IN THE COMPETITION APPEAL TRIBUNAL

Cases No. 1145/5/7/09
1153/5/7/10

Victoria House,
Bloomsbury Place,
London WC1A 2EB

12 January 2011

Before:

MARCUS SMITH QC
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) MOY PARK LIMITED
(2) FACCENDA GROUP LIMITED
(3) GW PADLEY POULTRY LIMITED
(4) O'KANE POULTRY LIMITED — Claimants

– v –

(1) EVONIK DEGUSSA GmbH
(2) DEGUSSA LIMITED — Defendants

– and –

(1) SANOFI-AVENTIS SA
(2) AVENTIS ANIMAL NUTRITION SA — Further Defendants

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(1) VION HOLDING N.V.
(2) VION N.V.
(3) VION FOOD GROUP LIMITED
(4) MARSHALL FOOD GROUP LIMITED
(5) VION AGRICULTURE LIMITED
(6) VION FOOD SCOTLAND LIMITED
(7) VION FOOD WALES & WEST ENGLAND LIMITED
(8) CYMRU COUNTRY CHICKENS LIMITED
(9) CYMRU COUNTRY FEEDS LIMITED
(10) GRAMPIAN COUNTRY FEEDS LIMITED

(11) GRAMPIAN COUNTRY CHICKENS LIMITED
(12) GRAMPIAN COUNTRY CHICKENS (BUCKSBURN) LIMITED
(13) FAVOR PARKER LIMITED
(14) SOVEREIGN FOOD GROUP LIMITED
(15) ROWYELL ROASTERS LIMITED
(16) MAYHEW COUNTRY CHICKENS LIMITED
(17) MAYHEW COUNTRY FOODS LIMITED
(18) VION FOOD UK LIMITED — Claimants

– and –

(1) EVONIK DEGUSSA GmbH
(2) DEGUSSA LIMITED — Defendants

– and –

(1) SANOFI-AVENTIS SA
(2) AVENTIS ANIMAL NUTRITION SA — Further Defendants

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HEARING

APPEARANCES

Mr. Ben Rayment (instructed by Hausfeld & Co. LLP and Maclay Murray & Spens LLP) appeared on behalf of the Claimants in Case Nos. 1147/5/7/09 and 1153/5/7/10.

Mr. Daniel Beard (instructed by White & Case LLP) appeared on behalf of the Defendants in Case Nos. 1147/5/7/09 and 1153/5/7/10.

Mr. Tom de la Mare (instructed by Ashurst LLP) appeared on behalf of the Further Defendants in Case Nos. 1147/5/7/09 and 1153/5/7/10.

MR. RAYMENT May it please you, sir, I appear on behalf of both sets of claimants in this matter, and my learned friend Mr. Beard appears on behalf of the defendants Evonik Degussa GMBH & Degussa Limited, and my learned friend, Mr. Tom de la Mare appears on behalf of Sanofi-Aventis SA and Aventis Animal Nutrition SA.

THE CHAIRMAN: Mr. de la Mare, should I have received submissions from you because if I should have done I have not?

MR. DE LA MARE: No, sir, you should not. My submissions such as they are, are contained in my solicitors' letter, the letter of 10th January which is mercifully brief.

MR. BEARD: If it assists you, sir, my clients' solicitors have prepared three bundles which may act as a starting point for further correspondence to be inserted. You should have them labelled "Outline Submissions", "Index of the Tribunal's Orders" and "Pleadings".

THE CHAIRMAN: I have two out of three. I do not have the pleadings file I do not think.

MR. BEARD: In the Outline Submissions bundle Mr. de la Mare's solicitors' letter appears at tab 4, it was just a question of organising matters because no bundles have been prepared and we thought it was useful to have them.

THE CHAIRMAN: That is extremely helpful because in fact this is a letter I have not seen and I had better read it now.

MR. BEARD: I am grateful.

THE CHAIRMAN: (After a pause) Yes, thank you.

MR. BEARD: Sir, just a matter of housekeeping, that bundle of outline submissions obviously does not include submissions provided rather late last night from the claimants. I just wanted to check, sir, that the Tribunal had seen both of those, because I think they take matters quite substantially further.

THE CHAIRMAN: Yes, those I have seen, thank you very much.

MR. BEARD: I am grateful.

MR. RAYMENT: That would be the next thing that I move on to, whether you had received my submissions and those of Mr. Beard in response.

I have to begin with an apology for those submissions not being available sooner. The background to that is touched on in our submissions and in those of Mr. Beard. It may not be terribly productive this morning to pick at those issues too much.

THE CHAIRMAN: No, I think we can take them as said.

MR. RAYMENT: Yes. For the record, just in relation to the latest set of submissions put in by Mr. Beard, he and I are professional colleagues and I do not want there to be any misunderstanding, I accept that he raised with me some of the issues that were proposed to

be raised in the submissions which were subsequently filed at four o'clock on 10th January, and he did before that time send me a copy of the draft directions. Nevertheless, the issues were significantly raised in those matters and we endeavoured to respond and give our view on what we thought the implications of those matters were as soon as possible. As I say, I am sorry we did not do it sooner. I hope with that we can put a line under the matter, because the result has been that I think matters have been substantially narrowed before you this morning as a result of that.

THE CHAIRMAN: I can see that, and I have read both those submissions, so I think I am up to speed on that at least.

Before you begin on how we progress this matter further, I did have one question of clarification for Mr. Beard. There does seem to be some point, and I am not quite sure what it is, that is being taken as regards the position of the first defendant. If one looks at your original skeleton, para.9, there is a point that is related to the position of the second defendant which then does not seem to be developed in the skeleton. I wondered if you could articulate what that was.

MR. BEARD: It is a rather simple and narrow point. If one looks, for example, at the pleaded case – unfortunately, sir, you do not have the pleadings file. If I can hand this copy up. (Same handed) It matters relatively little whether you look at tab 1 or tab 2, but let us take tab 2, because it is the amended claim form. If one turns on to para.24, what you have is a pleading as to what the jurisdiction is that gives rise to this claim in this Tribunal, or more exactly what the Tribunal's jurisdiction is for those purposes, under Regulation 44/2001, the Brussels Regulation. What it refers to is DEL – in other words, Limited, the second defendant – being a wholly owned subsidiary. Therefore, under Article. 2.1 of the Brussels Regulation the claimants are entitled to bring the claim against DEL pursuant to Article 2.1. Obviously, if DEL goes, that whole paragraph will require to be struck out.

Then (b) is a slightly discursive paragraph that does not particularly pertain to issues of jurisdiction. Then you go to (c) and it says: "ED [the first defendant] is the parent company of DEL", and then it works its way through and argues that on that basis this Tribunal has jurisdiction in relation to the claim against ED, in other words the first defendant, by virtue of Article 6(1) of the Brussels Regulation. In other words the provision of the Brussels Regulation that effectively says that if you have an anchor defendant which is domiciled in the jurisdiction of the court or tribunal hearing the matter and claims against parties domiciled in Member States elsewhere in the Community, you can deal with those claims as well, it is a matter that has been raised in various cases. What you have here is an

assertion that the jurisdiction of this Tribunal against the first defendant is predicated on the existence of the second. If the second defendant disappears so does that paragraph, it has no basis.

Paragraph "(d)" similarly says: "…the Tribunal has jurisdiction over DEL pursuant to Article 5(3) of the Regulation …" We are unclear why that is said as it is because there is an assertion of jurisdiction by virtue of domicile in the earlier paragraph but insofar as it is replying to DEL that would fall away. If, on the other hand, that is a typographical error, but that has not been clarified ----

MR. RAYMENT: I think it is.

MR. BEARD: In those circumstances the claim would be for jurisdiction under Article 5(3) in relation to where the harmful event or damage occurred in the United Kingdom. That would be a much narrower scope of jurisdiction under the Brussels Regulation and "(e)" is not relevant. So what you have is a reshaping of these jurisdictional pleadings. It may be that the other side are going to say that actually there are all sorts of other bases that we want to assert jurisdiction in relation to this particular claim, but on the face of it you would be reshaping the claim and we need to see where that takes us. More generally you have a situation in relation to this claim where the impact of having the second defendant in may be highly material as to how the claim is pleaded to, as we have already indicated in our submissions and indeed in relation to other matters such as disclosure, but I perhaps do not need to take that further.

THE CHAIRMAN: No, but the short answer to the point that I raised is that if your application as regards the second defendant is successful then that has, according to you, a significant effect on the jurisdictional basis as against the first defendant?

MR. BEARD: Certainly as it is pleaded.

THE CHAIRMAN: Of course.

MR. BEARD: We deal with what is put before us and we say at the moment those bits would have to go.

THE CHAIRMAN: The Tribunal will certainly stick to what is pleaded and if there is an amendment we will deal with that.

MR. BEARD: Yes, because obviously there are provisions in relation to amendments under the rules but permission has to be sought in relation to them.

THE CHAIRMAN: Thank you very much, Mr. Beard. I am sorry, Mr. Rayment, for that interruption.

MR. RAYMENT: Not at all, sir, that was extremely helpful because we, like you, as we set out, were not entirely clear as to the basis on which it was said that the potential departure of Degussa Limited would necessarily create the devastating consequences that Mr. Beard appeared to hint at. Our position briefly on all of that is that if those are the bits that go as a result of Limited going and the rest of the claim is left as it is. We say that is a relatively small matter because really what the pleading at that point was doing was setting out for the benefit of the Tribunal when the claim was originally lodged what the claimant said about the basis of the jurisdiction. In other fora there are actually other places where you would set out those matters, they are not matters which strictly have to be pleaded. Either the Tribunal has jurisdiction or it does not, and certainly one of the bases of jurisdiction that we did not set out at that stage was that the first defendant had submitted to the jurisdiction, but if anybody attempted to raise a point now about jurisdiction that is certainly a point we would be making. So, in a sense, there is an element in which that aspect of the claim form has rather been taken over by events. In any event we say it is not necessary to the claim as such.

Sir, the crucial issue which became apparent to us on Monday, exactly when I will not now go into in any more detail, was what should be the consequences of the Emerson strike out which it is now clear my friend says is of significant relevance to this case. We broadly agree that there should therefore be a stay until the judgment until that matter is published, but we made the point that this should not be a blanket stay where progress could usefully be made on other matters and there were two matters in particular that we identified as potential candidates to be an exception to a general stay and the first was the request for further information, and the second was issues relating to disclosure of a specific category of documents, namely documents that were provided by Degussa and other parties to the Commission in the course of its investigation. The position so far as the request for information has been concerned is that there has been an outbreak of harmony on that point and it is agreed that the Defendants will submit their request for further information to us within 14 days of the Tribunal's order and that we will respond, if so advised, within a further 21 days once we have seen what it is that they are after.

The only other consequential matter that arises from that that is not in agreement is that we were pushing to suggest that there was no need for the defence to take 28 days to be filed after the receipt of the request for further information, 28 days is the default period for a normal defence and the Defendants in this case have obviously had the claims for a long period of time. Once the RFIs fill in the gaps, even if they are substantial as they suggest,

our position is that they do not need a further 28 days and that 14 would suffice. That is our submission and I do not intend to make any further points on that.

THE CHAIRMAN: Yes, one might say the reason for a stay was so that the parties would actually progress matters, we will see what Mr. Beard says on that ----

MR. RAYMENT: Indeed.

THE CHAIRMAN: -- but I think it is going to be 28 days rather than 14, but I will obviously take it into account. On disclosure my instinctive reaction was that disclosure ought to follow the pleadings and that to have two stages of disclosure was perhaps both unusual and perhaps not altogether helpful. Can you help me on why you would want disclosure during the course of pleadings?

MR. RAYMENT: The point about this specific category of disclosure that we have requested is that it has certain characteristics that are unusual and do not generally apply to disclosure. The first point is that it has already been gathered up, so it is already packaged and therefore it is not a question of having to trawl around various sites looking for documents and so on, it is there. It is also highly likely to be relevant because it concerns the day to day operation of the cartel, how prices were fixed and so on and we say that early access to that information will assist us in understanding how the cartel operated and in bringing our claim and in due course focusing better requests for the subsequent stage of disclosure that still has to be identified in due course,

The other point about raising it at this stage is that, as you have seen from my friend's most recent submissions, there are a number of issues that may apply to this category of disclosure. Now, we do not accept what the Defendants say about that, especially not in relation to documents that they submitted to the Commission which are not admissions if you like, corporate statements or individual statements, or individuals admitting wrongdoing – put that category of documents on one side. Insofar as the rest of the documents are concerned, i.e. ordinary documents created in the course of Degussa's business when it was party to the cartel, we say that that information, where it is relevant to the issues in the case, that should be discloseable, and there is clearly a significant argument that that is the case.

It is also the case, we say, that you cannot equate as the Defendants try to do, the position of some of the individuals in the cases that they mention who are essentially making freedom of information requests to the Commission. What we would be proposing here is a request by this Tribunal to the Commission regarding orders for disclosure by this Tribunal in the context of court proceedings where there are a number of procedural protections and

guarantees that can be put in place. Our understanding is that that is a fundamentally different scenario to the one that is being treated in the cases involving the requests for information under the freedom of information regime. I am not expecting Mr. Beard to agree with that, and indeed he has already made it clear that he does not. There is a procedure at least for this Tribunal to seek clarification from the Commission as to, if it considers that certain categories of documents would be relevant to the issues it has to decide, what the Commission's view on it making relevant disclosure orders would be. Perhaps I can ask you to turn up the relevant provision. It is in Regulation 1 of 2003 (and I see that you have got the new shiny version). Would you go to para.3049(1). At this stage the issue that we are raising would not involve the CAT asking the Commission to transmit information to it, as such, but it would be asking for the Commission's stance in relation to the type of disclosure that we are raising. For the reasons that I have been suggesting, it may be suggested on the other side that there are cases going on that mean that any request would be pointless. We say there are points of difference about the context here, not only that any disclosure would be taking place within court proceedings, but also that it is far from clear whether, when one is talking about leniency documents, one is really talking about ordinary documents created in the course of business or just documents specifically generated to try and get the Commission to give you your discount on the penalty. We say there are some significant issues there.

One of the points that arise specifically on the facts, I have noticed, in the most recent submissions is that it is said that all of the documents in the category I have just mentioned were submitted pursuant to a leniency application. In this case Degussa got a 25 per cent reduction for leniency. It is not clear whether all the documents that have been submitted to the Commission were submitted pursuant to the leniency application or whether they also submitted documents pursuant to requests for information, and such like. Even trying to take a broad view of what leniency documents are, which I anticipate the Defendants wish to do, it is not even clear that, on the facts, all the documents in this case fall within that category. So there are a number of issues that arise. We say that it is plainly sensible that the Tribunal makes some attempt to clarify with the Commission what the Commission believes the position is so that we do not have to make that request in five or six months time. Although the European Commission is a fine institution it has lots of demands on its time and inevitably any response on what we would say is an important issue could take quite a lot of time and have the potential to delay the onward progression of the proceedings.

So that is what we say about disclosure at this stage.

Can I ask you just to turn now in our submissions to the directions section, if I can call it that, in para.31 at the back. I am afraid I did not see our submissions, for obvious reasons, featured in the index.

MR. BEARD: My solicitors may have done an Olympian job yesterday in getting it all sorted quickly, but unfortunately it was done before 9.30 last night. They should perhaps slot in at tab 5. The idea of these bundles is that they can be added to over time. Perhaps Mr. Rayments's submissions of last night could go in at tab 5, and if it could be imagined a notional tab 6 then our response this morning could perhaps slot in there.

THE CHAIRMAN: I have para. 31 anyway, Mr. Rayment.

MR. RAYMENT: I think (i) to (v) are now relatively uncontroversial. The same applies to paras.(vi) to (ix). I do not think there is very much between the parties on these points. I think Mr. Beard has raised a question in (viii) about the insertion of standard disclosure. We thought that that would be helpful to focus the minds of the parties on what it was they needed to be disclosing, but Mr. Beard appear to be suggesting in his submissions that if we remove standard, in fact the consideration given can be even wider than standard disclosure at this stage. So I certainly have no objection to that.

The final point is that the scheme is that the parties will meet to try and identify the scope of disclosure, and a CMC is provided for to deal with issues that arise at this stage of the proceedings. Those instructing me are very keen to emphasise that this is there if it is needed, but should not be regarded as a necessary date in everybody's calendar.

Then the further steps that I have set out in para.31 are really a check list of what would need to happen after disclosure is sorted out.

As you will probably appreciate, when my solicitors first wrote to the claimants last week to get the ball rolling on how this matter should proceed, it contained suggested directions all the way through to a final hearing date. That may be regarded as optimistic, but at the same time it reflected a real concern that, by the time that we get to disclosure, momentum should not be lost thereafter because there is not an expectation as to where the case is going.

That brings me on to the point raised in my submissions about whether or not it is useful to discuss the possibility of identifying a broad trial window in the future as the sort of time when it might be expected that the hearing could be listed or the reasons that I have given, which is that it gives everybody an expectation and a focus as to where we should be trying to get to. Yes, of course there are points that may be raised: there are a lot of documents, there are not a lot of documents, and we do not know any of this, we do not know how long

it will take to collect them, we do not know what witnesses we need, we do not know how long the experts will need to take. Whilst all of that is true to a certain extent, there is a danger that one can say these things but one has to put a deadline at some point and one cannot always foresee what time is necessary, but generally speaking when sensible deadlines are set that actually helps people to achieve things that they might not achieve within that time if they did not have the deadline, or at least the idea or expectation as to when things needed to be done by.

As we see it, the proposals that the parties are making up to disclosure get us to somewhere around the end of May. It is not impossible to foresee the end of June as a period by which disclosure could be made; of course, it depends on certain uncertainties, but it is not impossible. Witness statements of fact could be dealt with by August perhaps, experts could meet and report by October, and a trial in December we would say is not out of the question and we think it is helpful to raise that possible time frame now. Of course, there are uncertainties and one cannot predict entirely how all of these stages are going to unfold, but those instructing me are very keen to have a focus for the case going forward to a trial, even if it is not possible at the moment to make every detailed provision to get there.

THE CHAIRMAN: The difficulty is there is a large degree of uncertainty here because of Emerson, when that comes out, and what the consequences of that will be that we would not normally have in another case, that is the only thing that troubles me about that suggestion. I quite take your point, but having a date to work to concentrates the mind.

MR. RAYMENT: Yes. I suppose also it is the implicit assumption which I accept may be wrong, but there is an implicit assumption that we might be expecting the Emerson judgment possibly towards the end of this month – it was heard in December.

THE CHAIRMAN: Yes, 10th December.

MR. RAYMENT: It is a preliminary issue, it is not unheard of for judgments to come out within that time and that was the sort of internal working estimate we made and the way everything unfolds after that is based on that assumption. Of course, I accept that that assumption could be wrong, but even so it is helpful even at this stage to think about it in these terms because we are very, very keen to have a focus towards which to work.

THE CHAIRMAN: One point whilst we are talking about strike outs – perhaps more a matter for Mr. Beard, but I will raise it with you and he can deal with it as well – is there any advantage in getting the defendants to formulate the basis for their strike-out application now, all grounds, with a view to that being responded to before Emerson comes out, but

with any hearing occurring obviously after the Emerson judgment has been handed down and considered by the parties? Is that something which might expedite matters?

MR. RAYMENT: May I have a moment?

THE CHAIRMAN: Of course.

MR. RAYMENT: (After a pause) Well I think that is primarily in the first instance a matter for Mr. Beard, but we can see the force in that suggestion.

THE CHAIRMAN: Because it simply seemed to me the conversation we had at the outset regarding, for instance, the first defendant. I would quite like the consequences of a successful strike out against the second defendant to be clarified so that one knows exactly what other paragraphs go as against the first defendant, which will then give you a chance to articulate any alternative basis of jurisdiction which you might say would render the strike as regards the first defendant's paragraphs academic, because otherwise, it seems to me, there is a risk that the fall out from a successful strike out at least could drag out.

MR. RAYMENT: I do see the force of that and those instructing me certainly see the force and are strongly in agreement with you, sir, in which case so am I, I think. (Laughter) Sir, unless I can assist you further at this stage?

THE CHAIRMAN: No, that is very helpful, thank you, Mr. Rayment. Mr. Beard?

MR. BEARD: Sir, if I may, the Tribunal has the most recent further submissions that we put in this morning, I was going to work through the amended draft directions that are actually in that document appearing at para.17.

THE CHAIRMAN: Yes, I have that.

MR. BEARD: I will take the points slightly out of order from the way Mr. Rayment dealt with them, but just work through, if I may. In relation to para. (i) I do not think there is any particular issue between us. Obviously there would be consequential amendments depending on which way the Tribunal goes in relation to Mr. Rayment's application on disclosure.

Then (ii) is the obligation to lodge any application to strike out or dismiss the claim against the second defendant within seven days of the publication of the Emerson strike out judgment and then there is some wording along the lines of that which Mr. Rayment had in his submissions of last night, albeit not conditional on the specific success of the strike out application, because it must be possible that the particular circumstances of that mean that there is a quirk that means that strike out application does not succeed, but the reasoning in the judgment is applicable.

Dealing then in passing with the point that you raised, sir, just now with Mr. Rayment, the application to strike out is not going to be brief, it is quite a substantial argument that would be deployed - I outlined it in the previous submissions, but obviously to amplify those and set out what the full grounds on which a strike out would be brought is not a simple exercise, it is something that will cost a good deal and will cost a good deal to respond to on the other side. In the circumstances the production of that document and its response did not seem to us to be a sensible and prudent step in circumstances where I think both sides work on the basis that the outcome of the Emerson strike out application will probably be determinative of the way things go here in the sense that – and I do not commit the claimants to this at all – if *Mersen* was successful in striking out *Mersen* UK then the chances that in fact no application would be required from us and the claimants might withdraw the claim against Degussa Limited might be expected to be relatively high.

On the other side if *Mersen* UK were to be unsuccessful in striking out *Mersen* UK then there might well be a situation where we do not pursue this matter at all further. Therefore the incurring of potentially relatively substantial costs in producing applications did not seem to us to be a sensible way forward. I hear your comments, sir, about the possible ramifications of that application. It was envisaged that depending on how the Emerson strike out application went there could be a rather – one would hope – brief discussion about which parts of the pleading would then fall away. There may be some collateral issues about whether or not Mr. Rayment's clients need to amend or, as he puts it, actually there is no requirement to plead further in relation to jurisdiction, we hear what he says today, we will obviously think about that, but the need to go through the whole process of creating a shadow application in order to be able to deal with those matters at this stage seem to us to be premature. We are very happy for there to be rather strict deadlines for the repercussions of the Emerson strike out application to be dealt with at the time, so that it does not linger on, and those could probably be built into the timetable.

It would seem to us if the Tribunal's concern is about some kind of lengthy satellite discussion about precisely which bits of pleadings stay and which go, the sensible course would be to build in some deadlines after the decision in the Emerson strike out judgment in order to deal with that, and in doing so will obviate that risk but, at the same time, eliminate the risk that rather substantial costs will not be wasted on either side.

THE CHAIRMAN: I see the force of that. Does that mean that the seven days that you envisaged in your para. 17(ii) is actually a little bit brief given the amount of work that you say might have to be done in light of the Emerson judgment?

MR. BEARD: We are willing to work hard. We recognise the point that is being made against us that it is always going to be said that "these defendants are dragging their feet in producing this application" and what is being said is that we are just trying to delay everything. We thought we were above criticism if we said that we would deal with it within seven days ----

THE CHAIRMAN: Oh certainly.

MR. BEARD: -- and we will do so, and in those circumstances we are willing to make that commitment, but it will be a chunk of work and that work will not be cheap.

THE CHAIRMAN: Just to be clear though, the strike out application, I was not very attracted by the two phase strike out that was originally mooted by you, having first an Emerson and then a *Cooper Tire* strike out. This will be a strike out application that will deal with all heads of strike out.

MR. BEARD: Certainly, I understand. I think the point is that if all that is left is a *Cooper Tire* strike out then the nature of the application will be narrower. What is referred to in *Cooper Tire* as the *Provimi* point as the case law states, and I am just concerned not to be going back to an old case. This selection of directions is not intended to do that. Indeed, the previous set of directions did not create a bifurcation in terms of the timetable, all it did was alert the Tribunal to the fact that if there was an outcome that said that the matter was not struck out for the reasons in *Mersen UK* there remained another further argument, and since in its letter preceding this CMC the Tribunal had asked for any applications that might be made it seemed appropriate for us to explain.

THE CHAIRMAN: Yes, I just wanted it clear. Thank you, that is helpful.

MR. BEARD: As I say, shadow process not helpful, but constraint on dealing with pleadings we are entirely satisfied with, we do not have a difficulty with that, indeed, it might be sensible to build in a period after the lodgement of any application if necessary for that.

I should make clear that in any strike out application we would be making clear which paragraphs we were saying would go, so it would be built in. It is difficult to see what else is really needed, but we understand the points being made.

Points (iii) and (iv), they are an unusual process for dealing with RFIs, but one that in these circumstances we understand and we will proceed with. Mr. Rayment's clients were keen to have the "if so advised" in relation to the answers. If they are not so advised they can well expect that further applications may well be made or it may have an impact on the nature and detail in which we can plead in any defence, but I am sure they are very well aware.

MR. RAYMENT: We are well aware!

MR. BEARD: So those matters dealt with, 28 days after service of the defence, the Tribunal has already mentioned the point that there has been a subsisting stay here and so steps have not been taken in relation to pleadings, and it does not seem to us there is any good reason to truncate this timetable particularly when the questions that we will be being asked may be in relation to two defendants or one, it seems quite wrong to truncate that timetable. Sir, you gave a sort of preliminary mention with a degree of sympathy with the 28 day timetable, unless you want me to deal with that ----

THE CHAIRMAN: I do not think I want you to dwell on that. Can I back track to (iii)?

MR. BEARD: Yes, of course, I am sorry.

THE CHAIRMAN: No, not at all. The requests are emanating from the first defendant?

MR. BEARD: Yes.

THE CHAIRMAN: And I understand why the draft says that, but I understood from the submissions that you have made in writing that both defendants have issues with the clarity and particularity of the statement of case of the claimants. Is there going to be a material difference between the clarification that the second defendant would seek, as opposed to the first defendant?

MR. BEARD: We do not know precisely. I think it is likely that there is going to be a substantial degree of overlap. There are two ways of dealing with this. Pending the outcome in relation to the Emerson strike out and any further application, we could lodge RFIs on behalf of both defendants. There would obviously then be a costs risk to the other side because we would effectively be wasting any costs in submitting RFIs in relation to the second defendant, and we would expect those costs to be paid. They therefore suggested that the RFIs were only made on behalf of the first defendant and that if, in due course, there are supplementary RFIs, assuming the second defendant stays in these proceedings and they pertain to the second defendant only, then we would have to make provision for them. This timetable does not do that, we accept that. It did not seem sensible to start trying to do too many decision tree structures within a set of orders, and so at this stage we did not build that in and it is for that reason effectively to accommodate their concerns about their facing a costs' risk in relation to the RFIs that it is drafted as it is.

THE CHAIRMAN: Yes, I see. The problem is, Mr. Rayment, if there is a list of requests which are unique to the second defendant they are simply not going to be dealt with within this timetable which may cause delay.

MR. RAYMENT: May I clarify? We wish to receive an RFI on behalf of the second defendant if the second defendant has issues that it needs to clarify, and that is reflected in the written submissions and the order I think has got out of kilter, and I am sorry for that lack of clarity.

THE CHAIRMAN: No, that is helpful.

MR. BEARD: Well we put down the warning on costs.

THE CHAIRMAN: Indeed, and I think Mr. Rayment has taken that on board. In that case ----

MR. BEARD: It should therefore just be "defendants".

THE CHAIRMAN: "Defendants", exactly.

MR. BEARD: You did not want me to trouble you further on "(v)"?

THE CHAIRMAN: No.

MR. BEARD: Then "(vi)" concerns Mr. de la Mare, but I understand there is no issue in relation to that – he shakes his head. Then "within 21 days of the service of the Defence, the Claimants serve any Replies (if so advised)." That is obviously sensible.

Then in "(viii)" we are into a proposal that we put forward to effectively discuss in rather more specific terms issues in relation to disclosure, because whether you end up with standard or non-standard disclosure, obviously standard disclosure is not a concept that exists in this Tribunal, it is imported from the CPR. In any event, when you are dealing with a situation where you have an overseas defendant and you are talking about documents going over a long period of time, even if we were dealing with standard disclosure one of the issues that arises is the proportionality of certain searches. Experience tells that it is more sensible to discuss these in advance than for one party to head off doing disclosure in a particular way, produce its list and then for the other party to say "Actually, you should have searched in X, Y and Z places that did not occur" and to some extent it is to obviate that.

Mr. Rayment should not operate under any illusion that we are offering some much grander scheme of disclosure than would otherwise be given under standard – we are not going back to *Peruvian Guano* or anything of that sort. What we are talking about here is (a) discussing the sorts of categories of documents on both sides because there is going to be substantial disclosure required from the claimants here in relation to both levels of the pass-on arguments that are likely to arise, but it is sensible to discuss how those matters are dealt with and are going to be dealt with by the different parties. In certain circumstances it may be that the information can actually be provided in a digested form that is not formally disclosure of documents, but is actually more useful to the proceedings. I am not in any particular hope or expectation that that will be possible, but it is something that is worth

exploring and until we know in more detail precisely what is being looked for then it may be that it is unnecessary to deal with this in further detail at this stage.

THE CHAIRMAN: No, the only point I would say is that I entirely agree that an articulation of what is intended to be disclosed and the problems with what the parties mutually want by way of disclosure is invariably helpful.

MR. BEARD: That was our view, hence the proposal we put forward in relation to this. To be fair to Mr. Rayment and his clients they have entirely accepted that. I think there is a collateral change in relation to the timing of the listing of the CMC because I think in Mr. Rayment's draft directions of last night the process had become slightly compressed because our idea was that 14 days after reply there was an exchange of letters effectively setting out what was required and what was proposed by way of disclosure. Then there would be discussion within 14 days and you effectively want the CMC listed 14 days after that period, so that the discussions can have occurred. The issues that may or may not exist between the parties have crystallised and then they can be the focus of submissions for the CMC if any are required. Like Mr. Rayment we live in hope that it will not be necessary to have a CMC, experience tells that it is perhaps prudent to put a little bit of structure in at this stage.

THE CHAIRMAN: Yes, I understand. Just to raise Mr. Rayment's point about a request for clarification from the Commission.

MR. BEARD: Well I was going to come on to disclosure more generally. I am sorry, I was dealing with the ones here, obviously I have omitted that from his proposal on disclosure from the list because we object to it, and I was just going to come back to that at the end. If I could just deal with "(ix)" because I slightly jumped ahead to "(x)" on the CMC timing. "(ix)" is really just building in our response to Mr. de la Mare's defence, and again there is no objection to that as I understand it, nor I think in relation to any listing of a CMC which would concern Mr. de la Mare potentially as well.

THE CHAIRMAN: And what do you say about Mr. Rayment's point that some kind of even loose window ought to be built in for things like witness statements, expert reports?

MR. BEARD: As we set out previously in our submissions, we just do not really see the purpose and sense of this at this stage. It is rather odd to be proposing you build windows in circumstances where you do not know where you are looking in having not yet closed the pleadings and therefore crystallised the issues between the parties, it is a very unusual way of going. Of course, dates focus mind, but it is wholly artificial to be plugging in a trial timetable when we have no sense of how long it is going to take, what it is going to involve,

or indeed the process of disclosure, because it may be that Mr. Rayment is right, that in fact because this is an old case disclosure will be relatively limited because documents are not held. On the other hand that may not be right and there may be an awful lot of material that has to be searched through and sifted, in which case we do not know how long that is going to take. Trying to work out who we have as witnesses to deal with that documentation when we do not know what it is, is something we simply cannot sensibly assist the Tribunal on at this stage. The same goes for experts. The only comment on experts I would make is that Mr. Rayment referred in his submissions to the subsequent directions as being a checklist, obviously we have no objection to checklists being considered, but in relation to the expert, he referred to it being in relation to valuation of the claim, and we would not restrict expertise. We can deal with this in due course, but the nature of the expertise that will be required should not just be thought of as relating only to valuation unless the valuation is essentially the claim; matters of causation may require expert evidence as well, so I place that marker now but I am not sure that we need to deal with that further at this stage. I simply do not know how you calculate what the relevant trial window is, or where it should be put. The whole purpose of building a timetable to a CMC is to give the sort of focused case management that Mr. Rayment is asking for, and by that stage it may be much more sensible to be thinking about particular proposals, the timing of the next steps and so on and people can comment more fully then.

THE CHAIRMAN: Yes, and there is also an expectation that it will be complied with. The problem is that if one is faced with a degree of uncertainty – I will ask Mr. Rayment to address me on this – I do not see the point of having a timetable for this if it is so uncertain.

MR. BEARD: No, it just becomes merely a stick to beat the defendants with, we recognise that but it does not seem sensible for the Tribunal to deal with that in in that way.

THE CHAIRMAN: Your shoulders are broad, Mr. Beard.

MR. BEARD: That is very kind, sir. Sir, that deals with, I think, broadly the close to agreed structure, subject to those couple of points on dates. Then we turn to issues in relation to disclosure, and it is necessary then to just look at what it is that the claimants are now asking for because, of course, the position has changed since Friday. Their little (iv) was:

> "within 14 days of the date of this order the defendants disclose and produce the documents it provided to the Commission, excluding any corporate or individual statements produced for the purposes of leniency."

Well obviously the first point to make is the one we have emphasised on a number of occasions in our submissions, until you close the pleadings you do not know what the

particular issues are and you do not know whether or not that category of documents is all relevant. So the idea that you should be making any such order is plainly wrong on that basis alone. But we have also alerted the Tribunal to the fact that we were a successful leniency applicant, not one hundred percent successful leniency applicant, but nonetheless someone that came in and asked for leniency of the Commission. As the Tribunal will be aware when you do that you are under an obligation to co-operate and provide all relevant documentation and relevant corporate statement as well, and that is all covered in the Commission's Notice on Immunity on Fines. The Commission clearly has very significant concerns, as do all regulators, about the effectiveness of their leniency programmes, and they are very concerned that people should not be deterred from entering into them and for that reason substantial issues of public interest at a Commission level arise as to what can be done with the material that is submitted to the Commission, even when it comes from a particular leniency applicant and has originated from them in terms of the documents they provide. We have highlighted in our most recent submissions the fact that there is an alternative mechanism by which you can actually ask the Commission for documents and we have provided to the parties but I will pass up just for reference to the Tribunal, just copies of all of the cases and applications that are referred to in our submissions.

Just on the cover is a copy of the submissions, but if one turns the pink tab over one there sees Regulation 1049/2001 which is not in the purple book. In that it is a general mechanism for obtaining access, but to treat it as merely as an FOI request that is being dealt with in the various cases I will come on to is not quite right. What one sees from Articles 1 and 2 of this Regulation is an articulation of the basic principle of transparency and openness in the Commission. But in Article 4 there are various exceptions set out and, in particular, Article 4(2) deals with the exception where:

> "The institutions shall refuse access to a document where disclosure would undermine the protection of …
>
> – commercial interests …
>
> – court proceedings …
>
> – the purpose of inspections investigations and audits …
>
> unless there is an overriding public interest in disclosure."

Then also worth noting is 4(4) which is where you are concerned with third party documents, the institution should consult in relation to any confidentiality issues.

So what you have there is the general mechanism for obtaining documents.

Then at the next tab we have included just for reference, although it is in the purple book, the Commission leniency notice, actually "Immunity from fines". If you turn on to the next page you will see at para. (12) there is articulated the general and continuing requirement of co-operation in the provision of documents and information. The point I wanted to draw the Tribunal's attention to is para.40 right at the end of that tab.

> "The Commission considers that normally public disclosure of documents and written or recorded statements received in the context of this notice …"

So that will be all of the material you are giving, and it does say "documents" as well as "statements". Then: "disclosure … would undermine certain public or private interests", and so it will not be disclosed under 1049/2001 because it will fall within the scope of the Article 4 exceptions.

What we then have attached at the next three tabs are OJ notices indicating that people who are bringing, third parties who are bringing damages claims have sought to go to the Commission and say, "Look, under 1049 we want these documents, including stuff that was given by leniency applicants, and so on, because we want to use them in our damages claim". The first one is *Energie Baden-Württemberg*. The second one is the *Kingdom of the Netherlands*, although I do slightly wonder whether it is the whole of the Kingdom of the Netherlands that is bringing that claim. Given that it is to do with a bitumen cartel, their road-making agency may well be complaining. Then the third one is to do with a claims organisation in Germany bringing a claim in relation to the hydrogen peroxide cartel. Each of those are applications being made to the General Court because the Commission has said, "We are not giving you this stuff, we are not giving you this stuff, we are not giving you in particular anything to do with leniency statements". So there we have a situation where, although you have the presumption of transparency, the Commission is saying, "No, we are not giving you this sort of material", and we say part of that is because of the significant public interest in protecting their leniency procedure.

Indeed, there is a slightly odd case going on at the moment called *Pfleiderer*, which is not to do with the Commission's own leniency procedure, it is to do with the German domestic leniency procedure. In that case – the Advocate-General's opinion is at the last tab – what was happening was the Bundeskartellant had made an infringement decision, someone had come along to the Bundeskartellant and said, "Could we please have the documents that you received from leniency applicants because we would like to rely on them and bring a damages claim". Pfleiderer had done so. The German courts had said, "We are not really sure whether, even under domestic leniency schemes, we can give that, because we are

concerned that that could collaterally undermine the leniency schemes that operate at European level and it could undermine the way in which competition enforcement works at a German level because the Commission will no longer trust us with documents because we could end up giving them out to third parties, and so on".

The issue there was whether or not this third party could obtain leniency material. A number of Member States intervened, and that can be seen in particular at para.16. A number of Member States turned up, including the German State, saying, "Look, you really should not allow this, it would be contrary to European law if, even at a domestic level, we started giving this stuff away". The Commission has intervened and said, "No, we do not agree with that, we think that just giving the voluntary statements away would be highly problematic, but if it is pre-existing documents we are happy". The Advocate-General said that in this context, and I will not go into the details of the domestic regime, although it may well matter, because it sounds like the German regime is rather odd, you only get to provide them to your lawyer, any documents. There are all sorts of issues there. Nonetheless, the Advocate-General has concluded that he quite likes the Commission's approach to say things are different.

What we say is that you cannot possibly be making any orders in relation to this sort of thing because, even in relation to a domestic regime the matter is currently within the ambit of the court. If Mr. Rayment thinks that it would be fun to go off on a reference to Luxembourg in relation to these matters at this stage we wait for his application, but we do not assume that that is going to be the way forward.

In the circumstances, his application is not sustainable as it is set out in (iv) of his submissions. He then has now changed tack, I think perhaps in recognition of there being some force in this, but I do not wish to presume, and has said, "Actually we could all join hands and write to the Commission together and ask them about these matters under Article 15 of Regulation of 2003.

It goes without saying that if that is what he is asking for he should make a proper application setting out what he wants and what he wants the Tribunal to ask for. You cannot casually do this sort of thing on the hoof.

Even then, it is worth noting that the terms of Article 15 are not clearly applicable in relation to this sort of case. I am sorry, I do not have copies, I am just referring to the Purple Book again where Mr. Rayment took you:

> "In proceedings for the application of Article 81 and 82 of the Treaty …"

It is not accepted that where you are talking about these sorts of damages claims that necessarily falls within the scope of this –

> "… courts of the Member States …"

and we will presume for these purposes that this Tribunal falls within that definition –

> "… may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the Community competition rules."

Here we are dealing with a follow-on case. The infringement is well settled. The application of the Competition Rules has been done by the Commission. So we are not going to accept that this is the appropriate course. If Mr. Rayment wishes to pursue it he needs to set out properly and clearly on what basis he is intending to proceed and we can deal with it in due course. So even his new approach, we say, is not taking him any further, certainly for the purposes of making any orders or directions today. None should be made in relation to this documentation.

Unless I can assist the Tribunal further in relation to any particular matter those are my submissions.

THE CHAIRMAN: No, thank you very much, Mr. Beard. Mr. de la Mare?

MR. DE LA MARE: Sir, I have nothing to say in respect of the main body of directions, they are agreed. I just wish to address this question of disclosure very briefly, if I may.

THE CHAIRMAN: Please do.

MR. DE LA MARE: It may have a knock-on effect as to disclosure obligations as between Mr. Beard's clients and mine. My position is very much the same as Mr. Beard's, but I wish to make a couple of additional points. It strikes me that this application is very much in the nature of a dangerous course of seeking a preliminary issue before you actually know what the facts and matters are between the parties. Effectively, what Mr. Rayment is seeking is preliminary disclosure before we get to the main body of the disclosure. It is quite evident that this application, whatever shape it eventually takes, and I side completely with Mr. Beard in my criticisms of the vagueness of what is actually being sought and the means by which it is being sought. It is quite clear that the issue that underlies all this, namely the discloseability of material submitted to the Commission, raises a whole raft of issues of principle for the reasons that Mr. Beard has described. One must ask oneself in that context, first of all, is there is any necessity to go there in the first place? Is this a debate we actually need to have in the first place. Secondly, is now the time to actually do it?

In relation to the first question, I would suggest that this application suffers from a fairly significant vice which is that it tends to confuse the question of discloseability with the question of relevance.

There is no doubt that there is a potential – and I can say this all in a very much hypothetical fashion because we are dealing with the application vis-à-vis my learned friend's documents – for some of the materials submitted to the Commission pursuant to a leniency statement or request for information, they are pre-existing documents, to be relevant to the issues in this case. The issues in this case are issues in relation to damages and causation and it is a long push to assume that anything in relation to liability is necessarily – and I emphasise the word "necessarily" – relevant to questions of damages.

The first problem with this category is that it is potentially over-inclusive. There are many matters that may have been given to the Commission that are either admitted, germane or mundane matters of corporate structure, for instance, possibly not relevant to the issues in relation to liability.

The second vice, therefore, is that effectively what you are doing is confusing the fact that this is a category of information that may have material of use with whether or not the actual category itself is a relevant category of disclosure. It is not.

The further consequence is this: if there is relevant material and if there are agreed categories between the documents pursuant to the structure of the directions that has set out, so we agree that there are ten categories of disclosure, let us say one of those categories of disclosure is in relation to, for instance, a certain type of sales documentation, that material may indeed be present in the Commission papers because it may have been submitted pursuant to a request for information. If it is, if it is relevant, it will necessarily be disclosed pursuant to the further categories of disclosure agreed between the parties. So the obvious risk is that we are having a debate about material that may not even be relevant to the issues in question, but if they are relevant they are, as far as I can see, almost inevitably going to be disclosed in any event.

What then is the purpose of debate? I, with the greatest of respect, can see none at this point in time. I certainly cannot see the merit in the very immature state of these proceedings in triggering potentially speculative letters to the Commission, let alone references to the ECJ. It seems to me that by far the most sensible and prudent course is to deal with issues of disclosure properly in one go by reference to the other categories of disclosure so that one can ask questions as to the necessity of this information.

That was the additional point I wished to raise at this juncture. Obviously the rest of the interesting case management questions in this case await the next case management conference.

THE CHAIRMAN: Thank you, Mr. de la Mare. Mr. Rayment, it might help if I just indicated to you where I am coming from in terms of the sort of order that the Tribunal would be minded to make. First, as I have rather indicated to you but do feel free to persuade me otherwise, I do not see the utility in going beyond para.17.10 of Mr. Beard's order and laying down directions regarding witness evidence and expert reports and the like, given how early on we are in these proceedings. That is the first marker I just want to make.

The second one is that I am presently persuaded by what Mr. Beard and Mr. de la Mare say on disclosure, but that is something which I consider is most appropriately dealt with after close of pleadings rather than in a piecemeal process bit by bit, but again do feel free to bend my ear if you think that is appropriate.

Subject to that, it seemed to me that the directions with the amendment to 17.3 to embrace both defendants were largely agreed, but if you have got any further points then do let me hear those as well.

MR. RAYMENT: The only further point, sir, is in relation to a disclosure point. Of course, Mr. de la Mare, as usual, very helpfully clarified the issues, and it is very interesting to hear him say that if documents are relevant then they are going to be disclosed. Of course, that was music to our ears. Unfortunately, I do not understand that to be Mr. Beard's position, and I understand that he is taking a prior point, which is that even if they are relevant they are not discloseable. That is what I understood his position to be. We find that fairly extraordinary, that Degussa's documents submitted to the Commission which were not created in connection with a leniency application, maybe submitted with it, but have not been created for the purposes of a leniency application, of which there are clearly a relevant number, maybe not all of them, but there are clearly a number that are relevant. We say that is a pretty fundamental issue. Given that one of the means of resolving it is by contacting the Commission, we do not see that it is a sensible course to defer that until May or June of this year when inquiries might have to go off on this question of principle.

I do not accept for a moment what he said about the scope of Article 15(1) of the Regulation. It can certainly be read widely enough to include the sort of requests that we had it in mind to invite the Tribunal to make. It may be that Mr. Beard is suggesting that the Tribunal needs to write a preliminary letter to the Commission saying, "Would you be amenable to receiving a request relating to disclosure under this provision or do you believe

that it has no relevance to what we are talking about?" I think the answer to that would be pretty clear when it comes back that if Mr. Beard wants to take that point, so be it.

In so far as I understand your point, sir, it is about timing as much as anything. From our side, we see that this could have quite a substantial impact on the timing of the case further down the line if this position is going to be maintained. There may be some anodyne corporate statements, but what we are also talking about is detailed notes submitted by the first defendant relating to meetings which they attended which involved setting the price of the product with which we are concerned. There is a raft of other relevant material, no doubt, that was submitted.

The other point made was that we cannot tell what the issues are until the pleadings have closed. That is an incredibly narrow view of these types of proceedings. If the Tribunal is really going to take that view in all of these cases that has quite significant implications. It is not unusual that in bringing these cases claimants have some difficulty in particularising their claim because there is such an asymmetry of information. It is clearly helpful to have sight of information that is relatively easily available and has already been collected where it is relevant at an early stage, in my submission, and there is no real difficulty as to why that should not take place once one got over the sorts of technical objections that are being made on the other side.

So we do see this as a real issue, and we accept that, given the issues raised by Mr. Beard, it is not possible for the Tribunal to order disclosure of the documents that we have identified in our draft order. I entirely accept that and I entirely see why you are against us on that point today. It was really to see whether there was any room for agreement, and it is quite clear that there is not, but now that is clear beyond any doubt we do say the next issue is whether or not we have to invite the Tribunal to take this matter further with the Commission, and we think that warrants very serious consideration given, as I say, the very serious potential for the disruption of these proceedings if essentially relevant documents are going to be said to be non-discloseable.

I do not think there is any need for me to repeat some of the points that I made before. We do not accept that the legislation that Mr. Beard took you to on access on Commission documents is directly relevant to court proceedings. It is quite clear that in those cases, although the applicants for the information may well be interested in that information for speculative claims, we are dealing with a case here where there has been a pleading to which a statement of truth has been attached, and the various panoply of procedural safeguards that this Tribunal has to protect information. It is a different situation, and we

say there is limited assistance to be derived from referring to those cases which are in the clip that you have been handed and the situation that we are dealing with here.

Those would be my submissions on those points.

THE CHAIRMAN: I am grateful, Mr. Rayment, thank you very much. Mr. Beard?

MR. BEARD: For completeness, those behind me have pointed out that in my draft in the further submissions in (ii) there is an omission. I do not think it raises any issue but it is a typographical omission on my part. In the underlying section it says, "If the defendants lodge such an application the orders in paragraphs (v)", it should be (v) to (x). I think that is all well understood, but it is an omission, and before you went any further, sir, I just wanted to correct that.

THE CHAIRMAN: That is helpful.

MR. RAYMENT: Sir, I am so sorry, it is fatal to give somebody a breather. I just wanted to mention the other point, which is that we do not quite understand the position in relation to the documents that have been submitted. It is said that they were submitted as part of a leniency application. I have already made the point that it is not clear that all of them were submitted in connection with a leniency application. So there is another point of difference there. We have not been able to identify the existence of any leniency statement, for example, from the face of the decision, and it is unclear whether as a general cooperation is something that Degussa was rewarded for rather than for formal leniency. There are a number of questions there which have been raised but have not been satisfactorily answered in the context of this issue.

THE CHAIRMAN: In a sense, that is why discussion between the parties on disclosure is something which the Tribunal regards as helpful. Let me say at once that whilst I see that the timetable makes provision for discussion of disclosure questions, nothing should prevent the parties raising and discussing the points earlier than is envisaged in the order if that is sensible case management.

MR. RAYMENT: Obviously one does not want to foresee problems before they arise, but it seems to me that this one is already being posed in fairly stark terms, which is that there is a category of documents here which may contain documents that are highly relevant and documents which will – as Mr. de la Mare himself said – be relevant are not going to be discloseable.

MR. DE LA MARE: I said "may".

MR. RAYMENT: I have to go it alone. There will be documents in that material that will be relevant. It is inevitable, and those are said to be not discloseable and that is going to lead to a very major and disruptive issue further down the line.

THE CHAIRMAN: Thank you very much, Mr. Rayment. I am going to rise for five minutes, but before I do there are, I think, three loose ends that I just want to cross the Ts on and dot the Is on. First of all, I take that there is no issue about the Tribunal sitting as a Tribunal in England and Wales.

MR. BEARD: No, not for our part.

THE CHAIRMAN: No, and I take silence as consent on that point. Am I premature?

MR. RAYMENT: I hesitate to raise the issue, but I do not know what Mr. Beard is going to be saying about jurisdiction in the future, so I would like to reserve my position.

THE CHAIRMAN: Very well, you do not want me to make an order in that respect until ----

MR. RAYMENT: I would prefer you not to at this stage.

THE CHAIRMAN: All right. Secondly, when acknowledging service the further defendants indicated an intention to contest jurisdiction, Mr. Lusty helpfully reminds me. Are we to expect an application on jurisdiction from the further defendants?

MR. DE LA MARE: Our position is broadly reserved until we know the outcome of the strike out application. We have simply to reserve our position.

THE CHAIRMAN: I understand. Thirdly, there are amendments proposed, and I think uncontroversially agreed, in the 1153 case. It seemed to me sensible that we simply make an order that those amendments be made?

MR. BEARD: Yes, we have no objection to those, sir. I think we indicated that in the submissions. If we did not, I apologise.

THE CHAIRMAN: I think you simply suggested also that they could be left hanging until after the strike out application.

MR. RAYMENT: I mistakenly agreed with that because, given that the RFIs are going to be made, it should be on the basis of the official pleading, as it were.

THE CHAIRMAN: I was minded to make an order.

MR. RAYMENT: My instructing solicitor on the 1153 claim says that one minor change that needs to be made has been discovered, but subject to that, which can be forwarded to the Tribunal, in the very, very immediate future, there is no objection to that.

MR. BEARD: There is just one matter, just as a marker, which is in relation to Mr. de la Mare. The reservation that he maintains in relation to jurisdiction, I should make it clear that we do not accept, and should not be presumed to accept, that he is entitled to reserve his

position in relation to these matters, but it is not necessary in these circumstances - I do not think we need to deal with it now, but I think it is right that we put that marker down.

THE CHAIRMAN: That is helpful. One last point, I am told by Mr. Lusty that it is not altogether clear from the file in at least 1153 precisely what prior amendments the claimants have made and agreed on the pleadings. I just wonder if the parties could – I do not intend to make an order on this – make clear to the Tribunal the history of amendments which have been made and accepted.

MR. RAYMENT: Yes. It is all connected, as I think the Tribunal, to the restructuring ----

THE CHAIRMAN: I quite understand. It is simply a plea for clarity.

Very well, in that case I will rise for five minutes.

(Short break)

THE CHAIRMAN: I will make the order in roughly the terms of para.17 of Mr. Beard's 12th January skeleton but with a couple of amendments which I have already flagged. First, we will make an order regarding the amendments that have been flagged, but it seemed to me sensible to wait until the parties communicated all the amendments that need to be made, including the one Mr. Rayment mentioned before I rose, and we will do that therefore in a separate order as and when those communications have been made.

Secondly, in 17(ii) we will insert "(v) to (x)" which I think is non-controversial. 17(ii) does not make provision for a strike out hearing itself and that seems to me to be sensible, given that we are really in the hands of the Emerson case as to when that is dealt with, but clearly when a judgment in Emerson is handed down, and when application is made by the defendants the Tribunal will be in touch with regard to fixing a date as early as possible.

The final two points: in (x) there is reference to service of any reply, and just to be absolutely clear that seemed to us to be for reply to the defence of the further defendants in (ix), otherwise I think there is some ambiguity in (x). So I propose to amend the draft order in that respect.

Finally, I was going to make an order for costs in the case regarding this CMC. Mr. Rayment, clearly I am not persuaded by the points you have made on disclosure, but let me say this by way of indication, that if the parties consider it necessary in order to progress this matter expeditiously that questions of disclosure be discussed sooner than envisaged here then I would encourage them to do that informally, I am not going to make any order in that respect, but I know the parties will be sensible about this sort of thing and I am quite sure that we will not be faced with a situation where a road block emerges in the middle of the year.

MR. RAYMENT: I am grateful for that indication.

THE CHAIRMAN: Unless there is anything else, thank you all very much.

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