, bearing in mind we have not even got a properly pleaded case yet, for reasons we have explored. So that does not mean you have to - when it is appropriate to move on to consider quantum disclosure and so forth, I suggest you communicate with the other Defendants at that stage, and if you cannot reach agreement you can make a distinct application on that point when we know a little bit more about where we are.

MR WEST: Thank you, sir. There is then a question about whether the court should

proceed to list the trial at this stage. We have proposed - this is paragraph 11.1, the final sentence - an order listing the trial to take place from May 2024, with a provisional estimate of six weeks. The rationale is that the proceedings have already been on foot for some 18 months and having a trial date in the diary brings a certain measure of discipline to the matter and avoids drift. The Defendants' proposal was that this should await the second CMC, which they say should take place in May 2023, and that is the next question, of when the second CMC should be. On that basis we would be some two and a half years into the case and still with no trial date. The estimate of six weeks is obviously one which has been arrived at based on the best estimate of the Claimants' legal team.

THE CHAIRMAN: I think Mr (Peterson?) …

(No audio for one and a half minutes)

MS FORD: Sir, our position is that it is premature at this stage to list this matter for trial. Sir, you have rightly said in your extemporary judgment that we are at a relatively early stage of proceedings and we would respectfully agree with that. There are a number of moving parts, as we have heard canvassed fairly extensively today already. The Claimants are obviously planning to introduce their new claimants. We have heard the exchange which suggests that that may or may not raise limitation issues. They have also indicated that they would like to amend in the light of the first tranche of disclosure that they receive, and the Defendants will need to respond to those points. We have also canvassed today that that may or may not then entail strike out considerations. The directions that have been sought for disclosure today are only the first tranche, they are not the totality of the disclosure that is being contemplated and the intention is that the next tranche will be discussed at the second CMC. All of

that means that there are a number of issues which might well materially change depending on the position once the pleadings have eventually closed --

THE CHAIRMAN: (Inaudible) about two years out, so if things change they change. It would not seem to impact the trial date, May 2024.

MS FORD: If, for example, there were preliminary issues on applicable law, limitation, those sorts of matters, that potentially could impact a trial. Also these variants impact the period of time for which the trial is listed. It is very difficult to comment with any specificity on the six week estimate in circumstances where so many things are still up in the air. What we have done is to propose a timetable to a second CMC. It was provisionally suggested for May 2023 but given that there may not be rejoinders now, that potentially could come forward, for example, to April 2023.

THE CHAIRMAN: Can you just (inaudible) some other dates and then we can perhaps come back to trial date. So I am obviously particularly interested in when the second CMC is going to be so …

MR WEST: I think that is the only remaining point to decide if --

THE CHAIRMAN: Sorry, I did not mean to interrupt.

MR WEST: The timetabling points really all flow from the date of the second CMC.

THE CHAIRMAN: Shall we take them in stages? These are chronological.

MR WEST: I think it is fair to say that the relevant dates which have been proposed for all the interim steps are really driven by the ultimate date of the next CMC.

THE CHAIRMAN: Exactly. You need to plead your case and you cannot plead your case until you have got disclosure and you have considered that disclosure, so that (inaudible) first sticking points. Now we know the scope of disclosure that has been ordered, what dates are we considering for that to be produced by?

MR WEST: That goes back to, I think, paragraph 4, which --

THE CHAIRMAN: We have got - yes, we have got the decisions presumably to be produced. So we have got, at 3.3 we have got 29 July and 12 August, Redacted Confidential decisions. We have to go back to notification of the order on non-party addressees to make sure everyone has got enough time to do everything, so is there any reason why we cannot - so this is 1.1 where - or 2.1, the First to the Fifth Defendants are writing to the non-party addressees, and the date proposed for that is 17 June or 1 July. I do not see any reason why it needs to be 1 July. Can it not be 17 June? If no-one wants to address me on that I am going to order 17 June. Then non-party addressees have effectively nearly a month, so they are going to come back on the 15th, that is at 3.1(b), from 29 July.

MS FORD: Sir, we have requested an extra four weeks for the deadlines for them, the process of accessing the file documents and additional Commission file. I do not know if …

THE CHAIRMAN: Sorry, which …? That is when we get to 4.4, yes?

MS THOMAS: We are at 3.1.

THE CHAIRMAN: 3.1, yes.

MS THOMAS: So this is obviously my clients taking charge of this process of liaising with the non-party addressees.

THE CHAIRMAN: Yes.

MS THOMAS: The point there obviously is that if they are not parties to these proceedings, they need some time to deal with the matter.

THE CHAIRMAN: Yes, so they have got almost a month.

MS THOMAS: Indeed, but it is not appropriate to shorten those deadlines. They will need time to deal with what we are sending to them.

THE CHAIRMAN: So you are saying 15th is not appropriate, or is appropriate?

MS THOMAS: So this is the - sir, if you have brought up the 1 July to 17 June.

THE CHAIRMAN: Yes.

MS THOMAS: That does work, I beg your pardon, yes, then we have brought everything forward by two weeks, that the parties have the same amount of time. Yes, okay.

THE CHAIRMAN: Then 3.3, the decisions, 29 July.

MS THOMAS: Again that is the same two week gap which we said at paragraph 2.1.

THE CHAIRMAN: Yes. Then we have got Access to File Documents which, I think, Ms Ford, you were just about to address me on, I think.

MS FORD: Sir, I think I was raising essentially the same point. We were asking for the difference between the purple figures, or between the various coloured figures, was simply that we were seeking an extra four weeks for the deadline to the access to file and the additional Commission file documents.

THE CHAIRMAN: Right, so you want …

MS FORD: Sir, this is the process whereby the Defendants will have to review the documents that are going to be disclosed, both under the access to the file and the additional file documents, and determine whether any documents need to be redacted under the permissible heads.

THE CHAIRMAN: You have got 4.1(b), that can be 15 July, that is the non-party addressees, including First to the Fifth Defendants. I assume that is no problem on 15 July.

MS THOMAS: Sir, if I may, we saved the dates in - by requiring my clients to serve the order two weeks earlier in paragraph 2.1 we have been able to bring all the dates in paragraph 3 forward. But the difference between 15 July and 19 August is obviously more than two weeks, so the Claimants are trying to save

more time there. We do not think it is appropriate to ask non-party addressees who are not party to these proceedings to act more quickly than we proposed. We would also note that all this falls squarely within the summer when there may of course be availability issues on the part of the non-party addressees' legal teams. They are not party to these proceedings, they do not know the discussions that we are having today.

THE CHAIRMAN: Right.

MS THOMAS: So at most the 19 August date could come forward by two weeks in accordance with the two weeks that have been saved in paragraph 2.1.

THE CHAIRMAN: So you suggest 5 August.

MS THOMAS: Yes.

THE CHAIRMAN: What about (c) then?

MS THOMAS: That is the same point.

THE CHAIRMAN: Same point, so 5 August for that. Then 4.2, that would be 5 August as well.

MS THOMAS: Yes.

THE CHAIRMAN: Then we get to 4.3 which is now disclosure.

MS THOMAS: So this is not so much general disclosure but - it is disclosure but it is, having gone through this process of liaising with the non-party addressees my clients are managing the process of providing the Access to File Documents. So again, in accordance with the two weeks saved earlier, 16 September could come forward two weeks, but that means of course that all of this work has to be done in August - I just make that point.

THE CHAIRMAN: Yes, (inaudible).

MS THOMAS: Yes.

THE CHAIRMAN: Okay, leave that at 16th September at the moment.

MS THOMAS: Okay.

THE CHAIRMAN: We may come back to it. Additional Commission file documents, you do not have to go through the loop of non-parties here, right?

MS THOMAS: No. One point I would make here is that my clients have obviously said that they agree exceptionally to provide the additional Commission file documents but they did so on condition of not being rushed in so doing, so the agreement to provide these documents, which we do not say was necessary, was conditional on the date.

THE CHAIRMAN: The date of 30 September.

MS THOMAS: Correct, yes, so again so they do not have to be rushed, this does not have to be done over the summer.

THE CHAIRMAN: Okay. Then we do not have to worry about you are going to need to …

MS THOMAS: Now we are onto Part 7.

THE CHAIRMAN: … for when the pleadings are provided, yes. Amendments to the statement of case. At the moment - it is 7.2. Additional claimants, we have got until 1 July. Somebody has put 29 July but it is …

MS THOMAS: Yes, so we are told we are going to get the draft amended Particulars of Claim by 24 June 2022, so that is when the Claimants think they will be ready. Their proposal is the Defendants only have one week to consider those amended Particulars of Claim. You have obviously heard vociferous argument --

THE CHAIRMAN: Yes, yes.

MS THOMAS: … to the effect that we do not know what they are going to contain so that is a very short amount of time …

THE CHAIRMAN: Yes, I agree.

MS THOMAS: … and more is required, I say with some diffidence. You will see my name is not actually on the pleadings in this case and that is because those who would be considering this point on my clients' behalf are not likely to be available at the time, so that is a further reason I would ask for more time.

THE CHAIRMAN: So if we go for 29 July and 2 September there, for present purposes, and then we have got the question, the Claimants, now this is the Claimants' job of producing - if you are not getting documents, at least all the documents until 30 September …

MS THOMAS: Yes.

THE CHAIRMAN: Mr West, how long do you think you will need? Obviously, you will be getting them in dribs and drabs.

MR WEST: I am told that a month is expected to be a reasonable period of time for that.

THE CHAIRMAN: So if you are getting them on 30 September, the last tranche, unless I have got that wrong …

MR WEST: That is right, yes.

THE CHAIRMAN: You suggested 7 October. That is - I assume the Defendants cannot object to that.

MS THOMAS: No, 7 October, the red, is the Claimants.

THE CHAIRMAN: Yes.

MS THOMAS: So we had suggested 4 November.

THE CHAIRMAN: This is the Claimants Amended Particulars of Claim.

MS THOMAS: Yes, correct.

MR WEST: I think we now accept 7 October is probably too soon.

THE CHAIRMAN: Yes.

MR WEST: If we do not have the documents --

THE CHAIRMAN: When would you like …

MR WEST: Four weeks from 30 September. So the end of October.

THE CHAIRMAN: The blue says 4 November. Do you want a bit earlier than that? 28 October?

MR WEST: 28th?

MS THOMAS: Yes.

THE CHAIRMAN: And amended defences?

MS THOMAS: We thought a gap of six weeks, which will take us … 9 December?

THE CHAIRMAN: Do you need more than a month?

MS THOMAS: 9 November. No sorry, 9 December. Sorry.

THE CHAIRMAN: You are right. What is wrong with 28 November?

MS THOMAS: We will have received these documents on 28 October. The gap that we are seeking presently is six weeks, I believe.

THE CHAIRMAN: Yes, the Claimants are having a month to do their amended pleadings.

MS THOMAS: Yes, they are obviously …

THE CHAIRMAN: You are asking for longer.

MS THOMAS: … keen to speed things up for their own purposes.

THE CHAIRMAN: Yes, and you are keen to slow them down. You balance each other out.

MS FORD: Sir, just to raise one point. It is now proposed that applicable law points will be pleaded in the Particulars of Claim and we will plead back to that for the first time in our defences. That includes the applicable law, whatever that might be, that it is claimed for the new claimants so we do not even know what position is going to be taken on that, so we are quite conscious that there is potentially a substantial amount of material that will need to be addressed in this defence,

and that was the basis on which we sought six weeks.

THE CHAIRMAN: Okay. All right. We come round to 10 December.

MS FORD: Mr West seemed to think 9th.

THE CHAIRMAN: 9 December. Then how long do you want for the Reply being on 9 December, Mr West?

MR WEST: Four weeks.

THE CHAIRMAN: 7 January. Is that sufficient, given the Christmas period? Are you happy with that?

MR WEST: We would ask for an extra week in light of Christmas.

THE CHAIRMAN: Give me a date.

MR WEST: 13th?

THE CHAIRMAN: 13 January. Then we get to the further case management. 1 March 2023?

MS FORD: Sir, sorry, were you referring to date in 10.1 or the CMC dates?

THE CHAIRMAN: I was referring to the CMC date.

MS FORD: There is a date for EDQs and disclosure reports.

THE CHAIRMAN: You have got to do disclosure reports and EDQs. Let us fix the CMC first and work back to the - how long do you need between Reply and second CMC, to be realistic?

MR WEST: We would propose end of February or beginning of March for the second CMC, with the disclosure and electronic documents questionnaires seven days before.

THE CHAIRMAN: How are these disclosure reports going to work? Are they going to be like the CPR disclosure reports?

MR WEST: I believe so, yes.

THE CHAIRMAN: Do you have a meeting to discuss the categories and all that stuff?

MR WEST: We are going to have to try to put arrangements in place to narrow the disputes between the parties about further categories of disclosure, so, yes, there will have to be such a process.

THE CHAIRMAN: So I am going to say those are 1 March and 14 March. I think that is …

MR PICCININ: Sorry, sir, was that for the CMC?

THE CHAIRMAN: Yes. Is that too ambitious? You have got 13 January - it is not that you cannot do anything.

MR PICCININ: No. Sir, my concern is just that if that is the moment at which we need to have the strike out application heard as well, then we need to allow time for us to make the application and then for my learned friend to respond to it.

THE CHAIRMAN: You can make the strike out application at any time.

MR PICCININ: Yes, sir.

THE CHAIRMAN: You do not have to wait until the - the CMC is not the appropriate time really to have the strike out application. Why are we wasting all our time on disclosure reports if you are going to strike the action out?

MR PICCININ: Yes, I see, we can wait for the amended particulars, wait for replies.

THE CHAIRMAN: I would have thought so. Is that satisfactory? Do you agree? Strike out application can be made at any stage. Ms Thomas?

MS THOMAS: Sir, I think we see the logic of that.

THE CHAIRMAN: Okay, so the second CMC, put down “first available date after 14 March”. I do not know how many of these are Sundays. We are probably picking Sundays for everything but …

MR WEST: Then the disclosure reports and electronic documents questionnaires perhaps 14 days before?

THE CHAIRMAN: So these are the finalised - you have to serve these disclosure

reports on each other, do you not? That should … So they want to be served much earlier than that because you want to have resolved matters by CMC.

MR WEST: 28 days before?

THE CHAIRMAN: I think 1 February for disclosure reports. Maybe less, maybe 7 February for disclosure reports. It gives you three weeks after … Once you have had the claim and the Defence you ought to be able to put most of that together really. You do not have to wait for the Reply. So that gives you … EDQs - okay, so I am going to put 7 February for that. Then first available date after 14th … Is that right? In terms of listing, I am (inaudible) that it is not possible to list it for the date that you are talking about immediately here, so I think there are things already in the diary, but in principle I am prepared to list it and I suggest we deal with this in correspondence, and it will not be before May 2024.

MR WEST: There is a provision to that effect in the order.

THE CHAIRMAN: Do we need it in the order if it is going to be listed? I will say we will put it in the order listed not before the - what was the date we had? - not before May 2024. I am not saying first available date after May - it will be listed not before, and then if we can take that up in correspondence with the Tribunal to try and find a date.

MR PICCININ: Sir, I am not going to seek to persuade you not to do that, but I am just going to say obviously at the moment we do not have any idea how long that trial is going to be so at some point later when we know what this case is about we may be saying for the first time that whatever has been set aside is not enough.

THE CHAIRMAN: Thank you.

MR WEST: Only very, very tiny points remain. It is brought to my attention that on

paragraph 6 there is some non-agreed wording. In 6.1, we are not quite sure what "subject" adds to "without prejudice". And 6.2 we have put in some without prejudice wording of our own. I am not sure if that is still disputed, but if so, I suggest it be added in. It is only without prejudice, after all. I am not sure if anyone objects to that?

THE CHAIRMAN: It seems to say the same thing several times but I do not think we need "subject and" - does anyone disagree? I will put it the red, although I do not think we need it, at 6.2.

MR WEST: Just to mention, although this is not in the order, we sent requests for further information and all of the Defendants have now answered those requests …

THE CHAIRMAN: Yes.

MR WEST: … although some of them did so quite recently, so there is no need for any sorts of orders, but just to mention the Claimants are still considering those and whether any further steps might be needed arising out of them. But I do not ask for any order today.

THE CHAIRMAN: Thank you.

MR WEST: That is all of the business for today, I believe.

THE CHAIRMAN: Are you going to address me on costs?

MR WEST: The parties are agreed costs in the case of the CMC.

(16.03)

(**The Tribunal adjourned**)