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IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1173/5/7/10

Victoria House,
Bloomsbury Place,
London WC1A 2EB

29 July 2013

Before:

MARCUS SMITH QC
(Chairman)
MARGOT DALY
DERMOT GLYNN

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) DEUTSCHE BAHN AG
(2) DB NETZ AG
(3) DB ENERGIE GMBH
(4) DB REGIO AG
(5) S-BAHN BERLIN GMBH
(6) S-BAHN HAMBURG GMBH
(7) DB REGIO NRW GMBH
(8) DB KOMMUNIKATIONSTECHNIK GMBH
(9) DB SCHENKER RAIL DEUTSCHLAND AG
(10) DB BAHNBAU GRUPPE GMBH
(11) DB FAHRZEUGINSTANDHALTUNG GMBH
(12) DB FERNVERKEHR AG
(13) DB SCHENKER RAIL (UK) LTD
(14) LOADHAUL LIMITED
(15) MAINLINE FREIGHT LIMITED
(16) RAIL EXPRESS SYSTEMS LIMITED
(17) ENGLISH WELSH & SCOTTISH RAILWAY INTERNATIONAL LIMITED
(18) EMEF - EMPRESA DE MANUTENÇÃO DE EQUIPAMENTO FERROVIÁRIO SA
(19) CP - COMBOIOS DE PORTUGAL E.P.E.
(20) METRO DE MADRID, S.A.
(21) NV NEDERLANDSE SPOORWEGEN
(22) NEDTRAIN B.V.
(23) NEDTRAIN EMATECH B.V.
(24) NS REIZIGERS B.V.
(25) DB SCHENKER RAIL NEDERLAND N.V.
(26) TRENITALIA, S.P.A.
(27) RETE FERROVIARIA ITALIANA, S.P.A.
(28) NORGES STATSBANER AS
(29) EUROMAINT RAIL AB
(30) GÖTEBORGS SPÅRVÄGAR AB

Claimants

-v-

(1) MORGAN CRUCIBLE COMPANY PLC
(2) SCHUNK GMBH
(3) SCHUNK KOHLENSTOFFTECHNIK GMBH
(4) SGL CARBON SE
(5) MERSEN SA (FORMERLY LE CARBONE-LORRAINE SA)
(6) HOFFMANN & CO. ELEKTROKOHLE AG

Defendants

HEARING

APPEARANCES

Mr. Jon Turner QC and Mr. Rob Williams (instructed by Hausfeld & Co. LLP) appeared on behalf of the UK Claimants.

Mr. Mark Hoskins QC (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Fourth Defendant.

Miss Kassie Smith QC (instructed by Hogan Lovells International LLP) appeared on behalf of Fifth Defendant.

Miss Kim Dietzel (of Herbert Smith Freehills LLP) appeared on behalf of the Second, Third and Sixth Defendants.

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1 THE CHAIRMAN: Thank you very much for the timetable. I think it is Mr. Turner to begin.
2 MR. TURNER: Yes.
3 THE CHAIRMAN: Before you do, for better or worse I was doing a little reading over the
4 weekend in the light of your reference to *Kalfelis* and we have two authorities which you
5 might want to look at during our morning break, which we can hand down. There is
6 *Kleinwort Benson v Glasgow City Council*, a case from the House of Lords and *Domicrest v*
7 *Swiss Bank Corporation*. I will not say anything more than give you the page references,
8 p.649 in *Kleinwort Benson* and p.595 in *Domicrest* and they give some expansion from the
9 English Court's viewpoint on the point that you make in respect of *Kalfelis* regarding the
10 narrow nature of claims that fall under alternative jurisdiction under Article 5. I thought I
11 would raise that at the outset so I would not interrupt you when you come to *Kalfelis*, Mr.
12 Turner.
13 MR. TURNER: In terms of the agreed timetable, it may be therefore that I only come to deal with
14 that in reply after my friends have had time to digest it.
15 THE CHAIRMAN: That is absolutely fine.
16 MR. TURNER: May it please the Tribunal I appear today with Mr. Williams for the UK
17 claimants on the claim form. My friend Mr. Hoskins QC appears for SGL, the Fourth
18 Defendants on the claim form. Next to him, Miss Smith QC appears for Mersen, formerly
19 Le Carbone-Lorraine, the fifth defendants on the claim form, and Miss Dietzel appears for
20 the Schunk and Hoffmann parties, the second, third and sixth defendants.
21 This is the UK claimant's application. The UK claimants ask the Tribunal to lift the stay
22 on the progress of their claims for compensation against the defendant cartelists.
23 If I may begin with some housekeeping? You should have two application bundles each
24 marked volumes 1 and 2. I do not know if the Tribunal has already been supplied with two
25 additions to go behind tab 6.
26 THE CHAIRMAN: We have those.
27 MR. TURNER: Those are the current version of the claim form, which was amended in April
28 2011, and a draft amended version of the claim form which was sent to the defendants
29 immediately after the Court of Appeal handed down their Judgment at the end of July last
30 year, but which they are not prepared to consent to bearing in mind the pending application
31 before the Supreme Court.
32 With the Tribunal's permission then, I will organise my submissions in the time available in
33 this way: first, I will give a brief summary of our application. Secondly, I will take the
34 Tribunal to the essential context and specifically to parts of the European Commission's

1 infringement decision and my reason for doing that is to help show why, contrary to what
2 the defendants say, it is likely to be a significant step forwards if the English claimants
3 claims are now moved along, and that is the sort of relevant information and documents
4 which are likely to emerge if you take that step.
5 After doing that, thirdly, I will focus on the claim form itself and on the witness statement
6 of Mr. Paul Gold in support of our application today, and that is to show you the elements
7 of the English Companies' claim for damages and the solid basis of the Tribunal exercising
8 jurisdiction over them.
9 Fourthly, I will deal briefly, mindful that it is their case to resist this application, with their
10 chief objections to this application which we have outlined in their written submissions.
11 I will begin then, with a summary of our case. The essence of our application is, in fact,
12 simple, these are English rail companies. The place where the cartel overcharge was
13 imposed by the defendants, causing them loss, was England. This gives the Tribunal
14 jurisdiction over their claims. Irrespective of the cartelists' objections to the Tribunal's
15 jurisdiction over the foreign rail companies' claims, there is no doubt that the English
16 companies have proper claims in this jurisdiction.
17 Next, these well founded claims can and should be progressed expeditiously, in line with
18 guiding principles of Rule 44 of this Tribunal's Rules, which correspond with the overriding
19 objective in the High Court in English civil litigation. The Tribunal should manage the case
20 so that the parties are put as far as possible on an equal footing, and that includes in the pre-
21 trial procedure as well as in the lead up to and including the trial itself.
22 What are the key factors here? First, when you look at the English claims they are high
23 value in their own right. At the date of the original claim form, December 2010 the value of
24 the English companies' claims for compensation including interest was estimated at up to
25 £6.9 million.
26 Secondly, because this was a secret cartel all or much of the crucial material which the
27 English claimants need to progress our claims lies in their hands, the hands of the
28 defendants and, as matters stand, we are prevented from developing our case on the extent
29 to which their international cartel distorted market conditions and inflated the prices which
30 we paid. We cannot get a better purchase on our case until we can get hold of documents
31 and information from them showing how the secret cartel operated, how we were targeted
32 and any assessments which they may have made of the impacts on market conditions and on
33 us. They already have many of these documents organised and packaged up because they
34 supplied them to the European Commission for its investigation, or else the received copies

from the other defendants as a result of the Commission's procedure, known as its "Access to file process", but we have none of that two and a half years after the claim was started, nor can we consider whether there are witnesses whom we might try usefully to speak to in order to get any further information until we can see their documents and information. Contrary to what they say such witnesses may well become unavailable for one reason or another over the coming months, or even the years it may take to resolve the issues concerning jurisdiction over the foreign claims and the points which are now travelling to the Supreme Court and possibly from there to the Court of Justice.

The same is true for key documents as it is for witnesses. The defendants have refused in correspondence to confirm that they have taken steps to locate the individuals who were involved in the cartel on their behalf and to preserve personal documents such as notebooks and diaries. But in these sorts of cases, secret cartel cases, where elaborate precautions were taken by the defendants to cover their tracks such documents can turn out to be critical in helping claimants to prove their case. So, in summary, we see there as being a compelling case for the stay to be lifted as respects the English claims. The defendants should now serve defences to say what are their responses to our claims, and then there should be a case management conference to consider the giving of initial disclosure.

As in other cases which have been dealt with by the High Court that should include disclosure of relevant documents about the cartel from the Commission's investigations.

The Tribunal will note, and I emphasise, that we are proposing a staged approach to the giving of disclosure which, in the first instance will focus on key documents that should be readily available to the defendants. The ones provided by them to the Commission leaving aside documents which were produced in the context of leniency applications and documents from the other cartelists that they received in the investigation through the access to file procedure. That is all I desire to say about the essential outlines of this application.

May I now invite the Tribunal to pick up the European Commission's Decision in bundle 2 tab 93.

Just before I take you to any parts of it let me say this: the defendants' argument is that no real progress can be made in these UK claims without Morgan Crucible's direct participation and that is because Morgan Crucible was the main cartelist supplying carbon products for the British Railways Board and then for the successor rail companies. The propositions that I am going to ask you to take from the Decision, which we will look at in a moment, are these: first, the nature of this cartel, as you will see, was that it sought to create

1 common prices for the goods concerned right across the European market and including in
2 the United Kingdom. The Commission described the defendants as having the perverted
3 aim of creating a single internal cartel market. Information in their hands about its
4 mechanisms and its impacts on prices, particularly to large customers such as the UK rail
5 companies, is likely to be relevant determined by how much the price charged in the UK
6 was inflated.
7 The second point, the cartel was tightly controlled and monitored by the defendants
8 together. It was a joint enterprise. All the defendants played their own part in participating
9 in various forums for discussion to co-ordinate the prices charged by any one of them,
10 including Morgan, to customers. That includes large customers like the railway companies
11 in the United Kingdom. So they were all involved in the cartel as respects us.
12 The third point, all the defendants before you co-operated with the Commission's
13 investigation to a large extent, at least finally. They will have catalogued and handed over
14 to the authorities many informative contemporaneous documents about the mechanisms and
15 the impact on prices of the cartel. Many of these documents, as you will see, are even
16 referenced in footnotes to the Decision. It is particularly documents of that kind which can
17 be expected to be forthcoming in the stage disclosure, and important for the progress of the
18 UK claimants' case. Similarly, it appears from the Commission's Decision that the
19 defendants also gave written explanations of the documents about which the cartel was
20 based, where those were cryptic or opaque.
21 If you go to p.2, you have the recitals to this Decision, numbered paragraphs. At numbered
22 para.1 you see the line up of the cartelists reflecting the parties before you with the
23 exception of C. Conradty Nürnberg. Hoffmann, the sixth defendant, Carbone-Lorraine, the
24 fifth, Schunk, the second and the third, SGL, the fourth, and Morgan Crucible there also.
25 You will see the description of the cartel in recital (2), an agreement covering the whole of
26 the EEA territory by which they agreed and occasionally updated a uniform, highly detailed
27 method of calculating prices to customers covering the main types of products, different
28 types of customers and all EEA countries where demand existed with a view to arriving or
29 identically or similarly calculated prices for a wide variety of products.
30 You will see that they agreed regular percent price increases; (3), they agreed on
31 surcharges; and (4) they agreed account leadership for certain major customers, and
32 regularly exchanged pricing information and agreed specific prices to be offered to those
33 customers.

1 If you go to recitals (6) to (8) on the facing page, you will see a description of the products
2 concerned, which I can take quite briefly. I will not read those out in full but essentially for
3 present purposes there are two main products. Half way down (7) you will see reference to
4 carbon brushes used in the public transport market, and at the bottom of (7), to the traction
5 brushes used in railway and other public transport applications, mainly in locomotives and
6 in auxiliary electrical motors. That is the brushes.
7 Then (8):
8 "Electrical current collectors are used to transfer electrical current from
9 stationary source to a moving machine. An example is the pantograph carbons,
10 objects being thin strips of carbon, generally about a meter long, which are
11 mounted on the top of electrical rail trains. As the train moves, the pantograph
12 slides along the cables above the rail, staying in constant contact and providing
13 the train with its electricity."
14 So here we are concerned, as you will see, principally with the current collectors and
15 brushes.
16 If you go forward to p.12, under the heading "Demand for electrical and mechanical carbon
17 and graphite products", recital (39) refers to the fact that demand is divided between a
18 relatively small group of large customers and a much larger group of small customers.
19 At (41) a category of the large customers is the public transport companies, railways,
20 metros, trolley buses, and the number of those clients is several dozen, large end users,
21 often public companies, and it describes the products that they buy. We fall into that
22 category.
23 Then if you go to p. 15, para.(51), you will see the nature of the market geographically.
24 Under the heading "Interstate trade", and picking it up from the third sentence:
25 "In fact, all four major suppliers to the EEA market, Morgan, Carbone Lorraine,
26 Schunk and SGL, supply to all EEA Contracting Parties where demand exists
27 from production sites spread out over a number of EEA Contracting Parties.
28 The EEA market operates as a single market in this respect. However,
29 differences in local tooling costs (for instance, labour costs) contribute to the
30 continuation of price differences among Contracting Parties."
31 You will see also footnote 40, a submission by SGL recording:
32 "The geographical market that was discussed at the Technical Committee and
33 Summit meetings pertained essentially to Europe."

Then (56) over the page, we turn to the procedure and here you see the co-operation afforded to the Commission by the defendants. At recital (56) you will see that is kicked off by Carbone Lorraine sending a fax in August 2002 saying it requests leniency, and five lines down:

> "Full information to support the lenience request was received by the Commission on 24 September 2002."

So what happens is that they provide an account of the cartel and pre-existing or contemporaneous documentation that they have gathered about it.

Over the page at (57 you will see that Schunk comes in as well on 2nd September by fax saying that they want to co-operate. The last sentence, they provide additional information subsequently, mainly in response to questions from the Commission.

Recital (60) concerns SGL, also here today. You will see the last three lines of (60):

> "SGL apply for leniency on 17 March 2003 and submitted evidence on the same day. Subsequently, SGL provided certain additional information in response to questions from the Commission."

So all of these defendants have provided to the Commission a large amount of material.

If you turn to p.22, you have the heading "Organisation of the Cartel", and you will see, and I will not read it out, from (74) to (79) that there were essentially a hierarchy of meetings at three levels, summit meetings, technical committee meetings and local meetings. At (77), these local meetings were held on an *ad hoc* basis in, among other countries, the United Kingdom, and you will see from the fourth line:

> "These meetings discussed price increases in the country concerned, as well as the accounts of single local customers. In these meetings, representatives of the local subsidiaries of cartel members participated as well."

Over the page, p.24, there is a section headed "Precautions to conceal meetings and contacts", beginning at (81), That refers to the elaborate precautions that these companies took to cover up what they were doing. You will see on p.25, footnote 67, for example, SGL reporting:

> "The participants took notes during the meetings, which were then worked on at home or served to give instructions. Thereafter, these notes wee, as a matter of principle, destroyed".

So typically, the information that you would expect to find is fragmentary, much of it will be held by individuals involved in the cartel itself.

1 At (86) you see a reference to code names given to the companies to cover their real
2 identities and that the system was based on company locations. You will see particularly
3 for Morgan, the third dash down, which was the principal supplier to the UK rail companies
4 under the cartel, that it was based in Swansea in Wales, S was for Swansea, and it was from
5 there that it sold the cartel goods.
6 Page 27, "Activities of the Cartel", 7.1 Prices and Principles. If you would have a look at
7 recital (97), this was the paragraph I was referring to in my opening remarks where they
8 referred, four lines down, to the "perverted" aim of the cartelists:
9 "With a - perverted - view to the creation by the European Community of a
10 single Internal Market, the cartel tried to bring prices in all Member States to
11 the level of the European Scheme. This European Scheme formed, in terms of
12 its method of calculation, the basis of cartel members' discussions and
13 agreements on changes to price lists throughout the 1990s. The scheme was
14 regularly updated to take account of technical developments and with a view to
15 its simplification."
16 and so on. I will not read to the end of that, but you will see it for yourselves — only to say
17 that at the end of that paragraph, just at the top of p.30, there is a reference to the overall
18 objective, which was:
19 "to reach harmonisation of prices across Europe".
20 At the foot of that page, para.100 on p.30, you will see that Morgan, in line with this
21 principle of what was described earlier, calculating the new prices for United Kingdom,
22 Carbone Lorraine for France, and SGL for Spain and Schunk for Germany. And then:
23 "They would circulate their revised price lists or announcements of price increases
24 to each other, to show that they were complying with the agreed price increases,
25 and to ensure that the other cartel members sold at the same prices in the country
26 concerned".
27 And some examples are given: for example a note from Morgan is referred to, a
28 contemporaneous document at the end of para.100:
29 "To the other cartel members announcing the new coefficients to be applied to the
30 United Kingdom from 1 January 1989".
31 So, here you see both the sort of material that is coming out and that it was shared between
32 the parties and common to them. Paragraph 102, on the same page:

1 “General price increases across Europe were discussed and agreed at Technical
2 Committee and Summit meetings, at least throughout the years 1988-1999
3 [concerning] the main types of products and all countries covered by the cartel”.
4 And you will see that the documents available include, for example, the tables referred to at
5 footnote 108 on that page, which were tables prepared by Morgan – no, I am sorry, an
6 overview of increases in bareme prices [those are the index prices] for the different
7 European countries in national currency over a 10-year period, 1990-1999 -- therefore,
8 potential extremely useful for claimants trying to get a purchase on how this cartel operated
9 and how it may have affected prices.
10 If you go forward to p.36, look at para.110, again the Commission here refers to documents
11 which also will be useful. How the general price increase is agreed compared to inflation
12 levels can be seen in two tables established at the time by Morgan.
13 “These tables detail the price increases implemented in the United Kingdom,
14 France, Germany and Holland from 1985-1994 and compare them to annual rates
15 of inflation in those countries”,
16 and there is a reference in the footnote to the document concerned. Page 39, you see that
17 these agreed regular price increases were applied to the public transport companies, and if
18 we turn to para.121 on p.39:
19 “The alleged difficulty of applying bareme-level prices against constructors and
20 public transport companies does not mean the agreed regular percentage price
21 increases did not pertain to those clients. They did. Regarding public transport
22 companies, the agreed general price increases in technical committee meetings
23 would normally cover the products, current collectors and traction brushes”.
24 Over the page, 124, under the heading, “Account leadership, market sharing and bid
25 rigging” if you turn the page to p.41, you will see a reference to the customers covered by
26 account leadership and, five lines down on p.41, the least difficult large clients are the
27 public transport companies; and, in the last sentence, that:
28 “Carbone Lorraine admits, however, that the fixing of specific prices for
29 constructors and public transport companies did form the object of discussion at
30 cartel meetings, as well as of direct contacts among cartel members prior to
31 negotiation and bids”.
32 So, quite a lot of discussion between them and it cannot be said that the documents
33 concerned are only going to be held by Morgan, which was the principal supplier to the UK
34 rail companies.

1 Finally, in this document, on p.43, paras.130-131, you will see that the Commission records
2 that there was a meeting in June 1998 concerning the basic principles of account leadership
3 in respect of the pantographs. You will recall those are the carbon strips for transmitting
4 electrical current.
5 At para.131 you will see that there was a list of clients to whom the account leadership
6 would apply. It contained a continuing national bias, and that Morgan was the account
7 leader for British Rail and British Rail was the predecessor to the UK companies who are
8 claimants here today.
9 And I will end by referring briefly to footnote 172 on p.43. You will see again a reference
10 to yet another example of a potentially highly useful document, a detailed list of 82 pages:
11 "indicating deliveries in 1991-1995 and last prices by each cartel member to each
12 major client for collectors and pantographs in Europe".
13 So, to take stock, you see here that there is a large amount of information, potentially
14 readily packaged up, readily available, which will materially allow claimants with a high
15 value claim to understand, to develop their understanding of the case which they need to
16 make in their claim for compensation.
17 If I turn then (you can put that away) and go to the draft amended claim form which is in the
18 first volume at tab.6C. I am referring to the draft amended claim form which was sent to
19 the defendants at the beginning of August last year because, although they have refused to
20 consider this pending the application to the Supreme Court, they are doing that because they
21 say it is inappropriate while that is chugging along and that they do not want to lose their
22 right to challenge jurisdiction.
23 THE CHAIRMAN: Mr. Turner, just pausing there, I have a tab.6, but not a tab.6C. I have it
24 now, thank you.
25 MR. TURNER: I am sorry. Do all members of the Tribunal have tab.6C.
26 THE CHAIRMAN: We have all got it.
27 MR. TURNER: Thank you. We begin on the first page. And you will see from the list of
28 claimants there are 30 of them. A group of public transport companies across Europe who
29 combine together in this claim form because the Competition Appeal Tribunal was
30 perceived to be an efficient convenient forum for the trial of their follow-on damages claim
31 based on the European Commission's infringement decision. The first 12 in the list are
32 German companies in the sense they are not only owned by Deutsche Bahn, but they are
33 German operating companies in Germany. Claimants 13 to 17 are the UK claimants with
34 whom we are today concerned. 18 to 20 are Spanish and Portuguese rail companies. 21 to

1 25 are Netherlands based rail companies, 26 and 27 are Italian, and the last three, claimants
2 28 to 30 are Norwegian and Swedish companies.
3 The 13th to 17th claimants from the UK are also within the Deutsche Bahn Group but they
4 are English companies based in Doncaster, which were all part of the single British
5 Railways Board before privatisation took place in 1995 and they carry on the bulk freight
6 business, the Post Office traffic business and the international freight business that was
7 formerly carried on by the Board. All the claimant companies are described in turn in the
8 narrative in the claim form beginning at para. 4, and the 13th to 17th claimants are at paras.
9 21 to 25 on pp. 9 and 10. If you take, for example, para. 21 the reference to the 13th
10 claimant, DB Schenker Rail (UK) Ltd, you will see from the second part of that paragraph it
11 provides rail, freight, haulier services in Gt. Britain. It was one of three entities to which
12 the BRB transferred its bulk freight business including an entitlement to bring the present
13 claim in relation to loss and damage arising prior to the transfer pursuant to s.85 of the
14 Railways Act. There are similar descriptions for 14th to 17th claimants.
15 If you go to p.23 you will see para. 70 under the heading (on the other page) "Causation of
16 loss and damage", that the defendants, and each of them, by their acts in agreeing and/or
17 implementing and so sustaining the cartel caused the claimants and each of them loss and
18 damage in that they caused the prices paid by the claimants for the products or goods or
19 services incorporating products to be higher than would have been the case in the absence
20 of the breaches of duty.
21 70(A), which we propose to introduce, relates to the period after the cartel, and is with a
22 view to claiming the period prior to prices settling back down to fully competitive levels
23 once the cartel had come to an end.
24 Paragraph 73 over the page records that each of the defendants is jointly and severally liable
25 for all the loss and damage caused to the claimants and each of them resulting from the
26 activities of the cartel during the period of its participation.
27 Paragraph 74 makes the point, which I urge on the Tribunal that, pending disclosure or the
28 provision of further information the claimants are unable fully to particularise the extent of
29 their losses which depend on examination of the extent to which the defendants' behaviour
30 distorted market conditions, and the documents are held by those on the other side of this
31 courtroom.
32 Page 28, table B, is headed: "Total claims for damages" expressed in pounds sterling, and
33 you will see , at least at the date of the issue of the claim form DB UK, the penultimate row,

1 which is the four UK companies, the overcharge, with compound interest, amounts to
2 between £5.5 million to around £6.9 million.
3 So, to take stock, the English rail companies have their own distinct claim and it is properly
4 pleaded, and secondly, they wish the stay to be lifted so that they can make real progress in
5 their claims against the second to sixth defendants.
6 The defendants resist this and they contest that the Tribunal has jurisdiction over these
7 English claims. It does have jurisdiction and we rely on Article 5(3) of the Brussels
8 Regulation, and I will turn to that now.
9 THE CHAIRMAN: Just pausing there, Mr. Turner, as a matter of housekeeping or clarity, I know
10 that the defendants all say that there might be an uncertainty if the stay were to be partially
11 lifted whilst the status of the first defendant was determined by the Supreme Court. Would
12 it be possible or practical, were the stay to be lifted, for your clients, the 13th to 17th
13 claimants to produced, as it were, a claim form that simply set out, out of this document, the
14 claims that they were advancing as UK damages claims, so that one could have a very clear
15 distinction between claims which are premised upon an Article 5(3) jurisdictional base and
16 claims which are premised upon an Article 2 plus Article 6(1) jurisdictional base?
17 MR. TURNER: We can certainly do that, but first we say it is clear enough from the existing
18 claim form what the English claimants claim is. I will address in a moment the proposition
19 that it is necessary to plead jurisdictional facts.
20 THE CHAIRMAN: No, I do not want to take you away from that, it is simply looking at, say,
21 para. 73. You there, quite properly, assert each of the defendants is jointly and severally
22 liable, but that would seem to me to be a somewhat difficult proposition pending the
23 determination by the Supreme Court of the status of Morgan Crucible.
24 MR. TURNER: Yes, I understand.
25 THE CHAIRMAN: There seems to be a real possibility of confusion there. One has one set of
26 claims, the whole claims which are in limbo until the Supreme Court decides matters, and
27 then one has the claims which you are seeking to lift the stay here, which are the 5(3)
28 claims, and it does seem to me important that the defendants know exactly what it is that
29 you are bringing as 5(3) claims as opposed to the entirety of the claims which obviously you
30 can bring if the Supreme Court decides one way rather than another.
31 MR. TURNER: Yes, I am grateful. I am with you now. Should, of course, eventually, the
32 Supreme Court, possibly after a reference to Europe decide in our favour, then of course
33 Morgan becomes one of the defendants which is referred to here. We say, in any event, that
34 is the position and that there should not be any confusion on the defendants' side about it.

1 However, if it were desirable in the interests of clarity we would be perfectly happy to make
2 clear that where it refers to each of the defendants being jointly and severally liable, *pro tem*
3 we are taking this case against the second to sixth defendants in the way that we move
4 forward at this stage?
5 THE CHAIRMAN: Yes, obviously there is no intention, we could not even do it, of precluding
6 you if the Supreme Court goes one way or another, from bringing the claims articulated
7 here, it is simply a question of ensuring that the defendants know which claims are being
8 lifted as part of this jurisdictional application.
9 MR. TURNER: To make it quite clear then, these are the claims only by the UK rail companies
10 but not the foreign claimants which we are asking the stay to be lifted in relation to, and we
11 are asking for the claim to go ahead in relation to pre-trial steps ordered by this Tribunal
12 against the second to sixth defendants while maintaining our case that there is still a valid,
13 perfectly good pleadable cause of action directly against Morgan Crucible as well which is
14 not time barred.
15 THE CHAIRMAN: Exactly so, so this is a perfectly respectable draft for after the Supreme Court
16 has made its decision, but pending the Supreme Court's decision one would want to have it
17 clear that D1 is not included at the moment for the purposes of these UK claims.?
18 MR. TURNER: Yes.
19 THE CHAIRMAN: It just seemed to me that it might be helpful if – obviously not now – but
20 were the UK claims for the stay to be lifted in respect of those claims then it might be
21 helpful to have a further document just to make that clear, so that the parties do know and
22 there can be no argument what is and what is out for present purposes.
23 MR. TURNER: I entirely appreciate the sentiment behind it, the only caveat I would enter is that
24 we would not wish, if you were with us, that to be used as an instrument for unnecessary
25 delay when the substance of this ought to be perfectly clear to ----
26 THE CHAIRMAN: Indeed, I think it is a process which would be informed by way of deletion
27 rather than supplement, and in a sense it will be in your hands how quickly you can do it
28 were we to accede to your submissions,
29 MR. TURNER: I do understand.
30 THE CHAIRMAN: You might want to give some thought as to how quickly you could produce
31 such a document just so that we can think about things like timetable.
32 MR. TURNER: I am obliged, although we can do so very quickly.
33 THE CHAIRMAN: I thought you might say that, Mr. Turner.

1 MR. TURNER: So let us turn to the Brussels' Regulation itself, which is in the second volume at
2 tab 90. This will be very familiar to you, Chairman, but for the purpose of all the Tribunal
3 members seeing this we will begin at Article 2 on p.3: "General provisions" under the
4 heading "Jurisdiction". Article 2(1):
5 "Subject to this Regulation, persons domiciled in a Member State shall, whatever
6 their nationality, be sued in the courts of that Member State."
7 So the defendants argue that because they are domiciled in foreign Member States that is
8 where, presumptively, they should be sued. That is subject to the following Articles of this
9 Regulation which create certain exceptions. If you turn the page we go to Article 5.
10 Article 5 under the heading: "Special jurisdiction" states:
11 "A person domiciled in a Member State may, in another Member State, be sued"
12 and then you go to para. 3:
13 "in matter relating to tort, *delict or quasi-delict*, in the courts for the place where
14 the harmful event occurred or may occur."
15 So that is the provision on which we rely. Where the jurisdiction of a court or tribunal on
16 which proceedings are started is contested, as it is here the approach to dealing with that
17 contest then varies between different European countries. Some countries deal with
18 jurisdiction battles as an issue which has to be finally resolved alongside the substantive
19 issues in the case after hearing all of the evidence at the eventual final trial, and that
20 happens, I am instructed, for example, in the Spanish employment court. In England the
21 approach is not that. The approach here is to deal with jurisdiction battles swiftly and
22 economically at the outset, and where a defendant contests the court or Tribunal's
23 jurisdiction it makes an application and it can support it with some evidence. The claimant
24 can then serve some opposing evidence. There will then be a hearing and the court or
25 Tribunal will make a decision on the basis of whether the claimant has made out to your
26 satisfaction a good arguable case. The principles are conveniently shown in the *Cooper*
27 *Tire* decision if I may take you to that, it is in the same bundle at tab 72.
28 This is the High Court level of that decision which concerned another international cartel
29 case and was a Judgment of Mr. Justice Teare in October 2009.
30 If we go to para. 36, he says:
31 "It is common ground that the Claimants must establish a good arguable case that
32 this Court has jurisdiction. However, it is clear from *Kolden Holdings Limited v*
33 *Rodette Commerce Limited* …"
34 - that is an earlier Court of Appeal authority:

> "… at paras. 47-53 but in particular paragraphs 50-52 that the test is flexible and that what is required depends upon the nature of the issue in question. Thus where a fact must be alleged and proved it will usually be sufficient that there is evidence to support it. But where there is a disputed issue of law which the trial judge will be in no better position to resolve than the judge dealing with the jurisdictional challenge, the latter may have to determine that issue of law in order to have the required degree of assurance that the Court has jurisdiction."

We have copies of *Kolden Holdings* should the Tribunal wish to see that. Unless you do I will not necessarily take up time with it. If you then go forward to para. 65 the judge there considered whether there was jurisdiction under the Article which is at play in this hearing, Article 5(3), for Dow defendants also relied on Article 5(3) of the Judgments' Regulation to establish jurisdiction. The judge points out that his remarks on this are *obiter* in the sense it was not necessary for him to reach a decision on it because he had found there was jurisdiction under another provision of the Regulation, but what he does say is, taking it up from three lines down:

> "Article 5(3) provides for special jurisdiction 'in the courts of the place where the harmful event occurred'. That expression means 'both the place where the damage occurred and the place of the event giving rise to it, so the defendant may be sued at the option of the plaintiff in the courts for either of those places'."

And he refers to the *Reunion Europeenne* case -

> "However, where the place where the event giving rise to the damage occurred is difficult or indeed impossible to determine the plaintiff must sue in the place where the damage occurred. In the present case the Act complained of is a 'complex single and continuous infringement' of Article 81 of the Treaty by agreeing price targets, sharing customers [and so on] ... The meetings which gave rise to it took place in a number of locations …"

They are listed.

> "The cartel was ended at a meeting in London. I consider this is a case where it is, at the very least, difficult to say where the event which gave rise to the damage occurred. It was suggested the cartel was set in motion in England over the period 28 to 30 August 1995, and that is sufficient to show that the place where the harmful event occurred was in England. I have, I confess, a sense of unease in concluding in the context of a Europe wide cartel, orchestrated at

meetings in several countries, that the place where the harmful occurred is England because that is where the first meeting took place. That seems to me unrealistic. In truth the harmful events occurred in several countries. In these circumstances I consider the claimants can only rely on the place where the damage occurred. It is common ground that some damage occurred in England because some [cartel products] was sold here. However, it is also common ground that if jurisdiction is established on that basis it is only established in respect of the damage which occurred in England. That is, I understand, a very small part of the whole."

Those were the facts in that case. So you have seen in our case it is a significant amount of money, but otherwise we do not take issue with that description of the principles.

Before leaving this, I will turn to the Court of Appeal judgment, which is at tab 74, for one observation which is also set out in our written submissions. On p.11 at para.41, you find the sentiment expressed four lines down:

> "Enthusiastic litigants sometimes forget that jurisdiction applications are supposed to be dealt with swiftly and economically at the beginning of the case."

This echoes what the differently constituted Court of Appeal had said in that *Kolden Holdings* case, again I am happy to show it to the Tribunal, that under our system jurisdictional issues ought generally to be dealt with quickly, without oral evidence of mini trials.

So those are the principles.

What has happened in our case? In our case, none of the defendants who contest the jurisdiction of this Tribunal in relation to the English claimants have served any witness evidence on the Article 5(3) point either with their original applications to contest jurisdiction in 2011 or in reply to our evidence. Our witness statement from Mr. Paul Gold, the general counsel of DB UK, is unchallenged. That is in the first bundle which you will have at tab 1, if you would take up, behind the first divestiture. May I take it that the Tribunal has had an opportunity at least to glance at this? In that case I will be quite brief about what it says. Mr. Gold is the general counsel for the UK companies, and his statement provides factual evidence for a short number of propositions. Paragraphs 15 to 17 under the heading "DB UK's use of the Products" makes clear that we are English companies running the freight train network in Great Britain and in the course of business the British Railways Board and the successor UK freight companies from 1995 have

1 regularly been purchasing replacement parts for the locomotives and wagons which are
2 maintained in Crewe and Cardiff and other locations. These include the cartel goods, the
3 carbon brushes used in motors, the carbon strips in the pantographs which are fixed to the
4 top of the locomotives. You can see that from para.17 - English companies purchasing the
5 cartel goods in England.
6 The second proposition, if you turn to p.9, paras.25 and following, for the seven year period
7 from the beginning of this cartel in 1988 until privatisation in 1995, the British Railways
8 Board was a direct purchaser of the cartel goods, most of which were sourced from
9 Morganite, the Morgan Crucible subsidiary in Swansea, or from Le Carbone's subsidiary in
10 Sussex (para.28).
11 After 1995 Morgan and Le Carbone sold mainly through Unipart, which was an
12 intermediary, described in para.25, also based in the UK, therefore also purchasing the
13 goods at inflated prices in this country. It was similarly sold the goods by the cartel here.
14 There cannot be any doubt about where the overcharge was imposed by the cartelists.
15 As para.29 shows, at the foot of the page, since 1998 the 13th claimant has also been
16 undertaking the purchases on behalf of these companies and purchasing some limited
17 volumes directly itself from Morganite and Le Carbone in the UK for the latter part of the
18 cartel. Print-outs from the accounts software programme showing this are in the exhibit to
19 Mr. Gold's statement.
20 His key conclusion is para.31, that to the best of his knowledge:
21 "… during the period from 1988 until well after the end of the Cartel Period, the
22 DB UK entities purchased almost all the relevant Products for use in their
23 business in Great Britain from companies located and domiciled in England …"
24 that is referring to the cartelists -
25 "… and Wales and the Products were supplied directly or indirectly to DB UK
26 by members of the Cartel through companies located and domiciled in England
27 and Wales (almost exclusively by companies within the groups of the First and
28 Fifth Defendants)."
29 In view of that clear evidence what objections do these defendants raise to this Tribunal
30 exercising jurisdiction under Article 5(3)? Ultimately, there are really only two points:
31 first, the argument that the UK claimants are only indirect purchasers from the cartel, and
32 that is not good enough; and second, the argument that the UK claimants have omitted to
33 put all the relevant facts for the hearing of the jurisdictional application in their claim form.

The first point I will tackle briefly, mindful that it is their case to develop, and it based on the European Court of Justice authority of *Dumez*. *Dumez* is in the second volume at tab 83. You will see the facts of this case from para.3 of the judgment:

> "Dumez and Oth seek compensation for the damage which they claim to have suffered owing to the insolvency of their subsidiaries established in the Federal Republic of Germany, which was brought about by the suspension of a property development project in the Federal Republic of Germany for a German prime contractor, allegedly because of the cancellation by the German banks of the loans granted to the prime contractor."

These proceedings were brought in France. The issue was to decide the place where the harmful event occurred in these circumstances, as you will see from paras.6 and 7 over the page.

You will see from para.6 about half way down:

> "In those circumstances, the place where the harmful event occurred was, according to Dumez and Oth, for a victim who has sustained damage as a consequence of the loss suffered by the initial victim, the place where his interests were adversely affected; the plaintiffs in this case being French companies, the place of the financial loss which they suffered following the insolvency of their subsidiaries in the Federal Republic of Germany was therefore the registered offices of Dumez and Oth in France."

Because of their argument, para.7, the following question was referred to the Court of Justice for a preliminary ruling:

> "Is the rule on jurisdiction which allows the plaintiff, under Article 5(3) of the Convention, to choose between the court for the place of the event giving rise to damage and the court for the place where that damage occurs to be extended to cases in which the damage alleged is merely the consequence of the harm suffered by persons who were the immediate victims of damage occurring at a different place, which would enable the indirect victim to bring proceedings before the court of the State in which he is domiciled?"

Therefore, they were trying to bring an action here in France, saying that, as the parent company, the financial repercussions have been suffered by them in France.

At paras.13 to 15, over the page, the court summarises the problem it needed to grapple with. Picking it up in the last sentence of 13:

1 "The harm alleged by the parent companies, Dumez and Oth, is merely the
2 indirect consequence of the financial losses initially suffered by their
3 subsidiaries following cancellation of the loans and the subsequent suspension
4 of the works.
5 It follows that, in a case such as this, the damage alleged is no more than the
6 indirect consequence of the harm initially suffered by other legal persons who
7 were the direct victims of damage which occurred …"
8 and I emphasise -
9 "… at a place different from that where the indirect victim subsequently
10 suffered harm.
11 It is therefore necessary to consider whether the expression 'place where the
12 damage occurred' as used in the judgment in *Mines de potasse d'Alsace* may be
13 interpreted as referring to the place where the indirect victims of the damage
14 ascertain the repercussions on their own assets."
15 At para. 20 on the facing page, the court decides that the expression 'place where the
16 harmful event occurred' means 'the place where the event giving rise to the damage, and
17 entailing liability directly produced its harmful effects upon the person who is the
18 immediate victim of that event'.
19 This case, in our submission, supports the notion that the Tribunal has jurisdiction over the
20 English claims in this case. The cartelists sold the cartel goods which were purchased by
21 the UK claimants only, or almost only, in the United Kingdom. What we are complaining
22 about, as you have seen from the witness statement of Mr. Gold, is sales of cartel goods
23 from the subsidiaries of the defendant companies taking place from their facilities in Great
24 Britain to the purchasers in Great Britain. There is no other place apart form the United
25 Kingdom, which could conceivably be the place where the harmful effects occurred. That
26 is really an end of it.
27 There are, too, a number of supporting points which we have made which are in our reply
28 submissions at paras.47 to 56, but I will wait to see how the defendants try to grapple at
29 least with that completely decisive point.
30 Their second argument is about the pleading. They say that we should have pleaded all the
31 facts upon which we rely under Article 5(3) in our claim form, but this has never been the
32 practice in this jurisdiction, and it would be odd to plead out formally facts relating to the
33 threshold question of jurisdiction in a claim form, because that presupposes that there will
34 be a defence served in due course on those pleaded facts. Issues of jurisdiction are not dealt

1 with in that way here. They are dealt with swiftly and economically at the outset of a case
2 before you come to serving a defence. The point is that jurisdiction battles are dealt with on
3 the evidence and on the basis of a good arguable case. All the material needed to decide the
4 point is before the Tribunal here today, and their pleading argument is a non-point.
5 They do have a second legal point to which I will turn and briefly address you on, and that
6 is based on Article 24 of the Brussels Regulation. They argue that it is impossible for them
7 to maintain a jurisdictional objection to the foreign rail companies' claims if this Tribunal
8 decides that they have to respond to the UK companies' claims. In their submission, it is all
9 or nothing. And they base that argument on their reading of a different provision of the
10 Brussels regulation, Article 24. If you will pick up again the second volume, it is at tab.90
11 on p.8.
12 Article 24 states:
13 "Apart from jurisdiction derived from other provisions of this regulation, the court
14 of a member state before which a defendant enters an appearance shall have
15 jurisdiction".
16 And then it says, importantly:
17 "This rule shall not apply where appearance was entered to contest the jurisdiction
18 or where another court has exclusive jurisdiction by virtue of Article 22".
19 Their argument that there is an "all or nothing" situation is spurious, for all the reasons
20 which we have given in our written reply, paras.57-67. And now I am conscious that I have
21 not yet read the authorities, sir, that you have asked me to look at. So, the points which
22 I make are without prejudice to that. But, I will make a few chief points which should
23 dispose of this, in my submission.
24 First, the court of justice has made quite clear what the governing principle is behind this
25 article, Article 24, and they have done that in the *Spitzley* case which is at tab.81, para.15.
26 You will see that refers to Article 18 because it was referring to the Brussels Convention
27 rather than the European Regulation which was subsequently made and where it was re-
28 numbered Article 24. But the provision is the same, the court stated that:
29 "Article [read-24] in particular is based on the idea that by entering an appearance
30 before the court seised of the proceedings by the plaintiff without contesting that
31 court's jurisdiction, the defendant is by implication signifying his consent to the
32 hearing of the case by a court other than that designated by the other provisions of
33 the Convention".

1 So, the underlying concept is that you are implicitly giving your consent or exercising a
2 choice.
3 But, secondly, in our case the defendants have all very clearly challenged the court's
4 jurisdiction to hear the foreign claims. How therefore can it be said that they have signified
5 their consent? They challenged the court's jurisdiction in their acknowledgement of service
6 when they entered their appearance to contest jurisdiction. (I pause to note that SGL was
7 out of time to bring its challenge, but the UK claimants, say nothing about the foreign
8 claimants, for another day, take no point about it).
9 Nothing has changed since the defendants took that course and signalled at the outset that
10 they challenged the jurisdiction; and if there were any need to put the position entirely
11 beyond doubt, this Tribunal can adopt the technique which is referred to in my friend
12 Mr. Hoskins' submission which you will find in the first bundle at tab.3, para.36, where he
13 says, if you are against him and you are minded to require them to file a defence (this is
14 tab.3, the last page) then:
15 "It should be clearly recorded in the relevant Order that:
16 (a) the Tribunal's jurisdiction in respect of the part of the proceedings brought by
17 the UK claimants is limited to harm actually suffered in the United Kingdom;
18 and
19 (b) importantly the service of defence does not in any way constitute submissions
20 in the jurisdiction of the tribunal in respect of the part of the proceedings
21 brought by the other claimants".
22 And we have no objection to that being made clear should it be thought necessary. But it is
23 not necessary, because nothing has changed the position whereby they have challenged the
24 jurisdiction of the Tribunal in relation to the foreign claims anyway. It is worth noting on
25 this point that, in the European Court case of *Elefanten Schuh* which the defendants refer to,
26 the court also made clear that a party is not taken to have consented to jurisdiction under
27 Article 24, even if it enters a substantive defence to claims where jurisdiction is challenged,
28 provided it has declared that it is challenging the jurisdiction. So, if that is the case then by
29 even stronger reasoning a defendant cannot be taken to have consented to jurisdiction
30 generally by entering a defence only to claims over which the Tribunal has got jurisdiction
31 in any event.
32 And the third point which we made in our original application and which has not been
33 contradicted, is that it is self-evident — it must be in any case — that this all or nothing
34 argument is wrong because it is well established, and now we come to *Kalfelis* that:

> "A court or tribunal can be found to have jurisdiction to deal with a part of a claim before it, but not a different part".

So, for example, you can have jurisdiction under Article.5(3) over a claim in so far as it is based on a tort, but not in so far as it is based on a contract. That was decided in the *Kalfelis* case back in 1988. But, if the defendants are right on the all or nothing argument, then the court gains jurisdiction over the other part of the claim as well, and automatically, just by virtue of the fact that one part of the case at least has to be addressed because the court has jurisdiction over it. Now, standing back, we say there is simply no answer to these points. We are clearly right and their legal objections fail.

That leaves only a miscellany of case management objections which they have raised to the progress of the UK claims. None of them bear scrutiny. Again, I will allow my friends to develop these points, but I will foreshadow a few.

First, they argue that there would be two tracks in the litigation if you allow our application. There would be a potential need for two sets of pleadings. There would be two case management conferences, there would be different rounds of disclosure. For example my friend, Miss Dietzel, makes this point at para.36 of her written submissions. The point is that the course we propose involves no material duplication of effort. In so far as the UK claims raise issues which happen also to involve the claims of all the public transport claimants, for example because you need to understand the mechanism of the cartel to work out the extent by which you have been overcharged, and there were these common prices across Europe, that work is going to have to be done at some stage. If the foreign claims do proceed eventually, the work done now will not have been wasted and it will not have to be done a second time. You can build on it.

Secondly, the defendants say that we are guilty of delay in bringing this case in the first place, and so no weight should be attached to the argument that our case should be progressed by the Tribunal now. SGL make that point at para.13 of their submissions.

So, their complaint is that because we brought the case in December 2010, this Tribunal should not attribute any importance to the need to progress the case expeditiously now. We dealt with that in our reply at paras.29-33, and made the point that both the premise of that argument and the conclusion are equally bad. The premise is wrong because their allegation of our delay leaves out of account the years of the appeal process to the European Court in which they challenged parts of the Commission's infringement decision. And, as the Tribunal will be aware, the Court of Appeal has ruled in our proceedings that time did not in fact start to run for bringing the present claims until any appeals concerning the

infringement finding of the Commission were decided. So, seen in that way a complaint about delay on our part falls away. And as for the conclusion that they seek to draw, it is rather odd to say that, “Because you didn’t bring your claim sooner, even though you brought it within the time allowed under the rules, the Tribunal should not be affected by a need to progress the claim expeditiously”. The principle by which this Tribunal acts is to try to progress claims expeditiously on the basis that justice delayed is justice denied, and for all the specific reasons that I outlined in opening. So, their argument misses the point of our application.

The third point that they raise on case management which I will briefly mention is an argument that this Tribunal has effectively already decided against us that the proceedings should remain stayed as a whole with our consent. Mersen says that in s.5 of its written application. Their argument fails to take account of two obvious points. The first is that the circumstances have most definitely changed. The delays which occurred in dealing with Morgan Crucible’s strike-out application which was heard by this Tribunal a very long time ago, and far later than could have been anticipated when the stay was first imposed. Had it been suggested to us in 2011 that we would have to await a judgment from the Supreme Court in mid-2014 or possibly the outcome of a European reference would take another two years, our position would have been very different. Their argument is based entirely on the benefit of hindsight. The question for you is: what is the appropriate manner in which to proceed now as matters have developed? And I would add this — this is the first occasion on which you have been asked to lift the stay to progress only those claims over which you have jurisdiction in any event. Your order last September was concerned with a different case management question. It was premised on the idea that the case was proceedings as a whole and that the foreign claimants were marching in step with the UK claimants.

THE CHAIRMAN: That is true, Mr. Turner. But you could have made this application then, could you not? You could have said on the part of the English claimants that you would seek in the alternative a partial lifting of the stay last September, or even before that when the Tribunal struck out erroneously Morgan Crucible.

MR. TURNER: We at that stage could certainly have made that application. What has happened since is that it has become apparent that there are likely now to be very substantial delays beyond what was even expected at that time. Now the situation has turned out to be that there will be a hearing before the Supreme Court. The hearing will take place in March 2014. Judgment may be several months after that. And if it is decided that there is an arguable point of European law, there will be a delay of two years. So, to say that the

1 UK claimants should have made their move at that stage or else now have forfeited the
2 chance to go ahead is, we say, an argument of little weight. We do understand the
3 Tribunal's concern about the course that was then proposed, as was set out in your order,
4 when you made the decision to stay at that stage. But the same concerns that you expressed
5 then which led you to make the stay order related to the proceedings as a whole, and the DB
6 UK claims will proceed in any event in this Tribunal, and that is the point that we make
7 today. The question for you, therefore, is not whether these claims will proceed, it is in
8 justice and guiding yourselves by Rule 44 when and how these claims will proceed, not
9 whether they will.
10 THE CHAIRMAN: Quite. And when the second stay order was made last September in the light
11 of the appeal to the Supreme Court, the jurisdictional basis as then advanced or as then
12 understood by us, was of course in the hands of the Gods, it depends on what the Supreme
13 Court says, whereas now ----
14 MR. TURNER: Yes.
15 THE CHAIRMAN: -- you are saying (and obviously I will hear what the defendants have to say)
16 but now you are saying, "No, we, the English defendants, have a right to proceed, and that
17 needs to be taken into account by the Tribunal".
18 MR. TURNER: In the reasoning in your order of 13th September last year, that is absolutely right.
19 That is the premise on which the reasoning is built, that there is a point of jurisdiction based
20 on Article 6(1) of the Brussels Regulation to be decided, and that the matter was being
21 looked at overall. It is now that we are raising the DB UK point and the fact that these
22 claims will proceed in any event. That is why we urge that the right question is, "What do
23 you do about it now in the interests of justice?"
24 Sir, I have exhausted my time, as I am only minute over. Subject to anything further, those
25 are my opening submissions.
26 THE CHAIRMAN: Thank you very much, Mr. Turner. Mr. Hoskins.
27 MR. HOSKINS: It is painful to have to do so, but I have to preface everything I say by saying it
28 is obviously without prejudice to our jurisdiction challenge in relation to the other
29 defendants.
30 THE CHAIRMAN: Feel free to repeat that.
31 MR. HOSKINS: I will return to that theme during these submissions, I am afraid. There are three
32 principal issues for the Tribunal to decide on this application. Mr. Turner set them out very
33 clearly. First, does the Tribunal have jurisdiction over the DB UK claims under Article 5(3)
34 of the Brussels Regulation. Secondly, if the application were granted and the defendants

1 required. Secondly, if the application were granted and the defendants were required to file
2 defences in response to the DB UK claims, would that constitute submission to the claims
3 by the non-UK claimants by virtue of Article 24 of the submission issue; and, thirdly, as a
4 matter of case management should the Tribunal grant the partial lifting of the stay, and that
5 is clearly an exercise of discretion taking account of all relevant factors.
6 You will be glad to hear that I have discussed with my colleagues as to how we should
7 divide this up so we are not going to repeat ourselves. I am going to focus on the case
8 management issues.
9 Our submission is that whatever the answer is to the very interesting legal issues in the
10 Article 5(3) submission, you should not be acceding to this application in any event for case
11 management reasons. So I am afraid I take the easy way out, I say you do not have to get
12 into the esoteric stuff for this issue to get off the ground.
13 How do you approach the case management issue? You have to identify the benefits and
14 disadvantages of granting or refusing the application. Then you have to stand back and
15 decide what is the appropriate way forward in light of all the relevant facts. It is not an all
16 or nothing case, it is not there are no benefits here or no disadvantages there, that is not the
17 nature of this beast, there will clearly be some advantages, some disadvantages, and
18 ultimately it is a matter for you to weigh what you think is the appropriate course having
19 identified them.
20 But, for the purposes of presentation I will make my submissions under three main
21 headings. What are the benefits of granting the application? What are the disadvantages of
22 granting the application, and what are the disadvantages of refusing the application?
23 Clearly the points lead into each other but that is just a useful framework of dealing with
24 them.
25 Before I get to the detail, let us remind ourselves that it is the claimants who chose to bring
26 the claim in the manner that they did, i.e 30 claimants in one claim. Of course, the normal
27 way for dealing with a claim, regardless of the number of claimants, is to deal with it as a
28 whole, because that is procedurally efficient, it saves time and costs to do it that way, so that
29 is the norm.
30 What this application is seeking to do is to depart from the norm – I will come on to the
31 detail – Mr. Turner is looking to have a two-speed procedure for different categories of
32 claimant, depending on what happens to the Morgan appeal. In fact, if Morgan loses its
33 appeal we are actually going to have three speeds, because Morgan will have to catch up
34 with the other defendants, so you will have this set of defendants, UK claimants, this set of

1 defendants, non-UK claimants, and then you have Morgan coming in potentially to catch
2 up, so I will use the phrase 'bifurcation' – I am not sure the word 'trifurcate' exists, but you
3 understand the fragmentation point.
4 Mr. Turner comes before you and really he has the burden to convince you that there are
5 good reasons for departing from the norm, and to convince you that there are not real
6 problems of efficiency and cost involved in it. My submission is there are no good reasons,
7 certainly nothing we have heard this morning passes the threshold. As one would expect,
8 given what the norm is, Mr. Turner's approach would simply serve to complicate the
9 resolution of these proceedings, and it would increase the cost and effort involved in doing
10 so, not just for the parties but for the Tribunal as well.
11 Let us deal with the first heading: "Benefits of granting the application". The UK claimants
12 claim that lifting the stay would enable material progress to be made. It is not quite clear
13 what the progress is, is it? Progress in the action is it, just because it gives the claimants a
14 bit more information? I am still none the wiser, I must admit, having heard what Mr.
15 Turner said this morning. It may well be he is a bit shy about being too specific about the
16 benefits because it leads you straight into the fact that there is a bifurcation between our set
17 of defendants and the different claimants and 'trifurcation' – excuse me – if Morgan comes
18 back in, so maybe that is why that has been left a bit vague.
19 What does he say the benefits are? We get defences, he says that we will have to serve
20 defences. The truth is that defences in this case, you may have seen some of them – I must
21 spend my daily life looking at these sorts of cases – the practical reality is the defences one
22 gets at this stage of these sort of proceedings are pretty limited because they have to be.
23 The principal issues are causation and quantum in these sorts of cases. Causation requires
24 factual input from potential witnesses – you will be aware of the difficulty here that
25 everything is so old that it requires you to go through documents. The disclosure exercise
26 has not been done yet and so the truth is, in order to do it fairly, without the disclosure
27 having been done there is a limit to actually how much you can say. I am not suggesting
28 that it would be a shadow or skeleton, a holding defence, all the defendants would be
29 required to do the best job they can, but it is necessarily limited by the nature of these sorts
30 of actions, and the fact that disclosure has not yet been given.
31 THE CHAIRMAN: True, but then you will have your own documents, will you not, so obviously
32 you will review those for the purposes of the defence?
33 MR. HOSKINS: The disclosure exercise, of course, is not just going through documents, it is
34 identifying where documents are. So, yes, document preservation has taken place. A

1 disclosure exercise is identifying where the documents are, getting a team to go through
2 them, analysing them for privilege, it is actually a big task in itself; one sees that again and
3 again in these cases. And so when I say the disclosure exercise has not been done that is
4 what I mean in this case. Yes, we have the Commission documents but there are other
5 documents which would have to be disclosed and that has not been done beyond the
6 preservation exercise. So the defence is not going to take us that much further. Mr. Turner
7 did not push that particularly in his submissions to you.
8 The position is even more acute in relation to quantum because this really is a matter for
9 expert evidence in these cases, that is what these cases turn on. With economists –
10 apologies to the Tribunal – the mantra is always: " We need as much information as
11 possible"; "insufficient data", and that is the same in these sorts of cases. To suggest that
12 the quantum exercise is going to be somehow sufficiently robust pre-disclosure, in my
13 submission, is not realistic.
14 The benefits of pleading out defences in terms of causation and quantum will be limited at
15 this stage. It will move us forward a bit, I am not going to stick my head in the sand, but
16 not very much.
17 There is a suggestion if we move on a bit it will help us to calculate quantum, it will help us
18 with the overcharge. You will understand where I am going on this – without disclosure
19 any attempt to do this would be incomplete, it would be unlikely to permit a robust
20 overcharge calculation to take place, and certainly the exercise would have to be revisited
21 once disclosure had been done, so there would be here a waste of costs. It is far better to do
22 the exercise when everything is available rather than to get fragmentary information, try and
23 do the exercise and then have to come back to it when one gets the full information.
24 The basic mechanism for calculating cartel overcharge is some form of before and after
25 analysis. It involves economists plotting prices of the relevant products usually before,
26 during and after the cartel. You then draw a line between the before and the after, and
27 everything above in the 'during' period is the overcharge – that is put very simplistically,
28 but most of the methods are based on that sort of approach.
29 In relation to the period during the cartel, detailed information on the actual prices charged
30 would be essential, it always is: how do you plot a graph without the information? We have
31 seen that Mr. Gold in his witness statement, para. 27 explains that Morganite was the
32 principal supplier to the claimants in this case - Morganite being a subsidiary of the first
33 defendant. So the principal source of information on actual prices charged to these

claimants during the cartel period will be Morgan; information on actual prices, that is what is crucial – actual prices because that is what we need.

Of course, the question of disclosure from Morgan cannot be resolved until we know the outcome of Morgan's appeal. Is it going to be a defendant? Might it come in? Might someone seek third party disclosure from it? All for another day.

Can we look at the decision again, Mr. Turner took you to it, it is bundle 2, tab 93. Can we go to p.27, recital (91). What one quite often finds in a price fixing cartel is that the prices are fixed, the cartelists will say: "We will charge the sum of X" and that is the price fixing, that is not this cartel.

This cartel was not setting actual prices, it was agreeing a mechanism to set prices. I do not want to take you to the detail of it, but if you look at 91 you will see a description of how the foundation of this cartel was in fact the "scheme price" or the "bareme price".

Recital (92):

> "The bareme price was not a real sales price in any particular currency, but rather a relative value, indicating, for instance, that a complicated large brush should cost x times more than a small simple brush."

It was a mechanism to arrive at the same prices if you did what you were supposed to do under the Rules of the cartel, but it was not a setting of actual prices. You will see that there are other bits that feed into the mechanism. Recital (95) gives you a good summary of what that system produced. The point is it was not an agreement on actual prices. Indeed, what one finds is that, despite this mechanism, there were real difficulties for cartelists in seeking to achieve their unlawful aim of harmonising prices. Recital (97), ten lines down:

> "It remained, however, difficult to harmonise agreed prices across the Community…"

Similarly, (127):

> "The strategy of harmonised prices throughout Europe for OEM customers proved difficult to implement in practice."

So there is going to be no short cut here. In order to get a robust overcharge calculation there is going to have to be data, information about actual prices during the cartel period. Again, I am not saying that material that is referred to in the Decision is not going to be helpful, but it is not going to be enough – clearly not enough. The problem one gets, as I have already indicated, what we have here is a classic case of more haste less speed – "Give us something", "Give us something", "Give us something". Okay, we disclose this now, an exercise is done, people spend time, money, effort, but the truth is it is never going to be the

1 final answer, we are all going to be revisiting it again. Far better for the exercise to be done
2 once when all the information is available rather than this sort of piecemeal way.
3 Another suggestion that is put to you is that it is all really easy, it is an easy package, the
4 Commission materials are sitting there, they have just got to hand them over. Not correct,
5 because what you are being asked to do is to lift the stay in relation to the claims by the UK
6 claimants. The Decision covers a Europe-wide cartel.
7 Not all the documents in the Commission investigation will be relevant to the UK claims.
8 Some of them will be common, they will affect all the Member States affected by the cartel.
9 Some of them will be UK specific, and some will simply not be relevant to the UK at all.
10 So if a disclosure exercise were to be ordered, no disclosure is sought today but let us say
11 we come to it and the application is made, and disclosure were to be applied for, one of the
12 things I would be saying to you at that stage, a few months hence, is that this is a waste of
13 time because we are going to have to go through the Commission file and sort out what is
14 actually relevant to these claims. Of course, if we do not bifurcate the proceedings then it is
15 likely – I am not saying the exercise will not have to be done, but it will be a different
16 creature – because of the different nationalities of the 30 claimants that cover The
17 Netherlands, Sweden, Portugal, etc. You will not have that sort of exercise. There is a
18 whole sifting exercise that would have to be done to give disclosure, even of the
19 Commission investigation file, that is unlikely to be necessary without the bifocation.
20 THE CHAIRMAN: It depends, of course, because you are assuming that the Supreme Court
21 keeps Morgan Crucible in. If, of course, Morgan Crucible goes out then we will not have
22 bifurcation or a trifurcation, we will simply have this claim.
23 MR. HOSKINS: You do not know that.
24 THE CHAIRMAN: No, I do not know that.
25 MR. HOSKINS: That is why my submission is "avoid more haste less speed, let us wait to know
26 where we are". That is my submission, that is a facet of it. It is Mr. Turner who wanted to
27 pre-empt, and that is why it is his submission that might lead to wasted costs. Mine cannot
28 lead to wasted costs.
29 THE CHAIRMAN: No, yours leads to delay.
30 MR. HOSKINS: That is right. My point is that delay actually has a virtue here. It is not delay
31 for delay's sake, it is delay with a virtue, because I am avoiding cost and wasted effort by
32 the parties and by the Tribunal.

THE CHAIRMAN: Does that remain your point in terms of the weighing of the case management advantages and disadvantages were, for the sake of argument, the Supreme Court to make a reference to the ----

MR. HOSKINS: Can I come to that?

THE CHAIRMAN: Please do. Sorry, I do not want to ----

MR. HOSKINS: Absolutely, and if I do not deal with something you will no doubt tell me, but I think that is the last thing in my note I want to deal with so I will definitely come to it.

Can I stick with this idea of benefits, and this easy package of Commission investigation documents - not easy because they are not all relevant to what is being sought today. There will also inevitably be issues in relation to leniency materials. It was the hot topic in competition law last year at the ECJ in *Pfleiderer*, the *National Grid* case that both Mr. Turner and I were in. It is going to come up in this case. Also, when one looks at the benefits that Mr. Turner says of getting information early, you will actually see that most of the stuff which underpins the recitals he took you to come from Morgan's leniency statement. Let me show you that. It is recital (69) of the Decision, the bottom of p.18. You will see:

> "The facts set out in this Chapter are based principally on the following evidence:
>
> - Leniency Statement by Morgan of 5 October 2001 (hereinafter 'Morgan Leniency statement' or 'MLS') …"

Let us go back to the crucial paragraphs which tell us about the principles of the cartel and prices, and just glance through the footnotes. Eighty per cent of the information in this section of the Decision - 80 per cent is me sticking my finger, it is not an arithmetical calculation - is MLS, the Morgan Leniency Statement. The question of whether a leniency statement of that sort is discloseable or not is actually a question that was not dealt with in *National Grid*, because the claimants in that case did not actually ask for leniency statements. One imagines that one will have to adopt the *Pfleiderer* approach of the weighing the advantages and disadvantages, but the leniency statements are the Holy Grail, if you like, of the Commission's leniency programme. That is going to be a very, very sensitive and, one imagines, hotly disputed issue. So again, the idea that there is an easy package, no.

The other thing is, of course, you can imagine that Morgan, this is their leniency statement, will have a very keen interest in protecting their position. That is not to say that they cannot come along and protect their interests, but there is a slight oddity where you have got

1 proceedings stayed against Morgan, no application to lift the stay against Morgan, and you
2 are going to drag them into this bifurcated proceeding and require them to play what will
3 probably be a central role in relation to this issue. It is not ideal, and I do not think Morgan
4 will be very happy, but their happiness is obviously not your prime concern.
5 Disadvantages of granting the application: you have the point, it is additional expense and
6 inconvenience, things will have to be done that would not have to be done at all, some
7 things will have to be revisited, some things will have to be done twice. That is the nature
8 of these things. The defendants will have to submit at least two defences, one for the UK
9 claims, one for the non-UK claims. I do not overstate it, because a lot of the issues will be
10 common, but it will certainly happen.
11 Secondly, if there is to be disclosure in stages, as suggested by the claimants, there are
12 inevitably going to be additional hearings for disclosure in respect of the UK claims and the
13 non-UK claims, again depending upon what happens in the Supreme Court. We are all in
14 this sort of strange world looking forward.
15 Those hearings are often time consuming. Mr. Turner and I have spent many happy days in
16 the High Court, one to two days, just ploughing through the disclosure issues that arise in
17 these cases. They are time consuming and expensive. Even with the CAT's approach to
18 these sorts of cases to drive them efficiently, to drive them quickly, make no mistake, we
19 will be spending quite a lot of time in court if these issues are dealt with in this way. Of
20 course, refusing the application, refusing the bifurcation, will mean that disclosure issues
21 for both UK and non-UK claims can be dealt with at the same time.
22 Third, and this is a point I have foreshadowed, bifurcating proceedings is likely to lead to
23 additional, unnecessary disputes, things that would not arise absent bifurcation. For
24 example, scope of disclosure required in relation to the UK claims. I have just made the
25 point, there will be some documents generally relevant, there will be some clearly relevant
26 to the UK and there will be some documents about non-UK Member States, etc. This was
27 an issue that came up in *National Grid*, and again we spent three or four days in hearings
28 and this was not the only topic, but it was a main one.
29 To what extent is it necessary to give disclosure in relation to other countries? That is
30 something that would come up if there was a bifurcation. It is less likely to be an issue
31 without bifurcation because of the 30 claimants coming from the Netherlands, Sweden,
32 Portugal, Spain, etc, because they will automatically get disclosure in relation to those
33 countries. So it is far less of an issue.

1 The fourth part, again foreshadowed: how will general issues, comment or parties be
2 determined? You have got permission to amend the claim form to bring in past losses.
3 Again, Morgan has an interest in that issue because it might still be on the hook if it loses in
4 the Supreme Court. What is it to do? Is it to come and make submissions to you on the
5 permission to amend point before the Supreme Court ruled? It is not ideal.
6 The claimants suggested that problem could be dealt with by the Tribunal granting
7 permission to amend only in relation to claims of the DB UK claimants in the sense that we
8 can produce some tailor made document for this. That is going to wreak complexity and
9 confusion. It is much better to have one pleading for a whole case and proceed on that
10 basis. As soon as you start having multiple pleadings you have to have defences to them,
11 you have to have amendments, you have to understand the logarithmic complexity that
12 flows.
13 There are likely to be other general case management problems that create similar problems.
14 One of the benefits that Mr. Turner prays in his aid is, "If we get disclosure of the stuff that
15 is sent to the Commission and the material that was obtained by these defendants from
16 access to the Commission's files, that will include documents from Morgan". It tips you
17 straight into the leniency problem and I have already dealt with that.
18 This is a variation of the submission to jurisdiction point. I am not going to deal with it
19 head on, but I just make this point: if the proceedings were to be bifurcated so you have got
20 UK claims and non-UK claims and UK claims are going ahead and non-UK claims not, the
21 question of submission is not a matter of discretion for the Tribunal, it is a matter of law.
22 As you said when giving the last stay order in the written reasons, you materially increase
23 the risk of a party inadvertently doing something if you have the bifurcated proceedings.
24 You will see that I had to do it at the start, I have to stand up and say we are not waiving our
25 rights in relation to the non-UK claims. Every bit of correspondence would have to have
26 that in it. It is no way to conduct litigation. That is why, as Mr. Turner said, the ideal is
27 you deal with jurisdiction first, you get it out of the way so that people do not have to sit
28 and say, "Am I submitting, do I need to reserve my position?" That is why you deal with
29 jurisdiction first, even if it takes some time to do so.
30 In short, on this heading, we say the suggested approach creates complexity, it inevitably
31 creates additional expense and convenience, some things will have to be done twice, some
32 things do not have to be done at all, some things will have to be revisited. It is not a simple,
33 "Let us cut this little bit out and it can all go ahead", it is clearly not that in this type of case.

1 Disadvantages of granting the application: I appreciate I have already hopefully made some
2 headway on that, otherwise I am probably wasting my time with this third heading. What I
3 would really like to focus on here is the passage of time, because that is one of the
4 disadvantages of refusing the application. Of course, what the DB UK claimants say is,
5 "This relates to a cartel, it was a long time, and we started our claim a long time ago, so it is
6 not fair that we are being held back in this way".
7 What are the disadvantages of refusing the application that they are making? Clearly, the
8 Tribunal should take account of all relevant timing issues, of course, but what are they?
9 First of all, the Commission decision was adopted on 3rd December 2003. One has the
10 procedural issue flowing from s.47A of the Competition Act, that you cannot come to the
11 Tribunal until the appeals to the European Courts have been dealt with. That does not stop
12 them going to the High Court. There is no equivalent rule. If this was a matter of urgency,
13 something that they wanted to get on with, they could have gone to the High Court with a
14 pure follow on action any day after 3rd December 2003. We are all delighted to come to the
15 Tribunal, we all know its merits. Seriously, if someone wants to come to you and say that it
16 is not fair to have delay and they have deliberately chosen not to go down the fastest route it
17 is not an argument that should carry much weight.
18 The second point, on their own arguments, even if we say, yes, you wanted to come to the
19 Tribunal, and the ones that succeeded in the Court of Appeal they could have commenced
20 proceedings in the Tribunal at any time between 18th December 2008 and 18th December
21 2010. If you need chapter and verse on that it is in the Court of Appeal's judgment at paras
22 26 to 28, bundle II, tab 77, but I do not think it is going to be contentious so we do not need
23 to look at it.
24 What do these claimants do? The did not actually lodge their claim until 15th December
25 2010, three days before the expiry of the limitation period. It is important, when you think
26 that what we are talking about is a Supreme Court hearing in March next year, probably a
27 ruling just before the summer, hopefully, July, these claimants wasted two years in the
28 Tribunal, let alone my High Court point. Yet they come to you and say, "It is not fair, we
29 must get on", I am sorry, it is just hollow.
30 The third point, and Mr. Chairman, you raised this with Mr. Turner, they have been aware
31 of the potential basis for this sort of bifurcation application since at least 25th March 2011.
32 If you can take bundle 1 and go to tab 19, this is going back in time to March 2011. I do not
33 want to get stuck in the detail, I simply want to flag up, if you look at the penultimate
34 paragraph on the first page of that letter - this is a letter from the claimants' solicitors to the

1 Tribunal and they clearly indicate that they are aware of the 5(3) point, that the UK
2 claimants could bring the claim in any event regardless of what happens in 6(1).
3 So the basis for the application is, "It is unfair to make us wait any longer", but they have
4 sat on this since 2011. Indeed, what happened, of course, we had this series of written
5 submissions in 2011. In July 2011 the claimants were actually content for the proceedings
6 to be stayed generally. It is not just a case of the last time the matter came before you as a
7 result of what was happening in the Supreme Court, actually when it came before the
8 Tribunal in relation to the Court of Appeal they were aware of the 5(3) point and could have
9 taken it and did not. You see that from the Tribunal's order of 26th July 2011, bundle I , tab
10 11, a stay in the proceedings by agreement between the claimants and defendants.
11 The fourth point: in respect of witness evidence, and this was not really taken by
12 Mr. Turner, but let us kill it off anyway: the cartel took place between 1988 and 1999. Any
13 real deterioration in the availability and reliability of witness evidence will have occurred
14 long ago.
15 I am sorry, I keep repeating this point, but it is an important one: if the claimants had been
16 really concerned about the availability of witnesses, they had the mechanism to bring this to
17 the High Court in 2003, to bring it to the CAT in 2008.
18 Preservation of documents: again, this is an artificial issue that has been created to try and
19 improve the prospects of this application. By letters dated 28th July 2011, Hausfeld
20 requested that the defendants solicitors "confirm precisely what steps your client has taken
21 to date in relation to the preservation of documentation relevant to the claimants' claims".
22 Those letters are bundle I, tabs 32 to 34.
23 The response has come back that the one on behalf of SGL, 22nd August 2011, bundle I, tab
24 37, Freshfields confirmed that SGL was aware of its obligations in respect of the
25 preservation of documents that SGL had confirmed to Freshfields that it had taken steps to
26 preserve any relevant documents. When that assurance was given, and similar assurances
27 were given by the other defendants at the same time, no concern or complaint was raised by
28 the claimants about that assertion or that form of assertion until, lo and behold, the solicitors
29 write the letter on 26th April 2013 to tee up this application. I am sorry, if that was a
30 genuine concern, it would have been raised in 2011. This is just a device.
31 And the fact remains the people you have before you, particularly in terms of the solicitors'
32 firms that were instructed by the defendants, are large and experienced litigation firms.
33 Experienced about this generally, but in dealing with this precise type of case they are well
34 aware of the obligations of their clients. They are well aware of the consequences if they do

1 not comply with the obligations. And the professional obligations are —I do not need to go
2 to them, but they are set out in summary in **The White Book** at 31.10.6 in the notes and, in
3 relation to electronic disclosure, in Practice Direction 31(b) para.7. This is not difficult
4 stuff. These firms know what they are doing. And there is absolutely no basis to go behind
5 the firms' assurances at this stage. This is just an attempt to create some sort of issue which
6 has been of no concern whatsoever for two years and is not an issue in any event.
7 Finally we have the fact we know the hearing is listed before the Supreme Court for the 11th
8 and 12th March 2014. One would hope we would get a ruling before the summer recess,
9 July 2014, and in the context of this case, given the manner in which the claimants have
10 proceeded, to say "It's unfair to make us wait until jurisdiction has been resolved, until the
11 Supreme Court has dealt with this", it is completely hollow because they have shown no
12 desire whatsoever to move their case on since the Commission decision in 2003. This is an
13 opportunistic application.
14 The prospect of preliminary ruling, Mr. Chairman, I promised I would come back to that
15 point. It is not an issue at the moment because nobody knows at this stage whether such a
16 reference will be ordered or not. If a preliminary ruling is ordered, then the claimants come
17 back and say, "The whole game has changed because now we've got two years of
18 Luxembourg". But really at this stage, when we're looking at the crystal ball, we should
19 proceed on the basis that we do not know if a preliminary ruling will be made. It may not
20 be made, but it is certainly premature to lift the stay on the basis that it might be made. Let
21 us wait and see what happens.
22 So, where does that leave us? Let me go back to my three headings:
23 * First of all the benefits of granting the application we say will be limited at best.
24 And the real punch line here is that no real progress can be made in respect of
25 calculating the over-charge without disclosure in relation to actual prices during the
26 cartel period, and that information is going to come from Morgan.
27 * And the package point. I have made the points on the Commission package of
28 documents. That is actually a minefield of litigation, some of which will be
29 completely unnecessary if we do not bifurcate, for example, having to sift through
30 the Commission documents to see what is actually relevant to the UK claims and
31 what is not.
32 * Granting the application will also give rise to material disadvantages, and I have
33 done to death the complexity and duplication that would give rise to.

1 Refusing the application and awaiting the outcome of Morgan's appeal, would have little
2 practical effect in the overall context of the case, and it certainly cannot be said to be unfair
3 to claimants who have sat on their claim since 2003.
4 And for all those reasons we say regardless of what the views are on more esoteric legal
5 issues **… submission, it is clear that this application should be dismissed. Those are my
6 submissions, unless you have any questions.
7 THE CHAIRMAN: Thank you very much, Mr. Hoskins. Could I ask you two related questions?
8 Assuming, as you have done in your submissions, that there is jurisdiction and there would
9 be no submission, first do you say that any weight should be attached simply to the bare fact
10 that under 5.3 the English claimants have a jurisdictional right? Is that something which we
11 ought to attach weight to simply in the abstract, ignoring any of the other advantages or
12 disadvantages that Mr. Turner may say exist?
13 MR. HOSKINS: It is nothing to do with timing. Jurisdictional right is a right to bring
14 proceedings in the United Kingdom. But once you have established whether they do have a
15 right, it moves straight into case management. Is it appropriate? How is it appropriate to
16 allow this claim to go forward? So the fact it is a jurisdictional right has no bearing
17 whatsoever on your case management discretion. What it feeds into is Mr. Turner's point
18 which is, "Because we have a right to come here, we should have a right to go as fast as we
19 want".
20 THE CHAIRMAN: In that case, let me give a variant. You started off by saying that the
21 claimant had chosen to frame their claim in a very particular way with everyone in one
22 action. How different would the landscape be if they had issued two sets of proceedings or
23 multiple sets of proceedings by reference to different classes of claimant? Let us suppose
24 they carved out the 13th to 17th claimants and put them into a separate action before the
25 same court, and one had, let us say, say two actions? Would your arguments have the same
26 force, or less force?
27 MR. HOSKINS: Let us assume they brought a claim in the High Court. Non UK claimants had
28 brought a claim in the tribunal for UK claimants. We might have a dispute about whether
29 claims should be transferred from one jurisdiction to the other for them to be heard together.
30 And then you fall into my arguments. You might have a situation in which everyone was
31 somehow blissfully unaware of the other — what was going on in the other jurisdiction, and
32 then you never get to my arguments. So, I am afraid this is somewhat crude. But all I can
33 say is given where we are today, given how we have got here, all you can do is make
34 decisions on the basis of the litigation as it stands and not seek to make decisions on the

1 basis of how it might have been if the claimant had in fact brought forward their claims
2 differently. The trouble is, we all have two and a half years of shared history, now. No,
3 I say, "We are where we are", that is now.
4 THE CHAIRMAN: Thank you very much, Mr. Hoskins.
5 MR. HOSKINS: Thank you very much.
6 THE CHAIRMAN: Miss Smith.
7 MISS SMITH: Thank you, sir. I would like to make submissions that I hope do not overlap with
8 those already made by Mr. Hoskins on three points: First of all in our submission there has
9 been no material change of circumstances since the order of the Tribunal in September 2012
10 and, in those circumstances this Tribunal should be very slow to, in effect, overturn that
11 previous order.
12 The second point I am going to address briefly is the risk of submitting to the jurisdiction
13 under Article 24, and then the risk for the jurisdiction of the Tribunal to hear the UK
14 claimants' claims under Article 5(3) we do not accept that the position is quite as simple as
15 Mr. Turner seeks to suggest.
16 On the first point, a material change of circumstances, the main factual points have already
17 been made by Mr. Hoskins. I am not going to repeat them, but they feed into perhaps a
18 slightly different point about whether or not there is a material change in circumstances.
19 You are aware of the three previous orders or sets of orders staying the proceedings, and the
20 claimants argue that the situation has now changed, first, because the focus is now on the
21 UK claimants; and secondly because the delay in getting judgment from the Supreme Court
22 is longer than they could have envisaged.
23 As to the first point, the position of the UK claimants was clearly in the minds of all parties
24 and available as a point to be taken when the previous orders were made. Mr. Hoskins took
25 you to Hausfeld's letter of 25th March 2011 at tab.19. The point is raised again in their
26 letters of 8th April at tab.22 for your note; and 13th April at tab.26. I am not going to take
27 you to those letters, but it was an issue that was extensively canvassed in correspondence.
28 And the first stay was ordered and as Mr. Hoskins has already said, the claimants actually
29 requested the second stay. And that is their letter of 14th July 2011 at tab.28, although the
30 issue of Article 5(3) had been extensively covered in recent correspondence by that date,
31 there was no mention at all of the issue in the claimants' letter of 14th July 2011.
32 Furthermore, the claimants did not seek to reverse their position that they wanted the stay at
33 that stage as a result of any concern about prejudice arising from the availability of
34 documents, even though, as Mr. Hoskins has already said, that issue was also canvassed in

1 the correspondence, and he has given you the references for that. The letter from Hogan
2 Lovells is at tab.35. The letter from Herbert Smith is at tab.36.
3 But the letter from Hausfeld of 31st August 2012 which is at tab.52, setting out their
4 submissions prior to the September order, simply raised general concerns about delay. No
5 mention of the concerns about availability of documents. At that point in time they
6 appeared to take at face value, as we say they should, the assurances that were given by the
7 defendants that steps had been taken to preserve the documents; and they have been; and
8 we take absolute issue with the suggestion by Mr. Turner this morning that we have refused
9 to give appropriate assurances. Assurances have been given.
10 That leads to the second point, that the delay in progress of the case is longer than could be
11 envisaged. At the time the Tribunal made the September order last year, you already knew
12 that there was potential delay through an appeal to the Supreme Court. The proceedings
13 before the Supreme Court are not moving more slowly than usual, they are moving exactly
14 as proceedings before the Supreme Court move. The Supreme Court hearing was actually
15 listed in January. The claimants have failed to explain why it took them until June to make
16 this application. That is just again completely inconsistent with their now alleged concern
17 about the length of time that things are taking. So, we say there is no material change in
18 circumstance since the previous stay and no adequate explanation on the part of the
19 claimants as to why they have changed their position. In so far as it is useful, we do rely on
20 a case which I have given to the claimants first thing this morning called *Chanel v*
21 *Woolworth* which sets out, obviously in a different context, but I think is relevant, the
22 position to be taken — this is a patent case. I am not suggesting it is exactly the same
23 context, but the position to be taken or the view to be taken by the court in these sort of
24 cases where in effect a party is asking for a previous order to be set aside. I will just take
25 your Lordships to the judgment of Buckley LJ on p.492, at the bottom of p.492, the
26 penultimate page of the judgment, just below H:
27 "The defendants are seeking a rehearing on evidence which or much of which, so far
28 as one can tell, they could have adduced on the earlier occasion if they had sought an
29 adequate adjournment, which they would probably have obtained. Even in
30 interlocutory matters a party cannot fight over again a battle which has already been
31 fought unless there has been some significant change of circumstances, or the party
32 has become aware of facts which he could not reasonably have known, or found out,
33 in time for the first encounter".

1 That is absolutely not the position in this case. Moving then to what was described by
2 Mr. Turner as I think the second issue of law, the point under Article 24 of risk of
3 submitting to the jurisdiction. As I suggest was the position in September of last year the
4 question is now one of balancing prejudice, and we adopt the submissions of Mr. Hoskins
5 on balance of prejudice. But part what must go into that balancing exercise is the risk of
6 prejudicing any challenge that the defendants may wish to make to the Tribunal's
7 jurisdiction to hear the claims. And you did address that in the third reason given from a
8 September order.
9 THE CHAIRMAN: But their context does matter, because that was in the context of a stay or
10 lifting a stay in respect of all claimants and all claims.
11 MISS SMITH: Yes. But, as I have already said, in our submission that risk still exists because of
12 Article 24 and because — we say that the course proposed by the claimants still does
13 involve that substantial risk. And we say that this Tribunal does not have to decide, but if
14 the defendants follow the course proposed by the claimants, it is inevitable that the
15 defendants will submit to the jurisdiction. We say it is enough that there is a substantial risk
16 that that will occur because we are here balancing the prejudice to either side, and one
17 weighs in the balance what we say is a very substantial risk of submission to the
18 jurisdiction.
19 Now, the claimants say in response to that that by lifting the stay on the UK claimants'
20 claims, we are simply having to defend claims for damages that we would have to defend in
21 any event. Now, that presumes that this Tribunal has jurisdiction under Article 5(3) and
22 I will come back to that point. But the claimants' first point on Article 24 is based on the
23 case of *Kalfelis* which Mr. Turner took you to, and I would like to take you back to that.
24 That is in bundle 2, tab.82.
25 You have been taken to the paragraphs setting out the facts, I am not going to take you back
26 to that, but the heart of the Judgment is at para. 19 on p.5585. What the court decided in
27 that case is that under Article 5(3) a court only has jurisdiction over those parts of the claim
28 which fulfil the test under Article 5(3) but jurisdiction does not extend to other aspects of
29 the claim, and that is what is set out in the last sentence of para. 19:
30 "A court which has jurisdiction under Article 5(3) over an action insofar as it is
31 based on tort, does not have jurisdiction over that action insofar as it is not so
32 based."
33 That is not controversial. But neither this case, nor the quotation from **Briggs** cited at
34 footnote 9 of the claimant's reply submissions or, in fact, any of the other cases cited by the

1 claimants in their reply submissions address the question of whether by entering an
2 appearance to the part of the claim over which the court has jurisdiction the defendant
3 thereby submits to the jurisdiction for the purposes of Article 24 generally, or in some way
4 whether a party can submit to jurisdiction for part of a claim only.
5 All that the Court of Justice is saying in *Kalfelis* is that the defendant may challenge
6 particular parts of the claim as being ones over which the court does not have jurisdiction
7 over other parts of the claim. In such a situation the challenge to jurisdiction would come
8 at the start of proceedings and the court would determine over which aspects of the claim it
9 has jurisdiction and which it does not. The case would proceed on the former aspects, those
10 aspects of the claim over which the court has jurisdiction, and the latter aspects, those parts
11 of the claim over which it does not have jurisdiction would fall away or would have to be
12 litigated by the claimants in another Member State and that is what is envisaged at para. 20
13 of the Judgment in *Kalfelis*.
14 THE CHAIRMAN: Let us suppose, Miss Smith, that we have proceedings which contain claims
15 for which jurisdiction exists clearly in respect of Article 5(3) and contentiously in respect
16 of Article 5(1), to pick one at random.
17 MISS SMITH: Yes.
18 THE CHAIRMAN: You are saying that until one has resolved, however long it might take, the
19 contentious jurisdiction and Article 5(1) everything has to be stayed, no step further in the
20 proceedings, and matters can only go forward even as regards non-contentious jurisdiction
21 until all jurisdiction questions have been sorted out.
22 MISS SMITH: I am saying that the case law and the procedure, which is taken in this jurisdiction
23 under Part 11, and I will come to that, quite clearly envisages for good reason that
24 jurisdiction should be considered before one gets to deal with the merits of the claim. The
25 fact that you may have jurisdiction over part of a claim, and you may not have jurisdiction
26 over other parts of the claim, that issue too has to be dealt with up front because the courts
27 and the procedure envisage that one deals with that question. You have the parts over
28 which you have jurisdiction proceeding and other parts of the claim are dead. You do not,
29 for very good reason, take the course suggested by the claimants, that you proceed with
30 those parts which arguably you clearly have jurisdiction over and keep alive in some way
31 the other parts of the claim, because by keeping those other parts of the claim alive, even if
32 stayed, you have a substantial risk that what you are doing on those parts of the claim that
33 are going forward will impact on and will taint or will, in some way, affect the other parts of
34 the claim which are stayed, because the issues in this case are intrinsically interlinked. So

1 that while you are being forced to engage with those parts of the claim over which the court
2 clearly has jurisdiction by keeping alive the other parts you are, in effect, making the
3 defendants engage with the claim as a whole, you are not sorting out the position, killing
4 those parts of the claim over which the court does not have jurisdiction then cleanly
5 proceedings.
6 THE CHAIRMAN: I can quite understand the case management difficulties, I am sure Mr.
7 Hoskins could wax lyrical on those ----
8 MR. HOSKINS: I already have! (Laughter)
9 THE CHAIRMAN: -- in respect of the situation that I am hypothesising, I quite see that, and let
10 us take them as read. What I am interested in at the moment is the case where, let us
11 suppose, by some miracle there is actually no case management difficulty in dealing with
12 my Article 5(3) points. Whether there is actually a pure Article 24 problem in saying:
13 "Okay, we can deal with these 5(3) points because no one argued about jurisdiction, but
14 there is a problem with the Article 5(1) point in that it is not clear either way; maybe it
15 needs to go to the Court of Appeal or the Supreme Court to resolve whatever the
16 contentious issue is, but let us suppose it is very complicated. Are you saying in those
17 circumstances, assuming no case management problems, there is still a pure Article 24
18 problem with regard to jurisdiction.
19 MISS SMITH: We do say that, and we make three points on that, I will summarise them and
20 then if I can develop them. First, we agree with the claimants that the question of whether a
21 defendant has entered an appearance or submitted to the jurisdiction is a matter to be
22 determined by national procedural law. Secondly, we say that although it is English law
23 which determines if a defendant has submitted to the jurisdiction it is the Brussels
24 Regulation which determine the consequences, and Article 24 leaves no room for a partial
25 submission to the jurisdiction, and I will come back to the terms of Article 24 to make that
26 good. Under Article 24 if a defendant has entered an appearance it has submitted to the
27 jurisdiction. The only exception to that rule is when the appearance is limited to one to
28 challenge jurisdiction. There is nothing to suggest you can in some way partially submit to
29 jurisdiction.
30 Thirdly, we say, as a matter of practicality in this case it is not practically possible to
31 respond to a part of this claim without, in effect, entering an appearance in the proceedings
32 generally and thereby submitting to the jurisdiction because you cannot clearly divide the
33 claims for damages suffered in the UK and those suffered in other Member States as a result
34 of the cartel.

1 The first point is national procedural law. I have already made the point that at least by
2 analogy one should look at the process under Rule 11 of the CPR Rules, which makes it
3 absolutely clear that the issue of jurisdiction should be determined before any other steps
4 are taken in the proceedings. Sir, you might find it useful to have Part 11 open in front of
5 you, we have copies of it if people have not all brought their White Books along. The
6 procedure under Part 11 you will be familiar with. The defendant files the first
7 acknowledgement of service saying that it will dispute the jurisdiction and makes an
8 application on the back of that under Part 11 to dispute jurisdiction. The court considers
9 that application. If the court decides it does not have jurisdiction it makes a declaration
10 under Rule 11.6. If it decides it does it declines to make a declaration, but what is important
11 is that the effect of that determination by the court is that the original acknowledgment of
12 service ceases to have effect and the defendant is required to file another acknowledgement
13 of service under Rule 11.7, and the court makes jurisdictions on the back of that. It is quite
14 explicit, Rule 11.8 that it is that new acknowledgment of service which constitutes
15 submission to the jurisdiction.
16 So if we have a case where you go in front of the court and there is an argument about
17 different bases of jurisdiction and the court decides I have jurisdiction under 5(3) I do not
18 have jurisdiction under 6(1) and makes the declaration, saying "We have jurisdiction under
19 these Parts but not the other Parts", makes a declaration, the Parts over which the court
20 does not have jurisdiction fall away, and the defendant enters a new acknowledgement of
21 service and is only submitting to jurisdiction on those parts where the court is determined it
22 has jurisdiction.
23 The national procedure clearly envisages that you should not be required to submit to
24 jurisdiction until those issues have been resolved.
25 THE CHAIRMAN: That is quite right, Miss Smith, so far as national procedure in the High
26 Court is concerned and I am anticipating a point I suspect Mr. Turner would make in reply,
27 how far ought we to be drawing analogies with Part 11, when the procedure in the CAT is
28 rather different. If I remember correctly when one is serving out and one is saying one does
29 not need permission to serve out, one serves a form N103, which lists and certifies the
30 grounds and jurisdictions so they fall within certain grounds of the Brussels' Regulation.
31 So that document, it is not in the pleading, it is a separate document, that document is
32 served on the defendant so they know the jurisdictional base on which the claim is made
33 and served out on. That, of course, does not happen here. What happened here was that

1 there was a claim filed and the President made an order authorising service out which you,
2 quite rightly and properly at some point are going to be seeking to challenge.
3 Is the analogy not a rather dangerous one?
4 MISS SMITH: I am not sure they are in the bundles, but I think in the acknowledgement of
5 service to be filed in the CAT, in this Tribunal, that envisages, and I think has a box to tick,
6 as to whether or not jurisdiction is to be challenged, and the defendants are under an
7 obligation to make an application to make good that tick in the box within a certain period
8 of time. In fact, Mr. Turner mentioned the fact that they were objecting, I think, to SGL's
9 application because they say the jurisdiction application was not made in good time. So
10 even in the CAT the procedure envisages jurisdiction being dealt with first. So we say that it
11 is an apt analogy to look at Rule 11.
12 Then the second point, which is looking at Article 24, there are not cases, or no cases I have
13 been able to find that address this issue of whether you can in some way partially submit to
14 the jurisdiction or partially enter an appearance, or enter an appearance only to part of a
15 claim. What is important, if I can take you back to Article 24, which is in bundle 2, tab 90,
16 is the structure of the Regulation. As Mr. Turner said, the starting point is Article 2, which
17 is that a defendant is to be sued in the State in which they are domiciled, and every
18 exception that follows that gives special jurisdiction under s.3 and we say the provisions of
19 Article 24 by which parties may consent to have jurisdiction vested in effect in a court
20 which does not otherwise have jurisdiction. It is quite clear from the case law, and I will
21 come back to these cases if necessary, that those exceptions to the rule set out in Article 2
22 have to be strictly and narrowly construed. Article 24 on its face says that:
23 "Apart from jurisdiction derived from other provisions of this Regulation, a
24 Court of a Member State before which a defendant enters an appearance shall
25 have jurisdiction. This rule shall not apply where appearance was entered to
26 contest the jurisdiction, or where another court has exclusive jurisdiction by
27 virtue of Article 22."
28 Originally, as I understood it, in their application the claimants argued that in some way
29 those opening words before the comma of Article 24 envisaged partial submission to the
30 jurisdiction, and they said that was common sense. It appears that that has now been
31 dropped, that argument. It does not appear in their written response and it did not appear in
32 Mr. Turner's oral submissions. We say that those opening words clearly just mean that if a
33 court does not have jurisdiction under any of the other provisions of the Regulation, Article
34 2, Article 5, Article 6, it may nevertheless have jurisdiction under Article 24 when a party

enters an appearance and they consent, in effect, to lose the right to challenge the court's jurisdiction.

However, in Article 24, the only qualification to the Rule that a party enters an appearance is in the second sentence, where the Rule that once you have entered an appearance you have submitted to the jurisdiction, the only step that a defendant can take, we say, in proceedings as a result of which it will not be held to have entered an appearance is where it is taking steps solely to contest the jurisdiction. Otherwise, if a defendant takes steps in defending a case and enters an appearance then the court has jurisdiction. Sir, we say that is supported by the German language text of the Regulation, which it may be is most easily dealt with at para.6.7 of our written submissions, tab 4.

THE CHAIRMAN: It is also in tab 91, is it not?

MISS SMITH: It is. Paragraph 6.7 also sets out and makes the submissions on Article 24. I am afraid my German is not brilliant, but I am taking it on instructions that the text of the German language text, by referring to "*das Verfahren*", talks about the contemplated appearance relating to the proceedings generally. There is nothing to suggest that a defendant can choose to enter an appearance only as regards certain aspects of proceedings and not others. It makes no sense. If a defendant takes steps as regards even only part of the proceedings it will still have signified in general terms its consent to the hearing of the case by the particular court, and that is the *Spitzley* case that Mr. Turner referred which is, for your note, at tab 81 of the second bundle.

If a party engages with the merits of the case it has consented to the court before which it is engaging with those merits dealing with the case rather than some other court. It has entered an appearance.

That is our argument. None of the cases cited by the claimants in the response suggest, or even actually address, the question of whether a defendant, by having taken steps as regards part only of the proceedings, can be said to have entered an appearance as regards that part of the proceedings. We say that goes against the language of Regulation.

We also say, importantly, it goes against the purpose of the Regulation which is to ensure clear allocation of jurisdiction and the principle of legal certainty. In recital (11) to the Regulation on the second page, if I could refer you to that, it says that the Rules of jurisdiction must be highly predictable. We say what is predictable is what is set out on the face of Article 24, if a defendant enters an appearance in a case for any reason other than to contest that jurisdiction then it has submitted to the jurisdiction. The claimants' position is wholly contrary to the principle of legal certainty and predictability. How do you submit

1 only to part of a case? Say you take some step in a case other than putting in a defence, for
2 example, by applying for disclosure? Does the court then have to carry out some exercise
3 to determine and look at what part of the claim that disclosure relates to in order to
4 determine which part of the claim you have submitted to the jurisdiction on and which not?
5 That, we say, flies in the face of the certainty that these Regulations are designed to create.
6 We say that is borne out by looking at, which is my third point, what we are being asked to
7 do in the present case. We say there is no clear division on the pleadings between the
8 claims for damages suffered in the UK and claims suffered outside the UK.
9 THE CHAIRMAN: Just pausing there, you said you had done a comprehensive search, and
10 indeed I have looked myself to see if there is any authority on this. Certainly, as a matter of
11 English authority, I have found nothing. Has anyone done a trawl through what other courts
12 in other Member States are doing?
13 MISS SMITH: I cannot say, no, that I have done a trawl through other Member States.
14 Mr. Turner referred to some practice of the Spanish employment court. I can say nothing
15 about that. I think, in any event, that point went to the question of ----
16 THE CHAIRMAN: That went to when jurisdiction is determined in the course of proceedings.
17 MISS SMITH: Yes, when jurisdiction is determined. It is clear that there are different ways in
18 which the national courts deal with that. In *Elefanten Schuh* it was in a jurisdiction where a
19 defendant was required by the national procedural rules to enter a substantive defence at the
20 same time as contesting jurisdiction. The court held that in those circumstances where that
21 was a requirement in the national procedural rules just the fact that you put in that defence
22 should not say you have submitted to the jurisdiction. It is a slightly different point than the
23 one we are making, which is whether, as a matter of law under Article 24, one can partially
24 submit to the jurisdiction or not.
25 THE CHAIRMAN: You say it is a binary choice - either you submit or you do not.
26 MISS SMITH: Yes, and the only way that you can engage in any way with proceedings before
27 the court without submitting on the face of Article 24 is just by contesting the jurisdiction.
28 Sir, you asked the claimants whether they were prepared to re-draft their particulars, in
29 effect to make it clear what related to the UK claimants and what did not. We would make
30 the point that what you are being asked, sir, is whether there is jurisdiction over the claim
31 that was served on the defendants out of the jurisdiction. You are being asked whether you
32 have jurisdiction over the claim served on Mersen in France, not some other claim. No
33 application has been made to amend the particulars and from Mr. Turner was saying I am
34 not sure he even accepts that it would be necessary to amend the particulars. He says we

1 can proceed on the basis of these particulars, we just make it clear in submissions to the
2 court that all we are really concerned about is the UK claims.
3 THE CHAIRMAN: He does not want to amend out his claims pending before the Supreme
4 Court.
5 MISS SMITH: Sir, of course not, he wants to keep those claims live, and that is where we say the
6 problem arises.
7 Can we just look very quickly at the particulars before the lunch break. They are at tab 6.
8 THE CHAIRMAN: Can I look at the ones at tab 6(c), the draft ones?
9 MISS SMITH: You can, sir, but we would also make the point that there has been no order.
10 THE CHAIRMAN: I am happy to look at whichever ones you wish.
11 MISS SMITH: We also make the point that again we are concerned here with the claim as served
12 on the defendants.
13 THE CHAIRMAN: I will look at tab 6.
14 MISS SMITH: This is the claim that was served out of the jurisdiction. The points are the same.
15 Just flicking through, sir, para.1, the claim is pleaded generally. It is a claim for loss and
16 damage suffered by the claimants, all of them, as a result of the cartel.
17 Paragraph 48 on p.16, the description of the cartel, it is different types of price fixing and
18 other behaviour, it happened generally across the EU and EEA. There is no distinction was
19 to what was done as regards products sold in the UK or elsewhere.
20 Paragraph 52, the products again are pleaded in general terms.
21 Paragraph 58 relies on the Commission's findings that cartel arrangements were
22 implemented, and that anti-competitive effects took place in order to establish causation and
23 quantum. This pleading is entirely general, as are the Decision paragraphs that are relied
24 on, 244 to 247. They include the UK, but much more than that, once one pleads to this,
25 how does one say, "I am only pleading to the bits that relate to the UK and not to the
26 general findings here"?
27 Staying with the further averments in para.60, in para.65 the acts of the defendants as set
28 out in the Decision, all of them are said to be breaches of statutory duty, not just those that
29 gave rise to loss in the UK. Again, how is one expected to plead to that averment simply as
30 regards the loss that arises in the UK.
31 Paragraphs 67 to 72 on causation are also wholly general in nature. What you are doing is
32 you are asking the defendants to plead to the claim generally, but then at the end to say it is
33 only really about the UK claims. They go to the entirety of the claim.

1 That is the pleading. The next stage that the claimants want the defendants to engage in is
2 disclosure applications. How can those be addressed without engaging in the proceedings
3 generally? The claimants make it absolutely clear that they will seek from the other
4 defendants any of Morgan's documents which are on the Commission's file and which the
5 other defendants have in their control, and, as Mr. Hoskins said, there will inevitably be
6 arguments about the status of Morgan's leniency documents. By engaging in those general
7 issues we are engaging with the case generally, not just those UK claims.
8 Sir, there is a real risk, and it is an objective test under Article 24, that by taking the steps
9 suggested by the claimants the defendants will be held to have engaged sufficiently with the
10 case generally to have submitted to the jurisdiction. Certainly they will have taken steps
11 over and above contesting the jurisdiction which we say are the only steps that can be taken
12 under Article 24 without entering an appearance.
13 The reality of the matter is that the UK claimants, as Mr. Hoskins said on a slightly different
14 point, could have chosen to bring separate proceedings for the UK damages suffered only in
15 the UK but they chose not to do so, possibly for good reasons. They chose to join with their
16 German parent companies and other companies from across the EU to make a claim for all
17 damages and to face jurisdiction for that claim on the presence of the Anchor defendant,
18 Morgan.
19 Sir, I have a couple of points to tie up on 24. Do you want me to address those now or after
20 the break?
21 THE CHAIRMAN: No, I think we will rise now and resume at two o'clock.
22 (<u>Adjourned for a short time</u>)
23 THE CHAIRMAN: Miss Smith.
24 MISS SMITH: Thank you, sir, members of the Tribunal. I was just finishing on the Article 24
25 point and I took the opportunity over lunch to look at the cases that you handed down this
26 morning. I just make the following brief comments on those, if I may.
27 The *Kleinwort Benson* case, you referred to p.649 of that judgment, and there obviously the
28 House of Lords address the *Kalfelis* case at the top of p.649. Just above the heading, "The
29 application of the principles in the present case", the House of Lords sets out the two points
30 that the Court of Justice held in *Kalfelis*, which we say pretty much simply reproduces what
31 is in the European Court judgment: that is that, first of all, Article 5(3) is an independent
32 concept not related to contract under Article 5(1) and the point that we have been
33 concentrating on, the second point, a court which has jurisdiction under Article 5(3) over an
34 action in so far as it is based in tort or *delict* does not have jurisdiction over that action in so

1 far as it is not based, and the court held and stressed that the special jurisdictions in
2 Articles 5 and 6 must be interpreted restrictively; and further stressed (and this is the
3 para.20 that I emphasised) that:

4 "While disadvantages may arise from different aspects of the same dispute being
5 adjudicated upon by different courts, the plaintiff is always entitled to bring his
6 action in its entirety before the courts of the defendants' domicile".

7 So you fall back on Article 2.

8 THE CHAIRMAN: Yes. So there is one way of grouping everything together, which is to use
9 Article 2. I suppose the point which, as you rightly say, is not addressed here, is what one
10 does when one has multiple jurisdictions which are related but which, according to the logic
11 for *Kalfelis*, are also brought in different courts which happen in a case one had erroneous
12 …

13 MISS SMITH: Yes.

14 THE CHAIRMAN: Does that mean everything holds off until you decide that?

15 MISS SMITH: Yes.

16 THE CHAIRMAN: Or is there some *tertium quid*?

17 MISS SMITH: Yes. As we say, sir, it does not directly address our point. But we say it is
18 consistent that one needs to determine which court has jurisdiction for which aspects of the
19 case before one descends to dealing with the merits of the case because the Court of Justice
20 obviously envisaged those aspects of the case in that case which were not covered by
21 Article — jurisdiction was not given to the court under Article 5(3) could be litigated in
22 other member states. But there was definitely no consideration of the case here that you
23 determine jurisdiction on certain aspects, stay determining jurisdiction on others, but keep
24 those latter aspects live and stayed. And *Domicrest*, sir, I do not think takes matters that
25 much further, it is to the same effect.

26 Now, you have heard our points on submitting to the jurisdiction under Article 24. The
27 final point made by the claimants is in a response at para.66 of their response document,
28 that the Tribunal can make a ruling clarifying that any steps taken by the defendants do not
29 constitute an entry of appearance or a submission to the jurisdiction. Well, sir, that may
30 sound superficially attractive but, with respect, we say that is no answer to the problem.
31 The Brussels Regulation contains mandatory rules of European law to be applied
32 objectively across the European Union by courts of all different member states. If, as a
33 matter of European law judged objectively under Article 24, the steps to be taken by the

1 defendants do constitute entering appearance for the purposes of Article 24, anything, in our
2 submission, that the Tribunal may declare in a ruling or an order will not change that.
3 It is also notable that Mr. Turner today stressed on a number of occasions that he is only
4 speaking for the UK claimants. He is quite adamant that he is not tying the hands of the
5 foreign claimants. This leaves open the possibility at the very least of them arguing that
6 there was objectively submission to the jurisdiction. But, sir, that takes us back to the point
7 that in our submission there is no clear European or UK authority addressing this particular
8 situation facing the Tribunal whether a defendant can partially submit to the jurisdiction
9 under Article 24, and this means that we face substantial risk if this stay is lifted which
10 outweighs any prejudice caused to the claimants, the UK claimants, in our submission, by
11 waiting those few months for the judgment of the Supreme Court, and waiting so that all
12 jurisdiction challenges can be considered together, which is what we say the United
13 Kingdom procedure envisages that they should be.
14 It also means, however, sir, that if this Tribunal decides that as a matter of Article 24 what
15 the claimants suggest would not entail that risk, that decision is something which my clients
16 may wish to take further. It does involve issues of law which are not clear, on which there
17 is no clear authority, and obviously if we do decide to take that further, any benefits to the
18 claimants would be lost in any event. But, sir, with respect, that is exactly the sort of
19 problem which is created by seeking to litigate in this piecemeal fashion. Satellite litigation
20 spins out of control. As we have already said, the proper course is that all jurisdiction
21 challenges should be considered together after the position of Morgan has been made clear
22 by the Supreme Court.
23 Finally, then, sir, on Article 5(3) as we have already indicated, we do not accept that the
24 Tribunal has jurisdiction to hear the claims by the UK claimants under Article 5(3) and
25 I would like to take you first, if I can, back to the evidence put in by the claimants by
26 Mr. Gold, which is at the first tab of bundle 1, starting at para.25.
27 Sir, this evidence does not show what Mr. Turner suggested. It does not show that the
28 cartelists, that is the addressees of the Commission decision who are the defendants in this
29 case, it does not show that they sold the cartel goods in the UK and as he put it, “That is the
30 end of it”. It does not show that at all. If you look at para.25, Mr. Gold tells us towards the
31 end of that paragraph that:
32 Actually, during the cartel period and towards the end of the late 1990s purchases of the
33 product, that is the cartel product, were sourced by the UK claimant almost exclusively
34 through Railpart — a completely independent entity — almost exclusively bought from

1 them. Those products (para.25) he says were manufactured by Morganite and Le Carbone,
2 but were sold by we do not know who — Morganite, Carbone, maybe one of their
3 subsidiaries, to Railpart and then to the UK claimants.
4 We are told in para.27, the last sentence, that Morganite was the principal manufacturer of
5 those products. And then we are told in paras.28-29 at 29, that:
6 "DB Schenker UK [one of the UK claimants] also began purchasing limited
7 volumes of Products directly from Morganite and Le Carbone UK in 1998".
8 Now, Le Carbone UK is the UK subsidiary or a UK subsidiary of the fifth defendant. It is
9 not the fifth defendant. As you can see, Le Carbone UK is defined in para.28.
10 THE CHAIRMAN: Yes.
11 MISS SMITH: It is not the fifth defendant. It is a subsidiary of the fifth defendant. Now, those
12 limited volumes that are purchased from a Le Carbone subsidiary are supposed to be proven
13 by PG1, pages 1-8. I am afraid I have looked through PG1 pages 1-8 and I cannot
14 determine, there are certain products which have certain codes, but it is not clear to me at
15 least which of those products if any were purchased from Le Carbone UK, the UK
16 subsidiary or which were purchased from Morganite or which, if any, were purchased from
17 Railpart. But what we do know from Mr. Gold's statement is these things almost
18 exclusively the UK claimants purchased through Railpart with a small, the limited volumes
19 of products that they did not purchase from Railpart in 1998, they purchased some from a
20 UK subsidiary of the fifth defendant. So, it is absolutely not the case, as Mr. Turner
21 suggested, that the purchases were from the cartelists and that is the end of it. So, that is the
22 evidence, and we say that those indirect purchases are not enough to found jurisdiction
23 under Article 5(3). And we say that on the basis of the court's judgment in *Dumez*, if I can
24 ask you to go back to that. It is at tab.83 of the second volume, and you have been taken by
25 Mr. Turner to para.3 which sets out the facts. And then you were taken by Mr. Turner to
26 para.13, the last sentence, which I would also stress:
27 "The harm alleged by the parent companies ... is merely the indirect consequence
28 of the financial losses initially suffered by their subsidiaries."
29 Paragraph 14:
30 "… the damage alleged is no more than the indirect consequence of the harm
31 initially suffered by other legal persons who were the direct victims of damage
32 which occurred at a place different from that where the indirect victim
33 subsequently suffered harm."

1 Those are the arguments and the court considers them in paras. 20 through to 22, if I could
2 ask you to look at para. 20, it follows, the court says:

3 "the expression 'place where the harmful event occurred' contained in Article 5(3)
4 ... may refer to the place where the damage occurred, the latter concept can be
5 understood only as indicating a place where the event giving rise to the damage,
6 and entailing ... liability, directly produced its harmful effects upon the person who
7 is the immediate victim of that event."

8 Then at 21:

9 "Moreover, whilst the place where the initial damage manifested itself is usually
10 closely related to the other components of the liability, in most cases the domicile
11 of the indirect victim is not so related."

12 So there is a clear distinction between the direct immediate victim and the indirect victim
13 and jurisdiction is based on the events giving rise to the damage to the immediate and direct
14 victim not the direct victim."

15 Then in 22:

16 "… the rule on jurisdiction laid down in Article 5(3) ... cannot be interpreted as
17 permitting a plaintiff pleading damage which he claims to be the consequence of
18 the harm suffered by other persons who were direct victims of the harmful act to
19 bring proceedings against the perpetrator of that act in the courts of the place in
20 which he himself ascertained the damage to his assets."

21 Then the operative part of the Decision is set out on the following page.

22 "The rule on jurisdiction laid down in Article 5(3), ... cannot be interpreted as
23 permitting a plaintiff pleading damage which he claims to be the consequence of
24 the harm suffered by [others] who were direct victims of the harmful act to bring
25 proceedings against the perpetrator ... in the courts of the place where he himself
26 ascertained the damage to his assets."

27 We say that that case is absolutely on all fours with the evidence in front of the Tribunal in
28 this case. The vast majority of purchases of the products on the back of which the UK
29 claimants claim damages we are told are purchases of products by the UK claimants almost
30 exclusively from Railpart. Railpart is the direct victim, the claimants are indirect victims.
31 The claimants appear to seek to distinguish *Dumez* in para. 53 of their response, on the basis
32 that the losses suffered by the UK claimants are not suffered in "consequence of the harm
33 suffered by the direct victim, Railpart". They then go on to say Railpart simply passed on
34 any cartel overcharge to the UK claimants.

1 First, on that point, there is absolutely no evidence of pass-on, nothing from Railpart, no
2 mention of that at all in Mr. Gold's evidence, it is simply unsupported assertion and should
3 not be taken at face value.
4 In any event, even if there was pass-on that is a classic case of damage being suffered by the
5 direct victim, Railpart who pays inflated cartel prices, and then charges prices on to the
6 indirect victims, the UK claimants. We say *Dumez* in that case applies, and there is no
7 jurisdictionally significant damage on which to found a claim by the UK claimants.
8 The UK claimants response to that point is that Railpart itself is based in the UK, so both
9 the direct and the indirect victims are based in the UK so the Tribunal can take jurisdiction
10 under Article 5(3).
11 But, sir, the operative part of *Dumez*, set out by the ECJ, says that the claim must be based
12 on jurisdictionally significant damage and, as brought by this indirect victim it is not. It is
13 not enough that direct harm was caused to someone in the UK, it must be the harm that is
14 suffered by the claimant and the harm on which the claimant relies to establish jurisdiction.
15 There must be direct harm to the claimant which was within the jurisdiction to justify the
16 use of Article 5(3).
17 All we have left now are the very small unquantified damages that are suffered as a result of
18 some purchases from Le Carbone UK, the UK subsidiary. We make two points on that.
19 First, that damage, we say, is also indirect. It is caused by the acts of an undertaking which
20 is not an addressee of the Commission's Decision and which, after this Tribunal's decision
21 in the *Emerson* case could not be sued in the Tribunal. It is not clear that such damage was
22 caused directly by sales by the defendants. Le Carbone UK and the fifth defendant are not
23 the same undertaking for the purposes of the cartel and not the same undertaking for the
24 purposes of the claim. That is clearly established by the Tribunal's Judgment in *Emerson*.
25 In any event, the second point, the claimants' application overall, what is the very heart of
26 this application as to why this Tribunal should lift the stay is an argument that the UK
27 claimants' claims are going to proceed against the defendants in any event; you are going to
28 have to hear this at some point so hear it now. But if all we are left with is jurisdiction over
29 a very small number of purchases made from the Carbone UK subsidiary it is not at all clear
30 that they will proceed in any event in this Tribunal.
31 It is also in this regard very important that the claimants have indicated in correspondence
32 that if they cannot pursue their entire claim in the UK they will pursue it in Germany, and
33 the correspondence probably most easily referred to in our submissions, which is at tab 4,
34 paras. 7.4 to 7.9. I am not going to read it out, I will leave you, sir, and your colleagues to

1 read it. But in correspondence referred to here, I think it is in the bundles, I can get the
2 references if necessary, the claimants have indicated that they will pursue the claims in
3 Germany if necessary and have, in fact, entered into standstill agreements with certain
4 defendants. Those standstill agreements, I understand, were negotiated after there had been
5 correspondence on the Article 5(3) issues back in 2011. So this is something, we say, the
6 Tribunal can and should take into account in the balancing exercise it is carrying out on the
7 current application.
8 In conclusion, under Article 5(3), the Article 5(3) issues in this case are not as clear as the
9 claimants would like you to believe they are. They too raise difficult questions of law, and
10 the UK claimants' position on them is developing and changing. We have assertions made
11 in the response submissions about pass-on that are not supported at all in the previous
12 evidence that was lodged. In those circumstances we say it is both sensible and necessary
13 to address all the jurisdiction issues together after the Morgan appeal has been completed
14 when the position should become clear.
15 Sir, unless I can help you any further, those are our submissions.
16 THE CHAIRMAN: Yes, thank you. Just one short point. Assume that we are with you on the
17 one way or the other viewing of Article 24, in other words, that submission is an all or
18 nothing thing, I quite take your point that in that case a ruling from the Tribunal that
19 someone is not submitting is not going to help at all, but could the Tribunal use its case
20 management powers effectively to split the proceedings and hive off into, as it were, a
21 separate action the UK claims?
22 MISS SMITH: Sir, we have considered that and there are a number of points to make on that.
23 First, the point I have already made, that what you are considering when you are
24 considering jurisdiction is whether the claim as served out of the jurisdiction founds
25 jurisdiction. The claim that was served was that served in the original claim form.
26 The second point is that I suppose it is possible, as a matter of theory, for the Tribunal to
27 split the claims but what you would then be doing is effectively saying that there were two
28 claims that had been started before this Tribunal, which is not the case. The claimants could
29 have issued two claims. They could have run the case in that way. To now seek to split the
30 claims without requiring them to issue new claims we say is artificial, is not open to the
31 Tribunal, and they made a choice which the Tribunal has to now consider and that is the
32 position which is in front of the Tribunal. The claimants chose to litigate this by way of one
33 claim and splitting the claims would simply, we say, add further complication if Morgan
34 loses its appeal, we then have to come back and how do we deal with the Morgan aspects of

1 the claims? What are the claims that Morgan then faces, and how are they to be managed?
2 We end up creating a monster in a way, sir.
3 We say that the Tribunal is to consider the claim in front of it, as lodged by the claimants
4 against the defendants and whether or not that founds jurisdiction. We say that it does not.
5 THE CHAIRMAN: Thank you very much, Miss Smith. Miss Dietzel?
6 MISS DIETZEL: Sir, I will seek to be brief and not to repeat too much of what has been said
7 already today. Before I start, of course, any submissions I make are, again, without
8 prejudice to our challenge on jurisdiction.
9 As we see it, there are essentially three main issues before you today. First, there is the
10 relative prejudice on each side flowing from the continuation of the stay or the partial lifting
11 of the stay. Secondly, there are the jurisdictional issues and risks, the Article 24 point.
12 Thirdly, we say there is the question whether separating the claim into the two tracks is
13 practically possible, and can achieve what the claimants describe in order to justify their
14 current application for the partial lifting.
15 A lot has already been said on the first two issues today, and I will mention our position on
16 these only briefly. I am then going to focus my submissions on the third issue and on that
17 the Schunk and Hoffmann defendants consider that it would be practically impossible for
18 the Tribunal to move forward in the manner the claimants suggest whilst there is this
19 uncertainty on the Morgan position, and any partial lifting of the current stay will therefore
20 serve no useful purpose.
21 Turning to the first issue, which is the issue of relative prejudice. The claimants proposed
22 approach would be wasteful and duplicative, we say, causing prejudice to the foreign
23 defendants, which far outweighs any prejudice to the claimants as a result of not partially
24 lifting the stay. I do not have much to add to our written submissions on this, nor to the
25 submissions of Mr. Hoskins, with which we agree. However, I do want to emphasise the
26 key factual background, the three key aspects that bring us to where we are today. First,
27 that the claimants brought their foreign claims together with their UK claim in one claim in
28 these proceedings here in the UK, and I think it touches on many of your questions,
29 Chairman. The reason for this was presumably that they considered it advantageous to
30 them to bring these as one consolidated claim here and to make use of the English
31 jurisdiction in this way, including as relates to the foreign claims. The foreign claims make
32 up well over 90 per cent of this claim. They chose not to use Article 2 and bring the claims
33 where they could have easily done that in one entire set, but they chose to do it here because
34 they see advantages with that.

1 The second key factual background point is that the claim has been stayed since April 2011
2 as a result of the various defendants' jurisdictional applications and then in particular the
3 Morgan application which we now have pending. So in all this period the claimants have
4 previously been in favour of these stays and others have already referred you to the relevant
5 correspondence, which is long-standing, on this issue.
6 The third key factual point is that the claimants now seek to split this claim and lift the stay
7 in respect of the UK claim in order to move forward at least with part of the claim pending
8 the resolution of Morgan. However, the claimants are not prepared to amend their claim to
9 drop the foreign claims. That is of course open to them. Instead they want to have it both
10 ways. They want to keep the option open for now thereby creating this two-track process,
11 provisionally having their cake and eating it.
12 We have set out in our submissions what we mean by this two-track process, and just very
13 briefly I think I will highlight the key features as I see them. The process, we are on track
14 one, the DB UK claims only, and to which only the DB UK claimants and the foreign
15 claimants are party are engaged. Then separately later, and only if the first defendant,
16 Morgan, is unsuccessful before the Supreme Court, there is the track two, to which all
17 claimants and all defendants will be parties, and which would repeat the steps already taken
18 under track one, but this time in respect of the entire claim. We have talked already a lot
19 about the difficulties and inefficiencies with that, which I will not repeat.
20 The Schunk and Hoffmann defendants agree with Mr. Hoskins' submissions on this. We
21 think it would be very wasteful and duplicative. It causes prejudice to us which would far
22 outweigh any prejudice which has not been clearly identified to the claimants that results
23 from not partially lifting the stay.
24 That is all we need to say on the prejudice point.
25 Moving briefly to the second issue, the question of the jurisdictional risk, the Schunk and
26 Hoffmann defendants' position is clear, that the claimants' proposed approach would pose a
27 jurisdictional risk to us as a result of the operation of Article 24. We consider the
28 Tribunal's reasoning from last September remains fully valid on that, namely that requiring
29 the foreign defendants to take any steps pending the outcome of the Supreme Court
30 proceedings carries the risk of prejudicing any challenge. That is what we refer to as
31 "carrying this risk". We do not have to decide on this today. It is a risk that we saw in
32 September and we still see now that is unaffected or unchanged. Again, we have set that
33 fully in our written submissions, and we agree with the submissions made by Miss Smith

1 today, including on the point about the risk of further satellite litigation that can result out of
2 this clearly legal point on Article 24.
3 THE CHAIRMAN: I think when the second stay was imposed, and of course Mr. Turner's
4 clients were opposing the stay there, the risk that was being referred to was the risk of the
5 Supreme Court's decision going one way and a step in the proceedings going the other
6 before that decision, thus obliging parties to make a submission. It was not in relation to the
7 narrow jurisdictional point that is being made now. I do not think that was the Tribunal's
8 thinking in the second stay. The 5(3) point, for better or worse, was not before us then.
9 MISS DIETZEL: Sir, I am grateful for that. Here I think we have the difficulty that any step, as
10 we see it, cannot easily be separated out of a step that only relates to 5(3), or a step that
11 could prevent us to submitting ourselves to the jurisdiction on Article 24. We do not see an
12 easy way to distinguish between the one risk or the other.
13 In addition to Miss Smith's argument, I would like to add one further short point on Article
14 5(3) that relates specifically to the Schunk and Hoffmann defendants and our earlier
15 challenge to the Tribunal's jurisdiction. We put in evidence at the time of our earlier
16 challenge in April 2011, 7th April, that we have made no sales to the UK defendants. The
17 Schunk and Hoffmann have made no sales in the UK. Indeed, in our application we
18 challenged jurisdiction on a number of grounds, including by reference to Article 5(3). So
19 this is back on 7th April 2011, contrary to anything Mr. Turner suggested this morning.
20 As we have heard, Article 5(3) founds jurisdiction only in respect of direct sales made in the
21 UK. Neither the original claim from 15th December 2010, nor the amended claim form,
22 which was filed after our jurisdictional challenge on 19th April 2011, nor in fact the draft r
23 e-amended claim form circulated last August, which is now also in the bundle, addressed
24 this lack of pleaded factual support for jurisdiction pursuant to Article 5(3).
25 The claimants now say they have provided evidence in the current application. Again, this
26 does not relate to the Schunk and Hoffmann defendants, and cannot be properly understood
27 by us. Indeed, it appears to predominantly, if at all, relate to Morgan, but we heard
28 Miss Smith's submissions on the lack of clarity of what purchasers are actually pleaded in
29 aid of jurisdiction here. So, firstly, the evidence is untested by Morgan, who is not party to
30 the current proceeding; and secondly, to the extent it can be tested by Miss Smith, she has
31 voiced her doubts on what that evidence actually shows.
32 We have heard this morning several times that is not incumbent upon the claimants to have
33 to plead out jurisdiction, but we say that under the CAT Rules and Rule 32(3), the claim
34 form does need to be clear as to including a statement of all relevant facts based on which a

1 claim is made, and we say that what is before us today does not come up to that standard.
2 We simply do not have the clarity we need to understand fully the nature of the claim that
3 has been made against the Schunk and Hoffmann defendants and whether such claim is
4 legitimate.
5 The claimants have tried to portray this lack of clarity as resulting from the current stay.
6 However, the contrary is the case. It results from the claimants' own making, firstly,
7 because they chose to bring the entire claim as one claim before the Tribunal, benefiting
8 from Article 6 jurisdiction, they hope. They want to have the totality of this damage heard
9 together before the Tribunal which would work in their favour, yet we do not know whether
10 they can legitimately do so, and well in excess of 90 per cent of the claim will fall away if
11 Morgan is successful in the Supreme Court. They are not suggesting to plead out the UK
12 claim separately.. Again this morning Mr. Turner resisted the suggestion that he should do
13 so. They are also not suggesting that they will drop the foreign claims and therefore we
14 have a clear claim that we know we are moving forward. Instead, they want to keep this
15 option open, this provisional moving forward, bringing the foreign claims back in if and
16 when they can.
17 Then we also face other contradictory statements from the claimants. For example, they say
18 in their application at para.16 that they wish to take the UK track to at least the close of
19 pleadings and the first CMC at which disclosure could be ordered. They also say in the
20 application that disclosure would include material emanating from the first defendant - that
21 is Morgan, who is not party to this application. Again, we heard a number of quotes from
22 the Commission Decision this morning from Mr. Turner, the vast majority of which were
23 focused on Morgan evidence, and he sought to use that to support the fact that this could
24 move him forward, but it would not without any access to the Morgan evidence.
25 It is, of course, readily apparent why the claimants wish to use this two track, because they
26 do hope to get access to documents that lie in the hands of the defendants, including
27 Morgan, even if they do not fully spell this out because it raises a whole host of further
28 issues which I will come on to.
29 So they say that unless the DB UK claims are allowed to move forward, they are unable to
30 quantify their losses. However, the vast majority of the DB UK claims are based on sale of
31 products made indirectly from Morgan, which is not subject to the current application, and
32 that is acknowledged in the witness statement of Paul Gold and I do not need to re-quote, as
33 Miss Smith already has, but clearly the principal manufacturer was Morgan.

1 So no relevant evidence relating to the Morgan sales can rightly be expected to come
2 forward during the first phase of these contemplated two track proceedings, and indeed the
3 Schunk and Hoffmann defendants will have no evidence on any sales made the DB UK
4 claimants from us, because we simply did not make these.
5 So there cannot be any suggestion that this really would materially advance us. To our
6 mind, sir, this further adds weight to this weighing up exercise that the Tribunal needs to
7 undertake in considering prejudice, but we say there is no real progress that can be expected
8 to be achieved here, and yet there is a real jurisdictional risk that would be on the foreign
9 defendants as a result of trying to move forward in a two track way.
10 That is all I think I need to say on that point.
11 Moving then to the third aspect of our submissions, which is the issue of practical
12 impossibility of moving forward. The Schunk and Hoffmann defendants consider it would
13 be practically impossible for the Tribunal to move forward in the way suggested. I will first
14 explain why you need to consider this now, why this is an issue before the Tribunal now in
15 considering the partial lifting of the stay, and then I will explain that we think this practical
16 impossibility results from the type of materials that the claimants wish to obtain further to
17 this proposed partial lifting of the stay and the special way in which those materials need to
18 be treated. Then thirdly, I will set out the reasons why in the present circumstances it will
19 be impossible for the Tribunal to exercise its functions in the way it is required to do, which
20 will lead me to conclude that there is no sense in proceeding to a partial lifting of the stay at
21 this stage.
22 Turning first to why the Tribunal has to consider these practicalities now in the context of
23 the application, the practicalities go to whether the claimants can realistically hope to
24 achieve what they say they wish to achieve with this partial lifting and, therefore, whether
25 there is any sense in this application. If they cannot achieve what they set out then we are
26 all wasting costs without countervailing benefit coming out of this. The practical
27 difficulties we see do not just relate to the defendants. It is not just about us wasting costs
28 and efforts although that will be a big part, we actually say that the Tribunal itself will not
29 be able to exercise these functions properly.
30 That brings me to the second point, which is the materials the claimants are interested in
31 and hope to get disclosure of as a result of this two track process. What the claimants wish
32 to get is materials from the European Commission's investigative file, and they have
33 repeatedly made this clear in their submissions and this morning. That file is a compilation
34 of materials gathered during the investigation by the European Commission, either pursuant

1 to a formal information request or received voluntarily, for example from leniency
2 applicants. In our case, the first defendant, Morgan, was the leniency applicant, but there
3 were also other voluntary submissions on the Commission's file from other defendants.
4 Access to the file is then granted to all the parties who are subject to the statement of
5 objections from the Commission for the limited purpose of defending themselves from the
6 allegations made in the statement of objections. So material from the Commission's file, in
7 particular that emanating from the leniency applicants or other voluntary statements, self-
8 incriminating statements, are afforded special consideration in the disclosure context.
9 Over lunch we took the opportunity to do a quick straw poll of Mr. Turner's references this
10 morning and of then 22 paragraphs we identified as cited this morning 14 referenced the
11 Morgan leniency statement in the footnote. In addition, the footnotes are full of other
12 voluntary self-incriminating submissions that are referred to from the other defendants
13 which the Commission relied on its Decision.
14 So on each of those aspects, the Tribunal will need to consider specifically whether to order
15 disclosure.
16 THE CHAIRMAN: Miss Dietzel, would this not arise either which way? Either Morgan is in the
17 proceedings if the Supreme Court goes one way, in which case I have no doubt Morgan will
18 be putting points about leniency documents not being disclosed, and obviously we would
19 hear them on that; or they are out, in which case they would no doubt also want to appear
20 in front of the Tribunal to make the points that other parties, subject to potential disclosure
21 orders by the Tribunal should not disclose them? Is it not the same question either which
22 way?
23 MISS DIETZEL: At some point the Tribunal will have to address itself to that question. There
24 are two aspects here. One is, will the Tribunal have to do it twice? Will, the first time
25 round, the Tribunal have access to what it needs to have access to in order to be able to
26 order that disclosure? I will come on to what I mean by that. The way these materials are
27 treated has been the subject of a number of cases over the last year or so. Again they have
28 already been mentioned. The key European Court of Justice cases are *Pfleiderer* and
29 *Donau Chemie*, and they are both in the bundle but I do not think I need to take you to
30 them, they are tab 88 and 89, and then they were applied, or *Pfleiderer* was applied by
31 Mr. Justice Roth in *National Grid*. The principles that come out of these cases is that before
32 the Tribunal can order disclosure of the Commission file documents it is required to
33 undertake a weighing up exercise on a case by case basis according to national law, and it
34 has to weigh up the respective interests on the one hand of disclosure of the information for

the claimants, and on the other hand the interests in favour of protecting information provided voluntarily, for example, by the leniency applicant to the Commission and not undermining the Commission's leniency regime. And that weighing up exercise has to take account of all relevant factors, for example, Mr. Justice Roth in *The National Grid* considered:

"The proportionality of disclosure has to be considered in terms of

(a) whether the information is available from other sources; and

(b) the relevance of the leniency material to the issues in the case".

That brings me to my answer to your question, sir. The issues in the case would not be clear to the Tribunal yet, nor whether the documents are available from other sources or the evidence at that track 1 point. So, at the track 1, the Tribunal would not have the benefit of all the pleadings because we only have the pleadings on the narrow limited UK claim, and we do not know yet the Morgan position on those and whether Morgan is in or out. And so, similarly, we only have the narrow defences which will only deal with the UK claim, and we can only expect those to be very high level for the reasons already mentioned this morning, and that the defendants that were party to the track 1 are not the key people involved in any of the commercial dealings with the claimants. So, again, it would be so limited, and we would not be able to have any over-charge analysis or anything based on that. And the Tribunal then would not have a proper understanding of all the issues before it before trying to make this balancing exercise on the disclosure applications. So, the Tribunal could simply not know whether the relevant issues can be addressed in another way; whether they are so important to the claim that they justify effectively the waiver of the special treatment of the leniency documents, because the whole picture simply will not have emerged yet and we do not know whether Morgan is in or out.

So, the way Mr. Justice Roth puts it, he looked at the relevance of the leniency materials to the issues in the case. But that simply would not be clear at that track 1 and therefore could not be determined yet. And Mr. Justice Roth also looked at where else this evidence might be available. Now, in our situation a lot of the evidence might simply be available for Morgan if it is indeed in the claim, which we will not know yet at that track 1 point. So, we are sort of in a loop where we are trying to make an assessment without having all the factors in place yet, and then indeed at track 2 we will be making that assessment again, but this time in the full knowledge of facts, and either Morgan is in or Morgan is out, but we know and we make the assessment based on those facts.

1 So, in our submission, sir, the Tribunal simply cannot exercise its functions properly at that
2 track 1 stage. And only once there is clarity on the position as regards the entire claim and
3 whether or not Morgan's challenge has been successful, do we have sufficient
4 understanding of the issues in dispute and the relevance of documents and evidence to those
5 issues to perform that particular function. So, in the absence of this clarity to us, no real
6 progress can be made and there is therefore no sense in this partial lifting of the stay.
7 Unless there is anything further, those are my submissions.
8 THE CHAIRMAN: No. Thank you very much, Miss Dietzel.
9 MR. HOSKINS: There is one point I think would be useful, if I am allowed to for a short,
10 I would like to raise before Mr. Turner stands up and it comes out to the question you asked
11 me this morning and then the way you phrased it to Miss Smith. I am not sure if it is being
12 contemplated that what might happen is actually a formal splitting of the claims.
13 THE CHAIRMAN: I do not think it was contemplated by Mr. Turner.
14 MR. HOSKINS: Exactly. That is why I rise to my feet now, because were it to be proposed, if it
15 were on the table, because it is not, obviously the application is not to (I do not know what
16 the phrase is) an "unjoinder", a "de-joinder", a splitting of the claims into the UK claims
17 and the non UK claims, then that is something we would strongly oppose:
18 (a) it is not in the application; but
19 (b) it would lead to clear duplication, because what we would have then is very clear
20 duplication, because in the UK claim you would have witness evidence, you would
21 have defences, pleadings, witness evidence going to the operation of the cartel
22 potentially, the sort of matters that Mr. Turner dealt with this morning is expert
23 evidence dealing with over-charge etcetera, he would have exactly the same stuff to be
24 done in the new separate claim for the non UK claimants.
25 So, actually what one would do if one split them out in that way is to actually create a
26 greater amount of duplication, and it would be inevitable if they were formally split in that
27 way. And to sort of paraphrase back the way you put the question to me this morning,
28 "What if they had started them separately?" And the answer I would say in the context of,
29 well, if they had brought the UK claim, a non-UK claim at the start, we would be here
30 applying for joinders, because clearly the most efficient way if they had brought them split
31 in those ways would be for them to be joined because of the common issues.
32 THE CHAIRMAN: Yes. I was not suggesting that it was a way of avoiding the case
33 management difficulties that you articulated this morning. I raised it as potential and

1 I confess I would stress potential route out of the possible jurisdictional difficulties out of
2 Article 24 that Miss Smith was raising. That is why I raised it. But, I do take your point.
3 MR. HOSKINS: That is why I thought it was important to rise —
4 THE CHAIRMAN: No.
5 MR. HOSKINS: — and say I understand it might work that way, but we would have problems
6 with it.
7 THE CHAIRMAN: I can understand, if I can paraphrase, your points of this morning you would
8 make "with knobs on".
9 MR. HOSKINS: Yes.
10 THE CHAIRMAN: Thank you, Mr. Hoskins. Mr. Turner.
11 MR. TURNER: I am obliged. We say there is nothing in any of these submissions you have just
12 heard, though I will go through them as systematically and efficiently as I can, beginning
13 with the case management points that Mr. Hoskins kicked off with and which were
14 subsequently picked up by a number of his colleagues. The benefits of granting this
15 application, he says there are not really any when you inspect it carefully. Well, let us take
16 them in turn. Defences are certainly going to be valuable. Those define the issues and as,
17 sir, you know when someone pleads to something responsibly where you deny something is
18 the case, you have to say why you deny it. There are a series of very detailed pleas in our
19 claim form and it is not good enough merely to put in a short form defence. Mersen and
20 SGL differed in relation to that point in their written submissions and Mersen was right.
21 Mersen was seeking to say that it would be a trouble to write a defence and therefore they
22 were saying it would need to be a comprehensive document. We say the purpose of the
23 defence is a necessary step in English legal procedure to define the issues, and it would
24 certainly be useful in its own right.
25 Moving beyond that, you have seen from our written submissions that we suggested that
26 there would then be an initial stage of disclosure, and that with minimal effort very useful
27 documentation could be produced. The purpose of me taking you through the Commission
28 decision as I did was to show you that that is particularly so in the nature of this cartel. You
29 have a European-wide conspiracy, very close knit in which lots of documents and
30 information were shared between the cartelists, looking both at the methodology for setting
31 prices and at particular prices including prices which were the object that they sought to
32 achieve and looking at specific customers and what they expected to negotiate or bid for in
33 relation to large specific customers such as the British Railways Board in the United
34 Kingdom.

1 So for all those reasons you would expect the Commission documents to contain a very
2 large quantity of important information. Would it be all that is needed to decide this case?
3 No, we are not suggesting that it would. But it would be extremely useful on the key issue
4 referred to by the European Commission in its working papers and so forth of the over-
5 charge. It is on the over-charge and applying economic techniques to try to work out the
6 extent to which customers were overcharged, that all of this information is likely to be
7 extremely valuable. It will need to be provided at some point and it will advance the sum of
8 knowledge quite materially. Quite apart from what I also said about it telling us where
9 there are gaps in our own knowledge which can then usefully be pursued. This is the
10 procedure which has been adopted in other cases, the *National Grid* case is a good model,
11 where in the first instance Commission documents were what was ordered to be provided,
12 and then the parties moved on from that by stages, in staged disclosure.
13 It is not true, therefore, that Morgan alone is likely to have the vast majority, let alone all
14 the documents relevant to the case made by the UK claimants. Such documents are likely
15 to be in the hands of all of the parties. My friend referred to parts of the recitals that I had
16 taken you to in the Decision to say "This scheme, this conspiracy, really only related to
17 indexes or bareme prices and did not touch on the actuality of prices that were charged".
18 I do not, I hope, need to take you back to the same provisions I have shown you, because
19 you will have seen masses of information about actual prices expected and sought to be
20 achieved. There is a lot on that which will be extremely useful.
21 Now, the idea that Mr. Hoskins then moved on to was that they would have to sift out, if
22 you impose this burden on them after defences, irrelevant documents so far as the UK
23 claims are concerned. He held up the spectre that they will have to take the package of
24 Commission documents and winnow out at great cost to themselves documents which bore
25 only a relation to the foreign claimants' case. But, all the documents on the operation of the
26 EEA cartel are going to be relevant in helping show the extent to which prices were inflated
27 by the uniform mechanisms of the cartel. This argument, by the way, was rehearsed in what
28 is a stronger case for the defendants than the present case in *National Grid* as well, and it
29 may be helpful just to show you how it arose there and how the judge dealt with it. If you
30 have volume 2, one of the cases on which we have relied in the bundle is the *National Grid*
31 case at tab.76. Now, that was a case also, and I am going to take you to the passage
32 beginning at para.45 under the heading, "Relevance".
33 So, there you also have another of these big European-wide cartels. The way things worked
34 in that case was that certain territories were marked out as home countries and simply

1 reserved to a limited group of suppliers, and the United Kingdom was such a country. And
2 there was an issue as to the relevance of disclosing documents about how the cartel as a
3 whole worked on a Europe-wide basis, when all one was really concerned with was the UK,
4 which was a discrete little corner.
5 You will see that being picked up with at para.45 with the Commission which had made
6 observations pointing out that the United Kingdom was there treated as a home country and
7 not included in various calculations for the cartel more generally in that case. And if you
8 drop to the bottom of that page, para.48:
9 "However, this was a world-wide cartel and the Commission found that the market
10 for gas insulated switchgear projects was at least EEA-wide. Mr. Turner appearing
11 with Mr. Beard for National Grid submitted the effect on prices in the EEA outside
12 the home countries is therefore relevant to the exercise of constructing notional
13 competitive prices that would serve as the basis for the damages claimed,
14 contented the information was relevant to ascertain how successful the cartel was
15 over the prolonged period of its operation and when it was perceived to be working
16 well, when it was perceived to be working badly. The fact that the UK market or
17 projects in the UK may not have been expressly discussed did not therefore render
18 details about the functioning of the cartel [that is the overall mechanism] irrelevant.
19 I broadly accept those submissions. The UK was clearly not excluded from the
20 cartel but on the contrary was an expressly protected market under its terms. The
21 task of seeking to determine what prices would have been in an hypothetical
22 competitive market is a difficult one. Since the relevant geographic market here
23 included at least the whole of the EEA, the operation and effectiveness of the cartel
24 outside the United Kingdom is relevant to consideration of a benchmark price or
25 prices".
26 In other words, what was being said was that even in relation to that case, a stronger case
27 than the present one where you had a reserve territory, information about how the whole
28 thing worked on a Europe-wide basis provided useful information to help you calculate the
29 degree of the overcharge.
30 Our case is a stronger one because I have shown you from the recitals that this was a close-
31 knit cartel in which they were seeking to create a single internal cartel market and
32 harmonising prices across Europe including in the UK, and applying similar techniques.
33 Therefore, the submission that they are going to have to go to great pains to sift out

1 supposedly irrelevant documents in terms of the operation and impacts of the cartel is a
2 misguided one, it will illuminate the overcharge.
3 Next, there was a suggestion by Mr. Hoskins, now echoed by Miss Dietzel, that many of the
4 documents concerned were actually prepared in the context of leniency applications for the
5 Commission. That is profoundly misconceived. Pre-existing documents, contemporaneous
6 documents are not covered by that principle at all. Pre-existing documents are always liable
7 to be disclosed in court proceedings. What the Commission is concerned to protect are the
8 leniency documents you prepare for the purpose of applying to the Commission for leniency
9 in which you make confessions, and they are concerned not to deter people from applying
10 for leniency by the concern that such documents are going to be disclosed subsequently.
11 Different rules apply to those and I have never suggested that, at least at the initial stages of
12 disclosure, we would be seeking to obtain any leniency documents. We are concerned with
13 the pre-existing documents.
14 May I say that another point that came out of my friend's reply submissions was the fallacy
15 that somehow the amount of pre-existing documentation was small or minimal, not such as
16 to be significant. On the contrary, what one sees from the footnotes in the Decision to
17 which I took you, and more generally, is that there were many pre-existing
18 contemporaneous documents at large in the Commission's investigation.
19 Mr. Williams has pointed out to me that in relation to one of the references to the Morgan
20 leniency submission, I think it was the first one, p.18 of the Decision. The leniency
21 statement by Morgan is 3,000 pages, that is para. 69 at the foot of p.18. Of those 3,000
22 pages I would hazard a reasonably informed guess that most of them – if not the vast
23 majority – are not the cover submission, they are the underlying, pre-existing documents,
24 which are precisely the area which we are seeking to investigate in this case.
25 So, standing back, the suggestions that we are not going to be achieving anything useful by
26 this application are entirely misconceived.
27 He turned then to the supposed disadvantages of refusing the application. He said first in
28 effect, and I paraphrase, that it was to some extent our fault for choosing to commence these
29 proceedings in this Tribunal at all, as opposed to going to the High Court, the implication
30 being that we knew that we were going in the slow lane by choosing the Tribunal as the
31 forum. That is not so, the Tribunal is the efficient specialist forum for hearing these
32 damages' claims. The *Emerson* case, which concerned the same cartel, the underlying
33 cartel case, was already started here. It was suggested that, had we gone to the High Court
34 we would not have been faced with a difficulty of a stay being imposed until the appeals in

1 Europe had been concluded – not so either. In the High Court that question, whether one
2 can get on with a case even while appeals are proceeding to Luxembourg against the
3 Commission's Decision, were settled by a decision of the Chancellor only in June 2009.
4 Until that time there was no reason until it had been thought through to suppose that the
5 rules in the High Court were different from the principles applied by the Tribunal.
6 Next, Mr. Hoskins said it was our fault for delaying in this application because we had been
7 aware that there was a potential point to be taken about the UK claimants and jurisdiction
8 in March 2011. Yes, and here I can be brief because the point is a short one, of course we
9 were aware of that point, but the preferred course was to keep the case together as a whole,
10 largely because it was reasonably expected that the time limit point, which has now gone up
11 to the Supreme Court, would take much less time to resolve than it has, and it now appears
12 that it may do. We now have an appeal to the Supreme Court, we now have a possible
13 reference to the European Court. The real point for this Tribunal is whether, as things
14 appear to you now, it is the just and effective course to take to progress this litigation, to lift
15 the stay on the UK claims or not.
16 Oddly, Mr. Hoskins suggested at one point that we were not only too slow and had dragged
17 our heels, but we were now moving too fast because we should wait to see if an ECJ
18 reference is made, possibly in many months' time, and then returned to you. We are neither
19 too slow nor too fast – in Goldilocks' terminology we are 'just right'.
20 Next, there was an attack on our proposition that there is a risk to be borne in mind of
21 degradation of documentary evidence or of witness evidence. I did cover that in my initial
22 opening remarks.
23 So far as witnesses are concerned, they can become unavailable in the coming months or
24 years, it is not a risk that one can get much traction on but, yes, in a case where there may
25 be delays for months or years ahead, witnesses may travel abroad, people may pass away,
26 all kinds of things may happen, and people whose identities may have been revealed by the
27 documents which we hope would be forthcoming if you grant our application, may become
28 unavailable.
29 Similarly, in relation to documents, it was suggested that we were taking an artificial point
30 by saying: "We have asked you, have you taken steps to identify the individuals who were
31 involved on behalf of your companies in the cartel and to ensure that their personal
32 documents have been preserved." It is not an artificial point. In this sort of case it is an
33 extremely important point and, to this day, they have refused to answer that question. It is
34 not a question of whether we are raising it in order to gain some tactical advantage. If it is a

1 real point it is a real point, and the fact that they have not answered it is a cause for concern
2 that the Tribunal is entitled to think about and give some weight to. Those are the case
3 management points that Mr. Hoskins referred to.
4 I turn then to Miss Smith. Miss Smith began by picking up on the question of whether there
5 had been any material change in circumstances since stays in these proceedings were
6 originally imposed by the Tribunal and maintained.
7 I have made the point that our previous contentment to remain subject to a stay, rather than
8 asking for the UK claims to proceed was based on the belief that the issue would be decided
9 more expeditiously than at present it now appears they will. That remains so.
10 Miss Smith, however, turns to an authority, the *Chanel* case and says that this somehow
11 shows that we have made our bed and we must lie in it. I do not know if members of the
12 Tribunal have a copy of the *Chanel* case.
13 The *Chanel* case was an entirely different situation. If you go to the headnote you can see
14 what it was about. The plaintiff, an English company, brought an action for infringements
15 of trade marks, which they were the registered proprietors and passing off against importers
16 and retailers of foreign traders bearing their trade marks.
17 In 1979 a motion by the plaintiffs for interlocutory relief, so the plaintiffs apply to the court,
18 was stood over until trial by consent on undertakings by the defendants until Judgment or
19 further order not to deal in goods bearing the plaintiff's marks which were not the plaintiff's
20 goods.
21 Then in October the Court of Appeal, in deciding a similar case, held that every company in
22 a group of multi-nationals must be taken to have consented to the use by other companies in
23 the group of a trade mark and so on. The second defendants apply to be discharged from
24 their undertakings. So those were the circumstances. It was a case where the defendants
25 had consented in order to avoid a ruling against them, to give formal undertakings to the
26 court not to deal in goods with the plaintiff's trade marks. In our case there was no question
27 of us trying to unravel undertakings which we have given to the Tribunal to prevent the
28 defendants gaining any form of remedy. This is not a re-litigation case, this is a case
29 management decision where the appreciation of the circumstances have changed over time.
30 *Chanel*, therefore, takes you no further.
31 I then turn to what was the centrepiece of Miss Smith's submissions, Article 24 of the
32 Brussels' Regulation.
33 Her case is that there is risk of submitting to the jurisdiction under Article 24 in favour of
34 the foreign rail companies if this case progresses in favour of the UK rail companies. There

1 are a number of basic problems with her argument. I begin with the first point, which is a
2 practical point. She starts by referring to *Kalfelis*. She says that that case, which I had
3 referred to, does not actually show she is wrong about there being a trap for them in Article
4 24, and her reason is that if part of a claim is, let us say, bad jurisdictionally, at least in
5 England what you do is sheer it off at the start and then it does not pollute the remaining
6 progress of the claim, and so you have no problem. There is no risk that you would submit
7 to the jurisdiction under Article 24 for the bits that you have sheered off.
8 Let us examine that and make a number of points. First, a purely practical point and, sir, I
9 echo an observation you canvassed with Miss Smith yourself, she is implying that if there is
10 a jurisdictional objection to one part of a claim, one part of a case, then another part of the
11 case where the jurisdiction is clear has to be frozen in its tracks until you have sorted out the
12 position on that first part, in a way quite similar to what is happening in this case where the
13 time limit question is taking years to resolve and, in the meantime, the remainder of the
14 case is growing stale. Otherwise, she says, by proceeding with the obviously good part of
15 the case they run the risk of conferring jurisdiction and thereby losing out because of the
16 operation of Article 24. That point ought to give one pause to start with, because that is the
17 implication of her argument.
18 The second point is that it is clear from the authority I referred to which she did not deal
19 with, of *Elefanten Schuh*, that that is wrong. Would it help if I refer the Tribunal to the text
20 of *Elefanten Schuh*?
21 THE CHAIRMAN: Please do.
22 MR. TURNER: I cannot recall whether we have seen it before, but I talked about it. It is in
23 bundle 2 at tab 80. It is a short case on p.1682 you have the Decision of the Court of
24 Justice and I will pick out the relevant paragraphs. At para. 2 questions were put to the
25 European Court in the context of an appeal in cassation against a Judgment of the Labour
26 Court in Antwerp ordering Elefanten Schuh, a German Company, and Elefant, a Belgian
27 Company, to pay jointly a certain sum together with interest to Mr. Pierre Jacqmain for
28 having dismissed him without notice. Paragraph 3:
29 "In 1970 Mr. Jacqmain was employed as a sales agent by the German company
30 Hoffmann which he subsequently adopted the name Elefanten Schuh. However,
31 he actually worked in Belgium, in particular in the provinces of Antwerp, Brabant
32 and Limburg, on instructions which he received from the Belgian subsidiary of that
33 undertaking, Elefant NV. The main action arose as a result of difficulties which
34 occurred in 1975 between Mr. Jacqmain and the two companies concerning details

of the transfer of the contract of employment from the German company to the Belgian company."

Paragraph 4:

"Mr. Jacqmain brought an action in the [Labour Tribunal, Antwerp] against the two companies. The defendant companies appeared before that court and by their first submissions they contested the substance of the applications lodged against them. In further submissions lodged nine months later the German company claimed that the Arbeidsrechtbank did not have jurisdiction on the ground that the contract of employment contained a clause stipulating that the court at Kleve in the Federal Republic of Germany was to have exclusive jurisdiction in the event of any dispute."

So what you have is a situation where they first contest the substance and dive in to attack the detail of the allegations, and then later on they address jurisdiction. You see on the facing page, Question, 1, para.7, the question which the European Court was given. We are concerned with (b) and (c):

"(b) Is the rule on jurisdiction contained in [what is now Article 24] applicable if the defendant has not only contested jurisdiction but has in addition made submissions on the action itself?

(c) If it is, must jurisdiction then be contested *in limine litis?*"

right at the outset, and apart from dealing with the substance.

Paragraph 8 refers to the fact that Article 18 jurisdiction, now Article 24, is:

"… implied from submission as a result of the defendant's appearance."

Then if you turn the page, paras.12 to 16 are the discussion. Paragraph 12:

"The second and third parts of the question envisage the case in which the defendant has appeared before a court within the meaning of Article 18 but contests the jurisdiction of that court.

13 The Hof van Cassatie first asks if Article 18 has application where the defendant makes submissions as to the jurisdiction of the court as well as on the substance of the action.

14 Although differences between the different language versions of Article 18 of the Convention appear when it is sought to determine whether, in order to exclude the jurisdiction of the court seised, a defendant must confine himself to contesting that jurisdiction, or whether he may on the contrary still achieve the same purpose by contesting the jurisdiction of the court as well as the substance

1 of the claim, the second interpretation is more in keeping with the objectives
2 and spirit of the Convention. In fact under the law of civil procedure of certain
3 Contracting States a defendant who raises the issue of jurisdiction and no other
4 might be barred from making his submissions as to the substance if the court
5 rejects his plea that it has no jurisdiction. An interpretation of Article 18 which
6 enabled such a result to be arrived at would be contrary to the right of the
7 defendant to defend himself in the original proceedings, which is one of the
8 aims of the Convention.
9 15 However, the challenge to jurisdiction may have the result attributed to it
10 by Article 18 only if the plaintiff and the court seised of the matter are able to
11 ascertain from the time of the defendant's first defence that it is intended to
12 contest the jurisdiction of the court.
13 16 The Hof van Cassatie asks in this regard whether jurisdiction must be
14 contested *in limine litis*. For the purposes of interpreting the Convention that
15 concept is difficult to apply in view of the appreciable differences existing
16 between the legislation of the Contracting States with regard to bringing actions
17 before courts of law, the appearance of defendants and the way in which the
18 parties to an action must formulate their submissions. However, it follows from
19 the aim of Article 18 that if the challenge to jurisdiction is not preliminary to
20 any defence as to the substance …"
21 if it does not come first -
22 "… it may not in any event occur after the making of the submissions which
23 under national procedural law are considered to be the first defence addressed to
24 the court seised."
25 So what *Elefanten Schuh* tells us is that you can perfectly well, as I said in my opening
26 submissions, continue to go into the substance of a case, even a case where you are
27 continuing to contest jurisdiction, provided that you have at the outset, or at least at the
28 same time as beginning to make your submissions on the substance, made clear that you are
29 not accepting jurisdiction, that you are contesting it. That is a decisive point because in our
30 case all of the defendants have made perfectly clear in acknowledging service, and
31 decisively, that they accept the jurisdiction of the Tribunal in relation to none of this claim.
32 That takes me on to the third point which is the nub of it ----
33 THE CHAIRMAN: I was simply going to ask, Mr. Turner, what you make of the point
34 Miss Smith made about the analogy with CPR Part 11, where she said that if you look at the

1 national rules, at least for the High Court, one can see that jurisdiction is, on a national
2 level, an all or nothing thing?
3 MR. TURNER: In the CPR?
4 THE CHAIRMAN: The CPR, yes.
5 MR. TURNER: The CPR does not show that it is all or nothing. The CPR in the part that she
6 refers to merely says that there is the machinery in order to deal with jurisdiction
7 applications at the outset of the case. In no sense can that read back to a proper
8 interpretation of Article 24 to say that is all or nothing, and still less does tell us, sir, as you
9 pointed out to Miss Smith, that in any way the jurisdiction of this Tribunal, which is the
10 master of its own procedure, is in some way bound by that - in no way does it.
11 Sir, what one takes from *Elefanten Schuh*, which I mentioned in opening, which was not
12 dealt with, was that provided that the defendants have said at the outset, as they have, "We
13 contest jurisdiction", then even the steps that they take to deal with the substance do not
14 mean that they lose the protection or that Article 24 is engaged.
15 That takes us on, as I say, to the third point which is the nub of the error inherent in her
16 submissions, and I call it the "partial submission fallacy". There was an assumption in what
17 she said that we are somehow requiring them partially to submit to the jurisdiction of this
18 Tribunal in a way that engages Article 24. It may be helpful if one opens again Article 24 at
19 tab 90. Ultimately the wording is very clear, and when one properly appreciates it it boils
20 down to a question of common sense. Article 24 says:
21 "Apart from jurisdiction derived from other provisions of this Regulation …"
22 Pausing there, if we are right you have that jurisdiction under Article 5.(3) -
23 "… a court of a Member State before which a defendant enters an appearance
24 shall have jurisdiction. This rule shall not apply where appearance was entered
25 to contest the jurisdiction …"
26 In our case, there is no partial submission. If you take jurisdiction over the English claims it
27 is not because they have entered an appearance to accept that, it is because Article 5(3)
28 applies, and the first words, "Apart from jurisdiction derived from other provisions of this
29 Regulation" make that point very clearly. There is no partial submission. They have
30 submitted to nothing. They have generally challenged the jurisdiction and the Rule referred
31 in the *Spitzley* case that Article 24 is based on implied consent being given is not engaged
32 here because no consent has been given to anything.
33 I will pass to the next point, but that disposes of Article 24. It was said at one point that I
34 am here only speaking for the UK claimants. I am here only speaking for the UK claimants

1 in terms of the application to lift the stay with respect to their claims. I am, however, for the
2 avoidance of doubt, able to make perfectly clear that none of the claimants would treat the
3 further progress of the claim with respect to the English claimants, none of them, as a
4 submission to the jurisdiction against them.
5 I have made the point already that if the Tribunal wanted to make the form of order referred
6 to in Mr. Hoskins' skeleton, we would have no objection to that, and equally all of the
7 claimants could give an undertaking that they would not treat this as an acceptance of there
8 being jurisdiction over the foreign claimants' claims. In those circumstances, the notion
9 that there would be any real problem is fanciful.
10 Finally, Miss Smith referred before lunch to pleading issues. She took you to our claim
11 form and said that the real risk, when you looked at it, that if they were to engage with the
12 case by answering those pleas between paras.48 and 60 (she took in particular) there would
13 be a risk of having accepted the jurisdiction of this Tribunal over the foreign claimants, the
14 foreign rail companies' cases. I do not begin to accept that or understand it. Perhaps if you
15 pick up tab up 6C in the first bundle and go to para.48 and following, you have a part of the
16 claim form entitled "The Decision", which set out the propositions from the Decision and
17 what the Decision found. It is impossible to see how responding to pleas relating to the
18 Decision about the combination between all of the cartelists in an integrated EEA wide
19 cartel could conceivably be taken as accepting that the Tribunal has jurisdiction over the
20 foreign claimants' case. Moreover, all of these pleas apply equally to the UK claimants as
21 to the foreign rail claimants.
22 The claim form is, in fact, perfectly clear by explaining that there is a conspiracy which
23 gives rise to joint and several liability on behalf of the cartelists as a whole. You see that
24 from para.73. Each of the defendants is jointly and severally liable for all the loss and
25 damage caused to the claimants and each of them individually, because it is not a joint
26 claim, resulting from the activities of the cartel during the period of its participation.
27 THE CHAIRMAN: Is Miss Smith not right to this extent - paras.71 and 73 are quite good
28 examples: that one would have to read "claimants" in para.71 as confined to a specific
29 number of claimants, and similarly "defendants" in para.73 as confined to the defendants
30 that are relevant to this UK part? That might well be capable of being done by the
31 defendants in their defence. They make it clear that they are only pleading to certain points,
32 but undoubtedly as it stands at the moment this is advancing claims by all claimants as
33 against all defendants as they appear in the list of parties on the front of the pleading.

MR. TURNER: I do see that. It can be dealt with and, in my view, could readily be dealt with by the defendants making clear, if you were in our favour on this application, that what they were responding to in their defence was limited to the UK claimants' claims, and beyond that there was no acceptance of any jurisdiction and that they do not deal with the claims by any other parties. That could easily be done in the defence itself. Alternatively, although in my submission, and I repeat, it would be an unnecessary step, we could make that clear in relation to paragraphs such as this, but that is a very minor exercise. In truth, if one is being practical and seeking to minimise cost and delay the first of the courses, sir, that you have referred to would be the way to do it.

So that deals with Miss Smith's Article 24 case based on failure to deal with *Elefanten Schuh* and based on the fallacy that there is somehow a partial submission to the jurisdiction.

Then she turned to the facts and the witness statement of Mr. Gold. As regards the witness statement of Mr. Gold, the points I made in opening were perfectly good ones.

So far as Railpart is concerned, perhaps it is sensible to take up that witness statement again. It is in volume.1, tab.1 behind the pale green divider. What one has in this case is entities that prior to 1995 were all one corporation, the British Railways Board. So, for the first seven years of the cartel, between 1988 and 1995, the British Railways Board bought the cartel products from these cartelists. Railpart, as you see from para.25, for all of that period was a division of BRB, that is the fourth line down in para.25, a single company, the victim of the cartel indisputably and on any analysis bought in England from the cartel at an overcharge. So, that deals with a very substantial amount of the case to start with.

After 1995 the supply of the cartel products at an overcharge is still only in the United Kingdom. It is true that many of the purchases after 1995 are made to Railpart which has now become an independent intermediary. Nonetheless, either way the cartel goods are still supplied in the UK and the cartel overcharge is imposed in the United Kingdom. So far as the supply of products directly after 1995 to the 13th claimant is concerned, para.29 is equally unambiguous. According to our SAP records, DB Schenker UK also began purchasing limited volumes of products directly from Morganite and Le Carbone UK in 1998 during the cartel period. So, Morganite and Le Carbone UK are the vendors, the suppliers, not merely indirect parties somewhat further on down the chain. And that is what Mr. Gold says. Miss Smith says she did not see that from the print-out, however, the top of each of those print-outs the parties were referred to look at p.1 [of the Exhibit] referred to as

1 “Vendor”, “Mersen Vendor” download as at 20 May 2013. That is p.1. Pages 2-7 are
2 Morganite. So, the first one is Mersen, the following pages relate to Morganite.
3 So then it was sought to be suggested that that is not an insuperable problem for her
4 objection to jurisdiction, because of *Dumez*. It is said that on a proper reading of *Dumez*
5 you have to have someone who is clearly the immediate victim of the cartel or the
6 immediate victim or whatever the tort may be, suffering the damage about which you
7 complain. That is not what *Dumez* says, and if you pick up *Dumez* in Vol.2 and go to the
8 relevant paragraph, this is at tab.83, para.20. What it refers to is jurisdiction being available
9 for:
10 “the place where the event giving rise to the damage and entailing tortuous, delictual
11 or quasi-delictual liability, directly produced its harmful effects upon the person who
12 is the immediate victim of that event”.
13 So, even leaving aside the point that we have made in our written submissions, which is that
14 the victim may perfectly well be viewed as the person who bears the loss and is intended to
15 bear the loss rather than an intermediary purchasing company, still this refers to a place
16 rather than a person, and *Dumez* is about giving jurisdiction for the court of the place where
17 the immediate victim suffers the loss.
18 You will see in para.18 above part of the reason for this, which was elaborated on also by
19 the Advocate General, which is that what one is seeking to do is to avoid multiplying the
20 courts of competent jurisdiction and heightening the risk of irreconcilable decisions. And
21 that is why you focus simply on the place and rather than creating a range of places where
22 different victims down the chain may have suffered loss, you take one place which has a
23 close connecting factor with tort as a place where jurisdiction may be exercised.
24 Finally, Miss Smith said that Morganite and Le Carbone UK, the suppliers, were not
25 themselves addressees of the decision. They are not addressees of the decision. The
26 addressees of the decision were the topco companies, the parent companies in each case:
27 Morgan Crucible and Le Carbone, now Mersen SA. And those are the topcos, the
28 defendants whom we proceed against. But it is not the case that you can claim against any
29 member of a cartel only for the overcharges or goods which they have directly supplied to a
30 customer. You can claim against a properly constituted addressee for any overcharges
31 imposed by the cartel, and that is what is claimed for here. The immediate victim of the
32 overcharge was in the UK supplied from production facilities in Swansea and Sussex.
33 There can be no doubt that the UK is properly the place where the damage comprised of the
34 cartel overcharge was imposed.

1 Finally, before leaving Miss Smith's submissions, sir, you did ask her if there is a risk of
2 submission to the jurisdiction under Article 24, could the claims simply be split to make
3 things clear? Well, you have heard my submissions that there is no such risk and the
4 problems with her submissions in that respect, and I say that you can, with complete
5 confidence, rule in our favour on those. And on that point, therefore, the spectre that is
6 raised of them engaging in further litigation to the Court of Appeal and raising a further
7 sword of Damocles over your head as a route for further delay should not be countenanced
8 or taken into account.
9 If, sir, you were minded to direct that to make things absolutely clear a measure should be
10 taken in order to split the UK claims so as to produce a document which was self-standing,
11 that could be done for the reasons that we were canvassing earlier in a very easy way as
12 well. You have heard my submissions that it is unnecessary, but it is an easy thing to
13 achieve. You would arrive at a claim form that looks extremely similar to the present one
14 but stripping out the losses pleaded on behalf of other claimants. There would be no
15 additional detriments in terms of case management. All of the points that have been
16 debated back and forth on this side of the bar and on that side arise, and you have heard my
17 submissions about them. We say it would lead to huge advantages and would be something
18 that this Tribunal ought to do in order to make real progress for the first time in this case for
19 the UK rail companies.
20 That takes us, finally, to Miss Dietzel's submissions. Now, Miss Dietzel urged on you that
21 Schunk and Hoffmann have made no sales in the United Kingdom — her clients. But they
22 are not liable only for sales which they have made at an overcharge. The fallacy is that they
23 are liable jointly for the sales made by any part of the cartel to the customers of the
24 overcharge, and therefore the fact that her clients were not the direct suppliers is neither
25 here nor there. She seemed to complain that they would be put to some kind of
26 inconvenience which was inappropriate if they had to respond to the UK rail company's
27 claims against them. They urged on your that Morgan was the principal seller to the UK
28 rail companies and that no evidence about such sales to the UK companies could come from
29 them. That is wrong for two reasons:
30 * First, the point that I made a few moments ago that the assessment of the
31 overcharge and how it was arrived at is a key issue. That relates to the cartel
32 mechanism as a whole and its impacts. Schunk and Hoffmann will have many
33 documents on that issue taken by itself.

1 * Secondly, *Schunk* and *Hoffmann*, even as respects sales by Morgan in the United
2 Kingdom to the British Railways Board and the successor companies, do have all the
3 documents from the Commission procedure and they may also have, as you will have
4 seen from the recitals I took you to in the decision, documents of their own relating to
5 the discussions with Morgan about supplying the United Kingdom.
6 There was a suggestion that the access to file documents were somehow beyond the proper
7 ambit of a disclosure exercise. On that the point has been covered by authority, again
8 referred to in our written submissions and which is in the bundle, if I may I will briefly
9 direct you to that as well. It is bundle 2, tab.75. It is a slightly earlier judgment in the
10 *National Grid* litigation in July 2011 where the claimants could not directly get documents
11 from two of the defendants, and so what they did was to apply for disclosure from other
12 defendants saying, "Well, you will have received copies of those documents under the
13 access to file procedure".
14 Now, that was addressed by the Tribunal. If you begin at para.15 you will see there that the
15 defendants ABB and Siemens who were the target of the application to give disclosure of
16 these access to file documents objected. They raised a number of objections on the grounds
17 of EU law, and one of them maintained in correspondence the appropriate course is to seek
18 the documents another way, by making a request to the European Commission, not by way
19 of disclosure.
20 At para.16 the court quoted a letter which had been received from the European
21 Commission giving their view about disclosure of access to file correspondence, and you
22 will see in para.16 numbered paragraph [4]. You can read [3] for yourself, but I will start
23 with [4]:
24 "Equally, and subject to the above conditions, the Commission would not object to the
25 disclosure in proceedings before the English Court concerning the application of
26 Articles 101 and 102 … of documents obtained through access to the Commission
27 file, provided that the originators of that information … are guaranteed protections
28 equivalent to those addressees of a disclosure order enjoy under applicable national
29 law. The documents referred to are both those the Commission obtained itself (eg
30 during inspections) and those prepared and sent by the parties in response to the
31 questions the Commission raised in the course of its investigation".
32 So, that is what the Commission said, then the judge orders disclosure to be given of these
33 documents. If you turn to paras.25-26 he deals with the point that it was submitted that it

1 was more appropriate for such documents to be obtained by way of a request from this court
2 to the Commission than by way of disclosure. At para.26:

3 "However, in my judgment it is neither appropriate nor necessary to involve the
4 Commission in the provision of documents in the hands of parties to English
5 proceedings for the purposes of those proceedings when those documents can clearly
6 be furnished under the domestic rules for disclosure".

7 And so the court there had no difficulty in ordering disclosure of documents obtained by
8 access to the file. Mr. Williams draws to my attention, and I will mention it because the
9 next point made by Miss Dietzel was that there would be complications if you accede to our
10 application because they would have to go through everything looking to have to sift out
11 what she referred to as "leniency documents", and she said this was an additional
12 inappropriate burden. If you go back to para.16, Mr. Williams draws attention to para.3
13 which explains what the so-called "leniency documents" are and you will see halfway down
14 that:

15 "This position only applies to information specifically prepared for voluntary
16 submission to the Commission under the leniency programme, including
17 documents prepared by leniency applicants in the context of the continuous co-
18 operation with the Commission."

19 So this leniency argument, which we now move to, relates to documents which are not pre-
20 existing documents at all but one has prepared for submission to the Commission in the
21 context of the leniency procedure.

22 These are not being asked for. We do not envisage they would be asked for in the initial
23 stage of disclosure. We have made that perfectly clear in written submissions. What they
24 are saying is they are sitting on large amounts of extremely informative information going
25 to the overcharged imposed on our clients, which have nothing to do with the leniency
26 procedure, but which are documents emanating from the time of the cartel.

27 Those are my responsive submissions in relation to my friends. I also have nothing further
28 to add in relation to the cases, sir, that you asked us to consider.

29 I would agree with Miss Smith that they take matters little further. They are both cases
30 where the European Court Judgment in *Kalfelis* was looked at. In one case it was a
31 situation where there were two alternative bases for jurisdiction and the court found that
32 neither of them applied – *Kleinwort Benson*. The other one was a case where one of them
33 did apply and the other did not, and the court noted that the European Court overriding the
34 Advocate General in *Kalfelis* had made a decision in cases of that kind, even if it was

1 inconvenient, the court would, nonetheless only be allowed to exercise jurisdiction over the
2 part of the case where jurisdiction under now the Regulation applied. I do not believe that it
3 affects my submissions – it does not undermine them, but if there are any points that I am
4 missing no doubt you will inform us.
5 THE CHAIRMAN: Thank you very much, Mr. Turner, I did not have anything on that. But it
6 was implicit in a number of the points made by those against you that there will be no harm
7 in delaying the UK proceedings pending the outcome in the Supreme Court. Obviously I
8 have your points about the witnesses and perhaps lost documents, but assuming there is no
9 danger there, would you say that there is nothing in delay that could not be compensated for
10 in interest, or are there any other points you want to draw to our attention as being relevant
11 to lifting or not lifting stay?
12 MR. TURNER: Those points I do not want to be disregarded -----
13 THE CHAIRMAN: No, no, I am not for a moment suggesting they would be.
14 MR. TURNER: The answer to that is "yes" there is, there is an important litigation dynamic,
15 which is specifically recognised in the overriding objective in the High Court, but not
16 specifically referred to in Rule 44 and which is linked with the idea that the general
17 presumption should be that you get on with a case and progress it rather than leaving it to
18 lie, and it is partly because we are in a situation in this case where we are not on an equal
19 footing with the defendants at all. We have no information beyond what the Tribunal also
20 sees. If we get this information now, we are able to learn more about the case and we are
21 able, using that information, to make real progress which might mean that delays further
22 down the line will be avoided or minimised. If we wait months - at least months, possibly
23 years – that process, which might involve a snowballing cannot even start; the sooner it is
24 begun the better. An associated point also specifically recognised in the overriding
25 objective in the High Court, is that in a position such as the present where the rail company
26 claimants are unable to make any progress at all, we also cannot usefully negotiate
27 settlement terms, or consider settlement with the defendants, and that is also a factor
28 specifically referred to in CPR Part 1. At the moment we are disabled from being able to
29 get off the starting blocks in order to properly understand our case at all. Those are
30 advantages which I cannot say are ones which can always be compensated for by an award
31 of interest further down the line. We cannot quantify them but they are real advantages of
32 getting on with the case now. If you leave a case to grow stale it does become much more
33 difficult in any case for the claimants. In a case such as this, where we have nothing to be

1 getting on with, with the years of delay in the past and we face months of delay in the future, it is even worse.
2
3 THE CHAIRMAN: Thank you very much, Mr. Turner.
4 MISS SMITH: Sir, I hesitate to rise, but I think it is necessary for me to make my client's
5 position clear on the question posed by you, sir – I am not seeking to respond to anything
6 that Mr. Turner said in reply – which is the point about splitting the case. You asked Mr.
7 Hoskins and Miss Dietzel about that, and I think, if I can, with your permission, I would just
8 make our position clear on that.
9 THE CHAIRMAN: Yes, please do, Miss Smith.
10 MISS SMITH: First, and our primary submission which I think I have already made, is that the
11 Tribunal should determine jurisdiction on the basis of the claim as served out of the
12 jurisdiction.
13 THE CHAIRMAN: Yes, you made that point.
14 MISS SMITH: The second and third points are trying to clarify exactly what is meant by
15 'splitting the case'. There is obviously ordering refinement of pleadings or splitting the
16 pleadings in some way so that the claimants re-plead the case to focus simply on the UK
17 claimants, but the splitting of the pleadings in that way, while keeping the case as a whole
18 live, we say is insufficient for Article 24 purposes. The proceedings as a whole remain live
19 and submission to part of those proceedings by responding to a pleading, even if it focuses
20 solely on the UK claimants is still submission to the whole of the proceedings, and
21 *Elefanten Schuh* does not address that point at all.
22 The third point is: could this Tribunal in some way split the proceedings in order to
23 overcome the jurisdiction.
24 THE CHAIRMAN: Yes, that was a hare that I set running rather than Mr. Turner, but do go on.
25 MISS SMITH: I do not think Mr. Turner is asking you to do that, in fact, I think he is asking you
26 not to do that, but ----
27 THE CHAIRMAN: He is saying it is unnecessary.
28 MISS SMITH: It is unnecessary, but we say in any event there is no power for this Tribunal to do
29 that under the Rules. Your case management powers are limited to those under Rule 44,
30 which refer back to Rule 19, and those are simply case management powers to do with the
31 progress of pre-existing proceedings and make no mention, for example, of starting again or
32 splitting the proceedings.
33 What one could do, possibly, is give the claimants permission to withdraw the proceedings
34 as they are currently formulated under Rule 42, but they do not make an application to

1 withdraw the proceedings as currently formulated, far from it, they want to keep it all live,
2 but one could, in theory, do that. The problem then is that under Rule 31 any new
3 reformulated proceedings would be out of time and that, of course, is a function of the fact
4 that these claimants waited until three days before expiry of the two year time limit to make
5 the claim ----
6 THE CHAIRMAN: It is "deconsolidation" I think that is the term Mr. Hoskins used, it is not
7 possible.
8 MISS SMITH: Deconsolidation is not possible.
9 MR. HOSKINS: There is one legal authority that Mr. Turner referred to in his reply, and if you
10 give me the normal accommodation I would like to be able to deal with that because I have
11 not had the chance to do it up to now. It is in relation to *National Grid*, which Mr. Turner
12 and I are both involved in. If you could go to bundle 2, tab 76. You are probably aware
13 that disclosure in *National Grid* has been in stages and there have been a number of
14 hearings, and this one that you were referred to you will see on the front page the Judgment
15 was in April 2002, but the hearing took place in November 2011.
16 What the hearing was really about was the *Pfleiderer* type exercise. Mr. Turner took you to
17 para. 49 where Mr. Justice Roth at that stage said:
18 "I broadly accept those submissions …Since the relevant geographic market here
19 included at least the whole of the EEA, the operation and effectiveness of the cartel
20 outside the United Kingdom is relevant to consideration of a benchmark price or
21 prices."
22 You might be left with the impression that that was the end of the story, but this year, 2013,
23 in National Grid we have had two hearings, which lasted for three days, in which the
24 predominant issue was about the need for disclosure of non-UK documents, and what in
25 fact transpired was the judge, rather than taking a view that they should all be given, took
26 the opposite view, so there is UK disclosure and there is some limited disclosure into the
27 USA and Canada, but nothing else. The reason why I say this is not just to score points off
28 Mr. Turner, it is for two important reasons. One – and it is one I have already made so I
29 will be brief – if you bifurcate, I am not a betting man but I will bet heavy money we will
30 have a fight about the scope of disclosure, even of the Commission pre-existing file
31 documents, and National Grid have taken some time over non-UK disclosure.
32 The second point and, I am sorry, this is obvious, I am sure you are aware of it, it is very
33 important the Tribunal should not pre-judge now in making a decision about lifting the stay,

1 a fight to come about the scope of the disclosure if that were to arise, and I am sorry if that
2 is obvious, but you will understand why ----
3 THE CHAIRMAN: No, it is an entirely fair point to make, but that is well on board.
4 MR. HOSKINS: Thank you.
5 THE CHAIRMAN: Mr. Turner, if you want the last word you may have it.
6 MR. TURNER: Well, it is not a question of the last word, I am sorely tempted to make comments
7 about that, but I am not going to, but just to say that we do not accept that characterisation.
8 I do feel, in relation to the point about splitting or deconsolidating, that I ought to make our
9 position quite clear then.
10 These claims are under one claim form because they can conveniently be disposed of
11 together, and I am using the language you find in the White Book for different claimants
12 being included in the same claim form. They are a bundle of separate claims which are
13 brought together in one claim form. You can separate them procedurally without destroying
14 them in the process and requiring us to go back to the beginning. You have heard my
15 submissions about that.
16 Our final position is that we will accept whatever procedure this Tribunal feels is necessary
17 in order most efficiently to manage the proceedings, to move them forwards, and so I am
18 certainly not resisting any solution that this Tribunal may come up with. I have merely
19 made my position on its necessity, sir, as you pointed out.
20 THE CHAIRMAN: I am grateful. Thank you all very much. We will reserve Judgment but we
21 will try to hand it down as quickly as we possibly can. Thank you all very much.
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