**IN THE COMPETITION APPEAL TRIBUNAL**

Case Nos. 1248/5/7/16

Victoria House,
Bloomsbury Place,
London WC1A 2EB

12 January 2017

Before:

**MR. JUSTICE GREEN**
(Chairman)

(Sitting as a Tribunal in England and Wales)

BETWEEN:

**PEUGEOT S.A. AND OTHERS** Claimant

- and -

**NSK LTD AND OTHERS** Defendant

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# CASE MANAGEMENT CONFERENCE

## A P P E A R AN C E S

Tristan Jones (instructed by Hausfeld) appeared on behalf of the Claimants

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

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

Josh Holmes (instructed by Macfarlanes LLP) appeared on behalf of the Fifth Defendant

MR. JONES: Sir, good morning, I appear for the claimants. Mr. Bailey on the end is for NSK, that is the first and second defendants; Mr. Singla, next to me, for the third defendant, NTN; and Mr. Holmes for the fifth defendant, SKF.

Sir, there is a pleasing amount of agreement to report, although there are still a couple of issues that we need to trouble you with.

THE CHAIRMAN: Yes. Submissions by MR. JONES

MR. JONES: A new version of the draft order has been put before you, at least of Annex A of the draft order should have been put on the desk before you.

THE CHAIRMAN: Right, yes.

MR. JONES: I think it is in track changes.

THE CHAIRMAN: Yes.

MR. JONES: A few points have been resolved. The first is not in the order, but you may have seen in my skeleton argument I raise a point about readily available data, which I said I may need to trouble you with. I do not need to trouble with you that today; it might arise in the future because we have only just received some clarifications on it, but there is nothing for today.

There was a point in Mr. Holmes' footnote 3 about the definition of "data", which I think was just a misunderstanding and we have managed to resolve that; that is why the opening paragraphs of Annex A and Annex B have been tweaked in this document.

THE CHAIRMAN: Yes.

MR. JONES: There was the dispute about pass-on and the start date. That has also been agreed; you will see in paragraphs 9 and 10, the agreement there is to go back to the start of the cartel period, with this proviso, which is that the data in paragraph 10 is, of course, subject to the general proportionality restriction in the opening paragraph of Annex B, and what the claimants have said is that essentially they will think again about what can proportionately be done in that period from 2004 up to 2010/2011 --

THE CHAIRMAN: Yes.

MR. JONES: -- to see whether more can be done than they have thought could be done to date.

The issues before you are firstly the timing of expert reports, although I may leave that until the end. Secondly, then, the issue about what is called supplier contracts or the overcharge documents to be provided from the claimants. There is some movement on that, because the defendants have put forward a different proposal, it has essentially narrowed down what they were seeking; that is paragraphs 7 and 8 --

THE CHAIRMAN: Yes.

MR. JONES: -- that you will also see in track changes here. So the documents that they are seeking have narrowed down. We have considered that, we have not been able to agree to it. I do intend to address you on it both as a general point of principle, but then, sir, if you are not with me on that general point of principle there are a few points which I wish to put before you as to if this is ordered, some tweaks which may be made and some additional points which we would add.

THE CHAIRMAN: Yes.

MR. JONES: We do say that the point of principle is important. The defendants, in their skeleton arguments, put forward two broad reasons why they said this was required. I understand one of those has fallen away; that was, it was said to be relevant to the contract award date, to identify when the contract started. We had said that this was not relevant to that or at the very least now is not the time to start worrying about that because there are other ways of addressing that particular concern, and I understand that is now accepted, at least for the time being.

MR. HOLMES: Sir, just to clarify, we do think these documents may well be helpful in shedding light on the contract award date insofar as there is a gap in the other documents available. But as Mr. Jones says, we mainly rely upon the relevance of these documents for the purposes of quantifying overcharges, and assessing the evidence which merges from the econometric analysis.

THE CHAIRMAN: The benchmarking from internal documentation. That is as I understood to be the main point.

MR. HOLMES: Indeed, yes, Sir. In relation to timing, we will see where we get to with the information which the claimants have separately agreed to provide in relation to start date and whether the contracts are new or renegotiations of existing contracts, and if necessary we may need to pursue specific disclosure requests in due course, but for now that is not the basis on which the documents set out in paragraphs 7 and 8 of the new draft that you have in front of you is pursued.

I am very happy to talk you through those.

THE CHAIRMAN: Shall we let Mr. Jones finish his submission and then we can come back.

MR. HOLMES: Sir, yes.

THE CHAIRMAN: Mr. Jones, yes.

MR. JONES: I am grateful for that clarification.

Turning then, Sir, to the question of overcharge and the benchmarking exercise.

THE CHAIRMAN: This is paragraphs 7 and 8.

MR. JONES: This is paragraphs 7 and 8. The big picture point, which, Sir, I do want to spend a bit of time on, is to seek to persuade you that evidence of the type sought, which broadly speaking is evidence about a purchaser's approach to negotiations in the context of a cartel, is irrelevant to an analysis of overcharge.

I will develop the point, but in summary I say it is not a recognised approach to evaluating overcharge and, indeed, certainly on this side of the court we are not aware of any case in which overcharge has been established by reference to this sort of material. Sir, there is a very simple reason for that, which is that knowing in broad terms whether a purchaser is a good negotiator or a bad negotiator or what kind of approach they had to negotiations, will not tell you how badly affected they are by a cartel. A bad negotiator might, in the absence of a cartel, get generally bad deals relative to other purchasers, but those bad deals will be made worse by a rigged market.

Similarly, Sir, a good negotiator or a sophisticated negotiator may get generally good deals relative to other purchasers, but those good deals will also be made worse by a rigged market because they will start from a worse position. In a bidding context, a bid rigging context like this, the bids which will be put to them will be worse than the bids which would otherwise have been put to them.

The question in every case, whether you are dealing with a sophisticated or an unsophisticated negotiator, is what is the impact of the cartel on the prices paid by this particular purchaser.

There are several ways --

THE CHAIRMAN: I do not think it is pleaded that it is a failure to mitigate on the part of the claimants by being a bad negotiator.

MR. JONES: That has not been pleaded, Sir. There is a general plea as to mitigation which we sought to explore in correspondence, but certainly nothing of that nature has been put.

There are, of course, several ways of ascertaining the impact of a cartel on any given purchaser. Possibly the most common, certainly the one which the experts are agreed to in this case, is to look at the prices that that particular purchaser paid when the market was not rigged and to compare those to the prices that that particular purchaser paid when the market was rigged. Of course, there are all sorts of other things that one needs to try and balance for, demand factors, there might be capacity issues, et cetera, et cetera, those all go into the analysis. That, Sir, is one of the techniques approved in the Commission's Guide to Quantifying Damages, which is the rather hefty document that I have asked to be put before you.

If one looks, for instance -- this particular method is discussed in detail in this document but if one looks, for instance, at paragraph 38 on page 16.

THE CHAIRMAN: Yes.

MR. JONES: Sir, I will not take you through this in detail but just to highlight when one finds it in the document, this is A1, "Comparison over time on the same market", so it is a well-established mechanism for trying to analyse overcharge.

Later on in the document, section 2, they discuss different ways of doing this, econometrically and a regression analysis, that is the first one that is suggested, that is page 24. Here one has the type of method, a comparison over time, and then page 24, the different ways of essentially applying these methods, regression analysis.

In broad terms, that is what is being suggested by all of the experts in these proceedings.

Now, I said that there are several ways of assessing overcharge. It may be worth picking up just one other reference in the document. If one looks at paragraph 30, page 14 --

THE CHAIRMAN: Your point which you deduce from paragraph 38 onwards is what, that essentially the evidence required is not purchaser driven?

MR. JONES: Yes. Nowhere in this document, among all the methods that are discussed, is there any reference to needing purchaser information, information as to the purchaser's negotiation strategy. That is to be contrasted with, for instance, paragraph 30.

THE CHAIRMAN: Yes.

MR. JONES: Which refers to the possibility of also looking, for instance, to documents relating to the operation of the particular cartel.

That may be a helpful cross-check, because one might well want to look at what the evidence shows about the extent of agreement between the cartelists or the extent to which particular agreements were implemented in practice, and to say: well, we have econometrically shown an overcharge of 10% but does that stack up against what one would expect when one looks at the cartel mechanics? That is what Mr. de la Mare outlined to you at the last hearing and there is a lengthy extract from what Mr. de la Mare said in Mr. Holmes' skeleton argument, but what he says there is how the cartel operated on the ground, the cartel mechanics.

Those sorts of documents may well be relevant, and where we have got to on those is that we have had disclosure of the Access to File documents, those are the documents in the Commission's file, we got those in November, and we have said that we will look at those and consider whether it is necessary and proportionate to make further specific requests for more of those sorts of documents and we are continuing to do that. But those documents are

very different to purchaser type documents because, as I have said, knowing that a particular purchaser was sophisticated or a bad negotiator or well-informed or any of those things will not tell you what price they would have got absent the cartel. It will tell you whether they got a better or worse price or likely to have got a better or worse price than a different purchaser, a better or worse negotiator, and if the question was --

THE CHAIRMAN: What happens if there was an internal document which said, for the sake of argument, a strategy document of some description: we have to gear our purchasing policy upon the basis that we cannot pass these increased prices on, and therefore we have to see how we can adjust our purchasing policy to take account of the downstream pressures that we are facing. That would be a document from the claimants in which pass-on would be considered in the context of purchasing.

MR. JONES: Pass-on would be considered in the context of purchasing. Sir, I would need to think a bit further about that because I do not think that particular example has been given or indeed is sought expressly here.

THE CHAIRMAN: I am not certain if the documents being sought are sort of mechanistic documents concerning the modus operandi of purchasing.

MR. JONES: It is the modus operandi of purchasing, how we went about entering into tenders, who we invited to tender, how we evaluated those responses and those sorts of things.

My general response to the example you put, which would be a general response to any individual example and indeed the various ones set out in 7, (a) to (f), is that one always has to ask what is the counterfactual.

In other words, let us take as a hypothetical a purchaser which has that sort of policy. Well they, of course, do not even know there is a cartel, so they would have had that policy in the absence of a cartel. So it does not help you to explain what price they would have paid in the absence of a cartel. Conduct on the purchasing side will not help you to answer that question, it is only the cartelist side and the econometric analysis that will help you to answer that question.

Finally on this big picture issue, I do place some emphasis on the fact that none of the defendants' experts have addressed this category of documents, either in the joint memorandum or in witness evidence.

Sir, can I just show you the order that was made for the experts' hearing in the memorandum. It is in the core bundle at tab 17.

THE CHAIRMAN: Yes.

MR. JONES: In summary, the background to this was there was going to be a CMC and there was a dispute between the parties as to what should be disclosed, and broadly what was said by the defendants' solicitors was all of these requests need to be discussed by the experts, and the claimants were keen to ensure, if that was the case, that we should have some certainty that the experts would discuss what was being said they would discuss.

Paragraph 1 sets out what they are to discuss at the meeting; it is not a complete list, because one sees at the end of paragraph 1 "without limitation". There is a list of things to discuss. Then one sees (d), (e) and (f): the nature of the evidence which each party has readily available; the nature of the evidence which, so far as the experts are aware, exists; what evidence (including data), it would be appropriate for the parties to disclose to facilitate the resolution of the economic issues arising in this claim.

One then sees at paragraph 4 they are to produce a memorandum explaining their agreement and any disagreement on the matters at 1(a) to (f).

The extent of the overcharge is obviously an economic issue, self-evidently. That, if there is any doubt about it, is clear from the previous order that was made permitting expert evidence, that is at tab 15, where one sees in paragraph 13 one of the issues for the experts is essentially the overcharge issue, whether the defendants' conduct caused the prices to be inflated.

THE CHAIRMAN: Yes.

MR. JONES: So we say this really could not be clearer. If these wide categories of documents are relevant to that economic issue, they should have been discussed between the experts and they should have made their way into the joint memorandum. There is no mention of them in the joint memorandum.

I should say both Mr. Holmes and Mr. Singla say in their skeleton arguments that it is their experts who want this information. Mr. Bailey takes a slightly different tack and says: do not worry about experts, this is factual evidence that is going to supplement expert evidence. But the reasons he gives for it are very, very short summaries of essentially what Mr. Holmes has said in his skeleton as to why the experts want it. There is also no evidence before you from the defendants' experts on this.

Mr. Bailey also criticises the claimants for putting in what he calls late evidence, a couple of days ago. But Sir, it is, with respect, an extraordinary criticism because this is essentially a disclosure request by the defendants which has never been explained in any detail until the skeleton arguments, and the only reason that we put in a witness statement from the claimants' expert, which in a way was a strange thing to do, was just to explain why we do

not see the relevance; it was a defensive statement in the absence of any explanation from the defendants.

Finally, I say it is not surprising there is no evidence from their experts because, for reasons I have explained, this is not an organised approach to assessing overcharge.

Those are my big picture points.

THE CHAIRMAN: Yes.

MR. JONES: Can I turn then to the specific documents that are sought. It may be easiest to do this by reason of the explanations in Mr. Holmes' skeleton argument at page 12.

Sir, 7(a) and (b) on the annex are documents comprising the RFQ and responses received to the RFQ. You will see at (d)(i), Mr. Holmes explains why these are necessary; they will help to understand whether bidding was competitive or not by seeing which other undertakings were invited to participate and actually participated.

The obvious difficulty with this is that this was a bid-rigging cartel operated by the cartelists agreeing what bids they would put in. I should maybe show you that, it is in the core bundle in the Decision. You will see the summary of the Decision, so that is tab 1 of the core bundle. Tab 1, page 11. Recital 28. If you could read subparagraphs (1) and (2) in that. (Pause)

THE CHAIRMAN: Yes.

MR. JONES: You will see the point, that there is, in my submission, no way that these documents would tell you whether the bidding was competitive or not.

Back on the order, the next one, at (c), is documents relating to the criteria for short listing tenderers. This corresponds to (iii) on Mr. Holmes' skeleton, (ii) has dropped away, given the revisions to the order, so (ii) is not relevant, and (iii):

> "The criteria for shortlists will reveal whether Peugeot had preferences for certain bidders (excluding for example new entrants to the EEA markets) which could have affected the competitiveness of the procurement exercise irrespective of the infringement."

Here, in a sense, I just reiterate my big picture point. The words I would underline are "irrespective of the infringement", because if Peugeot had chosen, as it would have been entitled to do, to exclude certain participants from its bids, it would have chosen to do that, as it says here, irrespective of the infringement. So it may have got a worse deal than it would have got had it included them, but that tells you nothing about the impact of the cartel. Unless, as you indicated, it were pleaded that this was in some way a failure to -- a strange plea, but if they said there was some culpability attaching to the claimants for this;

but that is not said, all that is really being said is, "Let us see how they negotiated and see if we could have done better", to which we say "So what?"

That is the (c). (d) and (e) are worth looking at together, "Evaluation of responses from successful tenderers" and "Documents relating to the criteria for awarding a contract".

This then is addressed at (iv) in Mr. Holmes' skeleton, that:

> They “will also bring to light any such preferences ..."

There I make exactly the same point as I have just made, and it goes on to say:

> "... and should also reveal whether there were any post-bidding negotiations which might have broken the effectiveness of a co-ordinated response by the Defendants to the RFQ."

Sir, on that point, again I say it is impossible. There is no way they could show that. What this is positing is a rigged bid followed by a series of individual negotiations. What is being suggested here is that one might be able to look at those negotiations, the post rigged bid negotiations, and somehow work out whether they end up in the place that they would have ended up in had the bid not been rigged in the first place.

It is an impossible task. You will not be able to answer that question, because you will not know, had the bid started from a lower non-rigged point, where those post negotiations may have taken you.

(f), Sir, is the same point, I should have incorporated that with (d) and (e), negotiations on the final price, that is essentially the same point.

Then, Sir, 8 we have a particular difficulty with. 8 is “Documents evidencing the reasons for price renegotiations or other contract amendments to contracts relating to the RFQs identified by the Defendants in paragraph 7 above”.

Firstly, this is quite a large addition, it may not look like it but it is a large addition because for each RFQ there may be thousands of amendments, hundreds or possibly thousands of amendments.

What this envisages, although paragraph 7 is now limited to 30 RFQs, it says each defendant will identify ten RFQs, so that is 30, it would lead to a massive expansion because it would require one to look over time at all of these amendments. That is the first point.

The second point is that it is unnecessary because this very information is already included in the data that has been provided. So the data sets that have already been exchanged from the claimants' side include a full list so far as we are aware, of amendments, there are in total around 16,000, and, where the information is available, the reason for the amendment.

I say where that is available; that is, I understand, available in around 11,000 of those 16,000 data points.

Sir, if and to the extent that you are not with me on those submissions, there are three further points that I would make about appropriate tweaks or additions to this order, Sir, if this were to be made.

The first is that some of these documents will also be in the defendants' possession and they should plainly also be required to search for them. That goes for the documents at 7(a), (b), (f) and paragraph 8.

THE CHAIRMAN: If they are in their possession and they search for them and they find them, then what, they disclose them to you?

MR. JONES: Yes, Sir.

THE CHAIRMAN: Yes, that is tweak number one.

MR. JONES: Tweak number two is that, of course, if one were to want to look contract-by-contract at the process of negotiation, then it would make no sense to do that without knowing what is going on on the cartelists' side. I explained earlier that we are considering further whether we need to seek more cartel documentation, but what is clear is that if these are ordered then we would want cartel documentation relating to whichever negotiations have been selected, because otherwise one would have a very partial picture. That is tweak number two.

THE CHAIRMAN: So you want the counterpoint or equivalent documents.

MR. JONES: The equivalent documents relating to the negotiations and, of course, to communications between the cartelists in respect of any of those RFQs.

THE CHAIRMAN: Insofar as you do not already have that?

MR. JONES: Yes, insofar as they are not in the Access to File documents, yes, Sir.

I am asked also to raise the point that many of the documents that we have been given are in foreign languages and that we would need translations. I understand that is a general principle, but I should mention it just in passing on that particular point as well.

My third tweak, if you are not with me on the main point of principle, would be that we are concerned by the suggestion that all of these would be identified by the defendants' experts, and the suggestions is that they would each identify ten. We would suggest that instead they would each identify five, and in relation to each defendant the claimants would also identify five.

What I mean by "in relation to each defendant" is that we would identify five RFQs in which the contract was awarded to SKF and five in which it was awarded to NTN and so on, to avoid or at least minimise the problem of cherry-picking.

Unless I can assist further, those are my submissions on paragraphs 7 and paragraph 8.

Is it convenient to leave the expert timing point?

THE CHAIRMAN: Yes, let us deal with 7 and 8 first of all.

Yes, Mr. Holmes. Submissions by MR. HOLMES

MR. HOLMES: Sir, you will have seen from the document to which Mr. Jones took you that we took seriously the comments that were made by the Tribunal in its letter --

THE CHAIRMAN: Hints.

MR. HOLMES: -- and we have sought to render the request more proportionate. You will see that the reference to "all documents" has gone; there are now defined categories of documents, and we have proposed a sampling exercise, which is very much along the lines that we understood to be suggested at the first CMC by counsel for the claimants when discussing the relevance of supplementing the econometric analysis with a consideration of individual contracts.

THE CHAIRMAN: Can I tell you, the thought that went through my mind when I was looking at that, first of all, I had a concern about the breadth of the request, but in a sense that has been addressed. Secondly, I understand the point that the claimants are making about relevance; I find it very difficult to assess the merits of that particular argument at this stage.

MR. HOLMES: Yes, Sir.

THE CHAIRMAN: It did occur to me that one way round that was to order a limited sampling exercise so that the parties could see whether or not anything was going to be generated by that exercise.

MR. HOLMES: Yes, Sir.

THE CHAIRMAN: If it was not, that would be the end of it. If it was, then it could be expanded in a much more proportionate and focused way.

MR. HOLMES: In a sense, Sir, we would hope that our proposal precisely achieved the sampling which you had in mind. Was your suggestion that there be an initial sample on a smaller scale than is being proposed?

THE CHAIRMAN: Yes. You might actually do it in two stages.

MR. HOLMES: Yes, Sir.

THE CHAIRMAN: A limited dipping exercise to see what came out.

MR. HOLMES: Yes.

THE CHAIRMAN: If there was an indication that it was relevant material which was being generated, then one could expand it. Because I am conscious of the fact that it is potentially a very wide-ranging and expensive disclosure exercise which might not generate anything which is proportionate to that cost and time and effort; but I do find it difficult, from my perspective, to work out whether it will or will not at this point.

MR. HOLMES: Yes, Sir. Shall I address you on relevance first?

THE CHAIRMAN: Yes.

MR. HOLMES: So you can understand where we are coming from.

THE CHAIRMAN: Yes, and also mechanism, because I might have considerable sympathy with Mr. Jones' submission but nonetheless think some form of limited exercise would be worthwhile at least as a starter.

MR. HOLMES: I understand, Sir. Let me explain why we see these documents as important, to use the language of the letter, why they can be expected to add “proportionate incremental value” to the analysis.

THE CHAIRMAN: Yes.

MR. HOLMES: These documents we see as a useful supplement to the overcharge modelling --

THE CHAIRMAN: That does not mean anything.

MR. HOLMES: -- analysis.

THE CHAIRMAN: "Useful supplement", that does not mean anything.

MR. HOLMES: Let me explain why, Sir. Each of the experts will go away and they will produce an overcharge model based on the data which is partial and incomplete.

THE CHAIRMAN: Yes.

MR. HOLMES: That will probably result, one can anticipate, in a range of different estimates as to whether there was any overcharge, whether the overcharge was extremely small or extremely large.

THE CHAIRMAN: Yes.

MR. HOLMES: The Tribunal will then be called upon to assess the merits of these different models and, crucially, the plausibility of their outputs. Obviously the defendants have been doing their own initial modelling, their own preliminary assessment, and I can say for our part it appears that the overcharge is extremely small, if there is any overcharge at all, and we anticipate that the objection that will be raised is that this is implausible and it will be said that this lacks credibility. It will therefore be necessary to test, having regard to specific market conditions, whether there are circumstances affecting this market which could explain why, despite the efforts of the defendants, prices were unchanged --

THE CHAIRMAN: Yes.

MR. HOLMES: -- in the period before, during and after.

THE CHAIRMAN: I do not have any difficulty with the principle of internal disclosure being given to benchmark or provide a context to econometric modelling.

MR. HOLMES: I am grateful for that indication.

THE CHAIRMAN: I think what I would like assistance with is why the modus operandi of a procurement exercise is going to provide that context. What is it that you want from that corpus of documents?

MR. HOLMES: To give a few specific and concrete examples, Sir, one relevant consideration will be the extent to which individual procurement exercises, which may have been on a large scale and may have affected significantly the value of commerce, were characterised by, or involved bids from outside bidders who were not involved in the cartel process.

Mr. Jones, when he was addressing my skeleton argument, I think overlooked the point which I was seeking to make, which is that the defendants may have made their best efforts, but insofar as there were others at the table, and we know that significant volumes were purchased from non-infringing parties, that could have had a significant dampening effect, depending upon the mechanism of the procurement process, upon the final price that was achieved. That would be one example.

Another example would be that Peugeot, as it appears to us, is a very large and very sophisticated manufacturing enterprise with a very good insight into input costs and into manufacturing processes and we suspect that that may well be reflected in internal documents which would show the ability of Peugeot, through the procurement process, which may be multi-round, to exert a constraint on the price through countervailing buyer power. That would be another concrete example of how the internal documents of Peugeot, who else replied, who else was invited to bid, and how Peugeot approached the negotiations.

Then thirdly, insofar as there was an individual price negotiation at the end of this process, and insofar as Peugeot was a sophisticated purchaser, how that affected the outcome of the process; and this will be revealed by the documents that we are seeking, I will take you through the categories in a moment.

THE CHAIRMAN: Which particular sorts of document might reveal how the outcome was or was not affected by the cartel?

MR. HOLMES: The responses received to the RFQ, which are not, of course, all in the possession and control of the defendants, because the responses will not all have come from

the defendants, those responses will reveal how much of an external competitive constraint there was. Documents relating to the criteria for shortlisting tenderers will reveal the preferences of Peugeot for the selection of bidders to be invited for tendering and for selecting amongst those tenderers in a multi-round process, and that in turn will shed light on the extent to which there is an external competitive constraint.

THE CHAIRMAN: A lot of this is looking at the question of non-cartel suppliers and the impact upon the process.

MR. HOLMES: Yes, that is one of the elements but not the only element.

One then turns to the evaluation of responses from successful tenderers and one sees there the potential to gain an insight into Peugeot's ability to understand and influence the prices that were being required. For example, in some tendering exercises it is not uncommon for the purchaser to require information about costs to be disclosed either at the initial stage or at a subsequent stage of the procurement process. Insofar as information of that kind is being provided --

THE CHAIRMAN: You get information because you do an evaluation, you learn from that something about your supplier's costs.

MR. HOLMES: Yes.

THE CHAIRMAN: You then use that for what, future bidding?

MR. HOLMES: They may already know a great deal about costs from material in their own control. They obviously purchase steel on a significant basis and they understand manufacturing processes, so these are seasoned operators, and their evaluation of responses may show these factors at play being successfully deployed, looking at both the internal documents and the negotiations, to exercise a constraint on the prices that are achieved in these bidding processes.

The same point I think applies to documents relating to the criteria for awarding a contract and documents relating to the negotiation of the final price. Countervailing buyer power is relevant to all of these.

It was suggested by Mr. Jones that this was somehow an extremely unorthodox approach to take. We do not accept that, Sir. It may be convenient for you briefly to look, I am sure you are familiar with the document already, at the study prepared by Oxera, which is cited as the basis for calculating the quantum of the claim; that is the quantifying antitrust damages paper of which we have copies, if I can just hand that up. (Handed)

THE CHAIRMAN: Yes. The 2009 paper.

MR. HOLMES: Yes, Sir.

THE CHAIRMAN: Yes.

MR. HOLMES: If you could turn firstly, Sir, to page (ii) in the executive summary, and you will see in the middle of the page:

"Conceptual framework for damages estimation."

THE CHAIRMAN: Yes.

MR. HOLMES: Then the stages of that damages estimation, the first of which is determining the counterfactual scenario. This is exactly what the econometric analysis before, during and after aims to do, by comparing prices before and after compared with those during to establish a counterfactual value of the price that would be achieved.

THE CHAIRMAN: Yes.

MR. HOLMES: I draw your attention in particular to the third sub-bullet of the first point that it is relevant for the purposes of counterfactual analysis to look at the market and industry context in which the harm has arisen and what impact that might have on the counterfactual analysis.

They give one example there: is this a mature or new market?

In the same vein, that is developed subsequently at various points in the draft, if you turn within the document to the point that I cited this document for in my skeleton argument, at page 15, you will see there that specific attention is given to bid rigging cartels. This is significant because one of the two heads of overcharge which is claimed by the claimants relates to the RFQ exercise, request for quotations exercise. It is said that as a result of the co-ordination by the defendants RFQs were less competitive than they otherwise would have been.

Sir, I would rely in particular on the third paragraph under that heading.

THE CHAIRMAN: This possibility of non-collusive bidding operating in parallel with collusive bidding, yes.

MR. HOLMES: Yes, Sir, it is exactly the point I was making, that you might have outside bidders, in particular large contracts, which constrain the price. That may be the case regardless of whether the contract is ultimately won by one of the infringing parties or by a non-infringing party, because in a multi-round procurement process the competitive constraint exerted at the initial stages will affect the final outcome whoever is the successful bidder.

THE CHAIRMAN: What is the periodicity of bidding? Is it three-monthly, six-monthly, annually? How often does the bidding process occur?

MR. HOLMES: I know that these are long-running contracts.

THE CHAIRMAN: They may be framework contracts within individual bidding processes.

MR. HOLMES: Indeed, and I will need to take instructions on this. I suspect the periodicity depends somewhat on when new models are being produced and there is therefore a need to develop a new, bespoke bearing part for use in that new model.

If you could give me a moment, I will just take instructions. (Pause).

Sir, I am instructed that the average life of a car model is around seven years, and so once the bearings have been procured for the purposes of that car, unless, as sometimes happens, the procurer becomes dissatisfied with the supply arrangement, one might well see the contract remain in place. How often contracts are required will depend on how often new models are launched, for new contracts, and that is something on which I cannot advise.

THE CHAIRMAN: In a sense, part of the strength of your argument would increase if there was regular repeat bidding so that the learning process would increase or the ability to bring in a third party to impose some discipline would of course facilitate your case. If it is only once every seven years ...

MR. HOLMES: But there are new car models being introduced with greater regularity and so therefore there will be -- we know that there are a number of RFQs throughout the process and for each of these RFQs, in principle, the knowledge learnt in previous rounds could in principle be deployed.

THE CHAIRMAN: At all events that would be something which at least a sampling exercise would reveal.

MR. HOLMES: Yes, Sir, indeed.

To make good on my point about countervailing buyer power, let me just show you a specific case study in relation to the estimation of a cartel overcharge by the Federal Court of Justice in Germany, which is described on page 83 of this document.

Sir, it is simply to make the point that adjustments might be required for countervailing buyer power. I do not think we need to go into the details of the underlying arrangement, it was the paper wholesalers cartel judgment of 2007. In the penultimate paragraph of the description you see there, in the second sentence, that the judgment suggested a bottom up costs-based approach where an average profit margin informed by comparator markets is added to costs, and adjustments are made for buyer power and market structure. We say this is exactly an example of the benchmarking or tweaking that is required. In other words, it is not sufficient just to look at the data; in assessing the data, in seeing where you get to, it is relevant also to consider the broader context.

Just to make good the point that there is nothing unorthodox about this, if I could just take you to a passage in the Commission Staff working document, to which you were taken by Mr. Jones.

THE CHAIRMAN: Yes.

MR. HOLMES: The first reference is on page 9. It is simply to point out in paragraph 9 what the guide is addressed to. It is providing insight into certain database methods, but nothing in it should be understood as arguing against the use of more pragmatic approaches or as raising or lowering the standard of proof or the level of detail of the factual submissions required from the parties in the legal systems of the Member States.

Factual submissions; in my submission, by "factual submissions" they mean the evidence, both witness evidence but also disclosure documents, insofar as relevant, by systems provided for disclosure, and there at the end of paragraph 10:

"The present paper should therefore not be seen as exhaustive."

I think that is all I need to take you to there, Sir.

That, Sir, addresses paragraph 7 and explains why the documents in paragraph 7, in our submission, may be relevant and should not be shut out at this stage.

As regards paragraph 8, this is an important point, and with respect to Mr. Jones I am not sure that his submissions fully appreciated the significance of it.

There are, as he has pointed out, a very large number of price adjustments that are apparent in the database, the costs database provided, but a very large number of those, I understand, relate to automatic adjustments that are provided for in the contract framework and those can be taken out of account. Because those are provided from the outset, insofar as we are dealing here with price renegotiations of contracts concluded outside the cartel period, there is nothing to suggest that those will in any way have been affected by the infringing conduct.

In relation to other types of adjustment it is true that there are very broad generic indicators which we have seen in the data disclosed last Friday by Peugeot, a list of I think about 20 categories, which we still do not understand, Sir, and we are going to need to pursue in correspondence what exactly those categories mean. It has not been possible to do that for now because the data was only disclosed in the proceedings voluntarily on Friday. The point is that in relation to those cases where there is a price renegotiation, where there is a specific renegotiation, it is relevant to understand the reasons for that renegotiation in order to understand whether they could possibly be affected by the cartel.

We are not here talking about an RFQ exercise, where it is readily understandable how the cartel overcharge mechanism could have worked. We are talking here about ad hoc adjustments over the life of the contract which may be dealt with purely bilaterally and which may have perfectly innocent explanations, relating, for example, to a change of the delivery address for particular bearings, or an adjustment to the technical specifications of the bearing, in which there will be a bilateral negotiation and in which there will be limited or no scope for the cartelists' activities to have influenced the price adjustment.

This, Sir, is borne out, in our submission, by the way in which the point is pleaded by my learned friends. If I could ask you to take up the claim form, which is in the core bundle at tab 2, the re-amended claim form. If you could turn within that document to paragraph 62, you will see there a clear distinction drawn between the RFQ cartel contract overcharges which are alleged, and which to which paragraph 7 is relevant, and then secondly the amendment overcharges to which this paragraph 8 relates.

It is explained there by the claimants the basis upon which they claim. They say that:

> "Amendment Overcharges were caused by the co-ordination of the passing-on of steel price increases to OEMs, the co-ordination of responses to APR requests, and/or any other price amendment affected by the Cartel."

That is the million dollar question, Sir, what does it mean, a price amendment affected by the cartel?

The experts, who are much closer to the data than any of the lawyers here, have considered this, and the defendants' experts were emphatic at the joint experts' meeting that the reasons for the overcharge are of relevance. If I could take you to the joint experts' statement, Sir, which is in the hearing bundle, the CMC bundle, at tab 17. If I could pick this up at section 5 on page 19.

Sir, this addresses the question of what data is available, readily available, and what data is not so far readily available. In each case the data is data or evidence that is qualified as potentially relevant to the resolution of the economic issues. You will see that in, Sir, in 5.1(a) and 5.1(b).

THE CHAIRMAN: Yes.

MR. HOLMES: Turning in the table to page 23 you will see that each expert sets out the data or documents not readily available which may be relevant to the claim.

The first column, Sir, although it is not repeated on each page, is the claimants' experts, the second is the experts for NTN, the third is my client's expertfor SKF, and the fourth substantive column is for NSK. You will see that each of the defendants' experts mentions

as an important item the reason for the amendment, the reason of the price amendment. You will see that in the second and third block of text in the column for NTN, in the second block of text for SKF and at the end of the block of text for NSK. So in each case they are saying: we need to know the reasons for price changes.

Of course, taken on its face, this would suggest that for all amendments which are other than automatic, disclosure should be given. That was the basis upon which paragraph 8 originally proceeded. But taking on board your concerns about proportionality we have sought to tailor this and to focus only on sample contracts and to see what comes out. In my submission, Sir, that already achieves the sampling exercise that you described as a potential way forward in order to ensure that time is not wasted.

The other point while we are in this document is just to address the suggestion that the document does not sufficiently flag the need for a wider contractual context. If you could turn, Sir, within this document to section 3, this deals with the before, during, after analysis. Page 10. Still in the joint experts' report, page 10.

THE CHAIRMAN: Yes.

MR. HOLMES: Section 3, before, during, after.

At 3.5 the defendants' experts flag the importance of the availability of reliable data and the correct interpretation of data.

At paragraph 3.9 --

THE CHAIRMAN: What do you deduce from this?

MR. HOLMES: It is simply observing that data in itself may not be sufficient; it is necessary to interpret the data in the light of the surrounding market contexts.

THE CHAIRMAN: I see, yes.

MR. HOLMES: At paragraph 3.9 the experts all agree that it is necessary to build a set of contract information as comprehensive as possible in order to carry out the analysis.

Sir, I understand from my expert, who is present here today, that when discussing this, the way in which the economists think about the contract information is not merely the product of the contract but also the pre-contractual negotiations, and that was what was intended to be suggested there.

At 3.10 in the second sentence there is reference to the importance of considering whether the negotiations for the contracts identified based on transaction data, and whether the negotiations were carried out using a competitive process. So again relevant to consider competitive additions when assessing, when cross-checking, when benchmarking the results of the modelling exercise.

At 3.11:

> "There can be practical difficulties in cross-checking the data as the exhaustive list of underlying documents may not be in the Parties' control and it may be difficult or disproportionate to locate and collect such documents."

There, a reference to cross-checking by reference to the underlying documents insofar as they can be proportionately obtained. In my submission, that shows that the experts had well in mind a request which is now pursued.

I also, Sir, in that connection, would say that this has always been evident to both parties, the potential for these documents to be relevant, and I make two points in that regard.

The first is to draw your attention again, and I have set it out in my skeleton argument, to the remarks of leading counsel for the claimants at the first CMC. If we could turn that up very briefly. The CMC transcript is not in the bundle, I have it if anyone wants to look at it, but I am happy to take it from my skeleton if others are.

On page 11 of the SKF skeleton at tab 4, in the third italicised paragraph of the quotation, my learned friend makes the point that:

> "The span of the cartel is the best part of seven years. This 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."

Then a reference to the fact that the facts may be specific to particular contracts.

That was obviously not something that Mr. de la Mare plucked out of the air on his feet, it must have been on the basis of discussion with his experts, and it suggests precisely the approach that we are proposing and which you described, Sir, I think fairly, as a benchmarking approach; once the results of the econometric analysis are in, how do you test them and examine their plausibility, having regard to the market context and how the contracts operated in practice?

The other point I would rely upon is if I could ask you to turn to the disclosure report for the claimants, which is at tab 5 of the same bundle of the CMC bundle.

Sir, this document, you will see from the penultimate page, is dated 15 November 2016, certified by a Statement of Truth in the usual way.

As explained at paragraph 1, the table identifies all documents which exist or may exist and which may be relevant to the issues in the case and in respect of each such document, where and with whom it may be found:

At point 1, the claimants quite properly flag:

> "Documents relating to the purchasing process of bearings that may be relevant to the dispute, including emails, letters, faxes, spreadsheets, presentations."

So the procurement process recognised as potentially relevant. These, in my submission, are --

THE CHAIRMAN: That seems to be a reference to the more generic strategy type of document, rather than the nuts and bolts of the modus operandi.

MR. HOLMES: I agree it is a broad description and I do not attach much weight to it, but it does show that it did not come out of a clear blue sky that the defendants and their experts were interested in understanding the context by having regard to these important documents shedding light on the competitive dynamics which informed the procurement process.

THE CHAIRMAN: Yes.

MR. HOLMES: Sir, those are my submissions on relevance.

THE CHAIRMAN: Yes.

MR. HOLMES: You have really heard me already on proportionality, although I will ask for a few moments to take instructions of your sample within a sample suggestion, if it is one that your Lordship is minded to pursue, Sir. Sorry, I forget the forum.

The other point I should address you on is the tweaks that were suggested by Mr. Jones.

THE CHAIRMAN: Yes, mutual disclosure I think is important.

MR. HOLMES: Yes, that is not resisted and has never been resisted. It was offered, as I pointed out in my skeleton argument, at the very outset, when we first requested these documents.

THE CHAIRMAN: Mutuality was I think the essence of tweaks one and two, and then tweak three was an addendum or a modification of the sampling process.

MR. HOLMES: Yes, Sir, which we have no difficulty with.

THE CHAIRMAN: Yes. It is obviously important that if there is a sampling process it is done objectively.

MR. HOLMES: I agree, Sir, although in many ways, if there is a cherry-picking problem, in relation to the documents that are in control of the claimants the risk lies with the defendants rather than vice versa.

THE CHAIRMAN: Yes.

MR. HOLMES: Having said that, we accept the point. I can only speak for SKF, the other defendants' counsel will no doubt take instructions, but I think we will be prepared, subject to finding satisfactory wording, to accommodate each of those tweaks.

THE CHAIRMAN: Do you want to take instructions on the prospect of a sampling within a sampling example?

MR. HOLMES: Yes, Sir. Would it be convenient to rise for five minutes or would you rather we did it here?

THE CHAIRMAN: I do not mind.

MR. SINGLA: My Lord, I was going to add a couple of brief observations on the relevance issue, which it may be convenient to deal with now.

THE CHAIRMAN: I will hear everybody. Then if you wish to take a few moments to consider that, everybody, we can do that.

MR. HOLMES: Yes, let me just check if there are any other points that I have missed. (Pause). I am reminded, Sir, just by way of context, that of course there are two big issues in play here; there is overcharge and there is pass-on. In relation to pass-on the claimants have sought to focus upon documents, pricing strategy documents, as an alternative to econometric analysis. In this case, issues on the other foot, although they appear to prefer to rely exclusively on data, a hybrid approach has been agreed in relation to pass-on and it would be, in our submission, appropriate for a similar approach to apply equally in relation to overcharge. Submissions by MR. SINGLA

MR. SINGLA: We will take instructions on the tweaks and mutuality points, but on the threshold question of relevance in my submission it is disingenuous of claimants to say that what the defendants are seeking is in any way unorthodox. My Lord, the issue that these documents will go to is not merely the extent of any overcharge but in fact the anterior issue of causation. The question for the court ultimately at trial will be whether, and if so to what extent, the cartel had an impact on prices. In my submission it is entirely orthodox for defendants in that sort of situation to be seeking internal documents from the claimants in order to inform the position in relation to causation.

Mr. Holmes has given examples already of the types of factors, in addition to the cartel, that may or may not have impacted price, and I would simply reiterate some of those and add to the list: the claimants' own bargaining power. Who was invited to bid, was it a number of parties or merely one, was it cartelists only or non-cartelists as well? Did the claimants have particular reasons for having a preferred supplier for a particular contract? Might the price have been negotiated with the claimants having in mind that a supplier had a higher

quality? Obviously a perception that a particular supplier has a higher quality will in many situations lead to a higher price.

The submission in a nutshell, my Lord, is that we are proceeding on an entirely orthodox basis. If the CPR test of standard disclosure was being applied, there is plainly an issue on the pleadings (a) as to causation and (b) as to quantum of overcharge, and it is in that context relevant to see the documents.

One matter which I would draw your Lordship's attention to is really what is going on here on the claimants' side is that they are trying to box us into a position in which the only analysis of overcharge is done by reference to the economics and not by reference to the facts.

If I could take your Lordship very quickly to the witness statement from Mr. Holt, who is the claimants' expert, which is behind tab 19, one can see exactly the approach that is being adopted, at paragraph 33.

My Lord, in passing I should say this statement came in at midnight on Monday, so we would ask your Lordship to bear that in mind to the extent the claimants now complain about our experts not having responded in kind.

The short point arises out of paragraph 33, where Mr. Holt says, and this is his conclusion on the section of his statement dealing with overcharge, which starts at paragraph 27, he says:

> "For the avoidance of doubt, my view regarding the questions outlined at paragraphs 7-8 [in fairness to him he is dealing with the original requests but the point still holds] ... I can carry out an analysis without such documentation. Although it is possible that some of the documentation requested might add colour to the procurement process which could be of interest, there is no way of telling whether anything relevant to the overcharge modelling will come out of it at all."

Then at paragraph 32 your Lordship will see he says:

> "Similarly, I do not consider that the information requested at paragraph 8 ... is necessary for conducting the analysis of the effects of the cartel."

In my submission, what is going on here is the claimants' expert is saying: in my opinion, I can do the analysis that I want to do purely on the basis of economic approach. I do not need or want to see the documents underlying the economics.

The defendants' experts have said it is useful and relevant to look at the facts in relation to the economics. Your Lordship made the comment at the outset about the need to do benchmarking, and ultimately this is a question for the court as to how it will be in the best

position to deal with the question of causation and quantum at trial, and we simply say it is obviously relevant to look at documents as well as the economics.

Really, Mr. Holt does not say these documents are not relevant. In fact, I would submit that he gives the game away by saying it is possible they would add colour to the procurement process, which could be of interest. His point is, "I do not need them and it can be done without them", and we say that is fine if that is the view he takes, but we say they are relevant and we want to present a case at trial by reference to the facts as well as the economics.

My Lord, that is really the observation that I wanted to add on the threshold issue of relevance.

THE CHAIRMAN: Thank you very much.

Mr. Bailey. Submissions by MR. BAILEY

MR. BAILEY: For NSK I gratefully adopt the submissions of Mr. Holmes and Mr. Singla.

If I may, Sir, briefly address you also on the threshold issue of relevance, or as Mr. Jones put it his "big picture" point. You were taken to the practical guide, and if I may be take you to one other paragraph it may shed some light on the issue before you, Sir.

THE CHAIRMAN: Yes.

MR. BAILEY: It is at paragraph 123 on page 39. You will see there the Commission explained that each method, as you would expect, has it is own strengths and weaknesses. What I want to draw your attention to is the concluding sentence, which says:

> "In particular, the methods differ in the degree to which they are simple to apply, in the degree to which they rely on data that are the outcome of actual market interactions or on assumptions based on economic theory and [in particular] in the extent to which they take into account factors other than the infringement that may have affected the situation of the parties."

In my submission, Sir, that precisely supports the point made to you by Mr. Holmes, that factors other than infringement, as one might expect, would include the countervailing buyer power of a purchaser as sophisticated as the claimants.

Sir, there are two other brief points that I would wish to make to sort of supplement that. One is in support of the submission made by Mr. Singla in terms of orthodoxy. Mr. Jones made his submission that there is no case yet that has finally decided overcharge by reference to these documents. That is correct, but it is a matter of public record that in the trial in *Cooper Tire v Dow*, in the Commercial Court, there was reliance placed by both

sides not only on econometric evidence but actually relying on factual evidence, the internal documents of the claimants and the defendants, being used as a useful cross-check.

The final point, Sir, if I may, just simply to remind you of your words in the plain packaging litigation, a very different context, of course, and I recognise that, but the point, in my submission -- I have copies if those are needed -- is simply that experts do not have a monopoly in this area; actually the real experts are the people that run the businesses, they know how the market dynamics work. In my submission, that is a good reason why at the very least some form of sampling of these documents is required.

THE CHAIRMAN: Yes.

MR. BAILEY: Thank you.

MR. JONES: Just in case it helps on this question of sampling, Sir, I am told that over the period 2011 to 2016 there were 27 RFQs. I do not have more detailed information than that, but in terms of identifying a smaller sub-set I thought that may assist.

THE CHAIRMAN: Yes.

MR. JONES: Sir, that is outside the cartel period and we think it would have been similar in the previous -- I am not suggesting they should come from that period, but just to given an indication of the total numbers.

THE CHAIRMAN: What I am minded to do is to rule in principle on the structure of what I expect to see done and then leave the parties to work out the detail. So if I conclude there should be some sort of sampling, I am not going to lay down the parameters of that now, I do not think I am remotely in a position sensibly to do so, but I will simply rule on what needs to be done and then ask the parties to put their heads together.

On the question of sampling within sampling, what I had in mind was a relatively limited process which could be conducted reasonably quickly and so the parties could then assess the results to see whether it was worthwhile moving on, and if it was, on what basis.

What would your proposal be? You suggested there were 27 RFQs over the five-year period, so approximately five or six a year max.

MR. JONES: Yes. That looks like the approximate number and we think that is broadly what was there during the cartel. Sir, I would need to take instructions, if I may, before putting forward a precise proposal.

THE CHAIRMAN: Yes. Shall I rise now and give you 10 minutes? If you need a bit longer, let me know.

MR. JONES: I am grateful.

(A short break)

MR. JONES: Sir, the parties, if you were minded to go down the route of ordering a sub-sample, are broadly agreed, although there is one important difference; we are agreed that if, Sir, you were to go down that route and each of the parties could identify a number, the difference between us is as regards that number, and the disclosure could be given by the end of February. The claimants have suggested that the total should be 6 which would be identified by each of the defendants, each of the three defendants identifying one and the claimants identifying three, so, as I suggested before, one in relation to each of the defendants. The defendants have suggested that there should be 12, so that each party would identify three.

THE CHAIRMAN: Yes.

MR. JONES: There is, I am told, from our perspective a large difference between those in terms of the amount of work which would be required.

THE CHAIRMAN: Over what period of time are we talking about? Is there a time period for this?

MR. JONES: From which time periods would they be selected?

THE CHAIRMAN: Yes.

MR. JONES: We have not discussed that, Sir. I rather took the view myself that each party could decide for themselves which time period they wanted to select them from. If it were from the cartel period, which may be the most obvious, we think 6 would represent about 10%, on the basis of the figures that I gave you earlier, that there were 27 over 5 years, so that would represent something above 10% in fact, and we say that would be a sufficient sample.

THE CHAIRMAN: Yes.

MR. JONES: Sir, the other dispute -- and I am proceeding now on the basis that the point of principle has been decided against me so that there is going to be a sub-sample -- is over paragraph 8, which we do feel very strongly about, Sir.

Paragraph 8, as I explained, would add very, very considerably to the work, because it relates to amendments related to RFQs. Sir, as I mentioned before, one has an RFQ, and there are a relatively small number of those, and there are then many thousands of amendments; as I said, in total our database has 16,000. We have just recently, as Mr. Holmes said, provided that database. It identifies in the majority of cases the reason for the amendment, and as Mr. Holmes said to you, they have not yet had time to fully understand what is in the database.

A couple of the points made by Mr. Holmes we think should be capable of being resolved once his experts have looked at the database in more detail. For instance, I think it has been suggested that the large majority of those 16,000 were pre-agreed in the contracts. I have discussed that with one of Mr. Holt's colleagues who is in court who says that as far as he is aware that is not the case. So there obviously needs to be some liaison between the experts so that the defendants understand what the spreadsheets actually show.

The other point to make, Sir, is that we, for our part, do not think that an exercise of trawling through purchasers' emails looking for underlying documents relating to each amendment is going to be very fruitful. It will certainly be extremely difficult, and the reason I say that, Sir, is that one has this database, which is not a database which identifies each contract, it is a database which identifies things like technical specifications, price and so on, and there has then been this extremely complicated exercise, which the experts are still going through, trying to match that up to individual contracts.

THE CHAIRMAN: Would it be possible to narrow the focus of any search? I am working on an assumption at the moment that I am against you on your big principle, so let us assume, we are just focusing on an exercise within an exercise, that you focus only on, at this stage, strategy documents, presentations, Word documents, and if and insofar there are any emails in stage one it would be very narrowly focused upon key individuals or key types of documents. If I am going to go down this route, it will be upon the guiding principle that it is narrow and quick.

MR. JONES: Yes, Sir, that would certainly be a more proportionate and more practical solution. Importantly, what it would not involve is looking at emails relating to amendments which would take you into years of emails after the RFQs and, as I say, in relation to which it would, we think, be extremely difficult to identify which email related to which amendment or even which RFQ.

THE CHAIRMAN: The sort of issue that might hypothetically be relevant to the defendants, so far as amendments are concerned, are unlikely to be those which are more or less mechanical and reflected in emails from middle management; they are more likely to come out of strategy documents. So if there was a focus purely and simply on the higher level documents -- if it generated nothing, that would probably be a pretty strong indication that a trawl of emails would generate nothing.

MR. JONES: Sir, yes and no. We would be happy to look for the strategy documents relating to amendments. I should say that I am told we do not, as far as we know, think there would be such documents, but we would be happy to have a look for those.

THE CHAIRMAN: Maybe "strategy" is slightly too narrow a term, but you can get documents which may be strategy documents, there may be documents which talk about mechanisms for agreeing amendments, but broad level documents which are discrete from the actual amendment itself.

MR. JONES: Yes.

THE CHAIRMAN: Something which describes the process of amendment and its rationale at a relatively high level.

MR. JONES: Yes.

THE CHAIRMAN: In the first instance.

MR. JONES: Yes. Sir, that would plainly be much more proportionate and much more practical from our side.

Could I, on the amendment point, in anticipation of a point which Mr. Holmes may make, which is on the dates, because it might be said that one knows the dates of the amendments from the table and one could then go back to emails to try and look for amendments on those particular dates.

We have given that some thought. The difficulty with that is first, as I have said, there are hundreds of amendments per RFQ, and secondly, I am told it is extremely unlikely that the negotiations would be on that date, they would of course be some period before, maybe weeks before or maybe months before; and when one adds together hundreds of amendments, each potentially having discussions over several weeks, one ends up in the same place, which would be a trawl of the entire mailbox of the employee in question. Just to address that briefly.

THE CHAIRMAN: Yes. Yes. I am anxious to avoid that.

MR. JONES: Precisely, Sir, precisely.

We have not, I am sorry, discussed my three riders on this, so I am not sure --

THE CHAIRMAN: They seem to be agreed.

MR. JONES: They seem to be agreed. They were at least on the larger sampling approach. I have assumed they would be on the smaller, but I am not sure whether that is in fact the case.

Sir, that is addressing the sample within a sample. I of course have reply points on the general principle but I do not want to waste your time or anyone else's time, Sir, if --

THE CHAIRMAN: Provisionally I am attracted to a sample within a sample. I do not discount your argument, you may be right. I find it very difficult to form a view that is likely to be correct at this point, and that is why a sample within a sample, something which dips into

the documents on a representative basis and generates some sort of answer which will then enable the parties and the experts to form a more intelligent view as to where to go next, seems to have some attraction, provided it is on a narrow and quick basis, otherwise the exercise rather loses its utility.

MR. JONES: Yes. Sir, can I just take a moment?

THE CHAIRMAN: Yes, of course. (Pause).

MR. JONES: Sir, on that basis I will not trouble you any further, except of course to say that if any of my learned friends wish to resurrect their more general argument, then I may need to come back and reply on that.

THE CHAIRMAN: Yes, of course.

MR. JONES: If the sample within a sample is being followed, I am content to leave it there, Sir.

THE CHAIRMAN: Yes.

Mr. Holmes.

Further submissions by MR. HOLMES

MR. HOLMES: Sir, it does appear as though we are edging towards agreement. The two outstanding points concern the RFQs to be sampled within the sample, and on that, Sir, we are concerned that a sample of only six RFQs might not shed sufficient light, particularly given that three of those would be selected by the claimants, who have a better insight into the documents that we are particularly interested in getting.

On that basis, we would recommend to you an approach which sampled three RFQs nominated by each of the parties, three, six, nine and 12. That would represent, it appears, 20% of the RFQs that one would have expected to see within the infringement period, and --

THE CHAIRMAN: Is that effectively common ground that we are looking from within the infringement period? That seems to make sense.

MR. HOLMES: Not necessarily.

THE CHAIRMAN: You may want to have some before that.

MR. HOLMES: Yes, and indeed some after, because there is also the run-off period.

THE CHAIRMAN: I understand, yes.

MR. HOLMES: I think that should be left to the individual parties when deciding, in consultation with their experts, it would be most useful to --

THE CHAIRMAN: If everybody does this on a unilateral basis, is there a risk that -- in a sense, if I went down the 12 route, would it not be sensible to say X before, X after and X from

within? A co-ordinated approach. Otherwise you all go for your preferred RFQ and you miss out the before and after perchance.

MR. HOLMES: Yes, Sir. I just do not know whether we are in any position to arrive at a view about that division today.

THE CHAIRMAN: Yes.

MR. HOLMES: Sir, I think that it would be helpful to allow the parties flexibility in deciding with their experts what it would be most helpful to see. It may very well be that they decide that this will shed light in the before or after period. I suspect that the focus may be mainly upon the infringement period, for the obvious reasons that you identified.

THE CHAIRMAN: Yes.

MR. HOLMES: But our position remains, Sir, that 12 would be a useful and a fair number to apply.

THE CHAIRMAN: Let us just assume, take your figure of 12, 12 RFQs; what volume of documentation from within each RFQ are we looking at? Because each RFQ could generate a very large amount of documentation, if we get into emails, for example.

MR. HOLMES: That remains to be seen, Sir. These are relatively frequent exercises, as we have heard, five or six a year, so the volume need not be that substantial.

THE CHAIRMAN: I had in mind at least, again in the first instance, focusing upon the higher level documents, with perhaps some highly focused disclosure of emails.

MR. HOLMES: I understand, Sir. How did you have in mind to focus the disclosure, did you have any thoughts?

THE CHAIRMAN: Possibly key individuals?

MR. HOLMES: Yes, Sir, I think that eight custodians have been identified covering the entire purchasing team of relevance in Peugeot, so it is not a large number.

THE CHAIRMAN: So within 8 you are probably looking at a much smaller sub-set than 8.

MR. HOLMES: For the senior individuals.

THE CHAIRMAN: Of senior individuals. One has to accept that if this process occurs there is a risk that you will miss bits and bobs.

MR. HOLMES: Yes.

THE CHAIRMAN: But one hopes that between all the parties there will be sufficient to inform you whether or not this is in fact a seriously worthwhile exercise.

MR. HOLMES: A useful exercise. I see that, Sir. Of course, the larger the sample within a sample, the less risk there is of missing.

THE CHAIRMAN: Yes.

MR. HOLMES: It is also possible that the criteria used to catch the more important documents might lead to trains of enquiry that could be pursued by way of specific disclosure.

THE CHAIRMAN: There is always that risk.

MR. HOLMES: Yes, Sir, that is certainly something to which thought could be given.

On paragraph 8 you have seen, Sir, the way that this point is pleaded, and the point that I would emphasise is the importance of gaining an understanding of which amendments really are capable of having been affected by the infringement. It will obviously help us to have a greater insight into these broad generic codes which are described by Mr. Jones as the reasons given in the database. We suspect that further documentation will be needed in the light of those reasons.

One approach which did occur to us would be that we could have an explanation from the claimants of these generic codes and we could then identify particular amendments made by reference to a sub-set of codes which could then form the subject of a search.

THE CHAIRMAN: So as part of the sampling exercise, you would invite me to direct a witness statement describing the codes which generate the reasons or which describe the reasons?

MR. HOLMES: Yes, Sir, that would be helpful. Then, in collaboration with their experts, each defendant could identify a certain numbers of the codes in relation to which it would be particularly helpful to search for amendments, and the search could be focused in that way.

Given the importance of establishing whether, to use Mr. Singla's language, causation, the causation in relation to these amendment overcharges, which is a much more complicated exercise than in relation to the RFQs, it is, in my submission, important to dig down and that may require an assessment of documents within these eight custodians in order to assess the real reasons.

THE CHAIRMAN: How would you suggest that process is limited? If we are talking about 16,000 amendments -- well, between 11 and 16,000 amendments, how do you then get a representative span which enables you to see what is going on, but without imposing a disproportionate exercise? Because that is a large corpus of data.

MR. HOLMES: I understand your concern, Sir, yes. Once we have lifted the lid on what the codes mean, once we have a better understanding of how the amendments work, we can exclude or take out of account a number of codes.

THE CHAIRMAN: Automated changes which may be irrelevant.

MR. HOLMES: Yes.

THE CHAIRMAN: You are looking for ad hoc, I think it was described as, changes which are likely to be the source of the most relevant.

MR. HOLMES: Yes, Sir. Once those have been identified, we could -- perhaps combining the approach with this focus on the key individuals, if they can be isolated, and on this also witness evidence might helpfully elucidate the roles of different individuals within the team, a search could be conducted. We accept there may well be key account managers for particular defendants in relation to whom searches could be focused, using keywords, once particular types of adjustment have been identified once we have seen how this spreadsheet of generic codes actually works, what it means in practice.

Sir, that is slightly vague at this stage, Sir, necessarily but ...

THE CHAIRMAN: Putting it together, you suggest an explanatory witness statement, which should simply be technical, it should be factual, explaining what the codes mean --

MR. HOLMES: Yes.

THE CHAIRMAN: -- you think that will -- and this would not preclude the claimants explaining what were automated mechanical changes and what were ad hoc.

MR. HOLMES: Yes, it would be hoped that that information would be provided.

THE CHAIRMAN: From that, you would then seek to focus on those which are ad hoc, and the sub-set of those which were most likely to generate as it were market-driven explanations or context --

MR. HOLMES: Yes.

THE CHAIRMAN: -- and you will then drill from within that category into either high level strategy documents which explained the reasons for the ad hoc changes and possibly into emails, but only of critical and key individuals.

MR. HOLMES: Yes, Sir, and we would need some visibility as to who those key individuals were, which might conveniently be dealt with in the same witness statement. But you have hit the nail on the head, Sir; that seems to us an approach which really draws the sting from the concerns that Mr. Jones was expressing.

THE CHAIRMAN: Yes.

MR. HOLMES: Sir, two further points.

The first is that in relation to the question 7 documents it would be helpful to understand from the claimants what steps are to be taken to search for documents, in terms of custodians and keywords. One way forward for that would be to build into the order provision for a new disclosure report, a supplemental disclosure report to be filed by the claimants, perhaps by the end of January, in which they explain their proposals.

THE CHAIRMAN: I did notice from the draft order there was no disclosure of search terms.

MR. HOLMES: Yes, Sir.

THE CHAIRMAN: It might assist everybody if there was, and it might actually assist in ensuring a more proportionate and focused exercise if there was greater disclosure of search terms.

MR. HOLMES: Insofar as parties are proceeding by way of search terms, I fully agree and endorse that, Sir. It will I think, on the basis that we have been discussing for paragraphs 7 and 8, probably be important to enable the parties to have confidence in the searches that each is proposing to perform.

The second point, Sir, is in relation to paragraph 8. Insofar as the claimants are focusing on strategy documents, in the interests of ensuring a proportionate search, in our submission there would be no need in that case for the mutuality, at least at the first stage, that was discussed by Mr. Jones. It would really be sufficient to see whether the claimants have any helpful strategy documents which could shed light on this before proceeding to a fuller exercise. It appears to us that if we are looking at broad strategy documents, the mutuality approach seems to fall away, because we obviously will not have documents in relation to the strategic thinking of the claimants; we will simply have the usual emails responding to particular variations.

Sir, unless I can be of further assistance.

THE CHAIRMAN: Yes, thank you.

Further submissions by MR. SINGLA

MR. SINGLA: I am conscious of time but can I just address you very briefly on the number and size of the initial sample? We say 12, as Mr. Holmes has made clear, and whilst I am conscious that your Lordship has in mind a very quick, easy and simple exercise that can be done readily, on the other hand we are conscious that if the sample that is produced initially is too small and is not sufficiently informative, we may have a difficulty in that we will be back asking for permission to widen what will then be the second sample, with a view to working out whether any further disclosure is needed. Obviously in the context of the trial timetable it is important to make sure that this process does not become too protracted so obviously it needs to be --

THE CHAIRMAN: So you say 12.

MR. SINGLA: We say 12.

MR. BAILEY: Sir, we, NSK gratefully align ourselves with the position outlined by Mr. Holmes.

Reply submissions by MR. JONES

MR. JONES: Sir, I will try and be brief.

On the question of 12, it has been put to me that even if it were 12 there is a question of fairness. My suggestion was three from the claimants and three from the defendants. If it

were 12, the fair solution would be two from each of the defendants and six from the claimants, being two in relation to each defendant. Sir, that is the first point.

The second point is just jumping forward to paragraph 8 and the discussion you had with Mr. Holmes about the possibility of a statement. We certainly see the sense in that. We are uncertain about things like whether there were key individuals, who they might have been, what periods they were in place for and whether we might have any documents for them, and so on. Sir, what I suggest would be a practical solution would be a statement from the claimants, which could be done relatively quickly, explaining the codes and giving as much as they are able to give by way of explanation of what sorts of strategy documents there may be, who the employees were at the relevant times, what documents are available in relation to each of those employees, and so forth, so that the parties can then get together and have an informed discussion about how to take that forward, all of us having well in mind the comments that you have made, Sir, about the general intention of looking for strategy documents in a targeted way.

THE CHAIRMAN: Yes.

MR. JONES: If there were any dispute, then it may be necessary for to us come before you probably on paper, Sir, in relation to that sort of issue.

THE CHAIRMAN: Yes.

MR. JONES: There is then paragraph 7, Sir.

In terms of the suggestion of focusing on strategy, looking at paragraph 7 that appears to be most relevant to (f), which deals with documents relating to the negotiation. What might capture the strategic point there would be documents relating to the strategy and process of negotiation, rather than the underlying documents.

THE CHAIRMAN: Yes.

MR. JONES: Sir, as I understand it, in terms of the order that would be an amendment to paragraph 7; paragraph 8 would go in its current form and would be replaced with an order relating to a statement.

Just returning to the point on mutuality, Sir, I take the point that if all we were concerned with strategic documents relating to amendments then mutuality may not be so important, but if, as I understand it, seven remains and there are these more detailed documents on RFQs, then in my submission mutuality is still relevant, because all of this goes to looking at case-by-case discussions or at least what comes out of the process.

THE CHAIRMAN: Mutuality so far as relevant, because it may well be that, for obvious reasons, they will not have the same sort of strategy documents that you would have, but where there was a counterpoint document ...

MR. JONES: Yes, where there are counterpoint documents, which of course will only be in relation to some of those bullet points in 7, also where there are documents relating to the co-ordination and general bid rigging behaviour in relation to these RFQs which are identified.

THE CHAIRMAN: Yes. Yes.

MR. JONES: Sir, there is then the expert timing point.

THE CHAIRMAN: Thank you very much. Directions re disclosure

THE CHAIRMAN: What I am going to do now is give broad directions. I am going to leave it to the parties to flesh out the directions. I will give short reasons at a later point.

I am going to in principle order disclosure of categories 7 and 8. This will be upon the basis of the two-stage process that we have been discussing. The guiding principle is that the exercise is to be swift and highly focused.

So far as paragraph 7 and the RFQs are concerned, I am going to order disclosure of 12 RFQs to be chosen by the parties: two each from the defendants, six from the claimants, which will relate to two for each of the defendants.

In relation to the RFQs and documents relating to them, parties are to focus upon documents relating to strategy and process of negotiation. I do not preclude an email search but it will have to be upon the basis that it is very narrow and focused on key individuals only.

If there is a dispute about any of these matters I will deal with disputes on paper. If there is to be further search by search terms then the terms should be disclosed to the parties.

I am going to order mutuality but only so far as it is relevant, again leaving the parties to behave sensibly and co-operatively. I am concerned really here only where there are sensibly counterpoint documents to those which are going to be disclosed.

Once the parties have had a chance to analyse this data I will leave it again to the parties in the first instance to decide both whether and how they proceed to a second stage. If there is a dispute then it can come back to me on paper, at least in the first instance. If there really has to be an oral hearing then so be it. So it obviously assumes liberty to apply.

So far as paragraph 8 is concerned, again the guiding principle is speed and targeted focusing. In the first instance I would like the claimants to produce a witness statement, again I will leave content in large measure to the claimants, but this should at the least explain how the codes operate, and then give as much information as properly can be given

in relation to the decision-making process so that there can then be a sensible discussion as to categories of documents and key individuals which would then take place subsequently. Again I would expect the parties to be able to then proceed to a highly-focused disclosure process and only in the event of dispute will the Tribunal need to be troubled.

Does that cover the issue so far as categories 7 and 8 are concerned?

MR. HOLMES: From our perspective yes, Sir, that does.

MR. JONES: Sir, I think it does. Further clarificatory discussion

MR. JONES: Could I clarify one point, which is your reference to counterpoint documents on mutuality. Would that incorporate, for example, documents between cartelists in relation to a particular RFQ fixing their bids on that RFQ?

THE CHAIRMAN: I would be, to use a technical term, gobsmacked if that was not going to be disclosed in any event. That is obviously a highly disclosable document. If that exists it has to come out sooner rather than later.

MR. HOLMES: Indeed, Sir, but it has come out already. The liability documents, the Access to File documents which describe the operation of the infringement, have been provided, and there has been no subsequent application for further documents although the claimants reserved their right to do so.

THE CHAIRMAN: The answer in principle to Mr. Jones' request is, yes, that you have already disclosed it.

MR. HOLMES: Yes, Sir.

THE CHAIRMAN: If something else then came out of the process of disclosure then plainly it would need to be disclosed. Counterpoint is not intended to be a term of art. It is simply my rather cack-handed description of reciprocity or mutuality within this narrow confined process.

MR. HOLMES: If something came to light -- and the main focus of this disclosure request is understanding the dynamics of the negotiation process broadly speaking.

THE CHAIRMAN: Yes.

MR. HOLMES: -- and insofar as there are relevant documents to the infringement they will have been detected and disclosed as part of the Access to File process, the “Crown Jewels”, as I think Mr. de la Mare referred to them at the first CMC.

So it is not our intention, Sir -- and we will need to debate it if there is an issue about this -- to go away and do targeted further searches with the intention of finding documents concerning the infringement. But insofar as any turn up and they are relevant of course they should be disclosed.

THE CHAIRMAN: The answer is, yes, they have them already, but insofar as they have not they will.

MR. HOLMES: Yes, Sir, but without doing any specific searches with the intention of locating documents relating to the operation of the infringement, because that has already been done and the disclosure has been given.

THE CHAIRMAN: I do not think that is something which I am going to make any directions about at this stage.

MR. HOLMES: I understand, Sir.

THE CHAIRMAN: That is simply your position. It is recorded and it is on the transcript.

MR. SINGLA: My Lord, just to be clear, we adopt that position. We do not see this as being a complete revision of what was debated at the first CMC.

THE CHAIRMAN: This CMC is not about a dispute that you have failed to comply with your disclosure obligations in relation to that category.

MR. SINGLA: Exactly.

THE CHAIRMAN: If something arises in that field at a later stage we will deal with it then.

MR. SINGLA: To be clear, we have no intention, subject to your Lordship ordering otherwise, of doing any further searches of liability documents. If something comes up which is disclosable in the course of what we are now doing of course that will be disclosed.

THE CHAIRMAN: Your position is recorded. I am neither approving nor disapproving.

MR. SINGLA: I am grateful.

THE CHAIRMAN: Mr. Bailey, do you want to say the same thing?

MR. BAILEY: NSK's position is exactly the same.

THE CHAIRMAN: Ditto. You have ditto and ditto. Yes.

MR. JONES: I am grateful for that.

We may need to come back to the Tribunal because our understanding has been slightly different, which is that first stage of liability documents is what was called the Access to File documents, and we had made clear at the outset that we thought that would be a subset of all liability documents and it was a step-by-step approach.

THE CHAIRMAN: Raise it in correspondence. As a category obviously communications between the cartelists is prime disclosure. So there is not going to be any dispute in principle about that.

MR. JONES: No, precisely Sir.

MR. SINGLA: Just to be clear, there has not been any indication in correspondence that what we have given to date on liability is inadequate. To save the claimants from writing to the

Tribunal to seek clarification, this is a wholly new point, my Lord, and they should take that away.

THE CHAIRMAN: I am not going to get into that today. Yes.

Now other matters. I think they are largely timetable matters, are they not? Discussion on timetable

MR. JONES: Yes. It is a relatively small issue about the timing of expert evidence. We need to turn back to the order, Sir.

THE CHAIRMAN: Can I just tell you what my provisional view was on timetable just going through the skeletons?

MR. JONES: Yes, Sir.

THE CHAIRMAN: At the moment there seems to be agreement that the claimants' experts' report would be by 28 July.

MR. JONES: Yes.

THE CHAIRMAN: There is a dispute as to the defendants' experts' reports. The two competing dates are 25 August and 29 September. I have some sympathy with the fact that we hit the summer. My instinct was to go somewhere in between. I do not think everybody needs the entirety of the summer as a down period.

I was floating in my own mind a date of 15 September for experts' reports, the defendants' experts' reports; claimants' expert's response 13 October. The reason why I am being relatively generous to the defendants here is because, as I think it is probably common ground between us, the experts' reports are going to be fundamental to the sensible management of the trial in due course.

Equally, so far as the joint memorandum is concerned, I can well see that a month might be needed. I was going to suggest 10 November, but to ensure that momentum was maintained I was going to suggest that the experts provide a progress report to the Tribunal at approximately halfway through that month period. I am not suggesting they produce a draft of their report but a one-page or a half-page progress report saying: "We are making good progress. We do not need to trouble the Tribunal", or, "We are stuck on issue X". But something which would incentivise the experts to ensure momentum was being maintained so that we would get a joint memorandum by 10 November and then we could fix a PTR thereafter.

MR. JONES: Sir, that sounds very sensible to us and I will not trouble you with any further comments unless any of my learned friends disagrees.

MR. SINGLA: We are content with that, my Lord.

THE CHAIRMAN: Is this going to be your major sticking point, Mr. Bailey?

MR. BAILEY: I do not wish to be difficult, Sir. The defendants' position is more haste less speed. You rightly have acknowledged that the summer vacation will intervene, at least from the claimants' proposed directions.

I wish to make two points in support of our proposed directions, which even on 15 September, your preferred alternative, means it is still quite tight.

The first is, Sir, that our task, the defendants' experts' task, is actually somewhat different from the claimants, because of course not only do we have to prepare our own analysis of overcharge and pass-on, we also have to digest and respond to what the claimants' experts have to say.

At the first CMC the claimants, and indeed yourself, the Tribunal, expected that the defendants' experts liaise with one other, and RBB, CRA and NERA, that is going to take a period of time. Not everyone is in the same place or even in the same time zone.

The second point is really that we say this has been approached the wrong way round. If one works back from when the trial is due to start in January next year you, Sir, expressed at the first CMC that really the expert evidence should be done and dusted at least two months before trial. On our proposed directions we achieve that date.

So, Sir, in our submission we would say that the two weeks in September do really make a difference. We do not have any objection to your provisional view of allowing the claimants' expert until 13 October for their reply, which by its nature will be slightly more compressed. My understanding is that we similarly do not object to 10 November.

For those reasons we say it would be fair for us --

THE CHAIRMAN: I see that. I am anxious to leave as much time as I can at the end of the process so there is flexibility because inevitably things will arise in the last month or so prior to trial.

MR. BAILEY: Indeed, and it is for that reason that we do not object to 13 October or 10 November. That is then an uphill task to try and fit everything --

THE CHAIRMAN: It squeezes the claimants' experts in reply down to two weeks, does it not?

MR. BAILEY: It does, Sir. In that sense it is a reply. They already know what the issues are. It will not be that difficult for them, particularly as the defendants would have liaised to produce a common position as far as possible.

THE CHAIRMAN: That is all right then.

MR. BAILEY: You have my submissions.

THE CHAIRMAN: Yes, thank you very much indeed.

MR. HOLMES: Sir, we do not resist the timetable that you propose but we simply want to flag that we do agree and endorse the submission of Mr. Bailey that it will be a substantial task and potentially an uphill struggle. Obviously there is a general liberty to apply here. If problems did arise and we were confronted with a monstrous expert report that our experts simply did not feel in a position to deal with by 15 September, it might be necessary to seek a small indulgence.

THE CHAIRMAN: I was going to suggest in any event that the parties had a general liberty to agree short extensions of time without having to come back to the Tribunal, probably of up to seven days.

MR. HOLMES: Yes, Sir, that seems like an extremely sensible idea. I think that probably addresses the point.

THE CHAIRMAN: With probably some sort of backstop because if everything involves a shifting of the timetable I do not want there to be so many successive mutual agreements that the backstop then backs up right to the last day of December.

MR. HOLMES: That seems very attractive. So a hard stop date.

THE CHAIRMAN: For the parties to work out between themselves.

MR. HOLMES: Yes.

THE CHAIRMAN: If you want to do it as three day extensions, seven day extensions, rolling extensions, some sort of flexible mechanism, I would be happy to see that in the final record.

MR. HOLMES: I think that flexibility gives us considerable comfort, Sir, I am grateful.

THE CHAIRMAN: Tempted as I am by the powerful advocacy of Mr. Bailey I am going to go with my original timetable. I think everyone has a record of that.

MR. JONES: Yes, Sir, I am grateful.

THE CHAIRMAN: The flexibility to be built into the order along the lines just discussed. So that covers timetable matters. Just a point on trial start date. At the moment we are listed for six weeks. We have lost one defendant. That is going to involve some saving of time but probably not much. There is still going to be a great deal of work to be done. At the moment I am suggesting that we start the trial, or the first day of the trial, which will then probably not be taken up with hearings because it will build in some reading time for the Tribunal, would be Friday 12 January. It would probably be the case that oral hearings would not start until the 16th or 17th. So there would be three or four days reading. We would be looking therefore -- I would hope by then, particularly if the joint experts' report serves its function of narrowing down the issues, that we would be able to deal with this in

four weeks, four weeks plus reading time. But at the moment I think we are looking at a five week slot to include reading time. Again there is flexibility so far as that is concerned, but if that is what we work on at the moment then we can adjust as we see fit.

The only other point that I would like to make concerns the experts' joint report. I would like a template to be prepared for the Tribunal's approval so that we can all be certain that it does create a series of steps which the experts will go through which will result in the maximum narrowing down of issues. In the first instance that is for the parties and the experts to formulate.

MR. JONES: Do you want to set a deadline for that, Sir?

THE CHAIRMAN: I am going to leave that to the parties to think about in the first instance, but obviously the quicker that process is embarked upon the experts will then have very clearly in mind what they are then going to be expected to do, and if that is embarked upon now it may enable them to focus on their work over the next few months.

MR. JONES: Yes.

MR. HOLMES: Sir, there is one further point. It was canvassed in submission whether a further disclosure report might be a convenient way of collecting together the search terms, key custodians, and so on, that the parties planned to apply so that is actually formalised in the order. Was that something that you were minded to direct as well?

THE CHAIRMAN: Yes. I think I said that the parties would communicate with each other. I do not mind whether it is done through solicitors' correspondence or done more formally through a disclosure document.

MR. HOLMES: Our preference, for what it is worth -- and I appreciate it is 10 to 1 now and we are arguing the toss over relatively minor details -- is that a disclosure report would give form and focus and would of course be endorsed by a Statement of Truth. So it would have certain advantages.

THE CHAIRMAN: Yes. Mr. Jones, any objection to that being incorporated in a disclosure statement?

MR. JONES: There is no objection in principle. We have a slight confusion on our side about whether this is not already information that is going to go into the witness statement that is going to be prepared.

THE CHAIRMAN: Yes, if it is in the witness statement it is endorsed with a Statement of Truth.

MR. HOLMES: But I had understood that the intention was that a witness statement come from Mr. Jones' client but that all of the parties should endeavour to agree the basis upon which searches were to be conducted.

MR. JONES: Sir, I have no objection to the defendants providing disclosure reports.

MR. SINGLA: I am not sure that actually does reflect what your Lordship -- can I suggest that your Lordship leaves the directions as they were. They are on the transcript and certainly I had a clear note of what was supposed to happen. In relation to search terms I think I understood your Lordship to leave that to the parties. It may well be that that is done by disclosure reports or by correspondence.

THE CHAIRMAN: If there is a dispute I will deal with it on paper. Is there anything else?

MR. JONES: No.

THE CHAIRMAN: I have one important matter. Mr. Holmes.

MR. HOLMES: Yes, Sir.

THE CHAIRMAN: The rumour mill has indicated that there is very good reason for me to offer my heartiest congratulations to you, and no doubt those of the Tribunal on your appointment today to Queen's Counsel. Very well deserved and many congratulations.

MR. HOLMES: Thank you, Sir, I am grateful.

The Lord Chancellor still has time of course to change her mind. But thank you for that.

THE CHAIRMAN: I am sure your submissions today just glowed with silkiness.

Thank you all very much. For those of you who are going to Marcus Smith's swearing in, I think it is at 1.40.