IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1248/5/7/16

Victoria House,
Bloomsbury Place,
London WC1A 2EB

11 October 2016

Before:

THE HON. MR. JUSTICE GREEN
(Chairman)

(Sitting as a Tribunal in England and Wales)

BETWEEN:

PEUGEOT S.A.
& Ors. Claimants

- AND -

(1) NSK LTD.
(2) NSK EUROPE LTD.
(3) NTN CORPORATION
(4) JTEKT CORPORATION
(5) AB SKF Defendants

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CASE MANAGEMENT CONFERENCE

A P P E A R AN C E S

Mr. Thomas de la Mare QC and Mr. Tristan Jones (instructed by Hausfeld & Co. LLP) appeared on behalf of the Claimants.

Mr. David Bailey (instructed by Cleary, Gottlieb, Steen & Hamilton LLP) appeared on behalf of the First and Second Defendants.

Mr. Tony Singla (instructed by White & Case LLP) appeared on behalf of the Third Defendant.

Ms. Marie Demetriou QC (instructed by Travers Smith LLP) appeared on behalf of the Fourth Defendant.

Mr. Marc Israel (Partner, Macfarlanes LLP) appeared on behalf of the Fifth Defendant.

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THE CHAIRMAN: Mr. de la Mare, can I just ask everybody who is going to speak to announce themselves for the purposes of the shorthand writers before they do so.

MR. DE LA MARE: Mr. de la Mare leading Mr. Jones for the claimants. Sir, I am happy to say that the menu before you is shrinking somewhat as the parties seek to take items off it.

THE CHAIRMAN: How disappointing!

MR. DE LA MARE: How disappointing! Broadly speaking, the issues arising are these: first of all, what to do in relation to the confidential version of the Commission Decision. I think, subject to an issue of timing, there is complete agreement between us and all the defendants. As regards the access to file documents, I think there is a very large measure of agreement between us and either all of the defendants, or maybe all of the defendants bar NSK. I am not entirely sure in relation to that, and Mr. Bailey will explain his position. Effectively, what is proposed is that that is a useful condenser to the most relevant documentation, which will correct something of an information asymmetry on our part, given what little we know about the cartel from the Settlement Decision.

That issue, I think, is largely agreed, but we will need to go through the provisions carefully.

There is one ancillary dispute in relation to that, which is in relation to the confidentiality ring, because the defendants take the axiomatic position that anything that is disclosed pursuant to the ATF regime is necessarily confidential. We disagree. Very shortly stated, our position is that this material is between five and the best part of 12 years old.

MS. DEMETRIOU: We are not taking that position.

MR. DE LA MARE: White & Case are, as far as I am aware.

MS. DEMETRIOU: We are not saying that all of the documents that are on the Commission file should be disclosed into the confidentiality ring, we are saying that they should be subject to the procedure laid down in the confidentiality order, which means that there either be agreement as to whether they are confidential or an application is made to the Tribunal. So the wider disputes between us do not arise.

MR. DE LA MARE: As ever, Ms. Demetriou is the voice of reason, but as we had understood the amendments proposed by D3 in relation to the confidentiality ring, they were going to add a new category of defined confidential information which was to be each and every document disclosed from the ATF. If that proposal has gone----

MR. SINGLA: Sir, I appear on behalf of D3 and that proposal has gone. Mr. de la Mare has not caught up with last night's events

THE CHAIRMAN: There appears to be a disappearing issue.

MR. DE LA MARE: That is fantastic.

THE CHAIRMAN: Let us take them one by one. We have got the Commission Decision issues; we have got questions of access to file. On your agenda, is there a third category?

MR. DE LA MARE: I think the residual issues in relation to the confidentiality ring probably have largely gone.

The next issue is then experts. There is a large dispute between us in relation to the number of experts and the mechanics. Then we have the issues of trial dates, directions to support the trial dates, and whether or not there needs to be formal provision made for ADR. That really is the menu.

THE CHAIRMAN: What is the best way to deal with it: take each one in order, hear everybody, take a decision on that?

MR. DE LA MARE: I think so, Sir. I think that probably is the most sensible way forward. Let us deal with the largely non-contentious issues. Before we do that, can I just give you a tiny bit of background, really by reference to the Decision, which I am sure you have read. It is at tab 8 of the main bundle. There are two passages I want to direct to you in particular. As is characteristic of Settlement Decisions, there really is precious little in this, which is one of the principal attractions of that document no doubt to the defendants. The relevant portion is the portion dealing with procedure, and the description of events. So procedure, internal p.10. It is just helpful for you to understand the basic history procedurally of this case. There was a leniency application by JTEKT consequent upon the JFTC investigation to the Commission. That then led to 'me too' applications shortly after, we do not know when, from NSK and NFC, presumably on the same day or the day after, as is ever the way. That was followed by raids on 8th to the 10th at the premises of all the main addressee undertakings. Now, Schaeffler has, as you know, dropped out of these proceedings and NFC was never part of these proceedings because we never had sales from NFC.

SKF and Schaeffer then filed subsequent applications for leniency.

Then really the important part is para. 24, which is that after the Commission initiated proceedings, the settlement process began in March 2013 until early December 2013. During those meetings the Commission informed the parties of the objections - it gave some indication of the likely contents of an SO, and disclosed the main pieces of evidence relied upon by the Commission. The parties were given copies of the relevant pieces of evidence in the file as well as a list. So that is, if you like, the treasure at which the ATF application is directed, along with the various requests for information and responses to them identified

in recital 22. So you see there were Article 18 requests made and responses given, no doubt appending pre-existing documents.

That is the procedure. In terms of what we know about the cartel itself, that is described in section 4. There are just nine recitals dealing with all material aspects of the case. It is fair to say that whilst we are told that this is, in essence, a cartel involving customer and market allocation and involving the co-ordination of responses to the various tenders and the exchange of commercially sensitive information, beyond that we are told nothing whatsoever about the detail of the cartel mechanics. One could compare and contrast what is in this very brief decision with all of the relevant footnotes containing references to evidence redacted with what I know you are familiar with, Sir, as the 200, 300, 400 page contents of a standard decision which contains a wealth of evidence and detail into the operation of the cartel.

That is, of course, relevant because we are not dealing with a conventional market-wide commodity cartel where the price of widgets is fixed for all customers and effectively there is a market price that is offered. We are dealing with a systematic cartel that is designed to interrupt and displace the competitive tendering procedures put in place by these large undertakings in order to secure the best price for what are bespoke products. These automotive bearings are designed by reference to the specifications and requirements of a particular car part. They will be bespoke to the particular manufacturer and model.

So we are in the context of bid-rigging.

THE CHAIRMAN: Is there a great disparity between different types of product? We are dealing with a technology which is, I suppose, albeit bespoke in terms of contract relatively homogenous?

MR. DE LA MARE: I do not actually, honestly, know the answer to that question, Sir, and that is one of the questions that I am sure will emerge. I suspect, as in all things, there are probably plain vanilla or bog standard bearings which are at one end of the spectrum and super-duper bearings at the other end in your fancy high end bobble. I doubt that they are, to all intents and purposes, substituted. There will be a range of products.

The difficulty that gives rise to is obviously this: it is not enough for the defendants simply to admit liability in very general terms, as they have, and then pretend that all aspects of the cartel mechanic are irrelevant. Because we're dealing with bid-rigging, the way that the bid-rigging process works is going to have a direct impact on the likely efficacy of the cartel and there is no reason to expect, for instance, the same level of overcharge will be experienced, for instance, by all automotive operators. It may be because of the

peculiarities of, let us say, a particular contract cycle, and a particular steel increase that one manufacturer may suffer much larger loss than another which may be more able to effectively negotiate revised prices. That is why the details of which markets were allocated to whom, which customers were allocated to whom, and how the cartel actually operated is of direct relevance to quantum issues. That is that job, what is the state of the pleadings?

The state of the pleadings is really this, we have pleaded as facts the contents of those nine recitals and you can see that from our claim form, tab 9, and it is really para. 47 and following. As para. 47 indicates we have only been able to plead as facts those facts that have been revealed by the settlement decision, but if you look at para. 48 through to 55, we have been astute not to plead as facts that the Commission has found this, but to plead that the various things are, in fact, true.

The responses we have had to this have been unhelpful which has led to the requests for further information, and it is now accepted that those responses should be provided. But, the object of that exercise is to get beyond bare admissions of the contents of the decision and to get beyond bare denials of the causation of any overcharge or loss into positive cases, insofar as there are positive cases on these things, and an explanation of what positive case there is in particular on the overcharge, and on pass-on because at the moment there is nothing there.

The reason I mention that is for this reason, when we come to the question of experts it is said that there are all kinds of potential conflicts and situations X, Y and Z between the various defendants. There is not a trace of any conflict on the pleadings at present, and in relation to the issue of pass-on in particular it is impossible to see how there can be any conflict of the kind posited, so I just make that point on the pleadings. So, if you want, you can take D1's defence as a test bed for those propositions.

THE CHAIRMAN: I have read the defences.

MR. DE LA MARE: I am grateful. So, with that, let me pass through the issues in turn. Can I suggest that we deal with the Commission decision and the ATF documents as one issue? The proposal is, and it is agreed in relation to the Decision----

THE CHAIRMAN: I have the consolidated proposed directions, and we are looking at para. 4 onwards, are we?

MR. DE LA MARE: Yes. Ms. Demetriou has put up a version, I suggest we work from that and I can indicate any points of disagreement from that.

THE CHAIRMAN: Right, I am going to work out which version that is.

MR. DE LA MARE: It has lots of yellow highlighting. Ms. Demetriou has managed to access the----

THE CHAIRMAN: The Ministry of Justice does not run to colour.

MR. DE LA MARE: Yes, but Ms. Demetriou's copier does and I think she put it on your desk, so that is how it will identify itself.

MS. DEMETRIOU: It is headed "Claimants' Proposed Directions" and on p.2 it has yellow highlighter. Do you have that?

THE CHAIRMAN: Yes.

MR. DE LA MARE: The first thing to note is there is a proposal of notice to the addressees who are not any longer, or who never were parties, that is Schaeffler and NFC, so that they can identify in those seven or nine recitals or six or so footnotes, anything that might amount to a citation from a leniency statement, from a settlement submission or Pergan material. I think these are probably concerns of propriety rather than real practical concerns, and therefore that timeline should prove eminently workable along with the direction at 5 that the exercise should be completed by 9th November.

THE CHAIRMAN: Yes.

MR. DE LA MARE: So, that is, I think, agreed between all of us. We then come to the ATF provisions. Can we park the confidentiality ring order for the moment? You will see at para. 6 the provision is that it is going to be provided subject to the terms of the confidentiality ring order.

THE CHAIRMAN: Yes.

MR. DE LA MARE: Again, there is a provision for a notice procedure in relation to the addressees, so that is NFC and Schaeffler, again with a view to inviting them to make any edits that they think appropriate on the bases set out in paragraph 8, leniency statements, settlement submissions, information protected by LPP - it is hard to see how that is going to arise if the material has been disclosed, privilege is likely to be lost - and any Pergan material. The Pergan material in this context is a shorthand for relevance, because Pergan, strictly speaking, only applies in relation to the contents of the decision as a public proclamation. What this is really saying is if there are materials that may bear upon issues entirely unconnected with the automotive cartel that might be suggestive of wrongdoing or suggestive of something else they can be redacted on grounds of relevance, and we are content that there should be a relevance filter of that kind in the process.

But I think it is then reported to be clear what is going to be caught by this order so that there is no future dispute. The first point for that is the word "voluntarily" as being excised

from this draft by agreement. We do not want to have any debate about whether or not Article 18 responses or matters they enclose are voluntarily or not, so that goes. The object of this is to catch all of the relevant materials filtered by the Commission that have either been provided to the Commission or have been provided back by the Commission. That does not mean we are after the raw product of the raids that you saw took place. The starting point is that list to which you saw the reference, in recital 24 I think it was, of all the relevant documents. As we understand it, and we will be corrected if we are wrong, what the defendants have agreed to do is to provide those documents on that central list that have emanated from them.

THE CHAIRMAN: The assumption seems to be that there is nothing outside of the list that could be relevant, so there is no general obligation of disclosure on the parties.

MR. DE LA MARE: Not at present. The whole purpose of this is to provide us with much more insight.

THE CHAIRMAN: So that might come later?

MR. DE LA MARE: Indeed, because what is envisaged is that there will be subsequent applications for disclosure. These are effectively what the Commission think are the most relevant documents about the cartel mechanic. Once we have understood the cartel mechanic we are then in the position to ask more sensible questions directed at quantum issues. Obviously, that exercise is going to be directed, not just by these documents, but by input from our experts – a topic to which I will return.

Just to be clear, what we understand we are going to be getting is going to be those documents on the Commission list that emanate from any particular defendant, maybe emanate through the raid, they may emanate in pre-existing documents employed in an Article 18 response, or otherwise submitted to the Commission. It is going to be those documents that they have got back from the Commission, either because the Commission presented to them as recital 24 says, as the high point of their case. We know that the Commission handed over what they thought were the Crown Jewels, or because some access to file request was made after those meetings to certain particular documents. All of those we are to get access to, subject to an override that if what has been requested from the Commission are third party documents, then there is a provision for, if you like, the originator of the third party documents to go through the process of identifying the edits on the basis that we agreed should occur.

That is how we understand it should operate, and on that basis I think there is complete agreement between the parties.

MR. SINGLA: If it assists at this point, Mr. de la Mare rightly refers to the scope of the disclosure under this provision, but we, for our part, maintain the objection that we should be entitled to conduct a relevance filter, so that I think what Mr. de la Mare said was that the Commission will have already conducted that filter, whereas our draft envisages that we will conduct our own relevance filter in the usual way.

THE CHAIRMAN: You reserve the right to disagree with the Commission.

MR. SINGLA: We do. Sir, I think that Hausfeld say in their letter of Friday that everything that falls within the scope of this provision will automatically be relevant and we do not necessarily agree with that. So, in the usual way, we submit that we should be entitled to go through the documents and apply the 31.6 test.

I think, in fact, the draft already envisages that we will do that, but I think Mr. de la Mare did not necessarily----

THE CHAIRMAN: Where is that?

MR. SINGLA: This is para. 7, the second sentence does refer to the provisions of CPR 31.6, and it may be that I have misunderstood what Mr. de la Mare is saying, but as I understood what he said this morning, he is proceeding on the basis that everything within the scope of this provision will be relevant.

THE CHAIRMAN: What happens if there is a disagreement about relevance?

MR. SINGLA: Then a specific disclosure application will be made in the usual way.

THE CHAIRMAN: Will the claimants be notified of the category of document which is being withheld and its subject matter so that they can make an application? How are they put on notice that it is a matter in respect of which they might want to make an application?

MR. SINGLA: Normally a disclosure list will state what documents have been searched for. Here, obviously, the search will be conducted by reference to the Commission's list, so I would have thought it would be apparent what has been withheld on grounds of relevance, but I am sure some sort of procedure can be made express in the order. We do say that, however we get there, we should be entitled to do a 31.6 review. It does not automatically follow that this is a pure follow-on claim and Mr. de la Mare's clients' position is that everything on the Commission's file will be relevant, and we do not necessarily agree with that. It may be that ultimately we do agree with that, but we just want the right to do it.

THE CHAIRMAN: At the moment, what is going to be disclosed is not so much quantum material as liability material. Some of it, I can see, particularly in a heterogeneous product or a product which is relatively heterogeneous, or a bid-rigging case may be relevant, but maybe not all.

MR. SINGLA: Precisely, my Lord.

THE CHAIRMAN: Just before I come back to you, Mr. de la Mare, what is the position of the other parties as to this point of principle? Mr. Bailey?

MR. BAILEY: For the NSK defendants, we say that it is important that there is this 31.6 review for the reason that the Commission may decide that documents placed on a file are relevant to its investigation. Then documents, for example, sought from the defendants in relation to turnover figures in order to calculate the fine may not be relevant to the issues in the claim. So we agree with my learned friend that in so far as you use the documents on the file, that is the first stage.

The second stage should then be for each of the defendants' lawyers to review the documents to see the extent to which they are relevant to the pleaded issues.

THE CHAIRMAN: I understand that.

MR. BAILEY: Sir, in relation to my learned friend for the claimants indicating that there was disagreement on the part of the first and second defendants in relation to para.7, our position, as set out in para.15 of our skeleton argument, is that in principle we do not think we are at liberty simply to hand over documents that are not emanating from us. Our concern has always been that there be a procedure in place to protect third parties. We now understand that para.7 provides for that, and it is for that reason that we actually fall into line with the other defendants. There is a measure of agreement in relation to it.

THE CHAIRMAN: Mr. Israel and Ms. Demetriou, do you both take that point of principle? You are reserving your right?

MS. DEMETRIOU: Indeed.

MR. ISRAEL: So do we, and we think it is also consistent with the terms of the damages directive. We have copies, if it would assist the court, and one of the recitals, 23, says:

> "Disclosure requests should, therefore, not be deemed to be proportionate where they refer to the generic disclosure of documents in the file."

That is the approach that we take.

THE CHAIRMAN: Mr. de la Mare, can we just deal with this point? In principle, there may be something in it, but you would need to know precisely what documents were being withheld, so that if there was a dispute you would have sufficient information to be able to challenge that?

MR. DE LA MARE: Absolutely. To give a couple of examples: first of all, it has been suggested in early correspondence that material related to matters that were admitted were not relevant. I have explained why that is wrong.

Secondly, to give the example that Mr. Bailey just gave in relation to turnover, that is also relevant, because obviously how much of the market is comprised of these particular cartelists----

THE CHAIRMAN: You are simply saying there may be room for dispute. They may take the point.

MR. DE LA MARE: Absolutely. The only safe approach is that any assertion that a category of material is irrelevant has to be accompanied by a sufficient description of the basis for which it is said that that category is irrelevant.

THE CHAIRMAN: You have got to be sufficiently on notice.

MR. DE LA MARE: Absolutely. The first example would be the portions of the document that in no way relate to automotive bearings, in which case quite unproblematic. If they do, and it is said it is irrelevant because they are turnover issues, we can then say we disagree, that material is relevant.

If there is to be a relevance filter it has got to be accompanied by a sufficient indication of the basis on which it is said that category of documents is not relevant.

THE CHAIRMAN: It is common ground, therefore, there is the filter. What I would like to see in a final version of the order is a sufficient process of identification so that, if you take the point that it is not relevant, at least the claimants can then see in greater detail than one would habitually receive in a Commission list, which are pretty opaque often, an explanation of why. That should cover both parties' interests.

MR. DE LA MARE: Absolutely. The final point, I want to make absolutely crystal clear, is that this process will embrace the Article 18 requests and the Article 18 responses. So they will have to disclose the request made.

THE CHAIRMAN: Your point is that it is not the means by which the information came to light, it is the information itself?

MR. DE LA MARE: Absolutely. It may be that some of the requests are irrelevant, and that was contemplated as being potentially the case by Mr. Justice Henderson in the *Servier* case. If one of the requests is merely procedural, has no wider bearing, of course they can say the answers to that are irrelevant, and you need not provide the materials. What we want is a sufficiently clear narrative that allows us to engage with any contentions that arise.

THE CHAIRMAN: I do not think there is a disagreement on that process. It just requires a bit of drafting.

MR. DE LA MARE: That is right. I think on that side, on the ATF, we are now in a happy place.

The next issue is really the issue of experts because we really have to get in place the correct approach to that before we then attack everything else.

The position is very stark. We, sycophant that I am, are great believers in Green's law, that for every expert there is an equal and opposite expert. What we are faced with is the defendants' law, which is that for every claimants' expert there are as many equal and opposite experts as there are defendants. That does not seem to be a particularly happy presumption upon which to approach the question of expert evidence.

THE CHAIRMAN: The disputes between you - I think it is agreed that it is one expert per team.

MR. DE LA MARE: That is right.

THE CHAIRMAN: For the discipline of overcharging and passing-on you need one expert.

MR. DE LA MARE: That is right.

THE CHAIRMAN: So the question is whether or not the defendants have one expert or one expert each.

MR. DE LA MARE: That is right. The first point is this----

THE CHAIRMAN: Why will there not be a conflict, or at least a commercial conflict, between defendants' experts?

MR. DE LA MARE: Can we take it in stages. Let us start with the easy issue, or the easier issue, which is pass-on. It is impossible to see how there is any conflict at all in relation to pass-on. None of the skeleton arguments which have addressed this issue - which, with respect to my learned friends, the only ones that deal with it in any detail are Ms. Demetriou and Mr. Bailey - have identified any reason why pass-on cannot be dealt with by a single expert. Since the relevant documentation is either generic or likely to be in my clients' possession, it is hard to see how there could be a different case of pass-on, for instance in relation to bearings bought from JTEKT as opposed to bearings bought from SKF. It does not seem to stack up.

THE CHAIRMAN: Just explain why. Why might there not be a different evidential or factual position between defendants either as to pass-on at all or the extent of pass-on?

MR. DE LA MARE: Because pass-on is going to be determined by factors such as how my clients price their vehicles, and what positive linkage there is between the price of the bearings and the end price of----

THE CHAIRMAN: So the economics of pass-on will be governed by simply you?

MR. DE LA MARE: Indeed, and one only need look at, for instance, the recent *Sainsbury's* case to see how this issue was entirely governed by the claimant's evidence as to the claimant's pricing processes where it looked for savings, where it passed on costs, etc. It is going to be

the claimants' evidence that leads all that. There is no potential there for conflict whatsoever.

What is said to give rise to a potential for conflict is the position in relation to overcharge. One can see perhaps the possibility - and it is at this stage largely speculative - that, for instance, one contract may secure, for whatever reason, significantly higher overcharges than another.

Very much is going to depend upon the particular processes or investigation of the overcharge selected by the expert. We anticipate that dealing with a complex bid-rigging cartel, such as the present, any expert, claimant or defendant, is liable to employ a blend of techniques. There are, I am told, the best part of 16,000 relevant contracts or variations across the 18 or so claimants. So they have linkages because, for instance, there may be a group of parent umbrella contracts in relation to any particular Citroen model. So it may be that one model is manufactured in four or five sites and has the same bearings wherever it is manufactured, but they are separately procured by each of the relevant regional subsidiaries. Then there are variations of those umbrella contracts from time to time. So whilst there is a very large number of contracts, there are points of linkage between them.

The span of the cartel is the best part of seven years. That makes it very likely, we think, that any expert is going to approach it on the basis of econometric trend type evidence or trend approach, but it is likely, we think, to be supplemented by analysis of some sample - again, whether and what sample will be a question for the experts to determine - of the various individual contracts to see what actually happened on the ground. The general econometric evidence is going to be married against or compared with or tested against the factual evidence to see whether it is reconcilable with how this cartel actually operated. That is why the cartel mechanics are very important, because there may be facts specific to any one or two or ten or 20 contracts that explain why they are outliers from the trend generally identified. It may be that for one contract there is a set of peculiar reasons to explain why we were particularly well ripped off on this contract; and for another contract a set of reasons particular to it that explain why we were particularly effective in obtaining a true market price.

So one can see immediately that the expert is going to be employing a blend of techniques. What the claimants say from that is that any expert is going to be making a judgment based upon material, once they have seen it, of how, in these circumstances, it is best to go about appraising overcharge.

What the defendants say is, "Aha, if you accept that, it must follow axiomatically that we are entitled to have our own expert because there is a risk that different methodologies, different statistical or econometric analyses, will lead to different results for different defendants". With respect, that is a non-sequitur, because they are all going to be working from the same base of evidence. It is going to be the same base of contracts, the same base of materials directed to the contracts, the same basis of economic evidence about steel prices, and so on and so forth, that explains whether, on any particular contract, there has been a trend overcharge or a particularly explanatory feature to say why there has been more or less.

What may happen, however, is that different methodologies may suit or favour different defendants as between themselves. So this is an issue that principally relates to issues of contribution or carving up of the loss caused. As to that, there are at present no Part 20 pleadings, there is no Part 20 case, Schaeffler, NFC, have not been brought in as parties, and there is no basis to think that one single expert is not going to be able to express a view or address the range of different approaches to the handling of that material and the different results that they produce and explain why in his or her opinion technique one as opposed to technique two, three, four or five is not appropriate.

THE CHAIRMAN: I would have to be very confident at this very early stage that there were not going to be differences between the defendants to limit them. Can I be so confident now?

MR. DE LA MARE: With respect, I do not think you can, but I do not think that that is the relevant issue. I think the place we are at is this: do you start from a hard and fast presumption that everyone gets their own expert, or do you start from the presumption that, in principle, there are some or many issues that can be resolved by reference to a single expert, and that each defendant needs to make a reasoned case by reference to the issues in the case as to whether or not they should supplement the core defendant evidence by reference to an additional report.

THE CHAIRMAN: One of the thoughts that went through my mind was, in order to address this, something of a staged approach, which would be along the following lines, and I am not suggesting it is anything other than the most provisional or tentative of ideas. The claimants go first, recognising that the claimants' experts would probably be partial and need to elaborate, expand and come back. One of the defendants' experts, agreed expert, would then respond. Thereafter other defendants' experts would come in and tailor their responses to identify what they agreed with the claimants and the defendant, and you would get a full iterative reduction in scope of issues.

MR. DE LA MARE: That is exactly what I was going to propose, in other words, that there should be a----

THE CHAIRMAN: Is that an exercise in sycophancy again?

MR. DE LA MARE: It is not, it is an exercise in truth, you can check my notes if you want! There should be a lead expert for the defendants.

THE CHAIRMAN: But I would not preclude other defendants having an expert.

MR. DE LA MARE: No, but what they should be doing is making a reasoned case as to why it is necessary in the interests of particular fairness to supplement with, let us say, an additional methodology that cannot be adequately addressed and explained with its rival merits and demerits by the lead----

THE CHAIRMAN: I think one thing you can assume is for sophisticated parties such as these, the experts you will be instructing will be well-known to the Tribunal, respectable, credible, and will confidently be expected to co-operate.

MR. DE LA MARE: Yes.

THE CHAIRMAN: One would assume that that would happen in the ordinary course, and if it did not the Tribunal would simply case manage it.

MR. DE LA MARE: I think where we are at at the moment is a tonal point, if you like. Do we start from the presumption that everyone piles in with their own experts and then we kind of row back from that to try and identify the agreed criteria of what are the essential material points in dispute that produce material impacts on the end numbers? Or, do we start from the position that we do not need to unduly complicate the case by having a multiplicity of experts unless and until such points in time as the defendants can say: "This is where an additional expert in our view adds value and, in fairness, should be heard in relation to one of the issues in the dispute" and that, with respect, is what we think is tonally the correct approach.

THE CHAIRMAN: So you are suggesting it is claimants first, D lead expert and then other D experts?

MR. DE LA MARE: We think the claimants and a lead expert for the defendants should engage together as soon as possible, because one of the things that those experts can readily and helpfully do is cast early light upon what material is proportionately required for the purposes of disclosure.

THE CHAIRMAN: There is a bit of a danger there that the lead expert might disagree with the other defendants as to relevance.

MR. DE LA MARE: We have to start that process.

THE CHAIRMAN: You have to start the process.

MR. DE LA MARE: So whether it is done formally by requirement for them to meet beforehand, or simply for a requirement for the parties to put forward their views based upon views canvassed from their actual or potential experts we do not mind.

THE CHAIRMAN: Would you propose the defendant to choose a lead expert or is that for them?

MR. DE LA MARE: Well, since you point out that they are so very good at co-operating, indeed, they had seven years of perfect co-operation, maybe they could work out a mechanism between them to identify. With the best will in the world, it is not going to be impossible in the way that they present it, to identify somebody behind whom there can be a reasonable degree of commonality because, as we know, much of the work undertaken by the relevant experts is as much data processing and data crunching. Replicating that four times over makes no sense.

THE CHAIRMAN: It would have to be a process which was entirely without prejudice to other defendants being able to disagree with the lead, so they were not bound by it and they therefore would not suffer a prejudice as a result of that.

MR. DE LA MARE: That makes perfect sense and, again, one would envisage an exchange between the claimants and the lead defendant in which the other defendants can then weigh in with their additional views, so far as there are additional views required, based upon their discussions with their putative experts.

THE CHAIRMAN: Why should claimants not still go first?

MR. DE LA MARE: In terms of reports, we are entirely content with that, but the point I am making is that the process of engagement needs to occur much earlier, it needs to get in on a collaborative basis----

THE CHAIRMAN: Understood.

MR. DE LA MARE: --much earlier. So when we actually get to the reports process I agree the sense does seem to be on that approach, that the claimants' report goes first, then the principal defendants' response report, a short window for supplementary reports from supplementary experts if permission is obtained for them, etc. or asked for them. Then a reply process. Then we go over to the *BAT* process of whittling down to the key issues. Once one gets to whittling down to the key issues, the court, because we are sitting in the CAT, can then take a view as to whether or not for one or other of the issues on the menu it might be an appropriate issue to hot tub or not.

THE CHAIRMAN: I can see you can discuss it – we are jumping forward here – but if the Tribunal is required to go through a series of comparables in order to try and work out what

the norm was, you have a series of transactions or 'rigged bids' as you would describe it, there may be factual issues surrounding each of those bids which may require evidence, but it may be something the economist can say, perhaps with the assistance of the lawyers, this is the scope of the dispute on that particular issue.

MR. DE LA MARE: Yes, maybe part of the debate is what portion of the claim can be comfortably encompassed within the trend, what proportion is outliers, which are useful sample contracts to look at for the trends, which are useful sample contracts to look at for the outliers with a view to extrapolating from those to an overall damages sum. Those are all types of processes which I would have thought the experts could sensibly get together and work out.

THE CHAIRMAN: Does that encapsulate your proposed structure, therefore?

MR. DE LA MARE: It does. I think that is the issue of principle, and from that we can then thrash out more particular directions.

THE CHAIRMAN: Shall we see what the defendants have to say about that proposal?

MR. DE LA MARE: Yes.

MS. DEMETRIOU: We are now facing a proposal not that we should not be entitled to instruct an expert----

THE CHAIRMAN: Let us just go through it. It would be along the following lines, that the first report would be served by claimant, all defendants would have a right to instruct an expert. The defendants will choose a lead expert who would early engage, there is probably no difficulty with all experts engaging – some process of engagement. Once the lead defendant's expert produces a report there would be a gap for other defendants' experts to cogitate, absorb, produce their own reports. There would, at the moment at least, be no limit on what they could say, because I have not the faintest idea where they might consider themselves to be prejudiced, or want to elaborate or disagree with the lead expert, but at least you would have a process whereby you get some reduction, hopefully some reduction in scope in the issues and the avoidance of duplication. So you would have the right, everyone would produce their own expert, but it would be a somewhat staged approach.

MS. DEMETRIOU: Sir, my reaction to that, and the other defendants will have to speak for themselves, because it is not a proposal that we faced until this morning, is that whilst we are, of course, in favour of efficient attempts to reduce the scope of dispute between the experts, because that is going to be much more helpful for the Tribunal to have the disputes between the experts narrowed before the hearing, and we entirely accept that. We do agree that there should be iterative meetings between experts and agree/disagree statements and so

on in an effort to reduce the ambit of the dispute between them. I do not think that the proposal that Mr. de la Mare made just now is going to be either efficient or fair, and can I elaborate on that?

In terms of fairness, it seems that the starting point for Mr. de la Mare's concession that we should be entitled to instruct our own experts is, indeed, that there may be a conflict between the interests of the defendants and you, Sir, have acknowledged that. Certainly the Tribunal is not in a position to say now that there will not be; in all probability there will be because if there is a recovery of damages then that will have to be apportioned between the defendants. So fairness requires that each defendant instructs its own expert, and I do not know if you have seen the draft schedules to the confidentiality order that have been circulating, but, in fact, the defendants have already instructed experts.

THE CHAIRMAN: Yes, I am not surprised. Provisionally it seems to me that each defendant is entitled to instruct their own expert. The only question is staging or timing?

MS. DEMETRIOU: Sir, yes, but the same fairness issues that require each defendant to be allowed to instruct their own expert also require that each defendant's own expert have a proper shot at a report produced on that client's instructions which is then presented to the Tribunal. It may be that after a meeting between experts the scope of the dispute narrows and that experts are able to agree propositions in other experts' reports.

THE CHAIRMAN: I am not suggesting that any expert would be artificially constrained.

MS. DEMETRIOU: No.

THE CHAIRMAN: I think the suggestion is merely that the claimants should go first so you can see what you are facing.

MS. DEMETRIOU: Yes, we agree with that.

THE CHAIRMAN: Then we simply stage defendants. It may be there is mutual engagement between all of the experts with the claimants' expert, then one goes and that expert, presumably will say: "I agree with the claimants on A, B, C, I disagree on X, Y, Z". Then other defendants have an open shot to either agree or disagree, but the hope would simply be that because there have been two expert reports which were on the table and visible, it will assist the other experts to further reduce what they wish to say. There would not be any limitation on what they could say.

MS. DEMETRIOU: No, but my concern about that is that it would be more inefficient than allowing the defendants' experts to engage separately at the outset, because it may well be----

THE CHAIRMAN: "Engage" fine, but sequencing of reports?

MS. DEMETRIOU: It may be that they decide to adopt slightly different methodologies.

THE CHAIRMAN: It would not be precluded.

MS. DEMETRIOU: No, of course, but in those circumstances the decision as to which would be the lead expert is a decision which is going to be difficult to come to and which may well engage a conflict of interests as between the different defendants. So, as soon as you are in a position of having to choose a lead expert and therefore indicate some kind of preference for the methodology of that expert one is getting into conflicts problems. So I think that our position----

THE CHAIRMAN: I am sorry, why? Choose a lead expert – it could be done on a logical basis or the person who has suffered the largest fine, it could be any basis, but one person goes first, other experts are perfectly entitled to disagree and say: "The problem with that methodology is A, B, C, I prefer an alternative methodology." If there is no limit on subsequent experts disagreeing with their own lead it is just simply that that process might whittle down the issues helpfully. It does not limit though.

MS. DEMETRIOU: No, I can see that if it is not going to limit then that preserves each of the defendant's independence to argue the case in the way that they see fit and proper. But I do question whether that would actually be an efficient approach given that it seems to introduce another stage into the procedure, or two other stages. First, there has to be agreement as to who the lead expert is. Then there are iterations----

THE CHAIRMAN: Or the Tribunal decides.

MS. DEMETRIOU: Or the Tribunal decides, but, no doubt, there will be argument about that, because we will have a right to be heard. After that the other defendants' experts will have to react; rather than producing their own report they will have to react to the lead report. So it could operate to some kind of constraint on their ability to put forward the case that they think is the proper case to put forward.

Secondly, I think it could well be inefficient especially given that we are looking at quite a short timescale, whether one is looking at a trial in January 2018 as we think is appropriate, or October 2017 as the claimants are arguing for, either of those does not leave much time for this kind of iterative process.

In my submission, it would simply be more efficient to allow the defendants' experts free rein to analyse the data from each of their clients, produce their reports, and then set out a procedure whereby the disputes between all of the experts can be narrowed and refined before trial. So, we do not have any quarrel at all, and we agree that the Tribunal should not be faced with unnecessary disputes on the evidence and that there should be a process, akin

to the one that you, Sir, set out in the *BAT* case, to narrow the ambit of dispute, but we think that designating a lead economist on the part of the defendants would lead to inefficiency and potential unfairness.

I will let the others speak for themselves, but that is my position.

MR. SINGLA: We endorse what Ms. Demetriou has said. Where we have got to this morning is that plainly there is a conflict or, at least, a potential conflict, that is recognised by all parties. We also are conscious on this side of making sure that the experts do engage with one another and that they avoid duplication. But, we have to ask ourselves, why is the Tribunal being asked to depart from the usual practice? In all of these cases experts are instructed on a defendant by defendant basis, and it must come down to a proportionality argument, and an argument that we need to save costs. As to that, it was obviously the claimants' choice to sue different defendant groups and they could have got away with suing one on a joint and several basis and that would have kept costs down, so we are only in this position because of their decision to sue different sets of defendants. We do agree with Ms. Demetriou that it would be very inefficient to have a lead expert in the way you, Sir, suggested. There is plainly scope for disagreement between the experts which will result in the Tribunal being troubled to resolve those disagreements. There is also an issue, for example, if one of the parties were to settle midway through the proceedings, what would happen to the status of that party's expert report? In my submission, it is incredibly early in these proceedings to be making the order that you have suggested, Sir. The issues have not crystallised yet. The pleadings are not closed yet. Mr. de la Mare has outstanding requests for information. We do say this would be a novel order to make at a very early stage in the proceedings.

THE CHAIRMAN: That is red rag to a bull!

MR. SINGLA: Sir, for all of Mr. de la Mare's references to Green's law, I did not read anything in *British American Tobacco* saying that different defendants with different interests, both commercial conflicts and legal and factual conflicts, are not entitled in the usual way to have their own experts. If there is duplication which obviously----

THE CHAIRMAN: You see that any duplication is reduced after the first round, essentially?

MR. SINGLA: Precisely, and if there is case management to be done in relation to expert reports it is to be done at a later stage in these proceedings.

THE CHAIRMAN: Mr. Bailey?

MR. BAILEY: Sir, the position of the NSK defendants is in line with the other defendants. The simple point on sequencing is that in so far as there is to be an early meeting, as envisaged

by the *BAT* judgment, between the claimant and defendants' lead experts, of course that omits the benefit of the other defendants' experts at that time engaging early on and identifying the relevant documents in his or her view, and then that allowing the process to become much more streamlined. If you have a meeting between claimant and lead experts then----

THE CHAIRMAN: I can see that early engagement might include all experts and therefore the issue would only be one of sequencing of formal reports or physical reports.

MR. BAILEY: So in relation to that, Sir, the difficulty is one of essentially more stages, more sequences, having to occur, the other defendant experts expressing their own opinions, and then one has to ask the lead expert to respond to that, and that becomes less effective.

THE CHAIRMAN: Yes, I understand that.

MR. ISRAEL: On behalf of the fifth defendant we agree with everything that has been said by the representatives of the other defendants. There are two points that we would like to make. The first one is that it appears that the claimants wish to have their cake and eat it. On the one hand they are saying that they want a trial in October 2017, but this proposal seems to me----

THE CHAIRMAN: You think it will spin things out a bit?

MR. ISRAEL: It absolutely will if you have the lead expert for the defendants, whoever that may be - and I agree there will be discussions and debates and disagreements as to who that should be - followed by further periods where all the other defendants' experts may respond. Will they all respond at the same time, or will the second expert then respond and then the others can also carry on? It seems to me that it will string out the process. There was another point which perhaps I misheard, but I understood Mr. de la Mare to say that apart from the lead defendant's expert, or the defendants' lead expert, then others could make submissions if permission was sought and granted?

THE CHAIRMAN: Yes, I heard that.

MR. ISRAEL: Which seems again a further complication. There will be disagreements over that, there will be applications.

THE CHAIRMAN: I intend to grant permission to the defendants to instruct experts today, not make it subject to further permission. Any whittling down or control of experts can be done at a later case management conference.

MR. ISRAEL: Thank you, Sir. I also think there is an issue that even if a lead defendant's expert were agreed or, as you have suggested, by tossing a coin, it almost ties the other experts' hands behind their backs, because the lead expert's views may set the tone, and if other

defendants have different methods, or their experts wish to adopt different methodologies, I think they would be somewhat at a disadvantage.

Thank you.

THE CHAIRMAN: It is whittling down. Here we are, Mr. de la Mare.

MR. DE LA MARE: First of all, it is important not to lose sight of the fact of where we are at the moment on the pleaded cases. Each of the pleaded cases is that we have suffered no loss. There is a positive denial of any loss being caused. What will not be helpful to the court, I would suggest, is four sets of differing defendant expert reports all reaching the conclusion that no loss has been caused for different reasons.

The unstated premise of their answer to our proposal is that the reality of the case is that they are going to move from denying causing any loss to varying percentage figures, or varying identifications of the amount of loss that is caused, whether formally or whether by way of a practical alternative case.

The first point you have to note is precisely that: this is an argument that is actually difficult to reconcile with the present case.

THE CHAIRMAN: Just on that, can I go back a couple of steps? For the experts to say something which is going to be practical and useful, the disclosure exercise must precede it, so the expert has material upon which to work, would need to cover not just all issues relating to liability but issues relating to overcharge and passing-on. To what extent has that information fallen into the hands of the Commission to date? That is one of the reasons why I ask the question about whether there is an independent obligation quite independent of that which is in the possession of the Commission?

MR. DE LA MARE: The Commission, as is ever the way, will likely have very little information relating to overcharge and no information at all bearing on passing-on, because passing-on information is generally in the hands of the victims rather than the wrongdoers. So that is precisely what it is anticipated and agreed between all the parties that we are going to come back in December for a second case management conference.

THE CHAIRMAN: You may have information on passing-on but you may not have so much in relation to overcharge.

MR. DE LA MARE: Exactly, that is the general----

THE CHAIRMAN: The material in the possession of the Commission may not provide that much illumination as to what the level of overcharge was.

MR. DE LA MARE: It may or may not, we do not know. Sometimes one sees documents in other cartel contexts where they say, “We have achieved a 50 per cent price increase on this

contract". There may be evidence like that. It may be anecdotal, it may go further, we simply do not know.

THE CHAIRMAN: You have not seen the Article 18 requests and their terms, so you do not know what the scope of the requests was. It would be normal, I think, in an Article 18 request for there to be a question which was sufficiently broad to capture documents which covered overcharge, because it would be part and parcel of the evidence of the effect of a cartel.

MR. DE LA MARE: Not least since we know that one of the things that has happened in this cartel is that there is information sharing about the relative success or failure they have had in maintaining prices in the teeth of negotiations.

THE CHAIRMAN: So it may well be that once you have got that level of information you have at least got some material for the expert to bite upon.

MR. DE LA MARE: Or, alternatively, we know the types of meetings to look for, and therefore the minutes of the meetings that we want where they report back on, let us say, the PSA contracts.

THE CHAIRMAN: So coming back to the structure of the experts----

MR. DE LA MARE: Absolutely. The main arguments that Ms. Demetriou developed and everyone else tucked in behind is that somehow they are going to be unfairly circumscribed by the selection of a lead defendant. I have two points to make: no one, despite the glove having been very firmly thrown down, has come back with any explanation as to why there is any potential conflict in relation to the issues of pass-on. In relation to that, there is no answer as to the fact that that could sensibly be dealt with a single expert.

Secondly, as to this issue of circumscription, your proposal, Sir, is that there is general liberty to supplement or disagree with the first defendant report. Effectively, you are contemplating a mechanism that seeks to narrow the issues as between the defendants.

In that context, there are two points to note: there is nothing to stop all of the defendants' experts meeting and discussing the live issues they are prepared to address where they have, or may have, disagreements with the claimants' experts in advance of the lead expert putting in their report. The very function of that lead expert is to, if you like, identify (a) those points that are common to all of the defence experts, and (b) those points that, if you like, are singular to an expert or a group of expert within the four defendant groups. It may be that Expert A, the lead expert, can identify four issues on which the defendants are all aligned, and then three issues on which three out of the five are aligned, and then one issue on which that expert, the lead expert is out on their own.

What that process then does is effectively lead to an identification by the supplementary expert reports of those issues that are in dispute as between the defendants themselves. A number of those issues that are in dispute as between the defendants themselves may have no bearing whatever on overcharge or pass-on, and may be a tawdry little squabble between cartelists as to who should pick up the tab.

It is very helpful, no doubt, for the purposes of these as yet unarticulated contribution proceedings to have those issues separately identified, and in so far as they bear upon different responses to the claimants' case it is helpful to have them identified. Nowhere in that process are the defendants in any way circumscribed about what they may do. Indeed, we would be delighted if Expert A and Expert B launched into a violent disagreement on every aspect of their report. That would be manna from cross-examination heaven, but I doubt it is going to pan out like that. Nothing in this in any way circumscribes who does what or what they are at liberty to join issue on.

The process is one which results in the defendants as between themselves identifying in common areas. It has the very particular merit of saving us from what are inevitably the alternative consequences which are pages and pages and pages of repetitive expert evidence, or pages and pages and pages of unnecessary or broadly duplicative data analysis. It is a process that effectively concentrates the mind on the very things that you have asked in the *BAT* directions to be concentrated on, which is the areas where separate evidence is material and is required as between the defendants. It, therefore, produces, if you like, a short list of areas of disagreement with which the claimant expert can then sensibly engage.

THE CHAIRMAN: Yes.

MR. DE LA MARE: The next answer to this is to say, oh, well, we had it in our gift to avoid all this by suing a single defendant, in which case----

THE CHAIRMAN: We are where we are on that.

MR. DE LA MARE: With respect, it is not a principled criterion. There are many factors that lead to the choice of the number and identity of defendants - solvency, jurisdiction, applicable law, and to let that particular tail wag the dog of what is the appropriate way to proceed is completely back to front. There is a principled way to manage the evidence in question. It is not simply to look mechanically at how many defendants are in play. Why otherwise, for instance, are Part 20 defendants routinely not participating and putting in their own evidence? It is just not a principled response.

The vice, in my submission, and you will know a good deal better than I - I was involved in the early days of the litigation - the vice you were dealing in the *BAT* case was precisely this

absence of control in advance as to the number of reports being put in. It was all of the claimant tobacco groups putting in duplicative evidence covering the same, or much the same, or different areas of----

THE CHAIRMAN: On this aspect, the issue, so it seems to me, is that - and I come from a slightly broader concern - unless the parties take greater responsibility for assisting the court, and this Tribunal obviously is a specialist Tribunal, and it may not be so acute here as in other courts, but unless the parties actually pulverise the issues and work out what the essence of the dispute is, courts will simply take the easy option and reject claims.

Therefore, it is really up to the parties to make issues justiciable. I can see here there may be an avalanche of data spanning seven years. We may have 20 or 30- comparables to have to decide upon. That is an enormous task unless it is boiled down and turned into digestible proportions. It is really turning it into a justiciable issue. It is not so much the number of issues or the number of reports.

MR. DE LA MARE: I agree, but what this process effectively does is force or require the defendants to co-operate sensibly as between themselves.

THE CHAIRMAN: I understand your point. I think the defendants' answer to that is that that will happen. We are dealing with what happens on the first round. That is their response.

MR. DE LA MARE: With respect, there is no good reason not to institutionalise the process. No one's hands are tied by so doing. It is a commendable discipline.

To answer Mr. Israel's point, with respect, what he is doing is a good portion of what the *BAT* direction is required to do - in other words, it is identifying the material areas of dispute. It already, if you like, front loads that issue as amongst the defendants, so that what there is for the claimants' expert to engage with in reply is that much more concentrated.

Those are our submissions on that point, unless there is anything else on that topic.

THE CHAIRMAN: No, thank you very much. I am just going to give a series of directions, and I will ask the parties to draft them in due course. I am granting permission to the defendants to instruct their own experts.

I want early engagement by all experts, and I will leave it up to you to decide what is 'early', but the earlier the better, on the issues which the experts are to cover.

I would like the claimants to produce an agenda/paper for that meeting, which sets out the matters which the claimants consider ought to be addressed. Again, I will leave it to the claimants to decide as to the level of detail of that paper, but that should guide the discussions of the experts.

The claimants are to produce their report first. The defendants will then produce their reports collectively, at the same time. It is a 50/50 one this. There is going to be a whittling down process. I can see the risk, as Mr. Singla put it, of one party settling and that expert falling out. I think, if we are going to have a reasonably tight timetable for this, on balance it is probably better to allow the defendants to go together.

At that stage there will then be the iterative process of trying to reduce it down to its very barest of essentials, and that, I think, comes later in the directions.

So far as the meeting of experts is concerned, subject to any views of the parties, I think that should be experts only, and I am assuming, though I may turn out to be wrong, that the experts will, because of the process of the early engagement, avoid, to the greatest possible degree, duplication, although I accept there will be areas where a defendant is not certain of another defendant's position, where it is unavoidable at least in the first instance. But it will place the onus upon the subsequent iterative process to boil down the issues and make them more digestible if it does not happen at the first instance.

On that structure, is there anything left out?

MR. DE LA MARE: Once that process is complete, it is probably sensible at the PTR stage to then give consideration to the list of issues so whittled down and how they are to be tried out and, for instance, whether or not there is to be hot-tubbing.

THE CHAIRMAN: I think that is for a later stage is it not? Once one sees the final scope of the real issues between the parties it is at that stage that one can say: "This trial is going to take X amount of time. The best way to resolve those differences is as follows:" It is really premature.

MR. DE LA MARE: I am not asking for a direction now, I am simply saying that when we timetable it provision should be made for a PTR which then enables the soon to be trial judge to wrestle with the issues as then condensed, and make any further directions about simplification of narrative materials, and then to make decisions about how that evidence is to be deployed at the hearing. Thank you, Sir.

The next question on the agenda is the issue of trial date. The loyal and faithful people that we are, we did what the CAT asked us to do in the letter of 28th September (tab 49), which all the defendants seem to have lost sight of, of being ready for trial on the first available date after 1st October, and asked us to provide directions covering all of the bulleted points, and we faithfully did so.

The issues really between us are threefold it seems to me on the general plane. First, and foremost whether a date of 1st October as proposed by this Tribunal is realistic----

THE CHAIRMAN: In that term. We need to work backwards – how long is this trial going to be.

MR. DE LA MARE: That is the second issue.

THE CHAIRMAN: Well, in a sense, one starts with it. Let us assume one blocks out a window of six weeks – I suspect and hope it would be much shorter.

MR. DE LA MARE: Yes.

THE CHAIRMAN: But if one blocks out a period of six weeks I would not want it to run over the vacation so one would need to start it in the first part of October. If you start at the beginning of January, then you have a freer run without there being a risk of the vacation intervening.

MR. DE LA MARE: Yes, Christmas ruined, but that is life!

THE CHAIRMAN: Yes.

MR. DE LA MARE: On the trial length, we agree the sensible thing to do is to work on a six week window, not because we think that is how long it is going to take but that is the sensible precautionary approach. It may well be that once all the experts have collaborated in the immensely sensible way we now understand that they are going to do, the issues are corralled into a sensible, digestible list----

THE CHAIRMAN: It will take two days!

MR. DE LA MARE: It may take closer to our estimate of four weeks or less. But let us plan for a worst case scenario----

THE CHAIRMAN: Yes.

MR. DE LA MARE: --of total war, and then we can always pare back from that as matters develop thereafter. So we are content, not because we think it is right, but because it is sensible to go with the six week estimate. That does tend to suggest, for the reasons of your logic, Sir, that starting in January has some merits to it, but we are really in the Tribunal's hands. Our predominant concern is to get on with it, and to have the discipline of an imminent trial to focus matters going forward.

THE CHAIRMAN: Just pausing there, there is no great opposition then to scheduling a six week period at the beginning of January 2018?

MR. DE LA MARE: No, so long as it is at the beginning of January, absolutely right. Those are the first two issues. The last issue, as to which there is disagreement, is whether or not there was any purpose in making provision for all of the supporting directions to trial at this juncture, or whether that should, notwithstanding the letter of 28th, be held over until the

case management conference we all envisage taking place in December at which the various disclosure applications, if there are any live, will be resolved before this Tribunal.

We, for our part, think it is sensible to have an indicative timetable in place that all the parties begin to work to now, covering the directions that you have just given in relation to expert evidence, covering disclosure, covering witnesses of fact, other than expert evidence.

THE CHAIRMAN: Where does the expert procedure take us to in time terms? So, where would we be? We will not be anywhere near experts' reports at the beginning of December of this year, will we?

MR. DE LA MARE: This year, no. We are talking about disclosure.

THE CHAIRMAN: Which is when I think the next CMC is suggested.

MR. DE LA MARE: That is right. The most that will be possible before we obtain disclosure is some early very high level methodological discussions of the potential alternative ways of skinning this cat. That is going to be with a view to directing or informing what disclosure is sought and what disclosure is proportionate.

THE CHAIRMAN: Yes.

MR. DE LA MARE: So, no, realistically the earliest that expert evidence is going to be possible to be completed I would have thought would be by the end of the summer.

THE CHAIRMAN: The whole process?

MR. DE LA MARE: The whole process, yes. So the earliest that the experts may be locked down would be by the end of the summer, maybe by even the end of August/early September. But, obviously, if my Lord directs that the trial should start in January it may be sensible to give that process a bit more time so that we do not have two holidays in a row where it is before us; it is a question of stamina getting these cases ready, but that is really fine tuning. The issue of principle between us is, is it sensible----

THE CHAIRMAN: There is a lot of work to be done after – the real fine tuning is done once the experts have boiled the issues down because then one can see the shape of the trial.

MR. DE LA MARE: Absolutely. The principle is: is it sensible to make an indicative provision for these directions now with a view to, if necessary, adjusting them in December when the scope of the disclosure dispute is visible?

THE CHAIRMAN: If one were starting at the beginning of January 2018 one would want to have the experts done and dusted a couple of months beforehand at least, because it may be that witnesses of fact would really be focusing upon the disputed issues rather than anything non-disputed.

MR. DE LA MARE: That is right.

THE CHAIRMAN: And they would come relatively late on. There may not be much scope for witnesses of fact, or it may be on a fairly scatter-gun series of issues of fact.

MR. DE LA MARE: I think the witnesses of fact from the claimants' perspective are likely to be concentrated on the pass-on, and to an extent they may explain the negotiation mechanics that they thought they were going through and how that influenced their----

THE CHAIRMAN: You could have, for example, if the experts decide on 20 comparables you may have witnesses of fact addressing the comparables.

MR. DE LA MARE: Indeed. Then the defendants' experts I imagine are going to be principally in relation to issues of cartel mechanics where that is in dispute.

THE CHAIRMAN: Bringing it back to the basics, it may be difficult to lay down anything other than an indicative timetable, best endeavour staging points, at this juncture.

MR. DE LA MARE: Yes.

THE CHAIRMAN: The most important one is the point in time at which one finishes with the experts.

MR. DE LA MARE: Yes. If you are looking at a trial in January, then I would suggest that we look to have the expert evidence locked down by the end of September.

THE CHAIRMAN: Yes, so three months before.

MR. DE LA MARE: Yes, and that will allow time, if necessary, for any responsive evidence of fact, which is probably going to be concentrated on the issue of pass-on.

THE CHAIRMAN: Shall we find out what the defendants say both about trial window, and indicative timetable and endpoints for experts?

MS. DEMETRIOU: If we are talking about a trial window from January then we do not have any objection to that. You will have seen in our skeleton argument that is what we were suggesting. We think also that it is sensible to block out six weeks, it may be shorter, but it would be sensible to block out six weeks.

What we did not think was sensible was laying down precise dates now for the various stages of experts' meetings and exchange of both factual and expert evidence.

THE CHAIRMAN: An end date for that process?

MS. DEMETRIOU: We are content to specify an end date, a best endeavours end date. The key problem with specifying precise dates now is that, as Mr. de la Mare has said, the second CMC is going to be used to decide the ambit of disclosure. This is not a case in which the claimants have come prepared for this CMC with wider categories of disclosure. They have not sought to initiate any discussion at all as to wider categories of disclosure going to pass-on and to overcharge. So all of that, at the moment is at large, and we simply do not know

the size of it. In those circumstances we think that it is sensible to wait for the second CMC when everyone would be aware of what is in dispute in terms of disclosure and the size of the task, and we can reach, hopefully by agreement but if not the Tribunal would decide, when a reasonable period for completion of disclosure is and, of course, everything else follows from that. That is why we do not think it is sensible to lay down dates now as to the subsequent steps because they will all be determined by disclosure.

THE CHAIRMAN: If I were to plump for an indicative provisional end date for the expert process so you had something to work back from, is September of next year realistic?

MS. DEMETRIOU: I think it is a bit tight in the sense----

THE CHAIRMAN: It is going to be tight anyway.

MS. DEMETRIOU: It is going to be tight anyway. It may be that October gives a little bit more flexibility.

THE CHAIRMAN: So this is end of October.

MS. DEMETRIOU: Yes, end of October, which would still then give two clear months before trial, because we are talking about completion of the expert process, including the narrowing down of the disputes and boiling down to the essentials. I think that would give a little bit more flexibility in the timetable, but we do not have any quarrel at all with laying down a best endeavours end date, we just think end of September may be a bit tight.

THE CHAIRMAN: I think all I would do at the moment would be something like a target date----

MS. DEMETRIOU: Yes.

THE CHAIRMAN: --which would be subject, obviously, to liberty to apply and to review. So that for the purpose of everybody's planning from now on, we would work backwards from there, because I suspect once that has been achieved most of the other matters which will be in issue will largely fall into place once the experts----

MS. DEMETRIOU: Sir, yes, as long as everyone understands that we do not know at the moment at all what the size of the disclosure exercise is going to be, and that will have a knock-on effect on the subsequent steps.

THE CHAIRMAN: Yes.

MS. DEMETRIOU: We are content with that.

MR. SINGLA: We are content with that too. The January trial date will operate as an end date from which everyone will work backwards anyway. So I think the only question is, we have heard what you have said, Sir, about the merits of having an expert end date too, but it may be that the best thing to do is to stand that over until the second CMC. We are all

working towards the January trial date, and the precise whittling down of experts, etc., as we have discussed, may take a bit longer but allowing a bit more time for that whittling down process may actually have some benefits long-term, so in my submission we should list the trial now for January 2018, and not even set down any indicative dates for anything else, but we have heard what you have said, Sir.

MR. BAILEY: We are obviously content for a six week trial window in January 2018. In relation to my learned friend's point about the defendants complying with the Tribunal's requests, we did put in a draft order which sought to achieve the October date and the January date. If you look at tab 2, annex 1, you can see there a January 2018 timetable that we propose and, in mind of Ms. Demetriou's submissions, we have no objection to a target date by the Tribunal of the end of October, which you can then see actually tracks back and we would say is achievable.

MR. ISRAEL: We agree with Mr. Singla, and the directions which are not opposed are for the parties to write to each other in terms of the categories of document for disclosure, the point that Ms. Demetriou made. It may, therefore, be better to fix the date at the next CMC for the end of the experts' report, even on an indicative basis, if the trial is fixed for January 2018.

MR. DE LA MARE: The end of September is, I think, more sensible than the end of October. We probably should have indicative dates for other key milestones in the litigation. We had proposed in our directions that the witness of fact evidence be completed and the replies by the end of April. That, in our submission, remains sensible.

THE CHAIRMAN: The really important witnesses of fact might only come into play after the experts have reported, because it is at that point that you will really know for certain what is disputed and what is not. There may be some value in the witnesses of fact being produced at an earlier stage as well, but one should not preclude the possibility that they may all be overtaken by events. We just do not know.

MR. DE LA MARE: Possibly, but we still think that there is going to be a very substantial witness evidence exercise on the overcharge side for the defendants and on the pass-on side for us. That is what we are going to have to explain. Our pricing process is price sensitive, etc. That is the necessary input into the expert reports. We think an end date of April for that first round. It may be, as you say, that there needs to be sample specific or test case specific evidence.

THE CHAIRMAN: Are we still seeking a CMC at the beginning of December?

MR. DE LA MARE: That date sensibly has to tie in to the directions that you have just made about the access to file materials because we obviously need a sensible time from the receipt of that material to consider its contents and to inform----

THE CHAIRMAN: What I was proposing to do was to set aside a date. For my purposes, since I have got a trial out of London from 5th December to the end of term, it would have to be 1st December. We could reserve that date and, if needs be, it could simply be a written reporting in, or we can have a short hearing on any outstanding matters at which perhaps other timetabling issues could be considered, because at least we will be a couple of months further on. It may well be that there would need to be a much more substantive disclosure dispute at a CMC later on in the New Year.

MR. DE LA MARE: In January.

THE CHAIRMAN: Possibly in January.

MR. DE LA MARE: My concern is that at the moment the provisional direction 7 envisages that the ATF process will not have finished until 25th November, which is about six days before the first----

THE CHAIRMAN: That is why I suggested it is simply a reserved date. It may turn out to be nothing, or it may just turn out that the parties would report to the Tribunal on where they had got to with a suggestion that it all be adjourned until January for a more substantive hearing.

MR. DE LA MARE: If it has to be 1st December, there is no good reason why that file process needs to be as generous, and indeed need to march out of step with the decision. We do not understand this to be a case of a mass of third party documentation being live in any event. There may be two or three third party documents per defendant. There is no good reason why that process should not be done on notice to the relevant addressee non-parties by 2nd November with the exercise being completed by 9th November. There is no good reason why it should not follow. That then allows us to have the material for the best part of three weeks before the CMC.

I take your point, Sir. If there are going to be a large number of highly contested specific disclosure applications, I doubt that you are going to be ready to deal with it on 1st December, and we may need to have a separate hearing on the first available date at the beginning of the next term. At least some attempt to schedule those two together would be sensible.

THE CHAIRMAN: I am only around for the first half of next term, so until March.

MR. DE LA MARE: So it would have to be the early part of the next term.

It may be sensible also to diarise, given how popular at least those on the other side of the court are, a PTR now that we have provisionally locked down the expert evidence. If we do that in advance now, for instance, a PTR at the end of October/beginning of November, that allows us to address some of the issues in relation to expert evidence and maybe contested supplementary witnesses of fact, etc, at that stage. I would suggest that the parties be directed to find a mutually convenient date for a one day PTR in that window.

THE CHAIRMAN: Yes.

MR. DE LA MARE: I have not addressed today ADR, but I think that is a separate topic and principally an issue between me and Mr. Bailey. So unless there is anything else I can help you with on that indicative timetable.

THE CHAIRMAN: So far as other timetabling matters are concerned, we will schedule the trial for the beginning of January 2018 with a six week window, but on the assumption that it can be reviewed as to duration at a later point.

We will reserve a date for a CMC for 1st December, recognising that that might well turn into more than a written report from the parties to the Tribunal, which suggests an adjournment; or, if there are any outstanding matters which the Tribunal can usefully decide, they can be decided either at a hearing or on paper, as the parties consider sensible.

At this point I am going to indicate, but only in provisional target terms, that the end date for the expert process should be the beginning of October 2017, again recognising that this is provisional and tentative and might change. I think it is useful to have a point in time from which the parties can work backwards. I do understand that that is tight and there is a great deal of work to be done, but I think there may be quite a lot of work to be done after that process to get the trial ready for the beginning of January.

We have directions for the first part of this trial with the ATF procedure. I am not going to lay down any further detailed directions now. It can either be dealt with on 1st December, and is more likely to be dealt with through agreement between the parties. We can simply take that one in stages.

MS. DEMETRIOU: Sir, on the directions relating to the access to the file documents, I think Mr. de la Mare was urging the Tribunal to cut down the timetable under para.7.

THE CHAIRMAN: At the moment the timetable is?

MS. DEMETRIOU: At the moment the timetable is that the defendants will write obviously straight away to third parties to invite them to identify by 16th November all documents which were obtained.

THE CHAIRMAN: That is five weeks.

MS. DEMETRIOU: So it is just less than five weeks. Mr. de la Mare was saying that that should be 2nd November, which is the date for the Decision. Of course, the Decision is a short document where we can, at the outset, say that there are likely to be very few documents affected, but the parties are----

THE CHAIRMAN: I think, to be fair to these non-party defendants, they are going to need a certain amount of time to consider the position, take instructions, seek advice, and so on. I think five weeks is about right.

MS. DEMETRIOU: Thank you.

THE CHAIRMAN: Right.

MR. DE LA MARE: The next item on the agenda is ADR, Sir. This is a last minute thought on the part of my learned friend Mr. Bailey's clients. There has been no mention of ADR until extremely recently. We see no reason why these directions should in any way be interrupted by a process of alternative dispute resolution, where it is mediation or otherwise. There is no good reason why those efforts, which will doubtless be joined into with good faith and great interest on my clients' part, cannot twin-track with the provision of all these things that are necessary for a hearing to begin at the beginning of January. We do not think there is any justification for the type of directions my learned friend was proposing in his draft order if one turns that up, tab 2 of the bundle.

THE CHAIRMAN: I have seen that. Shall we ask Mr. Bailey what his reasons are for an immediate adjournment of everything pending ADR?

MR. BAILEY: Sir, I am happy to say that the NSK defendants are very content with the consolidated draft order that we proposed and that you have indicated. So far as the claimants are willing to engage with us in an ADR process, we are content to do that with the January 2018 timetable. So there is no issue.

THE CHAIRMAN: No issue, a piece of cake!

MR. DE LA MARE: That was easy. What a triumph of advocacy that was!

Lastly, confidentiality order: I think it is probably helpful that we go through the latest draft in relation to that and get that important document done and dusted. So that I am not accused of anything by Mr. Singla, perhaps we could have circulated the latest draft of that order. (Same handed)

MS. DEMETRIOU: If you have the same draft order that has lots of track changes in red on the next page, Sir, the track changes are the defendants' track changes to the claimants' suggested order.

THE CHAIRMAN: Yes.

MR. DE LA MARE: It is para.1.2.2, which was the point that attracted my submission that they were seeking to enhance the definition of 'confidential information' in an axiomatic way. If this paragraph is to be included, then I stand by that submission, because what it seems to be saying is that material in the ATF basket is confidential information even if it does not contain sensitive pricing information.

Perhaps it is best, since these drafts come from my learned friend Mr. Singla, perhaps it is best if he or Ms. Demetriou introduces the thinking here. We favour simply a designation of the Decision as confidential on the basis that anything else would be looking behind the reasoning of the Commission, and commercially sensitive pricing information. Beyond that, it is impossible to see what commercially confidential information there is.

MS. DEMETRIOU: Sir, can I explain how it operates?

THE CHAIRMAN: Yes.

MS. DEMETRIOU: You will see in para.1.2.1, 1.2.2 and 1.2.3 three categories of confidential information. The first is the Decision. The second is non-sensitive pricing information, a residual category of information that might be confidential. The third is commercially sensitive pricing information. Those are all subject to the proviso at the end of the paragraph, which is that they are not automatically designated confidential information, but they are confidential if their confidentiality is agreed or if the Tribunal has so ruled. So they are not automatically confidential information that has to be disclosed into the ring.

THE CHAIRMAN: Yes, I see.

MS. DEMETRIOU: The reason for separately designating 1.2.2 and 1.2.3 is that when it comes to commercially sensitive pricing information that has been held to be confidential, then the defendants have inserted over the page at para.2 a proviso relating to such documents. So in the case of documents falling within 1.2.3 above only to relevant advisers who are not in-house counsel. So it is a more restricted version of the ring that does not include in-house counsel.

So, in so far as there is commercially pricing information that has been designated as confidential, then that goes to a smaller version of the ring that does not include in-house counsel. That is the reason for the slightly lengthy drafting in para.1.2.

THE CHAIRMAN: Just going back to 1.2, the proviso at the end which you say addresses Mr. de la Mare's concern, if we read 1.2.2 with the proviso it is "documents disclosed pursuant to the Tribunal's order comprising materials on the Commission file which do not contain commercially sensitive pricing information", and then going down to the proviso,

"being the material contained in the relevant documents in respect of which a claim for confidentiality is agreed". Is that subject to agreement?

MS. DEMETRIOU: Yes.

THE CHAIRMAN: Or subject to a ruling of the Tribunal?

MS. DEMETRIOU: Yes, exactly.

THE CHAIRMAN: So if it is not subject to one of those two things, then 1.2.2 does not bite on non-commercially sensitive information?

MS. DEMETRIOU: That is right. That information would not be disclosed into the ring, but would just be disclosed generally.

THE CHAIRMAN: It is not entirely clear it works that way. My concern with the drafting is the word "being" in the proviso assumes that all of that information has already been either agreed or subject to a ruling. It may just be that there is a drafting issue there.

MS. DEMETRIOU: It may be that there is a drafting issue. I think that what we are intending to set out is a procedure whereby either it has been agreed to be confidential or an application will be made in respect of it. If that application is rejected then it is disclosed generally. We can tweak the drafting, but that is what is intended. I recognise the drafting might be a bit unclear.

THE CHAIRMAN: Let me just come back to Mr. de la Mare. The principle does not seem to be in dispute, it is the drafting. In other words, if it is on the Commission file and it is not commercially sensitive pricing information it goes into the ring. It would only go into the ring if it is either agreed or the Tribunal so ruled.

MR. DE LA MARE: With respect, and I do not mean to mean, it is remarkably clunky because at the end of the day----.

THE CHAIRMAN: Let us just take it in stages. The principle does not seem to be in dispute, it is an issue of drafting?

MR. DE LA MARE: The issue is why any of this draft in any way by reference to the ATF documents at all? If what is being said is what is entitled to be treated as confidential information is commercially sensitive pricing information as to which an inner ring is required, and other documents which are not commercially sensitive pricing information, but which are nevertheless confidential, all of that, and agreed to be such or ruled to be such by the Tribunal, can be expressed in that way otherwise than by reference to the Commission Decision.

The reason why I say that point is important is, of course, we may have information to put into the ring, not least in relation to how we go about setting our prices. Therefore, what we

need to have, since this order is not simply for the purposes of this recent parochial dispute about the Decision and the nature of the documents, but to govern the dispute, is a definition of confidential information that works for the dispute as a whole.

THE CHAIRMAN: On the basis of Ms. Demetriou's explanation, do you agree there is no dispute in principle between you, albeit that there is a drafting issue.

MR. DE LA MARE: I agree that in relation to pricing information an inner ring may be justified, and I can see why that information should be kept away from in-house----

THE CHAIRMAN: So I just send you away to redraft it.

MR. DE LA MARE: Yes, and I agree that there are other areas where we have agreed the material is confidential and that will have to be subject to the supervision of the court because of *Scott v Scott* and all those principles you are familiar with, Sir, or because the Tribunal otherwise would, in those cases the documentation shall also be confidential. We are very keen to displace, which has certainly been present in an amount of the correspondence, the presumption that simply because embarrassing emails had been seized that they are to be treated as confidential, they are not.

THE CHAIRMAN: They are not, unless they are genuinely confidential.

MR. DE LA MARE: And the hurdle in proving that pricing information from 2004 remains commercially sensitive is a formidable one. We do not want a presumption that things go in and have to be argued out, we want it to operate the other way around.

THE CHAIRMAN: Your position is now very clear, it is on the transcript. Anything which is excessively out of date you say is not confidential. If there is a dispute the Tribunal will resolve it in due course.

MR. DE LA MARE: Correct.

THE CHAIRMAN: So can I ask parties to refine the drafting on this one. It seems to be in principle Mr. de la Mare's point, there does not seem to be any objection to it in principle, it is just a matter of fine tuning or reworking the draft.

MR. DE LA MARE: I do not think there are any other issues we need trouble you with, Sir. If there are any small points on the further draft we can deal with it by alternative drafts and notes, and we can pick and choose from the à la carte options.

THE CHAIRMAN: Is there anything else?

MR. DE LA MARE: No.

THE CHAIRMAN: Can I thank everybody very much.

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