IN THE COMPETITION APPEAL TRIBUNAL
Victoria House,
Bloomsbury Place,
London WC1A 2EB

Case No. 1173/5/7/10

20 January 2014

Before:

MARCUS SMITH QC
(Chairman)
MARGOT DALY
DERMOT GLYNN

Sitting as a Tribunal in England and Wales

BETWEEN:

(13) DB SCHENKER RAIL (UK) LTD
(14) LOADHAUL LIMITED
(15) MAINLINE FREIGHT LIMITED
(16) RAIL EXPRESS SYSTEMS LIMITED
(17) DB SCHENKER RAIL INTERNATIONAL LIMITED
(formerly, ENGLISH WELSH & SCOTTISH RAILWAY INTERNATIONAL LIMITED)

Claimants

-v-

(2) SCHUNK GMBH
(3) SCHUNK KOHLENSTOFFTECHNIK GMBH
(4) SGL CARBON SE (formerly, SGL CARBON AG)
(5) MERSEN SA (formerly, LE CARBONE-LORRAINE SA)
(6) HOFFMANN & CO. ELEKTROKOHLE AG

Defendants

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CASE MANAGEMENT CONFERENCE

APPEARANCES

Miss Sara Masters QC and Mr. Rob Williams (instructed by Hausfeld & Co. LLP) appeared on behalf of the Thirteenth to the Seventeenth Claimants.

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

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

Mr. Daniel Beard QC and Miss Sarah Ford (instructed by Hogan Lovells International LLP) appeared on behalf of Fifth Defendant.

THE CHAIRMAN: Good morning everyone. Before you start, Miss Masters, I have a few preliminary points. First of all, thank you all for the joint statement and the skeleton arguments we got at the end of last week which we have all read with attention. Regarding those, there has been an expression of interest - I cannot think why - from the press regarding these documents. We cannot see any reason why they cannot be made available, and our proposal is that a copy be handed out to the gentlemen of the press unless there are any objections. The claimants, as I understand it, have already said there is no problem. I think there has been radio silence from the defendants, but I am assuming that there is no difficulty there.

MR. HOSKINS: I am quite happy on this occasion, but there might be another occasion when there is something more interesting that we might want to think about.

THE CHAIRMAN: So on the understanding that these are completely boring documents, today there is no objection. Mr. Hoskins, that is well noted.

MR. BEARD: No objection, they are protected by the privilege of tedium ------

THE CHAIRMAN: Secondly, just a quick word about terminology in the context of jurisdiction. I have a strange feeling that we are all going to use the terms "claimants" and "defendants" over the course of today. When the Tribunal does so it will be referring to the UK claimants only. I want that to be clear. Equally, when the term "defendants" is being used, at least by the Tribunal, it does not include Morgan. For the purposes of these proceedings, Morgan is going to be treated as a third party. We note also that nothing that the defendants do or say today amounts to submission to jurisdiction, and we are proceeding on that basis, just so that we are clear.

As I have said, we have read all the documents submitted with care, and it is true to say that we did expect disclosure to feature significantly, but it must also be said that we did expect the parties to give some thought to directions beyond disclosure. In particular, we would have liked the parties to give some expression of thought to trial date.

As the Tribunal noted, when acceding to the claimant's application to lift the stay in para. 76 of the 2013 CAT 18 decision, where a claimant has a claim with a clear jurisdictional base, then it is a matter of basic right that their claim should be progressed with a view to advancing to a substantive hearing as soon as possible, unless there are good case management grounds for denying the claimant that basic right. We want to give effect to that and we want to fix a trial date. We will hear the parties' submissions on that perhaps after the lunchtime adjournment, but just so that the parties know our thinking we have availability for a three week hearing in late November or December of this year, and that

does seem to us, subject to what the parties have to say, a realistic date for the parties to work towards. We are keen to establish a trial date because we have well in mind Miss Masters' point that diaries do tend to get booked up.

Turning to disclosure, a few general points which I hope will assist the parties: it does seem sensible to make it explicit that all documents provided pursuant to the disclosure process will be provided on a CPR Part 31.22 basis, and we would intend that any order we make makes this explicit, so unless anyone disagrees we do not need to hear submissions on that.

Secondly, we need no persuading as to the advantages of confidentiality rings. As you all know, they are a staple feature of Tribunal proceedings, but, given the issues that have been raised in the *BMI* and *Eurotunnel* arguments and decisions, it does bear emphasising that documents should only be introduced into a ring when that is absolutely necessary, and not merely because the parties desire a level of protection higher than CPR 31.22. We just make that as a general point.

Thirdly, it does seem to be common ground that disclosure of the Commission index be ordered, provided it goes into the confidentiality ring. For our part, we would be minded to order disclosure, but we would like some help on why exactly this document does require protection for the confidentiality ring.

It also seems to be common ground that the redactions to the confidential version of the Commission's Decision be reviewed with a view to creating what I would call a less redacted Decision. We would be minded to order that the defendants co-operate on that, so as to produce a less redacted version within a certain timeframe for the claimants to consider, but to leave the position at that for today. The claimants can then raise with the other parties any issues that they might have regarding those redactions with the defendants in the first instance and then with the Tribunal, if necessary.

Fifthly, on disclosure, we do not need any persuading that leniency material should not be disclosed now, but should be deferred, whether that material appears in the Decision or elsewhere. Equally, we are, for the moment at least, persuaded that the parties need to err on the side of caution, lest leniency material be inadvertently disclosed. That said, it is usually pretty clear what constitutes leniency material and what does not.

Subject to that, the partitioning off of leniency material, it would be helpful for the parties to explain why disclosure cannot proceed in respect of essentially three key areas right away, and those three key areas would be, first, the operation of a cartel; secondly, who sold what cartelised products to whom and when and at what prices; and thirdly, the chain of title question regarding previous incarnations of the present claimants regarding their title to

claim. It seems to us that the Commission materials will assist chiefly on the first area, the operation of the cartel, but less so in the other two areas where it seems to us, but again we are interested to hear what the parties have to say on this, that these are areas where the parties will have to make disclosure into documents which are not necessarily on the Commission file.

As regards the Commission file, it would help us to understand why the defendants do not simply disclose the two CDs provided to them by the Commission right at the outset of the investigation back in 2003. These are referenced in para. 64 of the Decision and it seems to us a good way to circumvent the rather cumbersome process that has otherwise been contemplated by the defendants, but it does seem to us that those documents could be provided at a pretty early stage in the proceedings here.

I hope that was helpful. I am sorry to have gone on, Miss Masters, before you have had a chance to put in a word edgeways, but it seemed to us helpful to give you an early steer as to how we see things. Subject to that, welcome, and do begin.

MISS MASTERS: Thank you very much, Mr. Chairman, thank you very much for your helpful indications. Taking those into account, I am very much in the Tribunal's hands as to, firstly, the order in which you would like us to proceed, and perhaps it might be sensible, given the agenda that you have set out this morning, to proceed by way of your agenda and add in additional points as necessary at the end; and secondly, as to whether or not you wish me to address you on behalf of the claimants in relation to all the items or merely item by item and to allow the defendants a response. I am very much in the Tribunal's hands as to which you would prefer.

THE CHAIRMAN: It is probably most helpful, Miss Masters - I am very happy for you to address us by reference to the agenda - if you go through it as a whole, then we will see what the defendants say after you have had your say initially.

MISS MASTERS: Thank you for that. The first matter on your agenda, the index: as to disclosure of the confidential index, as the Tribunal has indicated, that is agreed. The Tribunal has raised a point as to why the parties have agreed that the index should be disclosed into a confidentiality ring. Clearly, that is not a matter for us to address the Tribunal on. We are happy for it not to go into the confidentiality ring. It is a matter that I shall leave to the defendants to address the Tribunal on, and I will respond as necessary. That then deals with that.

The second issue is disclosure of the confidential version of the Commission Decision. As to that, we thank the Tribunal for its indication that redacted material, that the parties should

seek to co-operate to produce a less redacted version of the Decision, with an appropriately short timescale to try and agree that. Then if - and I would very much hope that there would not be any disagreement - there are any areas of disagreement they can then be dealt with by the Tribunal, as necessary.

The second point in relation to disclosure of the confidential version of the Decision is leniency matters. As to that, we, as I hope is clear in our skeleton and in the joint statement, we take the view that for the moment leniency matters and all leniency material should be excluded. The reason for that is that we are seeking to make progress, and sensible progress, in this claim. It may be, given the Tribunal's indication as to the future progress of this matter and the indication from the Tribunal that they wish to get it on for trial as soon as practically possible, we may be coming back to the Tribunal sooner rather than later in regard to needing leniency material, I put that marker down now, but for the moment the leniency material remains out. There then remains the third matter as regards the disclosure of the confidential version of the Decision, and that is the defendants' point that third parties and the Commission need to be consulted in relation to the disclosure.

On that we make two submissions. The first is that essentially when we are talking about third parties we are talking about Morgan, because they are the only relevant third party who applied for leniency.

The other addressee of the Decision, to whom I shall refer in shorthand as "Conradty" did not apply for leniency, so no question of leniency arises, and other third party documentation that may appear on the file we do not know what because we asked for the index some time ago but as yet have not been provided with a copy. They are people like the cutters and various people who took raw materials and produced it into products which formed part of the cartel, but who are not members of the cartel. Of course, by definition, they were not found liable for any infringement, and there is no leniency material arises to them.

So far as Morgan are concerned, we have no objection to them being consulted. In fact, as regards Morgan it is probably a sensible time for me to deal with the position of Morgan in relation to the hearing ----

THE CHAIRMAN: Yes, you have drawn attention to Morgan, to the hearings taking place, and they have declined to attend, or said they do not need to.

MISS MASTERS: Yes, indeed. The Tribunal should have copies of two letters. Do the defendants have copies of these letters as well? Yes. My solicitors wrote to Clifford Chance in the middle of last week putting them on notice, although we are sure that they

probably knew anyway that the issue of disclosure and disclosure of their documents was likely to be a live issue at this hearing this morning, and asked them if they would wish to make any submissions in this regard, and inviting them to attend the CMC, or to make any submissions they might do so in writing or, if they attended, orally.

We received a short response on Friday afternoon, saying that they did not consider it necessary to appear before the Tribunal today or to make any submissions. We would say their position is more relevant in relation to our request for disclosure of their documentation that forms part of the file, but also, in my submission, it is relevant to this point as well in that they are not indicating any objections to the position that we are proposing, or certainly they are not objecting and they are not opposing. In our submission the Tribunal should take from that letter that they are relatively content for the moment with what is being discussed this morning. That, then, deals with the position of Morgan.

As for consultation of the Commission, we say that is not necessary either and we rely in that regard on the decision of Mr. Justice Roth in the 2012 *National Grid* case, and if I could ask the Tribunal just to get it out briefly. I am afraid that this bundle is quite full, but it should be at tab 44A. If I could ask you to go directly to para. 27 of the Judgment of Mr. Justice Roth.

You may be aware that one of the issues that Mr. Justice Roth had to determine in this case was whether or not an application for disclosure of leniency material, i.e. material which was of greater sensitivity in my submission than merely the decision, had to be referred to the Commission. On that issue he held quite emphatically that it was not necessary for him to do so and, in that regard, accepted the Commission's view on the point. Just looking briefly at para. 28 of his Judgment he starts with the proposition that it is possible for the national court to request the Commission to transmit leniency materials, but then he makes the point that there is nothing in the relevant regulation that even remotely suggests that the court is precluded from applying its own national rules and access to documents relying in that regard on the *Pfleiderer* decision, saying that it is a matter essentially for the national courts.

Then, at para. 29, first, he accepts the Commission's submission that Article 15 of Council Regulation 2003 does not stop national courts from determining their own procedural rules as to those relating to the disclosure. Then, and in my submission, this is important for these purposes, he deals with the practical problem that would arise in the event, if every single application had to be referred to the Commission, this will take time, this will take delay and, in any event, is not necessary, since a specialist Tribunal like this Tribunal and

the national court is definitely well equipped to deal with it. So, in that regard we say if there is no requirement to consult the Commission before disclosure of leniency material, where particular sensitivity issues arise, we say this is *a fortiori* in the case of the Decision and the confidential version of the Decision.

Unless the Tribunal has any questions for me on that issue that was all I propose to say about the Decision and I now propose to turn to what is really the heart of the matters that the Tribunal has to deal with this morning, which is disclosure of disputed areas of disclosure.

As for that I would propose, first, to address the Tribunal on the defendants' disclosure, and the matters that are not agreed and in that regard then I will be dealing first, with the three categories that the Tribunal indicated in its opening agenda. I will be dealing, largely, first with category 1, documents relating to the operation of the cartel. Documents 2, "who sold what to whom, when and at what price" category I accept is largely a matter for my clients, and I think this is common ground, and category 3, which is what I would call the title to sue point, the documents relating to the assignment and whether or not the relevant cause of action vested in my clients after privatisation, that is a matter which is clearly documents that I hold. In that regard, I do not believe there to be any dispute between the parties as to disclosure of the category 3 documents. We are happy to disclose those at the moment that are available, or reasonably available in a short time, and that, we say, would allow real progress to be made in the action on that issue.

The areas of dispute relate to item 1, operation of the cartel, where there are two disputes, and item 2 in relation to the who sold what to whom, when, and at what price category, where we think we are in real difficulties in ordering disclosure on that at this precise time.

THE CHAIRMAN: Yes, what I read was the suggestion that the problem simply be parked and addressed later on. It does seem to me that this is an area which is absolutely critical to get to grips with at an early stage. It may well be that the relevant documents are not simply documents which your clients have but they are materials in the hands of the defendants which could assist your clients. It does seem to us that it is quite important that we do not park this issue but actually get a process rolling whereby the relevant materials are collated so that ideally some experts can agree on the volumes, prices, dates of purchase and so on, so that instead of having several lorry loads of invoices, or whatever other documentation one has, one has an agreed schedule of what actually was sold and when, and that is something I think we would be keen to encourage the parties at this stage to get a grip on sooner rather than later.

MISS MASTERS: I am grateful for that indication and I will deal with that, if I may, in due course. First, I propose to deal with my client's application for disclosure as regards the defendants' documents, and the areas of disagreement there. As to that I have identified three areas of disagreement. First, there is what I call the 'temporal scope' point or, putting it another way, what is meant by "pre-existing documentation".

Secondly, there is an issue as to whether or not the disclosure that is ordered should be limited only to documents produced by each defendant, or also to include documents provided by third parties that are part of the file. In that regard I note the Tribunal's indication. It seems to me that I am part of the way there on that point, if I may be so bold, given the indication that you would like to hear the defendants as to why they simply cannot disclose the whole file CD roms.

Dealing, firstly, with temporal scope, we seek disclosure of all documents in the file, save for those documents that have been specifically created in connection with leniency, and there, as I have said, we are not seeking those at this stage, but we may be doing so in the relatively near future, depending upon the further directions that are set down for the progress of this claim.

We understand, and this is reflected in the joint statement, that disclosure of all original documents contemporaneous with the cartel period is agreed.

We were a bit bemused by a reference in Schunk's skeleton, which I am sure the Tribunal has seen, seeking to split out the documentation into three periods - pre-cartel, time when the Commission investigation starts, and then after cartel. We were bemused by that, not least because if you look at the Commission's Decision, tab 49, para. 69, p.18 - as I say, we have not seen the index so we are slightly in the dark as to what the file contains, but what we have noted is that the documentary evidence is set out at para. 69, and there are various page numbers which start at 01 and go to 14,998, on p.20. My learned junior noted on Friday afternoon that there seems to be a big gap in the index in the 12000s and the 13000s, so we are not quite sure what those contain. The point is that it appears that the vast majority of the contemporaneous documents were produced under the cover of leniency submissions, so therefore what we are going to be looking at is original documents that have been exhibited or annexed to potential leniency submissions. That means that necessarily some form of sifting or collating will have to be done by the defendants in order to separate the leniency submissions from the contemporaneous documents.

So we were a bit concerned at Schunk's suggestion that they were not going to produce anything after the investigation started, because that would seem to us potentially to mean

that they were not going to produce anything at all from looking at these documents. However, thankfully, this has now been clarified and it is, I understand, common ground that all original documents from the cartel period will be disclosed.

There are two areas of dispute which arise: firstly, documents on the file that may pre-date the cartel period; and secondly, documents that post-date the cartel period. As to that, I spoke to Mr. Beard this morning and I think there may be a slight gloss placed on that second category because he has indicated that he is happy to disclose original documents that post-date the cartel period that may relate to things like pricing or the effects of the cartel. What he is not happy about is disclosing any documents that were created as part of the Commission investigation, such as responses to requests that may contain information that is not leniency material as well as leniency material. He can address you further on that, but I thought I had better raise that issue now.

It may be that there has been a narrowing also of the area of dispute in relation to what I call post-cartel documents.

As regarding pre-cartel documents, I am sure that, having read the Decision, you will be aware that there is a lot of history in this case and there are references to the 1930s and 1940s. We are not expecting reams of documentation in relation to that, and nor is there is likely to be any on the Commission file. We are not sure whether or not this is seriously disputed. We accept that there is not likely to be many documents, but that which there are we say should be disclosed because they may well be relevant to the beginning of the cartel and to its implementation. Self-evidently, no issue can arise about leniency documentation because it was well before even the first party, Morgan, applied for leniency in September 2001. So we say that is pretty straightforward, there cannot be any sensible objection taken to those documents to the extent there are such documents that form part of the file.

That then leads to documents which post-date the cartel, so after the end of 1999. As to that, there are two relevant periods. The first is the period before the Commission got involved in 2001, and there cannot be any sensible objection, in my submission, to documents relating to that period from the end of the cartel in 1999 to 2001 when the Commission first became involved. Nor, in my submission, is there any real and reasoned objection to disclosure of the later documents.

The defendants have raised two issues as to why they object to providing these documents at this stage, and their objections are practical. They say, firstly, they would need to make extensive review to make sure that they do not, by mistake, include leniency material; and secondly, that any review could also potentially involve leniency material provided by third

parties, and they would be in a difficult position trying to work out whether or not material provided by third parties was or was not leniency material.

We have a short answer to that, and we say they really are overstating the difficulties. They are seeking here to make reasons not to do anything at all. Particularly given the Tribunal's indication that they would like to move forward on this case expeditiously, we say they are going to have to do some work and the answer is that they are going to have to largely perform this exercise anyway now, and the further difficulties they refer to are not reasons, in our submission, why disclosure of the entire post-cartel documentation, save for leniency material, should not be disclosed at this stage.

The first point is, we are all agreed that leniency material is not to be disclosed at this stage, so therefore they are going to have to review the material anyway to extract the leniency material. I have already shown the Tribunal the list of documentary evidence set out at para. 69 of the Commission's Decision, which indicates that the vast majority of the contemporaneous documentation was provided under cover of leniency material. So they are going to have to review that anyway. As part of that exercise they are going to have to take out the documents that were contemporaneous with the cartel period, which they agree should be disclosed, and also those that were created afterwards, and after the Commission became involved in order to separate them out into the different categories and to review them to see if they include leniency. Therefore, what we are talking about are documents created post-2001 when the Commission investigation began save for that which is obviously leniency material. We say it is going to be a relatively easy exercise to identify what is leniency material and what is not. They are their documents, they created them, and they should be able to do that job in a relatively short time.

Secondly, as to leniency materials coming from third parties, as I have said, we are only talking about Morgan because no other party applied for leniency, and as for Morgan we have had their letter saying that they have had a copy of the joint statement and they have no submissions to make and, on that basis, I would urge the Tribunal to take the position that they do not object to what is being proposed.

Just finally on that point, if there are any issues that arise as to the position of third party in documentation it is a normal procedure for them to engage with those third parties and to seek to sort out any problems that arise, but in my submission there are most unlikely to be any. They can speak to Morgan if they need to and no other defendant applied for leniency and so therefore there should not be a problem with leniency material. That is all I propose to say on that issue, the temporal scope issue.

THE CHAIRMAN: Just on that, and it may be wider than this, you are not envisaging the use of (para. 64) CDs as a helpful shortcut simply to get to the claimants quickly the material which has already, reading para. 64, been pre-filtered by the Commission to exclude confidential material?

MISS MASTERS: I think the problem with that, it would be fantastic if it worked, but I assume, though, as I say, it is difficult because we have not seen the index, that the file will include CD-roms will also include the leniency statements – or am I wrong on that?

THE CHAIRMAN: I was reading it as excluding that because it says it excludes business secrets and other confidential information. It may be that the defendants can correct my reading on that.

MR. BEARD: If I may just assist, the central issue with CD-roms is, yes, it does contain material relating to leniency undoubtedly and, therefore, whilst there is a delightful prospect of just handing over a couple of disks and it all works marvellously, unfortunately you cannot do that because we are going to have to go through that material. I will come on to why it is not straight forward to identify what is and what is not leniency material because, of course, some of the material is going backwards and forwards and being used in other documents, and different parties do not know which bits are leniency from one party to another, and so on. I will come on to it but that is why we were delineating between original documents and documents that were then provided to the Commission because we actually thought we would speed this process because what you would get is a cohort of documents that were produced by those parties to the cartel, or pre-existing, that then could be gestated. There will have to be some sifting exercise to identify what those are on the CDs, but that exercise is not the same as trying to work out what is actually leniency information on the documents on those CDs, and that is a very big and painful exercise.

THE CHAIRMAN: Right. When you come to address us on this I think it would be helpful to have an understanding of what the Commission means when it is referring to confidential information, it clearly seems to be confidential information of parties who were perhaps not being investigated by the Commission.

MR. BEARD: I will take instructions, but the instructions on what is on the CDs is absolutely clear and therefore, unfortunately 64 does not offer the panacea that one might hope.

THE CHAIRMAN: So, Miss Masters, you would be happy with this course if we said you get the index, you get the CDs, and then come back further but, as I think we hear, that is not something that the defendants are likely to sign up to.

MISS MASTERS: Yes, we would, however, we also believe that the CD-roms may well contain the leniency material as well, so we did anticipate that the defendants objected, hence I do not think, absent what the defendants say on the matter, that I can say ----

THE CHAIRMAN: Anything further on that?

MISS MASTERS: -- that it is quite as simple an exercise as the Tribunal believed … which, of course, I was able to say so.

Moving on to the second main area of objection in relation to the defendants' disclosure, and that relates to their position that they should disclose only documents that they themselves provided for the Commission, original documents, but not documents that were provided by third parties as well.

Three preliminary remarks at the outset on this point. I am sure the Tribunal is aware, the effect of the defendants' position is not merely that we would not see other copies of each of the defendants' documents as supplied to the other defendants as part of the access to the file procedure in the redacted version. The effect is we would not see any documents at all coming from third parties that were provided to the Commission at this stage. We say that, first, this would deprive the UK claimants of a large volume of documentation relevant to the implementation of the cartel and its effect on prices. We say a large part of that documentation will have been provided by Morgan, and just going back to para. 69 of the Decision, and I am sorry that I hark on about this but this is the only evidence we have at the moment as to what the file contains. If you look at the first two items listed at para. 69 of the decision, these are the first two leniency statements provided by Morgan, and they amount to 4,600 pages. Notwithstanding the industry of lawyers and their ability to create very long documents, I very much doubt that the leniency statements themselves amounted to 4,600 pages. We say that it is almost inevitable that a large amount of those two items are contemporaneous documents, and if the Tribunal accedes to the defendants' position we simply will not see any of that now and, without that, we say it is not possible to much useful progress, or we will be severely hampered in the useful progress we can make in prosecuting this claim.

Secondly, and harking back to last summer, when I was not here, you were lucky enough to have Mr. Turner in front of you instead, it was an important part of our case to lift the stay, that we could make useful progress pending the outcome of the Morgan Crucible appeal. An important part of the argument, as the Tribunal may recall, was that the defendants held third party document that had been provided to the Commission including documents held by Morgan, and this is also acknowledged by the Tribunal when it made its ruling.

I do not know if the Tribunal would find it helpful to be taken to the relevant parts of the transcript where we made the point good in July. If it would, can I ask you to take up briefly – I will not take much of the Tribunal's time on this.

THE CHAIRMAN: By all means.

MISS MASTERS: -- the case management bundle, and tab 50. This is a point that we made several times before you in July of last year. I am told that p.64 makes the point most clearly. This is Mr. Turner's reply to a point made by Mr. Hoskins, which was also relied on by Miss Dietzel, that many of the documents were actually prepared in the context of leniency applications. This was in response to our point that useful progress could be made notwithstanding the fact that the Morgan appeal was pending before the Supreme Court, to which Mr. Hoskins said that most of the documents are leniency documents. The reply is that this is profoundly misconceived. Leniency documents is not everything attached to a leniency statement, it is only those documents specifically created in the context of a leniency application.

The second point starts in the middle of line 14, another point was that somehow the amount of pre-existing documentation was small or minimal. The response to that, and this is making the point that I have already shown to the Tribunal this morning, that the leniency statement is 3,000 pages, so there is a lot of documentation where they have been even more than that, so we are talking about potentially several thousand documents, and we say that the Tribunal's decision to lift the stay was made against that background and in full knowledge that this is what we were seeking to do and that these were the sort of documents that we wished to see.

Therefore, and this is my third preliminary remark, the effect of what the defendants now seek, if the Tribunal accedes to it, will be to frustrate the future progress of this claim for an indefinite period, and we would put it as high as this, it is potentially to emasculate the Tribunal's ruling that the stay should be lifted that you made in August of last year and we would say that you should simply not accede to it because throughout the entire thrust of our application was that the stay should be lifted so that useful progress could be made, and a large part of useful progress in progressing this claim in order to understand the nature of the cartel implementation, depended upon the documents from Morgan.

Those are my preliminary remarks.

The defendants have raised four objections as to why they should not produce these documents at the moment. The first one is duplication, the second is the position of Morgan, and that Morgan may wish to be heard and that, pending this, their position must

be protected. The third point is other third parties (apart from Morgan) may have concerns about confidentiality or concerns about the material, and they would need to be consulted. The fourth point is a further practical point. They say that it may not be apparent whether particular material is leniency material or who provided it, and it would be very cumbersome to do the exercise of working out what it was and who provided it, and more consultation would be needed; it is practically difficult and not straightforward.

Responding then to each of those points, the first point, the duplication point: we say, firstly, we are keen to avoid any duplication where possible. After all, it is us who is going to be reviewing the files and we would much rather have one original document than two or three copies of the same document, one original and two redacted. We say that this is a point really against them because we are the ones who are going to have to do the work in this regard and we are perfectly happy for any duplication, and clearly it makes good sense, to be avoided. We set out in our skeleton at para. 11 one possible way that duplication could be avoided, which is that each defendant provide original copies of its own document and then you have one lead defendant providing copies of third party material.

We say there may be others. The Tribunal has identified merely giving the whole file. That would be another way. It would not avoid duplication but it would make it relatively simple, but there may well be the issue there that it contains leniency material.

Also this raises a point of principle, which is the fact that we might potentially receive several copies of documents, which, as I say, causes problems for us because we then have to review them, it is not a reason not to give disclosure of those documents at all. They are saying, "Because it will be duplicative, we simply should not have to produce the documents". In my submission, that is no answer to disclosure of otherwise discloseable documents. That was all I proposed to say on duplication.

The second objection is as to the position of Morgan. On that, the short point is that we contacted Morgan last week. We invited them to make submissions. The Tribunal has seen their response. They have not seen it necessary to appear before you today, and have indicated that they do not wish to make any submissions at this time. In those circumstances, we would say that any objections that the defendants have based upon the fact that Morgan have a right to be heard and their position needs to be protected fall away.

We say that that is the answer to two points raised in the defendants' skeletons. Firstly, the Schunk defendants at para. 17 of their skeleton refer to the *National Grid* 2011 Decision about disclosure of third party documentation. This was the case where Mr. Justice Roth ordered third party disclosure from the defendants in circumstances where the parties'

whose documents they were said they could not produce them because it was contrary to the French blocking statute. I do not think it is necessary to take you to that. They said in that case the parties did not object, they just could not produce the documents because they were subject to a French blocking statute. We would say the position is the same here. We would say, taken from that letter, the Tribunal can take the position that if Clifford Chance had anything serious to say in relation to what we were seeking, they would be before the Tribunal today, or at the very least would have put in written submissions. We say you can discount the objections from Morgan. In any event, they can be consulted as regards any potential difficulty that they rely upon as to the identification of any leniency documentation.

The third and fourth points as to the position of third parties other than Morgan, I propose to take those together and essentially two points have been raised here. The first is confidentiality, and that the third party documentation we seek may contain confidential material which it may be difficult for these defendants to identify because they are not their documents they belong to third parties and will require extensive consultation. Secondly, the identification problem arises again. It may be difficult to identify what is leniency material.

As to the first point, confidentiality, three points: so far as we are talking about third parties other than Morgan, this point will arise at some stage irrespective of what happens to Morgan. The Tribunal has urged me, in a sense, to grasp the nettle this morning and to drive these proceedings on. We say this is certainly an area that can be driven on. These documents are, on any view, discloseable, and there is no reason to park this point now. It will have to be dealt with at some stage and we say it should be dealt with now, so it is not dependent on Morgan.

Secondly, as to confidentiality, we say that this is confidentiality of documents of other third parties. We say this is profoundly misplaced. The documentation that the defendants will have will be those that have been provided to them by the Commission. Those will have already been redacted in order to remove confidential information or business secrets, as the Tribunal has pointed out earlier this morning, and the reference to para. 64 of the Commission's Decision. Our understanding is, therefore, no issue should arise as to confidential information from a third party as the Commission will already have performed that task for the defendants.

There is a further point here. We are not talking about documentation that was produced a few months or even a few years ago. The Commission Decision was in 2003, so therefore

even the newest documentation is approaching 11 years old, and some of the oldest is going to be more than a quarter of a century old.

Could I just ask you briefly to look at the Commission Notice in this regard on access to the file, which is to be found in the CMC bundle at tab 47. There is just a short point here, point 23, dealing with confidential information and requests to the Commission that documentation provided be redacted for confidentiality. Paragraph 23 states that certain information:

> "… will not normally be considered confidential. Information that has lost its commercial importance, for instance due to the passage of time, can no longer be regarded as confidential. As a general rule, the Commission presumes that information pertaining to the parties' turn-over, sales, market-share data and similar information which is more than 5 years old is no longer confidential."

We are not talking about no longer than five years old, we are talking some of it potentially is 25 years old.

On confidentiality, we say that, firstly, it is misplaced because the documentation should have been redacted; and secondly, we doubt very much that even if it had not been redacted it can be confidential now given the passage of time.

MR. HOSKINS: (no microphone) … business secrets and confidential information. They are actually technical terms for the purposes of procedural regulation, and you see them defined in paras.18 and 19. I hope you do not mind me interrupting to deal with that now. It will hopefully save time later.

THE CHAIRMAN: Thank you.

MISS MASTERS: Thank you. That then leads to the third objection, which is that identification of leniency material held by third parties will be difficult. We say that is far-fetched and we do not shy away from that. We say that in the vast majority of cases, first, they were only talking about Morgan documentation because they are the only third party who applied for leniency. Secondly, the vast majority of documentation, it should be readily apparent whether or not it is leniency material. If one takes a step back and thinks, "What is one talking about, identifiable leniency material? It is not clear when it was made or who made it". That supposes that there is documentation which is sent to the Commission without a date on without saying who it is from. If I were a potential infringer of Community competition law and was seeking leniency, the last thing I would be sending is undated and unsigned documentation to the Commission, because the chances are it would never appear on the file. We would say that this idea, this category of documentation, it is so difficult to

find out what it is is simply far-fetched. We say there may be a very few documents, Morgan documents, where it is not clear whether or not it is leniency material, but we say the parties can seek the views of Morgan. This is what happens in those circumstances. We say it is not going to lead to any significant problems, and in any event the exercise will need to be done at some stage anyway, and why should it not be done now in order to allow us to get on with matters and to progress this claim?

THE CHAIRMAN: It is not just Morgan though. There is a letter from Carbone-Lorraine, as we can see on p.19 of the Decision, requesting leniency dated 16th August 2002.

MISS MASTERS: They are here.

THE CHAIRMAN: I appreciate that.

MISS MASTERS: So they should know whether or not that applies to their documents. We are not seeking leniency ----

THE CHAIRMAN: I take your point that it is easy to differentiate one from the other. I understand that. It is in terms of the leniency versus the non-leniency camp. It is more than Morgan. Morgan is not here obviously but it is more than just Morgan.

MISS MASTERS: They have already accepted, sir, that they are going to have to work out what is leniency and non-leniency as regards the parties, which will include Mersen. The issue is leniency and non-leniency as regards Morgan. We say it is not that difficult, and if Morgan had any real objections they would be before you this morning and they are not here.

That was all I proposed to say on the areas of disagreement as regards the defendants' disclosure. Then we turn to my client's disclosure. As I say, category 3 of the items of disclosure that the Tribunal specifically referred to this morning is agreed. We agreed that we will provide documentation as regards what I call title to sue, the assignment documentation relevant to what happened with the privatisation of the British Railways Board and also how this course of action vested in the UK claimants - that sort of documentation we agree to provide. It can be made available in short order.

THE CHAIRMAN: What do you mean by short order, Miss Masters?

MISS MASTERS: We are proposing four weeks for disclosure. It is not going to cause any massive practical problems. What is not agreed at the moment, though I hear the Tribunal's comments in this regard, is disclosure of what we call the purchase documentation - who bought what, when and at what price?

My understanding from reading the joint statement and reading the skeleton is that only the Schunk defendants and Mersen are pursuing this point, and Mr. Hoskins is not seeking disclosure from my clients on this point, though he may like to confirm that.

MR. HOSKINS: (After a pause) I am so sorry I was seeking instructions on something.

MISS MASTERS: I am sorry, Mr. Hoskins, I was just saying that on purchase documentation my understanding is that only the Schunk defendants and also Mersen are seeking disclosure from my clients on this point - is that correct?

MR. HOSKINS: Our position was that we thought it should be done at an early stage, but we did not particularly push for it today or the day after today. It is obviously that has to be done early. We are in the same position as the Tribunal. I am sorry I was otherwise engaged.

MISS MASTERS: No, not at all.

THE CHAIRMAN: I have to say, Miss Masters, irrespective of the position that the defendants take, the view from the Tribunal is that this is something that really needs to be done sooner rather than later.

MISS MASTERS: Can we take instructions on the point? (After a pause) Our objection is not one of principle, because we are happy to crack on with this aspect. The issue is one of practicality and the difficulty at the moment relates from the fact that our information on this and our documentation is very limited. To make that good, if I can just ask you, hopefully this is the only time that I will ask you to look back at the bundle from the July hearing ----

THE CHAIRMAN: Mr. Gold's statement, is that?

MISS MASTERS: Yes, Mr. Gold's statement did not find its way into the CMC bundle. We tried to avoid duplication. Tab 1, vol. 1, towards the back of that tab and if I could ask you to turn to para. 18 of Mr. Gold's statement. There are two points that I seek to draw from this evidence. First, our information is limited; and secondly, it is not entirely straight forward for us to produce it. It does not simply form some lovely files that are in Hausfeld's office that we can send, or a CD-rom that we can send to the defendants. Paragraph 18 – the first point is we have no invoices prior to 2003 and, indeed, I am instructed we have nothing at all prior to 1995/96, which is before privatisation, because that documentation is still held somewhere in the national archive in relation to British Rail, and we have some limited documentation from 1997 to 1998. So therefore we accept our documents are important on this issue, but documents that are held by the other defendants and, in particular, Morgan, will be crucial in order to get a full picture in relation to purchase information and also, more importantly, overcharge, and therefore in order to determine quantum.

So, we say that we need disclosure from all defendants to get a proper picture, and I should add in passing, though most of the documentation will be held by Morgan, there will also

be some documentation from Mersen, from whom we made some direct sales, and we see this at para. 29 of Mr. Gold's statement, and also we made some from Morgan from the period 1998 to 2003. We do not have a great deal and we say we need documents from all defendants in order to get the full picture.

The second point regards how easy it is for us to produce these documents and, as I say, it is not simply a matter of picking out the relevant file. In order to produce the information that is contained in Mr. Gold's statement – there is no paper documentation it all comes from the databases. There are two databases. One is, and this is referred to in para. 19 of Mr. Gold's statement, the SAP system. That contains basically stock transfer records by reference to product codes, so that is half the picture. We could see that certain items with very long product codes were bought and when these were replaced. In order to find out what they were, and whether or not they were the relevant products, we needed to look at another database, which is called the "PADS" database. The very industrious team behind me, and also Mr. Hudson and his team, spent many a happy hour putting the two together in order to produce the information that you find in Mr. Gold's statement as to the purchases for the purposes of establishing jurisdiction under Article 5 (3) of the Brussels Regulation. There is not hard copy documentation as such, it would be a matter of interrogating the relevant parts of the database.

Subject to that, and subject to finding a way to do it in a cost effective and efficient manner, we are happy to make as much progress as we can. The issue we have at the moment is the practicality of this exercise in circumstances where, as I say, we only hold half the picture, and that which we hold is not readily accessible. Tied to that then is the question of experts and the Tribunal indicated it was quite keen to get on with the appointment of experts and get them doing some form of exercise as relating to quantum sooner rather than later.

As I am sure the Tribunal is aware, instructing experts is expensive, and they like to have as much information as possible. Our concern is what will actually happen in effect now is that experts instructed to get on with the task on the basis of partial information they have is that they will not. Either they will charge a lot of money and say: "We do not have enough information to provide any definite view, and this is all full of suppositions and estimates", or they will do the job as best they can and, in the event that further documentation becomes available when the Morgan appeal is determined, either because they stay in as a party or, even if they do not, by reason of third party disclosure orders or contribution proceedings or various other procedural matters, they may say: "We need to do the job again on a different basis". So we will have two lots of costs, and so those are our concerns. Our concerns are

not objections of principle, they are just ones of practicality in doing the exercise now, but subject to that we are keen to progress this claim, as I hope should be apparent.

THE CHAIRMAN: Miss Masters, obviously, we appreciated when we saw Mr. Gold's statement on the jurisdiction application that this was a very difficult area of disclosure. It is just one that actually needs to be grappled with in quite a fundamental way, because obviously you and I both have the same difficulties regarding the Commission documents in that we have not seen them but I would be quite surprised if those documents provided this sort of data. The Commission's investigation will not have been sufficiently granular to provide that information, so it has to come from somewhere and, without putting too fine a point on it, it is absolutely fundamental to your client's case that material be produced and, if possible, agreed with the parties at an early stage. I do not think we are in the business, in disclosure, of simply grasping at the low hanging fruit of disclosure, making orders regarding that, i.e. the Commission file where we have CD-roms and other materials all nicely filed and available and we are just grappling about what should and should not be disclosed. I think it is imperative that we have an approach that produces, in very early order, documentation which will enable this Tribunal to reach a decision at a substantive hearing.

Now, I understand from what you are saying that the relevant material lies in three broad areas. One is documentation that is in your client's control, the other is documentation which may be in the control of the defendants and the third – bearing in mind my definition of "defendants" – is actually material that lies in control of the third party, Morgan. So, it seems to me, that it is quite important that you come up with a fairly precise statement of what it is that your client needs in order to make good its case and enables this Tribunal to make appropriate orders to ensure that we have the factual baseline to make a determination in due course.

Obviously, we are going to have to park Morgan documents for the moment, but it does seem to me that you need to proceed on the basis that Morgan will not be a party, in the formal sense, to these proceedings. This case was given, as it were, licence to run separate from the broader case on the basis and the assumption that Morgan would not be a party, so you have to treat them as a third party; if they have material documents you need a strategy for how those documents are going to be produced.

MISS MASTERS: Well, as I said, we have no objection in principle, our observation is the practicality and a case management point, which is given that the Morgan appeal is due to be heard in a little over a month, it may well be that in a period of a relatively few months that the matter is clear and whilst there is this uncertainty, we would say that there is some

sense in parking the point, though, as I say, we have no objection in principle. It will take a little time to produce the documentation and it will involve some practical difficulties.

Mr. Williams reminds me there are two points here really. First, there is production of the relevant documents, and the second issue is what is done with them.

As to the first issue you have my client's position. As to the second issue, either we leave them on one side, and we see what the position is as regards Morgan, although the Tribunal indication is they would prefer it to get on with the exercise, and perhaps work out another way of filling in any gaps that we have, irrespective of the position of Morgan. We can look at that. My concern, as I say, is I do not want to incur a lot of cost and expense in circumstances where, in perhaps two or three months, the job has to be done again with the Morgan documentation.

THE CHAIRMAN: That really raises a difficulty which we grappled with for the last jurisdictional hearing. The whole point was to cut loose certain segments of an overall claim that could be tried on the basis that Morgan would not be a party. For the Tribunal's part we would be most unwilling to adopt a course which involves the defendants giving disclosure of the Commission files, nothing else happening pending the resolution of Morgan's appeal to the Supreme Court, which is only being heard in mid-March, and then obviously there will be a question of how long it takes for the Supreme Court to issue a Judgment in that case. There is no question of this action being stayed pending that outcome. That would make the whole jurisdictional argument, which was run last year, really something of a useless undertaking. So, I am afraid, having taken the decision that your clients have done, which is to have an action which is a subset of a broader action, that action now goes on and we are not in the business of saying "Let's wait until the Supreme Court has made its decision so that Morgan can come back in." We feel that this is a separate action now that needs to be tried and tried expeditiously, and that I think involves, not simply the defendants making disclosure of the documents that they hold but, I am afraid, your clients incurring expense, and we accept it is a difficult practical area that needs to be grappled with, but your clients incurring that expense with a view to having this action tried really within the sort of time frame that we were floating at the outset.

MISS MASTERS: Just on the suggestion that we want to stop now, that is not correct. We are keen to progress the action, and that is why we have suggested, and this is agreed, a staged approach to disclosure; we have a stage now and then we come back for a CMC in July. So we are not simply suggesting that we do this and then we wait and see what happens for a matter of months and years. We are keen to get on with it as quickly as possible. We are

just concerned about the practicality of doing it in circumstances where the Morgan position may be clear in a matter of a few months.

To summarise, we are happy, in principle, to continue. We are concerned about the position of Morgan. I get the feeling that perhaps the Tribunal is pushing us towards the possibility of making a third party disclosure application as regards Morgan. We have not considered that today, because after the last hearing we took the view that the Tribunal's indication was - and this was the basis upon which we applied to lift the stay - we could make useful progress whilst the Morgan appeal was being heard, and when the position of Morgan was clearer we might or might not stop for a little or carry on. If the Tribunal is indicating that we should be considering a third party application for disclosure from Morgan in order to get on with matters we will consider that. Subject to that and subject to not getting too involved in experts and expert evidence until we have an appropriate evidential base to do so, we would be happy to give the disclosure sought.

THE CHAIRMAN: As you may know, the Tribunal tends to rise for five minutes to give the shorthand writers a break in transcription. Before we rise I will just leave you with two points. One is that it is obviously in your client's hands what course you take, but I do recall Mr. Turner making the point that useful progress could be made. I will go back to the point that I made at the outset, which is that when the Tribunal made its jurisdictional ruling it attached some weight to an action moving forward expeditiously if there was jurisdiction and there were no case management objections going forward. Given the basis upon which the jurisdictional application was made last year, namely that this was something that could proceed even if the Supreme Court decided that there was no jurisdiction as against Morgan, that is how we are proceeding and that is the way in which your clients need to approach matters. I fully recognise that there are considerable practical difficulties in getting together this material, but that is why we are raising it now, because these practical questions need to be addressed sooner rather than later.

The second point I will leave you with, because I do want you to give some consideration as to the time frame in which this sort of material can be produced and what you are expecting the defendants to do in the same way is that we see experts as assisting the parties not so much in reaching a concluded view as to what was going on in terms of the cartel's operation, but actually simply in identifying what is needed for the claimants, on the one hand, to establish their case - in other words, what material an expert needs to see in order to reach an informed opinion; and on the other side, for the defendants to identify what

material they need - I am thinking here in particular of the practicalities of the passing on defence - by way of evidential material in order to make good the defences that they raise. We will rise for ten minutes until midday to give you a chance to think a little bit further on those points. I anticipate from what you have said that four weeks is not going to be the date that you are going to come up with as regards this class. I think I have read that right, but I think I would like some indication as to what sort of timeframe is achievable by your clients and what it is you will be seeking from the defendants. We will park a Morgan third-party application because that is a matter which is entirely within the decision of your clients.

Until midday, thank you very much.

(Short break)

MISS MASTERS: Returning then, sir, to the matters that the Tribunal left with us when we rose for a few minutes - and we thank you for the opportunity to take instructions - by way of preliminary remark I repeat the point because I think it does bear repeating that we are not seeking to drag our feet here. The approach that we have taken to date, and that is the approach that has been agreed in the joint statement, and the joint statement reflects that, which is what is agreed between the parties after extensive and, in my submission, useful discussion, is based on case management decisions, and is also based upon the approach advocated by the Tribunal in its ruling in August, and this is particularly as regards Morgan, and the position of Morgan. You have sought so suggest that the matter proceeds forgetting about Morgan for the purposes of dealing with this claim. In my submission that was not the basis on which we approached matters in July, and nor was the basis upon which the Tribunal made its ruling in August. If I could refer you to para. 85 of your Ruling, which is to be found at tab 44B of the CMC bundle.

In my submission, this makes good the point that the whole background to lifting the stay, and I have already taken the Tribunal to para. 64 of the transcript of the hearing, was to enable useful progress to be made and the position to be reviewed within short order, in order to see whether or not the position of Morgan was clearer after the hearing of the Supreme Court appeal at the beginning of March.

Mr. Williams points out – just dealing with para. 84 – dealing with this point ----

THE CHAIRMAN: So you are looking at para. 84 of the Judgment, are you?

MISS MASTERS: Paragraph 84 of the Ruling, yes, at tab 44B. This deals first with the point that the defendants were not obliged to put in a full defence to the both the UK claimants and the non-UK claimants, and then dealing with going forwards –

"… necessary for the parties to grapple with the manner in which the cartel affected the prices of Products, but thereafter, it will be a question of assessing, as regards each UK Claimant what (if anything) that claimant overpaid for the Product it purchased. Should all of the claims proceed in the Tribunal

- dealing first with the position if Morgan remains a defendant, and so therefore predicating that Morgan will be here when this matter is tried,

"…then the action will have progressed."

In the meantime, this is the point on useful progress, but:

(1) The general operation of the Cartel will have been pleaded, and

(2) The specific claims of the UK Claimants will have been dealt with.

In this way, without duplication, the entire action - should Morgan remain a defendant - can efficiently progress."

Paragraph 85 is expressly predicated on the basis that Morgan stays in and deals with the question of catch-up. So, therefore, in my submission, this was the basis upon which we have proceeded, that if the Supreme Court holds Morgan in, they may need to catch-up. It will be allowed to plead its defence and make disclosure after the defendants have filed their defences and made their disclosure, it may be that the action would be delayed again. That is not certain at this period and at least some progress can be made in the intervening period.

"As Mr. Hoskins submitted, the issue of quantum will be complicated and almost certainly require expert evidence - at least if some disclosure has been given, the process could be begun while the 'catch up' takes place. Furthermore, it has been the experience of courts dealing with competition cases that disclosure can take a long time, and that the disclosure of the Defendants will not necessarily be resolved quickly. If Morgan's appeal to the Supreme Court succeeds, such that it is not a defendant to this action, we will simply have delayed an exercise that will inevitably have to take place."

Against that background, we and the defendants approached this CMC, and we decided to take a staged approach to disclosure, and in the first instance, and with the aim of obtaining readily accessible documentation to enable us to progress the action. We sought disclosure of the Commission file. In my submission, it goes further than that, because that is not only consistent with the approach advocated by your ruling and the basis upon which we approached the lifting of the stay, it is also entirely consistent with the approach advocated by the authorities as regards leniency material, in that one seeks disclosure of the

documentation that is readily available first, the non-leniency material, sees what one has and then later down the line seeks disclosure of leniency material as necessary in order to make good the case. We have parked leniency material for the moment. If the matter is to proceed very expeditiously we will have to put down a marker that we are going to need the leniency material as well pretty quickly. We have concerns that that may not be an appropriate exercise to consider until after we have had an opportunity to consider and review the documentation which is to be reviewed as part of the first stage.

So that is my preliminary remark – we approached it on that basis with the aim of making useful progress in this action, and the parties have come to the Tribunal having made a great deal of progress in agreeing matters, as regards disclosure of the first stage and those are the matters which are before the Tribunal which had been agreed. There are small areas of disagreement upon which the Tribunal is asked to rule.

Against that background, dealing with, first, the purchase documentation that the defendants seek, we have taken instructions. As I said, our concern to this is not a principle one, it is a practical one, and if the Tribunal is minded to order disclosure of the purchase documentation we could produce it. It would take us slightly longer, I am instructed, than four weeks – we are talking probably in the region of six weeks, and progress on a piecemeal basis could be made in that regard. But, if we were seeking that documentation we would say, and consistent with a principled approach to disclosure, we would say that the defendants equally should be asked to produce the same category of documents to the extent that they have done – it may be that some have quite a lot – the Mersen defendants should have a certain volume of documentation since they made some direct sales to my clients, and also sales through Railpart/Unipart. There will be documentation for them to give. That deals with the position now.

As regards the position going forward, as I have said, we come before the Tribunal with an agreed joint statement and that deals with the issues we have liaised about. We have not yet liaised with the defendants on other matters and in those circumstances, in our submission, it is difficult to take instructions and set out our position in relation to other case management orders in circumstances where, it may well be, that if the matter is left over albeit with a short timetable with the parties to liaise and to seek to agree further directions, much of the too-ing and fro-ing and many of the difficulties which are raised by having to consider such matters on the hoof are avoided. But, the simple matter is we do have concerns as to the practicalities, even considering the matter afresh and with no previous

indication, that this was going to be suggested at the hearing this morning, as to the practicalities of setting a date now of November and December.

If I may address you as to the concerns we have as to how practical – what I am saying is it is not practical to set it down without allowing the parties to liaise and to work out between themselves, albeit, we would say with a short deadline to do so, as to what needs to be done and as to how realistic it is to do that which needs to be done before the trial. We would submit in those circumstances that a short period and a short deadline should be given to liaise.

First, as I have said, there is the question of leniency documentation. In accordance with the staged approach advocated by the authorities, we would submit that the sensible course is to review the documentation that is provided by the defendants, and then consider what leniency material is needed, given there are sensitivities as to the production of that documentation. That is going to take a certain amount of time.

Secondly, we come to the position of Morgan. We had not considered the possibility of a third party disclosure application as regards Morgan, and we had not done so largely on the basis of the approach we had taken as to why we were seeking to lift the stay, and also in light of the Tribunal's decision which considered the possibility that the defendant could remain a defendant at some catch-up time. We did not approach ----

THE CHAIRMAN: Miss Masters, I think you are misreading our Ruling, I have to say.

Paragraph 86, for instance, makes it quite clear that matters will be proceeding whether or not Morgan is a party. I appreciate that Mr. Turner made submissions that useful progress could be made on disclosure of the Commission's file, that was something that was useful, but I think if you read the Ruling as a whole you will find that that does not come front and centre in the Tribunal's reasoning. What is more, I would like to think that the Tribunal's letter of 7th January 2014, which made a series of suggestions to the parties as to how they might approach disclosure, fundamentally suggests that simply confining the disclosure exercise to disclosure of the Commission's file was not something that was particularly on the Tribunal's radar. So it may be that you are right, it is sensible, given that these things have not been thought out, that we building a couple of days thinking regarding the way forward on disclosure, but obviously we will hear what the other parties have to say on the various points you have raised. We are fundamentally not attracted by the idea of a parking of what we accept are extremely difficult disclosure questions for your clients. We think the more difficult the issue the earlier it should be addressed rather than the other way around.

MISS MASTERS: Sir, we appreciate that, and we are keen to grapple with difficult issues. The question is: is it a practical and a sensible way forward from the point of view of case management. If we take, for example, the position of Morgan, we could make an application for third party disclosure now irrespective of the pending Supreme Court hearing in March.

Prima facie then if we made an application we would have to pay the costs of that application, and we would say that is inappropriate and disproportionate in circumstances where it may be that Morgan are back into this claim in a few months if the Supreme Court orders that they remain a defendant and Morgan's appeal in that regard is unsuccessful. At the very least we would say those costs should be reserved, if we are forced to make a third party disclosure order. Then, if that happens, if Morgan are back in, what practically will happen? If we get to May or June the Supreme Court appeal is unsuccessful, and then Morgan are back into the action. They will not have pleaded a defence, and in those circumstances it will be almost inevitable, in my submission, that the November date will have to go. What we are saying is proceed, and proceed as expeditiously as possible, and practically, but we doubt that it is sensible to do so entirely without regard to the position of Morgan. That is our primary position.

Our fall back position, because I sense some resistance from the Tribunal on that is that, at the very least, we came to the Tribunal having agreed those matters that were agreed, and having ventilated those matters that were not agreed, we have heard the Tribunal's indications on that and we should be given a reasonable opportunity – the Tribunal mentioned a couple of days – we think it would take a matter of a week or two, to discuss the matter going forward. The real practical problems, as the Tribunal is doubtless aware, as an advocate I have only limited experience of the practical difficulties of orders that are given by tribunals and courts that raise serious and difficult practical exercises that need to be undertaken. I can agree to things that are completely unrealistic and in those circumstances I would say the only sensible thing to do is to give the parties the matter to consider.

For example, one other point that will need to be considered, which will take some time, is if the Tribunal is minded to order further disclosure at this stage, not only a question of discussing it with the solicitors and the client, there will also have to be, as the Tribunal has anticipated, discussions with experts as to what documents are necessary. We are not resistant to that but all I am saying is it will take some time. It all needs to be built into the timetable, and we would put down a marker now that that may mean that November or

December is not a realistic date. It may be different in the early part of next year but we just think it will take much longer and if the fact it takes much longer means that in the event Morgan are kept in and can be here in front of the Tribunal at the substantive trial we would say so much the better, and that is the expeditious, and the case management way to proceed.

I have, I am afraid, addressed the Tribunal rather extensively on that point.

THE CHAIRMAN: Yes, it has been very helpful, Miss Masters.

MISS MASTERS: I hope it has been at least of some assistance, and unless there is anything further on that point I am really now, I think, down to a couple of final issues.

The next point then is confidentiality. I think, following the Tribunal's agenda there are two points on that. First, as to what the confidentiality ring should contain in terms of documents. I do not propose to say anything more about that given the Tribunal's indication at the outset this morning, it is for the defendants to make the running, in my submission, on that point and to satisfy you that documentation is in fact confidential, given the passage of time and with reference to the Commission's notice (para. 23) that I took you to earlier.

As to the second point – this is a new point – which we did not know anything about until Friday afternoon. It is a point only taken by Mersen in their skeleton and it is a point that the Cuatrecasas lawyers, who are instructed on the claimants' behalf, should not see any of the disclosure in this case. We have a number of points on this which, as I say, we only heard about on Friday afternoon. We do not know how serious the point is. My understanding is there have been some issues about the exact position the Cuatrecasas had in these proceedings before.

We say it is not clear what their objection actually is and I wait to see what Mr. Beard says on that. However, we do have a number of preliminary points to make. If one looks at para 21 of Mr. Beard's and Miss Ford's skeleton they say, first, that Cuatrecasas are involved in some unspecified capacity and they are not lawyers on the record. They are also understood to be involved in proceedings commenced by other claimants in Paris.

> "Whilst it is obviously a matter for the UK Claimants which lawyers they choose to instruct, it is submitted that material disclosed by the Defendants should not be provided to lawyers who are not even on the record for the UK claimants."

So, their objection seems to be directed to the fact that only Hausfeld are on the record for the UK claimants and Cuatrecasas are not and, therefore, they should not, for some unspecified reason see the documents.

As to that, we have four points to make at this stage. If the concern is that they are not on the record, which is what it would seem to be, we would say that that is no objection at all. First, they could have been on the record, they are EEA registered lawyers, as I am sure the Tribunal are aware, there is no objection in principle to them being on the record, but instead they chose not to be. They are instructed by their clients, the UK claimants, in relation to these claims and they decided, together with their clients, as part of their strategy, to instruct Hausfeld, experienced UK competition lawyers, based in London – rather than a Spanish firm - as solicitors on the record. But, and this is an important "but", the claimants instructed both firms to work together in relation to this claim in order to progress it in the most effective and cost efficient way. So they are both involved. We would say that in the above circumstances the Tribunal should not go any further, and that it would be a gross interference with the client's right to choose the most cost effective way and efficient way of conducting its litigation if the position was that merely because Cuatrecasas were not on the record they could not see the documents. It would cause them substantial prejudice as well. It would make the position unworkable. The simple point is that the UK claimants are Cuatrecasas's client. It is up to them how they decide to conduct their litigation.

THE CHAIRMAN: I think that point, Miss Masters, is well made. Would it be best perhaps to see how far the point that we made, that we would explicitly apply CPR 31.22, makes a difference to Mr. Beard's position and, if that does not resolve his concerns, have you address his concerns in reply? I am bound to say I do see the force in what you are saying, but obviously I have not heard from him. I do not want to cut you short but ----

MISS MASTERS: I am perfectly happy, subject to one point which may also short-circuit the matter, which is that we do not oppose a CPR 31.22 order. There is another point though, which is that the partner involved, Mr. Hitchings, is a UK practising solicitor. So he is fully aware of his obligations and bound by the Law Society's Professional Conduct Rules, and he will abide by those, and can also ensure that members of his team who may be Spanish lawyers do so. So no practical issue, in my submission, arises. That was all I was going to say because it may be that the defendants were unaware of Mr. Hitchings' qualifications.

THE CHAIRMAN: I have no doubt that, whatever the situation, Hausfeld & Co would make clear to anyone involved in the case what their duties were with regard to documents disclosed during the course of these proceedings.

MISS MASTERS: Indeed. Sir, unless I can assist you with anything further at this stage I shall sit down.

THE CHAIRMAN: Thank you very much, Miss Masters. Is it Mr. Beard next?

MR. BEARD: Yes, sir, we drew straws and I lost. I will work my way through things broadly in the order in which they have arisen. If I may, however, I will start with the issues concerning the pre-existing documents on the Commission file, which I think was where Miss Masters started off. The Tribunal at the outset indicated that there was a temptation to look for the CDs and hope that the answers lay therein. Unfortunately, it really does not lie there. The difficulty we have in relation to the CDs is that they contain documents that one effectively has to download and put on to a database and sort through. Some of those documents will be pre-existing original documents and some of the documents will be material from third parties, and some of the documents will be materials that have been submitted pursuant to leniency applications. Obviously, given what has been said about leniency material, documents that have been submitted for leniency applications have to be sorted out and sifted out. Unfortunately it does not stop there because material from leniency applications then gets used in other submissions and other documents. The difficulty then comes is that you are only looking at our leniency material we have to work out what our submissions - one hopes we can do that. We have to identify where there is leniency material used in relation to those. The problem is that the leniency material that is put in the first time will be recycled and referred to in further submissions, some of which will be containing leniency material, some of which may not.

The greatest complication comes when any submissions that are being put in, say, by us actually contain leniency material from other parties. We are not going to be in a good position to detect what is leniency material from another party that we may well be referring to in these documents going to the Commission. That is where these sorts of difficulties arise. We recognise, and what we were trying to sort out was a way of delineating a category of documents that did not risk containing leniency material, because if we delineate that category of documents that did not risk containing leniency material then the exercise we would have to do is narrowed to some extent. It is still a fairly substantial exercise because these documents are not all neatly in English, they are not all necessarily chronologically sorted, and so on, so there is actually a reasonable amount of work to do to sift them anyway.

That is where our difficulties arise. What we were trying to do was sort out an agreed category of documents where we were not having to go hunting through for leniency material. That was why we were talking about pre-existing original material. Documents that preceded the advent of the investigation and the leniency application being made, even identifying that category would take a while for the logistical reasons that I have explained

because you have got to actually pull them together, identify, for instance, relevant dates, and so on. You have got to make sure that you set your deadlines in a relevant way that you are not picking up leniency notes, and so on, that have been included with submissions. That is a real problem in relation to the logistics of this. We do not know a magic way of getting round it because the Commission does not label up leniency material, and it does not then carry through some kind of identification of leniency material into further submissions, nor do the parties making them. That is where our difficulty arises, given these concerns. We are happy to, and we have tried to, engage constructively so as to identify a way of making the CDs more useful, but because of this leniency material issue it just is not that straightforward and we cannot simply press a button, sift the CDs and drop out material that is non-leniency information. That really is key to our problem in relation to this sort of category of pre-existing documents.

What we should say is that we are particularly concerned about that in relation to documents that are not our own. When it is said, "You can give all the Morgan material", we know that Morgan was a leniency applicant but we do not know beyond, for instance, the basic first leniency application what other material was provided pursuant to that leniency application which we are then getting back through this access to the file process. So it is a logistical exercise given that constraint.

We are obviously willing to try and identify the best ways of doing it. It would still take weeks to do the sifting exercise, even if we can find some sort of bright line. I do not think we should shy away from the difficulty. As I say, what we have tried to do is to say that if you exclude anything that is correspondence with the Commission in relation to the investigation, then what you are doing is eliminating the stuff that risks containing leniency material.

THE CHAIRMAN: Thinking about this, one bright line would obviously be any and all relevant documents pre-dating 18th September 2001?

MR. BEARD: Yes. The only query I have is in relation to the precise date threshold in relation to that. If there were leniency notes that were prepared just before that date and materials of that sort and then submitted to the Commission, we only had a slight concern that if you set the date at precisely that point it might be of concern. I know that Schunk have a particular concern in relation to that idea. In principle, setting some sort of date that will pick up these sorts of documents may well be the way of doing it. Then the process will be, download the documents, put them on to a database, have them reviewed to be labelled with the relevant dates and then they can be sorted and categorised accordingly. There is still quite a lot of

work to be done in relation to that sort of exercise. That is just the way of these things, because the Commission is not organising its access to the file CDs with a view to enabling or facilitating subsequent disclosure in follow-on claims. It is just not in the right shape and form to be able to be done quickly. As I say, it will be quicker than trying to review it even for our own leniency material, but we are still talking about weeks to do this rather than days.

THE CHAIRMAN: You may not be able to answer this because it is quite a detailed question, but is there is a more detailed index of the material that is on the CDs? What sort of format are we talking about?

MR. BEARD: We are in a slightly odd position because we do not appear to have an index at all. We have said this in correspondence. This is what makes the world harder for us, we do not seem to have an index. This was specifically asked for. We just have what appears to be something of a document dump that we would have to sift through.

THE CHAIRMAN: Would I be right in inferring from what you say that we are looking at a standing start for this process, no work has been done?

MR. BEARD: No, because we have not had a sensible way of doing that at the moment. I think that probably deals with the majority of points in relation to the pre-existing documents. It is this sensitivity about leniency materials.

I should say that there will be non-leniency confidential material that may be included in that. We are not turning round and saying that, in relation to disclosure obligations, confidentiality is a bar to disclosure or anything silly like that. We do recognise that there are third parties. Miss Masters took you to recital 69 in the Decision which gives that long list of documents and the pages. If you read through it, what you note is that most of it is referring to Schunk or SGL or Mersen or Morgan, but there are various other names of companies there that were submitting material. We do not know whether or not there are any confidentiality issues that arise in relation to them.

We quite understand again, as I say, confidentiality is not a bar to disclosure. We are in a slightly unusual circumstance, because what we are talking about is documents that have only come to us because of the operation of the Commission process. Of course, under Article 15 of the Regulation - you have it in the bundle, I think, it is probably worth turning it up, it is tab 46. This is the Regulation concerned with access to the file itself. What is said here is that access to the file will be granted and then it says at 4:

> "Documents obtained through access to the file pursuant to this Article shall be used for the purposes of judicial or administrative proceedings for the application of Articles 81 and 82 of the Treaty."

We are not saying that this acts as a bar to your ordering disclosure, but what you are talking about here is material having been obtained by the Commission through that process and third parties who may have concerns about it. We do not say, no, they could stop you ordering disclosure of these sorts of materials, what we are concerned about is whether or not this Tribunal should be affording such people the opportunity to comment before that sort of material is disclosed. That obviously goes, *a fortiori*, in relation to the position of Morgan. You have a situation where the claimants have written to Morgan and said, "Please come to the party", and strangely they have seemed a little coy about the prospects of their kind invitations, perhaps understandably, given that they are subject to a stay in relation to these proceedings. Whatever the position is, there are concerns about those sorts of matters. Indeed, that was the reason why it was mentioned about the possibility of just raising this with the Commission and saying, "Look, is there any real issue here given these confidentiality and leniency questions?"

That I think probably deals with pre-existing document material. We are not saying that there is not a way through, but it is not as straightforward as is being said and the central issue is in relation to that leniency material.

That perhaps then takes us on to dealing with the claimants' disclosure of documents. In relation to, as the Tribunal put it, the third category of material, the entitlement to bring a claim, there it appears that the UK claimants are going to provide the relevant documents. They are not confined to the assignments following privatisation of British Rail. There may well be other relevant documents beyond the assignments themselves, but all of those documents must be disclosed. That is important, because we are not going to beat about the bush, if it turns out that there was a problem in relation to these assignment arrangements there is no claim here, and it may well be that this Tribunal has to get engaged in an interlocutory application in relation to these matters. We are not in a position to assess these matters properly yet, but we do have real concerns that a situation has arisen where the majority of the claims on the claimants' own case are claims that flow through the Railpart/Unipart entity. They say we can bring claims in relation to purchases made by them. Let us not forget Railpart/Unipart still exists. It is not a defunct entity. In those circumstances these issues about the assignment of rights to claim in relation to those sorts of matters may well be quite significant. As I say, we do not fight shy of the possibility

that, having received that sort of material, further steps should be taken. Indeed, it fits with our overall approach to it.

We think that in relation to decisions relating to disclosure and case management, it is obviously critical that this Tribunal takes a proportionate approach in relation to these matters. We do think a staged approach to disclosure is sensible and proportionate in this regard, and indeed what that does is it means that this sort of category of material, which might mean that actually there are applications that have to be made and dealt with, is brought out early so that those issues can be smoked out more quickly. It may be that they get left to a full trial, but at least those sorts of decisions can be made sooner rather than later.

That then takes us to the second part of the material that we referred to as obviously being critical to the way in which the claimants bring the claim. They sought to have the stay lifted in relation to the UK claims. They did so on the basis that there was jurisdiction under 5.3 of the Brussels Regulation. They did so on the basis that there was real damage suffered in the UK.

What we see in the Gold statement, which may have been sufficient for arguing there is jurisdiction here, is a statement, "We have no information about purchases". On the face of it, that could be fatal to their claim as well. If there is no damage, you might have jurisdiction to hear the claim but "there ain't no claim there". In those circumstances, again, for the same reason, when you are thinking about proportionate stage disclosure it seems to us that identifying that at the outset is critical. As Miss Masters quite fairly said, that is a matter largely for them. We have said, "We are not asking you for the world in relation to disclosure". We are saying, "When you put this claim together and when you made the decision that you wanted to float these UK claimants' claims off you must have made an informed decision about the purchases you were making, and that is why you put in the Gold evidence and we want the material that you collated for that, we are not asking you to carry out some vast wide and disproportionate search". We are saying, "You must have done this and we want that material". Miss Masters is saying that actually is quite limited. So be it, that may be somewhat double-edged for Miss Masters in terms of (a) the need for the disclosure, and (b) the prospect of further matters arising in relation to it.

We are concerned about these things, because we see at the back of the claim form the values of commerce in relation to the UK claimants running into millions of pounds. We then look at the sort of schedules that have been pulled together using a disparate set of databases by Mr. Gold. In relation to Mersen you would be less than £100,000. These are

vastly differing figures, and isolating what is going on there is critical, in particular for the proportionality of the assessment of the further steps. If we are really talking about those sorts of numbers, the way in which this case should be case managed becomes very different it seems to us, because asking for wider disclosure going on and getting into the sort of data that Miss Masters suggests sates the appetites of economists, who are always hungry for these things, is and can be quite a significant and expensive exercise and this Tribunal would have to think very carefully about whether that was the sort of stage that should be undertaken, whether or not there was any extant claim. So it seems to us that that is the very minimum that should be provided.

We also refer to the fact that in annex 6 to the re-amended claim, there is a reference to a supply agreement and we say that should be provided as well, and indeed any documents of a similar sort.

The UK claimants have been initially saying that this was all too broad. I think their position, perhaps in reaction to the way the Tribunal has approached matters today, has somewhat changed. As I say, they do not ring out in this court the claim *cris de coeur* of claimants, "We don't have the documents, because this is your cartel". It is not that situation here. This is purchase material, it should be the sort of material that lies with them. Since, on the claimants' own case, they appear to have purchased largely from Railpart/Unipart, and it is really not going to be for the defendants holding material about sales to these particular claimants at all. We have dealt perhaps in passing with the exchanges that the Tribunal have dealt with, and clearly the focus of the claimants' concern is in relation to Morgan. Indeed, that can be seen to some extent from the material in relation to Mr. Gold.

That again casts something of a shadow over the process that was undertaken last year by the claimants to press on with the claims when the focus is Morgan and we now hear that it is going to be critical and there is some kind of third party disclosure application made against a stayed party in these proceedings in circumstances where that really does not fit with the strategy that has been adopted to date.

I think that probably deals with the majority of the disclosure topics that were raised in relation to the claimants' disclosure by us.

In her most recent submissions, Miss Masters was starting to say, "We would like some other disclosure from the defendants in relation to purchases, and so on". We have not seen what the particulars of that are, and that would be important because the idea that we should be just put to, "You should give relevant disclosure", that is antithetical to the way in which

disclosure should be dealt with on a staged basis. It is antithetical to the way that the Jackson reforms work. It seems to us that it is incumbent upon a claimant in those circumstances to say to us, "It is this sort of material we want", because that is not what has been said to date. We need to understand what those specific requests are in order that we can deal with them and assess what sort of exercise is involved, again going to the proportionality of these matters. Casual changes in the parameters of disclosure requests can have real repercussions for those that are on the receiving end of them. It is simply not fair, it is not consistent with what, in CPR terms, would be referred to as the overriding objective just for these sorts of general requests to be thrown out.

That then takes us to the Commission Decision itself, the confidentiality of the Commission Decision. Mr. Hoskins helpfully has already taken the Tribunal to the part that I was going to refer you to which delineates business secrets and confidential information. As I say, it does not cover redactions in relation to leniency. One of the little quirks is that the confidential versions of the Decision that the defendants may have may each be different because the redactions to the confidentiality may vary between them. We are not sure to what extent to which that creates complications. What we do know, or what we suspect is that there is going to be material in there that is sensitive to Morgan, and all we are doing is highlighting the difficulties that arise in relation to dealing with Morgan's leniency material in relation to that.

The suggestion that was in the skeleton, it has not been echoed again this morning, was that one defendant takes the lead and tries to turn out a consolidated version of the Decision. I think the Tribunal's approach was a slightly different one, as floated at the outset, which was that we each look at our own Decision and identify which bits are confidential to us and relate to leniency material and therefore redactions should be maintained. One can see that that process can be undertaken by each of us. Quite how one gets through that process to a discloseable Decision, I am not sure, because we may well be able to say, "These bits are confidential to us on the basis of leniency concerns", but we cannot say it necessarily in relation to other people's material. We could not just hand over our confidential version in those circumstances, I would suggest, certainly not without that being further reviewed.

THE CHAIRMAN: I was thinking of the sort of approach that you will be familiar with, but others may not be, that was adopted by Competition Commission in *Eurotunnel* where redactions were made, but in each case it was identified which party had asked for the redaction. One has one document containing all the redactions, so that the claimants then have a document that they can look at and they know who is objecting to which bits.

Obviously that implies a degree of co-operation between the defendants and may require investigations as to why particular materials have been disclosed.

MR. BEARD: Yes. The difference of course with *Eurotunnel* is that you have the Competition Commission sitting there that can act as, effectively, the omniscient body in relation to all of the requests for confidentiality. If the European Commission were to sit in that role I think everyone's life would be an awful lot easier, we can entirely see that, but they are not. One of the practical issues will be what to do with the Morgan material, or material that none of the three defendants identify as relating to them, and in relation to which they are unsure. You suggest co-operation. Of course we are willing to co-operate. I just do not want to presume that there will be no problems arising. It may be that no problems will arise, but it would be unwise for me to presume that is the case because the history of dealing with these sorts of documents is such that it tends to be more complicated than people anticipate.

MR. GLYNN: May I ask a point of clarification: when you refer to the Morgan material, there is obviously leniency material which will have its own character. There is also material about the sales that Morgan made in the UK and indeed in other parts of the areas affected. Do your clients know what Morgan's sales were in the UK for the cartel period?

MR. BEARD: I would very much doubt that we would know that sort of thing. I do not know whether or not you are, in fact, right that the Decision contains that sort of material, because, as the Chairman rightly adverted to previously, in these sorts of Commission decisions where they are looking at was there a cartel, was there an interchange between rivals, they are not necessarily looking at the extent of the impact in relation to those matters.

MR. GLYNN: No, they are clearly not looking at the extent of the impact, but they might well have been interested in the volume of sales, which is different obviously from the impact. In the description that the Commission gave of the working of the cartel it appeared that there were meetings at which the operation of the cartel throughout the area affected were reviewed by cartel members. In the course of those meetings - perhaps this is not a fair question - were the sales volumes of Morgan known to and discussed with the other members of the cartel?

MR. BEARD: I am not in a position to be able to answer that sort of question, but I do not think one should wait with baited breath for that sort of material to come out of Commission decisions or underlying documentation because one does not necessarily find that sort of level of detail in relation to any of these sorts of cartel decisions at all. It is one of the great

perversities of cartel decisions that it has been observed that they tend to be made as findings of an object case infringement and therefore actually the extent to which it is necessary to consider detailed documentation or evidence in relation to particular effects, and so on, declines and therefore the extent to which material has to be gathered and considered in relation to those issues may decline concomitantly.

In any event, in so far as the sort of materials that you are referring to might exist and are documentary material that is on the case file, and there is obviously pre-existing original material, then we are recognising that such material would be produced as part of this exercise.

MR. GLYNN: Thank you.

MR. BEARD: That probably takes me on to confidentiality and the prohibition on the use of documents in other proceedings. Obviously we are grateful for the indication now that the CPR Rule 31.22 undertaking will be made explicit by way of an order, so it is not merely an implied undertaking as it is in High Court proceedings.

Just picking up the concerns about Cuatrecasas that have been raised in our skeleton and elsewhere, the point is a relatively simple one. In circumstances where a set of lawyers is acting not just for one set of claimants in relation to a Commission decision, but in relation to two different separate sets of claimants - and I am not here talking about UK claimants and non-UK claimants in relation to Deutsche Bahn, I am talking about entirely separate groups of claimants in relation to the Electrical Carbon cartel decision. The concerns on the part of the defendants in those circumstances are particularly acute. It is actually slightly different if you are dealing with the same claimants in different jurisdictions perhaps, but if you are dealing with different claimants in different jurisdictions there is a real concern on the part of defendants that lawyers are obtaining materials, subject to an implied undertaking that is now made explicit, but nonetheless are obtaining an awful lot of information. We do not really see how they set it from their mind when they then go and work for other clients.

We recognise, of course, that lawyers do work for a whole range of clients, but we are acutely concerned about the idea that you have lawyers who are not formally on the record and are therefore not subject immediately in these circumstances to this Tribunal's jurisdiction, albeit that they may be subject to a disciplinary sanction - I am grateful for Miss Masters' indication in that regard - but the idea that such lawyers can sit in the background in relation to this sort of case, obtain sight of material in circumstances where they know about that material when they go and work for other clients, not these clients, is

the point that is of greatest concern. It is really that that caused us to raise the question of why it was that this material needed to be provided to Cuatrecasas at all in relation to these matters. We do not think the fact that in these proceedings a stay has been lifted in relation to a number of claimants and this Tribunal wants to move disclosure forward means that there should be an access to the Commission's file that might indirectly be of benefit to other clients in other jurisdictions. That is the concern. We are not really sure quite how that is dealt with. We recognise the comments made by Miss Masters in this regard, but it is a general concern when you are talking about multi-jurisdictional litigation potentially with a whole range of different claimants. As I say, our understanding is that those at Cuatrecasas are acting in Paris for different claimants, and in those circumstances our concern is that the implied undertaking not to use would be difficult to practically apply to a lawyer acting in those circumstances. It is a bit akin to the problem that sometimes arises in relation to confidentiality rings. We do not have the power of that fantastic device in ***Men in Black*** where you can have your memory wiped at a relevant moment and then proceed afresh as if you are untainted.

I think those are the concerns we have about allowing that material out to lawyers who are not on the record in these proceedings. The fact that they have chosen not to be on the record does not offer a great deal of comfort in relation to these sorts of matters here.

I think, moving on to time for disclosure, I focused primarily on the issues concerned with the Commission Decision and the CDs of materials that accompany the Commission's file. I have already given an indication that it would take us several weeks. We would not be able to get that exercise done, even with the sort of bright line deadline we are talking about, within four weeks, as is being suggested. Those behind me have said that we should be able to complete the exercise within eight weeks, having prepared that database and done the work in relation to it. We suggest that is therefore a sensible time period within which that disclosure should be ordered.

As to the precise date, as I say, setting it at 18th September may be slightly too late on, but I will leave that to Schunk to pick up, and then we have timing in relation to the next CMC and setting down in July which, as far as we can see, is done on the basis that effectively there is a good chance of us knowing what the Supreme Court's ruling is. If that is the case we can see there may be a danger of that CMC slipping, but if a default date is what this Tribunal wants to set down then obviously we recognise the benefits of that, but with the recognition that if that is the basis on which the date is being held it may have to move at some point.

Unless I can assist the Tribunal further, those are my submissions.

THE CHAIRMAN: Thank you very much. We will rise until two o'clock, and it is Mr. Hoskins next. Thank you.

(Adjourned for a short time)

THE CHAIRMAN: Yes, Mr. Hoskins?

MR. HOSKINS: I will just bounce through them as quickly as possible. On the index to the Commission file – why should it go into the confidentiality ring? The position in our skeleton is just simply we are erring on the side of caution because we do not know whether it is a confidential or non-confidential version of the index. In some cases you do find both exist. We do not know if this is or is not, so we suggest the safest course is for it to go into the ring. We do not have any substantive reasons; we are not saying to you: "Please, please, please, put this in the ring". It is entirely a matter for you. That is all I have really got to say on it; that is hopefully what we said in our skeleton.

If I can take the decision and the documents received through the Commission's file together, because I have just got a short point to make, which is whatever the Tribunal decides to do, it is important to understand that the defendants cannot do Morgan's job for it, cannot do the third party's job for it, i.e. it is not for us to pour over documents and ask: "Oh, is this a leniency document, or is this a confidential document belonging to a Czech producer?" We are not equipped to do that. We are not in a place to do it, and it is not our job. Again, it is entirely a matter for the Tribunal, we will do whatever you order us to do, but we cannot be expected to do their job or take their points for them, and there has been the correspondence with Morgan, and that clears away a lot of the problems, I would have thought on that to be perfectly honest.

The final point I want to make, really, I know we were going to come back to it after lunch but I will deal with it now, because it seems to me there has been a very large elephant in the room. You let it in this morning, you sat it behind you and it has been there all morning, and we have been fiddling around talking about indexes in the ring or not in the ring. It is irrelevant. If we are having a trial in November we need to produce a detailed timetable to trial and we should do it as soon as possible, because, as I am sure you are aware, November is a big challenge to get this to trial. I am stating the obvious – every day will count. So, yes, we have done some useful stuff today in the detail, but to be perfectly honest the heart of it is: how are we going to get this to trial in November?

Two general points in relation to that: I think the parties do need to be involved. In our defence, we were not aware that it was going to be a November trial date. We saw your

letter, one can see the hint, but to be perfectly frank the claimant, having applied to lift the stay, then comes up with those proposals, that is where we are. If we are going to get on with it fine, but the parties need to be involved because it is going to be a tough ask, and it is going to take some thought.

The other general point is if we are going to need the documents relevant to value of sales and over charge and pass through, we are going to need the documents relevant to the value of sales and overcharge and pass through, and we are going to need them as quickly as possible, because to give economists any meaningful chance of getting to grips with the information, the disclosure is going to have to come quickly to allow them to do so.

Unless you have any further questions, that is all I wanted to say.

THE CHAIRMAN: Mr. Weiniger?

MR. WEINIGER: Sir, just a few further things in addition. Going through in no particular order, let us start with the pre-existing documents on the Commission's file. I feel I do need to make some small attempt to clear things up on the Schunk proposal. Just because it was described – if I may say – so poorly by Miss Masters, who mis-described what the three phases that we had set out in our skeleton argument actually were, and this is at para. 9 of our skeleton argument. I think if the Tribunal were to take regard to that, they could see how this is the sensible way to proceed in this respect, because the idea is that we have identified a first phase where leniency issues do not arise. That is not by reference to a gate, but by reference to a stage which, as we say at:

> "9(a) first, from the start of the cartel period up to the commencement of the Commission investigation and the filling of the initial leniency application."

The reason there is not a hard cut-off date of 18th September is that the parties before you today do not know what happened before the first meeting that is described in the Decision. We do not know if there was a pre-meeting, or a letter written, or something of that nature. So that is why that phase 1 is described in that manner.

Then, as the skeleton sets out, phase 2 and then phase 3 are where the documents are going to be, let us say, infected with leniency materials, and where the Tribunal needs to step more carefully. I do not need to make further submissions because when we are moving into phases 2 and 3 that has already been covered in what my learned friends have already said.

The second issue on which I would like to make submissions is on the matters relating to the claimants' production. The documents we are arguing over, as regards the claimants' production, the relevant purchase information, these all fall within the category of readily

available, highly relevant information that need to be produced whatever happens to Morgan's application in the Supreme Court. In the same way the documents we have just been looking at, the Commission's documents are available to the defendants only, but not to the claimants, so too these documents generally are available to the claimants and not to us, by which I mean the UK defendants, because in the large part there are some exceptions, but for the most part we are not the parties that made the UK sales. So we have little idea what is actually at stake in this claim until we actually see these documents. Mr. Gold actually admits in his witness statement that Schunk made no sales to the UK claimants, so therefore there is nothing that Schunk can do to assist with this stage of disclosure. But at the same time in order to understand this case we need to see their documents and we need to see them quickly.

MR. GLYNN: Could I put to you a similar question to the one I put before? Do your clients have any knowledge from the workings of the cartel of the sales that Morgan made in the UK?

MR. WEINIGER: We do not think the information in the Decision is going to be very helpful in that respect. Over the luncheon adjournment we have not been through the whole Decision, but even if it was to say that Morgan arranged sales in the UK you do not know what sales were arranged, what the product was, what the quantity was. There are a number of different purchasing parties.

MR. GLYNN: Forgive me, the impression that I have from reading the Commission's 2003 Decision is that the cartel was rather a thoroughly organised cartel. They took care to make sure that the participants – many companies covering many countries – were aware of what each other was doing in order to look out for what they called "cheating" in that context. It seemed to me very likely just *a priori* not from anything that is stated in the Decision, that a part of that process would involve the companies such as Schunk knowing what the other members of the cartel had at an aggregated level in each of the countries that was affected.

MR. WEINIGER: I can see why that makes sense as a hypothesis, sir, but we have not investigated the documents in order to check whether that actually is the case.

The next subject on which I would like to make submissions is the confidentiality ring. I appreciate that at this stage I would not get very far making a submission that every single document that we are looking at disclosing in this first stage of disclosure raises immediately stark concerns of confidentiality. What I would submit is that this is not really the issue at this early stage, because what we are dealing with is a national court making orders for disclosure of documents from a Commission file, documents which may have been provided under cover of a leniency application. We accept that we would need to

establish the need for any particular document to go into a confidentiality ring, but at this stage we would suggest that is not a particularly heavy burden, because the interests of the CAT in a full disclosure being made need to be balanced with the interests of the EU system of making sure parties remain willing to submit documents, and co-operate fully with the Commission. If such documents were automatically to lead to public disclosure, it is easy to see how the CAT's interests could collide with the Commission's interests. When you add that to the fact that some of the documents we may be asked to disclose may emanate from third parties, we suggest the CAT should be even more astute to those concerns at this stage. All we are asking for at this point is an order that all of the documents disclosed go into a confidentiality ring, which means that no harm will be done for the present. The claimants' interests are protected; the defendants' interests are protected, and the Commission's interests are protected. Any designations made now can be revisited later, and we can take steps to ensure that initial designations are appropriate. It does seem that safety first is the right way around, and I do not think it is an answer to this point to say: "Well, business secrets after 5, 15 or 25 years are no longer business secrets". Sometimes redactions are made, for example, to protect the names of individuals so that they can have an unblemished career following any disclosures made to the Commission. We do not know if that is the case in this case, but if that is the case it would not be much protection for his name to be disclosed and I do not think the passage of time makes a material difference there.

The point has been made, well, the Commission has already reviewed all these documents for confidentiality when providing them to these parties, to the parties being investigated, but that just means a process has been undertaken whereby the Commission has decided in conjunction with the parties what redactions need to be made for the sake of these particular parties, that is not the same as taking steps to consider what redactions need to be made for the interests of the public. So all we are asking really is for this to be done in stages, for the moment for everything to be put in the confidentiality ring, and if, as will obviously be likely, some questions will need to be revisited then we do that when we have more parties around the table and on the basis of more information; safety first is basically the submission there.

The final point relates to Cuatrecasas, this is not just a Mersen concern, and the Tribunal can see this from para. 29 of our skeleton argument, I do not need you necessarily to turn to it now, but we have made the point and we support the submissions made by Mersen in that respect.

Unless I can be of more assistance, those are my submissions.

THE CHAIRMAN: Thank you very much, Mr. Weiniger. Yes, Miss Masters?

MISS MASTERS: Briefly, in reply, and dealing first with Mr. Beard's submissions. On the pre-existing documents, and I will adopt Schunk's characterisation here, the phase 2 and the phase 3 documentation for leniency and non-leniency, two problems have been identified. One is leniency material emanating from the Morgan defendants; and thirdly, references to other parties' leniency material in defendants' documents in part 2 and part 3.

First, we say that this is an exercise they are going to have to do at some stage in any event given the Tribunal's indication that they want to get on with this matter expeditiously, we say,given that they are already going to have to sift leniency and non-leniency, it is merely part and a small further exercise for them to do. Secondly, and this is, in my submission, the real answer to this point, they significantly overstate the problem. If I can ask you to turn, yet again, to the only clue that we have as to what is, in fact, contained in the file, para. 69 of the Decision.

If I can ask you first to look at para. 64 at the bottom of p 17, because this is significant. It says that the Commission took the decision to initiate proceedings on 23rd May 2003 and adopted a statement of objections. Then "Parties were granted access to the file", so therefore it followed from that that before 23rd May 2003 none of the defendants has access to the Commission's file or anybody else's leniency material and you see that in para. 65.

If you go on to para. 69 of the Decision, and look at the documentary evidence set out therein, you will see that, apart from the last document, which is the reply from Hoffmann to the statement of objections dated 21st July 2003. All of the documents pre-date the date upon which access was given to the Commission file. So it follows that none of the defendants would have received the other defendants' documents, including any leniency documents, so they could not have made reference to them in t heir own submissions. So we say the concerns that there may be leniency materials referred to by a defendant which, in fact, refers to leniency materials from another defendant simply does not arise because they would not have seen that material when they made their submissions.

MR. BEARD: Just on that, I do not want to leave Miss Masters in any difficulty by raising this later, this is not an index to the CD's that is listed here, so I do not think we should be under any illusions that this is all that we are talking about.

THE CHAIRMAN: No, but it clearly is sequential, if you look a the ----

MR. BEARD: Oh yes, it clearly is sequential. What we do not know is whether there is more other stuff, that is the only point I am making. I do not want to leave Miss Masters in the position where I stand up at the end and say: "Actually, there may be more here."

MISS MASTERS: That is true, but if one looks at para. 65 and they say after they received the statement of objections

> "Substantive replies to the Statement of Objections were received from all parties, except Morgan, which merely noted that it had no observations to make. Carbone Lorraine, Schunk, Hoffmann and SGL said in their reply they did not substantially contest the facts."

In my submission, taken from that which is all I have to go on, it appears that they would not have had the documents when they made those submissions.

That then leads to the position of Morgan and the further point that is made that they would need to go through the Morgan documentation and make calls as to what was and what was not leniency documentation.

Just looking again at para. 69, and let us look at what that would involve. The first two documents are very lengthy, we accept that, 3,000 pages and another 1,500 pages more or less. They are going to have to go through those documents anyway to sift out contemporaneous cartel documentation from leniency material, otherwise we are not going to get any documents at all. Then, further on, and it is accepted, I think, the suggestion in Mr. Beard's submissions that they need to look at replies to information and the dialogue following part of the investigation between the Commission and Morgan, and that might refer to further leniency material. If you look at what it actually is, the first document is the second document on p.19, that is three pages. The second document, one further down, is 10 pages. Then, in the middle, there is another one dated 18th September 2002, that is, we accept, a bit more weighty, that is 105 pages. The final documentation, p.20, just in the middle, 21st March 2003, four pages. We say that is not a Herculean task on any view, and they can liaise with Morgan as necessary to make sure they are not disclosing leniency material. That is all I have to say on the pre-existing documents point.

In relation to purchase documentation, you have had my submissions as to what we agree we will provide. We were asked about the supply agreement, which was referred to in one of the annexes to our claim submissions. Yes, we will be providing that. We will also be providing any other relevant documentation as is set out in the joint statement. We have a definition of what we are providing there and we are happy to provide it.

I mentioned this morning, in light of the Tribunal's indication that it wanted to do more than the parties had agreed, that we would also be seeking purchase information from the defendants, and that is correct. In essence, what we will be seeking is the similar sort of information as we are providing. However, we discussed at lunchtime providing a request today but, having considered the matter, it is not quite as straightforward as in our case, because the position is that before privatisation there were direct sales to BRB, of which Railpart formed a division, and then after privatisation there were also sales through Unipart and Railpart to my clients, and some direct sales. Given the fact that as we have indicated and as Mr. Hoskins has also submitted, if we are going to get on with this the parties need to seek to see the practical ways and how practical things are. In our submission, as part of that discussion and in short order we should formulate our formal disclosure request and get the defendants' comments on it, because there is little point in making an order now that cannot be complied with. So, on that point, we would suggest that it goes into the list of things that we have to discuss and agree.

Finally, on Mr. Beard's submissions, the confidentiality ring and the position of Mr. Hitchings. When all is said and done, his position came down to the fact that Cuatrecasas are not on the record. He seemed to say that because Cuatrecasas were not on the record they were not subject to the court's order under the express undertaking, equivalent to CPR 31.22. We say there is nothing in the point. The court makes this order. The claimants and the defendants are bound by it. The legal advisers will equally be subject to it, and we say it is not a reason given the serious consequences it would have if Cuatrecasas were not allowed to see documents disclosed in these proceedings. It would be a very serious matter and there are no good grounds, or any good grounds to exclude them.

Moving then on to the submissions of Mr. Hoskins, commendably short submissions. My only point on those is in relation to Mr. Hoskins so-called "elephant in the room". We agree that if we are going to get on with this case expeditiously the parties do need to get together quickly to discuss the practicalities, and what actually is involved in bringing this case to trial given that that is not a matter that we had thought of or discussed at all until today. As part of that exercise we would submit that we should equally work towards whether or not a November trial date is actually practically possible, given that which is going to need to be done before that.

We would submit that in those circumstances the Tribunal should not fix a date today, but as part of the exercise that we anticipate the Tribunal is going to order, and it is going to order it to be done quickly, we should also seek to liaise and discuss exactly what needs to

be done, how long it is going to take and when realistically the first date the case can be ready for trial.

THE CHAIRMAN: Miss Masters, I suppose it is as true for the claimants as it is for the defendants, albeit perhaps a little more puzzling, that since the Court of Appeal decided that the appeal of the jurisdictional Ruling of this Tribunal should not go any further, your client has really done nothing to bring the matter on in terms of thinking how the matter could be brought to trial. It has really been a fresh start today for you – that is what you are saying?

MISS MASTERS: No, sir, I do not think that is a fair characterisation of our position. Following the decision of the Court of Appeal we sought, I think, originally to have a CMC listed. There was a CMC listed last time ----

THE CHAIRMAN: There was an attempt to list it but unfortunately diaries were such that it could not take place, but, yes, this is the earliest CMC that could be managed.

MISS MASTERS: And since before the Christmas break we had been seeking to agree directions with a view to dealing with matters today in January. The Court of Appeal ruling was late November, so we are only talking about a period of six weeks, and certainly I think we wrote to the defendants initially about 9th/10th December, so I do not think we can be accused of dragging our heels in that regard.

Sir, unless I can be of any further assistance to you, those are my submissions.

THE CHAIRMAN: Thank you very much, Miss Masters. We will rise for maybe more than a few minutes to consider what to do in the light of your very helpful submissions. Thank you all very much.

(Short break)

THE CHAIRMAN: My apologies for keeping you, but we have been discussing what order we should make. It has been clear, as I intimated earlier, that this action would go ahead in one shape or another since 20th November 2013 when the Court of Appeal handed down its judgment. As I indicated this morning, we all found the parties' joint statement a little underwhelming, but nevertheless we think that an order to progress matters can be made. The Tribunal will draft the order and will circulate a draft towards the end of this week, but I am going to tell you the provisions of that order today, and you should all be clear that the timeframes in the order are being calculated on the basis that the parties start work now rather than when the order is finalised.

First, we will, as I indicated this morning, explicitly apply CPR Part 31.22 to all documents that are disclosed in the course of these proceedings.

Secondly, we will set up a confidentiality ring in terms that are usual before this Tribunal, but we do stress that confidentiality does have a particular meaning in these proceedings, and we would expect the parties to abide by that.

In the case of each document that is introduced into the confidentiality ring we would like the party insisting on confidentiality to be identified in colour-coding- , so in the top corner perhaps indicate in colour which party is stating that the document is confidential.

Having regard to Mr. Weiniger's point, we are happy that documents go into the ring quickly so that parties can at least review them fast, subject to a later review, say a month later, so that documents can be taken out of the ring and that way one can at least ensure that all parties can see the documents in the ring quickly with a view to removing them from the ring at a later date. We take the view that this approach, the combined application of a confidentiality ring and CPR Part 31.22, ought to protect the defendants from the manner in which the claimants have chosen to instruct two firms of lawyers, because we have no doubt that a firm like Hausfeld & Co will be well aware of its obligations and will be aware of the need to communicate those to all members of the team.

The index of documents on the Commission's file shall be disclosed and shall be disclosed into the confidentiality ring.

The Decision of the Commission: as to this, only and all leniency material can be redacted from that Decision and that is to include Morgan leniency material. The defendants are to co-operate in producing on this basis a, so far as possible, unredacted version of the Decision and to produce a single version of the Decision which identifies all of the leniency redactions and who is making that redaction. In each case, where a redaction is continued, the party insisting on that redaction shall be identified. That copy shall go to Morgan, which will have five working days to review the document and to make further suggestions as to further redactions. Thereafter, that version will go into the confidentiality ring.

Disclosure of documentation ----

MR. HOSKINS: Sir, what do we do in relation to Morgan documents? If one of us thinks that it is a Morgan leniency document, do we put Morgan - do you follow me?

THE CHAIRMAN: I understand. I would put Morgan and the party who is acting as a proxy for Morgan. If you are of the view that it is Morgan's redaction you would identify both.

MR. HOSKINS: We may have four names if we are all doing it.

THE CHAIRMAN: That is fair enough. One thing I would like, because redactions tend to minimise the amount of text that is being excluded, is for it to be clear how much text is the

subject of the redaction rather than the usual square brackets with three dots in the middle, so that we can see what is being excluded and what is not.

General disclosure: we identified three classes of documents. First, documents going to the operation of the cartel. Disclosure in this regard is initially to be limited to disclosure of documents on the Commission's file. We do not accept that a temporal filter should be applied, whether pre or the post the Commission's investigation - in other words, anything on the Commission's file, whatever date and subject to what I say on leniency in a moment, is to be disclosed.

Confidential documents held by the defendants, including third party confidential documents, are to be disclosed. We make no order that the defendants should consult with either the Commission or the third parties, but of course they are at liberty to do so if they wish.

No document pre-dating 18th September 2001 can be protected on grounds of leniency. Morgan is to apply to the Tribunal if so advised to identify any specific leniency document outside this definition - i.e. pre-dating 18th September 2001 - within four weeks of the date of this order.

Leniency documents for the purposes of this order do not include non-leniency submissions to the Commission, nor do they include annexures or appendices to a leniency document where they are not, themselves, leniency documents.

Finally on disclosure-, the defendants are to provide a disclosure statement setting out what they have done by way of filtering the Commission's file.

The second class of documents, which I will call "Who sold what to whom?", the claimants are to provide standard disclosure with a disclosure statement. These documents are to include, but are not limited to, the documents used in support of Mr. Gold's statement.

Third, title to sue documents: the claimants are to provide standard disclosure with a disclosure statement.

If I may say, disclosure statements should be obviously sent to the Tribunal but please excuse us the full extent of the disclosure at this stage. We do not really want to see it now, but we will let you know when.

We make no order as regards any disclosure requests that the claimants may make of the defendants at this stage, or indeed, vice versa, any other requests that defendants may make of claimants; nor do we say anything about disclosure requests as against third parties. Such requests will obviously be progressed informally although we do say this: requests by

one party of another for disclosure shall formally be made at a time no later than the time for disclosure, and those requests are to be populated into column 1 of a spreadsheet.

We make no order, but again we would encourage the use of experts in formulating document requests and in identifying what it is that the parties actually need to see of each other.

Again, as regards the use of experts, we would expect, but we make no order, each party to consider exactly how they intend to prove their case - in other words, what they will need to prove and how they will do so on the basis of the material they have.

One of the experiences the Tribunal had in the course of *Cardiff Bus* was that there was a mismatch in terms of the documentation that the parties were each relying on with the result that agreement as to material that could be agreed was reached very late in the day, and we are anxious to ensure that, where it is possible to agree particular classes of figure, that is done early on. Equally, where a party is proposing to make an assertion which will be based on certain evidence it is important to identify precisely what evidence will be needed for that, and we do anticipate that experts will be involved in that process. We do not make, as I say, an order in that regard, but the parties can quite confidently expect that orders will be made in the future.

In terms of when disclosure shall be made and when disclosure requests shall be made, that will be eight weeks from today. We make no order but, if possible, disclosure should be provided on a rolling basis.

There will be another CMC on a date to be fixed, but likely to be the week commencing 24th March 2014, and we would be grateful if parties could check availability, as will the Tribunal, for that week. We are not fixing a date today, but will do so in fairly short order.

As regards the date for trial, we make no order fixing a trial today. Instead, you have 14 days from today's date to present to the Tribunal proposals as to when the trial might take place. You know what we think about timing, but equally I have heard concerns from the claimants and I am keen to ensure that everyone has the ability to make their say as to when a trial is possible.

Finally, costs in the case.

Is there anything that I have forgotten? Mr. Beard?

MR. BEARD: Sir, I am not for a moment suggesting that there are things that you have forgotten, but in relation to one of the early parts of your order, you referred to producing a single version of the Decision. There may be practical difficulties. This is something we can come back to on the text of the order. As I understand it, actually what we have is a French

version of the Decision. What others may have are German versions of the Decision. In those circumstances, sorting out a unified version of redactions, and so on, might technically be a little hard, but we will take that away. It is just important to note that they are not all identical.

THE CHAIRMAN: That is a helpful indication. I confess we had not thought of that particular point. Two points in respect of that: first of all, we will obviously circulate a draft order and, as you say, hopefully that can be dealt with in the drafting.

We would also say that if, in the course of the next eight weeks, difficulties emerge, the parties should feel absolutely free to make a written application to the Tribunal to which whoever has objected to whatever problem has arisen can respond, and we will endeavour to deal with that in writing fairly swiftly, if possible, obviously not having another hearing. We will be keen to keep the number of hearings like this to a minimum.

MR. BEARD: Understood. I am grateful.

THE CHAIRMAN: Mr. Hoskins?

MR. HOSKINS: As well as having coffee and buns in the last half an hour, we endeavoured to think what a trial timetable would like if we were to have a trial in November. I hear what you said about that. I think it is quite useful at least for us to share what we came up with because it will focus minds, I think, and I do not mean on your side of the bench, I mean on our side of the bench and what would have to be done. It might be easiest to do it working backwards. Let us assume a trial were to take place towards the end of November, going into December, which I think is the indication you gave. One would expect to have a PTR on, say, 1st November or thereabouts. The experts' meeting would have to be roughly two weeks before that, so that would be 15th October. That would mean the reply expert reports would have to be about 1st October. The experts' reports would have to be at 7th September. Witness statements would have to be 15th July, and disclosure would have to be 15th May. I think that is the most important date, because if we are aiming for a trial in November, or even shortly thereafter, disclosure is going to have to be done before the summer, to be perfectly frank, and I think it is important that everyone in the room recognises that. I am not saying that to dissuade us from a November date, I am just saying that if that is what we are doing people cannot sit around, but you know that already.

THE CHAIRMAN: No, I think that is absolutely right. The reason we have not addressed it, and have left it to the parties, is because the timing, particularly of witness statements, because I am really not sure how much witness evidence there will be and I am not asking you to enlighten me, when the experts are engaged and whether one goes for sequential or non-

sequential experts' reports, these are all questions the parties will need to think about. We will obviously listen to whatever points the parties make in terms of timetable up to whatever trial date the parties are advocating, but we do regard the November/December date as doable, but we are not inclined to require the parties absolutely to burn the midnight oil to achieve it.

MR. HOSKINS: As I say, the main point for me is this flashing light point, that disclosure will have to be before the summer for a November or even shortly thereafter trial date.

THE CHAIRMAN: That is why I think we were reacting with a little more aggression than is usual to the joint statement, because we felt it was not taking a judicial approach.

MR. HOSKINS: I understand, I was giving myself a kick.

THE CHAIRMAN: There is no need to go that far, Mr. Hoskins.

MR. BEARD: I am very sorry, going back through the notes and listening, there is one thing that does strike me, which is that the proposals for progress to a trial timetable are, on the account that the Tribunal has just given, to be given within 14 days. One of the key factors will be disclosure proposals. At the moment, those are fixed for eight weeks time. We can see that there might be some sort of difficulty, or at least our trial proposals are going to be quite heavily caveated depending on where things have got to in relation to the disclosure discussions, because they may well be significant factors in how you do things together for timetable to trial.

The other point that has just been picked up is some particular phraseology about what constitutes non-leniency material, but again I think that is something that we can deal with in drafting.

I am grateful.

MISS MASTERS: Just on that point, my understanding is that all disclosure applications are to be made by the time that disclosure is given - is that correct?

THE CHAIRMAN: That is correct. I am not suggesting that anyone be closed out after that date.

MISS MASTERS: Clearly there may well be applications for specific disclosure and further disclosure arising out of the documents.

THE CHAIRMAN: That is entirely right, and I am very conscious that all that has happened is that the key three areas of disclosure have been identified.

MISS MASTERS: Just to be clear, that would not necessarily prevent an application for leniency material after the eight weeks?

THE CHAIRMAN: Absolutely not, no.

MISS MASTERS: Thank you. Thank you for that clarification.

THE CHAIRMAN: Thank you all very much.
