IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1248/5/7/16

Victoria House,
Bloomsbury Place,
London WC1A 2EB

Friday, 2nd March 2018

Before:

THE HON. MR. JUSTICE GREEN
(Chairman)

(Sitting as a Tribunal in England and Wales)

BETWEEN:

PEUGEOT S.A. AND OTHERS — Claimants

- and -

NSK LTD AND OTHERS — Defendants

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PROCEEDINGS

A P P E A R AN C E S

Mr T de la Mare QC and Mr T Jones (instructed by Hausfeld) appeared on behalf of the Claimant.

Mr A Kadri (of White & Case LLP) appeared on behalf of the Third Defendant.

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THE CHAIRMAN: Mr de la Mare.

MR DE LA MARE: I appear with Mr Jones; Mr Kadri appears on behalf of NTN; the other two defendants in this matter are not before my Lord. Can I do some housekeeping to begin with?

THE CHAIRMAN: Yes.

MR DE LA MARE: There's a clip of recent correspondence----

THE CHAIRMAN: Yes.

MR DE LA MARE: -- and, in the case of the fifth defendant, a consent order to hand up.

THE CHAIRMAN: Yes. I have seen the draft of the consent order.

MR DE LA MARE: Right. It's in materially identical terms.

THE CHAIRMAN: Yes.

MR DE LA MARE: I'm also happy to report that on the topic of how to deal with Dr Mazzarotto's report----

THE CHAIRMAN: Yes.

MR DE LA MARE: -- the third defendant agrees with what the fifth defendant has already agreed to.

THE CHAIRMAN: Yes.

MR DE LA MARE: And that issue, which we were going to raise by way of housekeeping, has certainly fallen away. So we're going to have a clear identification as to the parts of that report the other defendants adopt.

THE CHAIRMAN: Yes.

MR DE LA MARE: So very sensible. Before I get stuck into the body of the application, can I also just mention to begin with confidentiality----

THE CHAIRMAN: Yes.

MR DE LA MARE: -- and our approach to that? The parties are a very long way along the road, I hope, to a series of very sensible agreements that really should minimise to a very considerable extent the amount of confidential information that will require special handling at trial, but there are outstanding areas to address in relation to the witness statements.

THE CHAIRMAN: Yes.

MR DE LA MARE: And obviously for today's purposes I'm going to need to refer you to the witness statements. I've discussed the matter with my learned friend Mr Kadri. We're both agreed that actually, when you look at the particular paragraphs we're going to be referring to for today's purposes in relation to licensing, there's nothing confidential in relation to those. But the documents as a whole----

THE CHAIRMAN: Yes.

MR DE LA MARE: -- remain confidential, because we haven't got to the part of having redacted out the limited areas. That's why, for the version of the skeleton we've prepared for the press, we've excised all references to the witness statements, because they remain at the moment confidential. We anticipate----

THE CHAIRMAN: There's references in the application not just to the witness statements but to individual documents and extracts from documents.

MR DE LA MARE: The individual documents we're in a position where we're agreed that none of the documents to which I'm going to refer contains anything confidential, save that there have been some redactions made to some of the documents which I think would be redactions made at trial----

THE CHAIRMAN: And nothing in the documents referred to in the application is confidential.

MR DE LA MARE: That's right.

MR KADRI: Sir, that's correct.

MR DE LA MARE: Yes. So hopefully that should provide a relatively straightforward way to proceed. We don't really want to be bedevilled now or at any of the future hearings by confidentiality issues if we can avoid them.

Submissions by MR DE LA MARE

Now, as you know, our application has three limbs. You can probably see them most clearly from the terms of the draft order in bundle 1, tab A3. The main event is paras.1A to D, which is specific disclosure sought in relation to both the licences granted in relation to the ASB technology and in relation to any negotiations leading to such licence or leading to the refusal to grant such licence.

THE CHAIRMAN: Yes.

MR DE LA MARE: That's the main point. Then there is a second and third limb in paras.2 and 3 respectively. Paragraph 2 now only applies to NTN-SNR, and it seeks specific disclosure in effect of five attachments or five documents cross-referenced in one of the ATF documents.

THE CHAIRMAN: Mm-hmm.

MR DE LA MARE: And they all relate to amendments of the licence plainly in play between NSK and NTN-SNR. And then the third strand relates to ATF documentation that has been redacted -- or not provided, more accurately -- by the third defendant on grounds of

relevance, where it's plain from the titles of those documents that those documents themselves also relate to IP licensing.

So that's the grounds of dispute. Our application is founded upon both a general application for disclosure of relevant documents, and in part upon CAT r.61, which is the analogue, imperfect analogue, of the CPR equivalent. And effectively, what is between the parties are two sets of dispute: the first dispute is as to the relevance of the documents; the second is as to the proportionality of requiring this disclosure, which Mr Balmain's witness statement explains will be expensive, in their view.

THE CHAIRMAN: But less than the costs of this hearing.

MR DE LA MARE: Yes.

THE CHAIRMAN: Substantially less.

MR DE LA MARE: Yes. You've got my first point. In any event, it's very much predicated on a worst case scenario. I'll take you to the substance of the correspondence where, for instance, we've made offers which haven't been really taken up and run with to narrow the scope of search required so that we can focus in on the core documents.

Now, we would also point out that the arguments about proportionality have been very much undermined by what's happened in relation to SKF, not least the discovery of 50GB of material they didn't have to go through previously, which were processed in rapid order; then followed by the consent order you've seen, where effectively we've got pretty much what we asked for. The important thing I'm sure my Lord appreciates----

THE CHAIRMAN: So far as just -- I'm sorry to take it out of order -- so far as they're concerned, there was a single licence between the parties, so the whole question of grant and not grant is less significant so far as they're concerned.

MR DE LA MARE: That was exactly the point I was about to make.

THE CHAIRMAN: So the terms and conditions of the licence and any amendments, and the criteria by which the licence came into being, will be that which governs that relationship.

MR DE LA MARE: Absolutely right. Absolutely right. And as we understand it from the witness evidence, the most recent version of that cross-licence was concluded sometime in 2001, but it governed the cartel period.

THE CHAIRMAN: Quite.

MR DE LA MARE: And effectively meant that in any area where the ASB patents were live----

THE CHAIRMAN: Yes.

MR DE LA MARE: -- front wheel generation 1 bearings, wheel bearings, SKF and SNR were always able to bid.

THE CHAIRMAN: Yes.

MR DE LA MARE: So there's no doubt that the burden of disclosure is going to be greatest not just in relation to SNR but also those other cartelists who were regularly seeking access to the licence in order to be able to bid.

THE CHAIRMAN: Your position is that D3 is, as it were, at the centre of the spider's web, because they're the proprietors.

MR DE LA MARE: Absolutely, and NSK, for instance, is one of its most frequent interlocutors, and we know about the negotiations that took place by reference to them.

Now, our case on relevance is really pretty straightforward. I should emphasise at the outset----

THE CHAIRMAN: Can I throw out an idea that -- undoubtedly unworthy and improper -- that I've had about this? Standing back from it, one of the difficulties the Tribunal, and indeed any court, looking at a follow-on action would face is that we don't have a full descriptor of the cartel----

MR DE LA MARE: Yes.

THE CHAIRMAN: -- because it's a follow-on decision.

MR DE LA MARE: It's a settlement decision. That's the particular problem.

THE CHAIRMAN: So if one makes the assumption, particularly with a relatively mature cartel, that its purpose is to achieve supra-competitive prices, then is it a reasonable inference to draw that the mechanisms of the cartel have that as its object; and, therefore, understanding the full modus operandi of the cartel is necessary to understand how it impacts upon price?

MR DE LA MARE: Well, when we came before you before and we argued about the relevance of the qualitative analysis, my Lord was of the opinion that qualitative considerations would be relevant, and indeed that's one of the reasons why you ordered the disclosure you did in relation to the RFQs. And now, we say, the boot is very much on the other foot, because the expert evidence, which is undoubtedly going to be the kernel of this case, consists of both a quantitative aspect and a qualitative aspect. And if I can just very briefly summarise the position, the lay of the land as it lies on the experts' evidence, Mr Holt's report, when you come to see it, treats both very fully.

THE CHAIRMAN: Yes, I have read it. Briefly.

MR DE LA MARE: And you see his view is the qualitative material is confirmatory of, or consistent with, his quantitative findings.

THE CHAIRMAN: Yes.

MR DE LA MARE: Dr Kalmus's report is almost exclusively quantitative, but he justifies his central conclusion, which is that neither on the plane of RFQs or APRs there is any overcharge at all.

THE CHAIRMAN: Yes.

MR DE LA MARE: He justifies that by reference to qualitative considerations.

THE CHAIRMAN: Mm-hmm.

MR DE LA MARE: Dr Rosati, or Mr Rosati is pretty -- Dr Rosati is pretty similar in his approach to Dr Kalmus; he, too, makes more extensive references to qualitative materials. And then the Mazzarotto report is, if anything, primarily qualitative in its outlook.

THE CHAIRMAN: Yes.

MR DE LA MARE: And he reaches the view based effectively only upon the description of the cartel in the EC settlement decision, and his review of the ATF materials that it's in effect impossible that a cartel of this kind in this market context could have worked to operate to increase prices.

Now, it is not our case that this licensing material is relevant to establishing a particular price increment; it is instead relevant, when my Lord comes to the question of working out where the lay of the land lies between the pole set by Derek Holt and the pole set by the defendants' evidence. In short, it comes to application of qualitative consideration to work out which is more plausible or where the relative line of plausibility is to be drawn.

And how the cartel functions -- whether, for instance, it operates on the base of pretty hard-edged customer allocations; whether there was use of cover pricing; whether or not there was profit sharing through the guise of royalty payments or such like -- is all going to be of direct relevance to that overall tonal judgment that the court will have to make about the quality of cartel.

Now, the approach of the defendants to this issue, in my submission----

THE CHAIRMAN: But just standing back at an even more elementary level, it did strike me that any tribunal or court has to have a comprehensive analysis of the cartel, a descriptor. We need to know its full modus operandi. And if the full modus operandi is -- and it at least seems to me it's a reasonable starting inference to draw -- designed to create supra-competitive prices by one means or another, I'd have thought that the Tribunal has to have that full understanding, even if one can't say with absolute precision precisely how it then implements itself through into higher prices. But any cartel that is designed to restrict or limit the number of bidders is designed to limit the intensity of price competition, and thereby engender a supra-competitive price, and it all flows from the mechanism.

MR DE LA MARE: Absolutely right. And, with respect, the particular difficulty the court is facing in this context is a function of a number of factors. It's a function of the generality of the settlement decision, because pretty much the entirety of the infringing conduct is summarised in recitals 28 and 33 of the decision. It's very high-level.

THE CHAIRMAN: Yes.

MR DE LA MARE: High level enough to indicate that RFQ sharing or allocation was a regular topic of discussion, but not in the usual 300 pages with recitals detailing which RFQs were shared. So we don't have that level of detail; that's the first problem.

The second problem we have is that the defendants have consciously eschewed calling any witness who gives any insight into the actual detailed operation of the cartel, and that can only be a deliberate strategic choice. They are effectively refusing or failing to inform the court as to the detail as to how the cartel operated; and then it is quite plain they're intent on sitting back and saying, "Aha, you haven't proved anything. You haven't proved anything: your case fails on the plane of causation because you can't show that this very generally described cartel is joined up with damage that you suffered."

Now, I can tell you that our response to that, particularly given that the likely, more limited evidence that's going to be available to you before trial -- and I'll say nothing more about that for reasons you'll have inferred from reading the letter of 26th February -- our response to that is going to be a very lengthy written opening where we're going to take your Lordship through what documentation we have to show you what can be seen and what can be inferred about----

THE CHAIRMAN: This case is largely going to be about the documents, not the 23 witnesses of fact.

MR DE LA MARE: It is. It is. It's going to be about the documents and the expert witnesses, and the witnesses of fact, I suspect, are very much secondary to those----

THE CHAIRMAN: They're the entertainment factor in the case.

MR DE LA MARE: Yes. So we're going to take you through all that material, but you will of course appreciate that one of the things that hampers us in relation to that is that it is quite plain that there has been wholesale documentary destruction, and I will show you some of the remaining documents that are plainly flagged "destroy after reading", "handle with care", et cetera.

What we have on the factual plane is but a few remaining pieces of the jigsaw from which the court will then have to infer the full picture. And it's plain that the cartel, we submit, operated in a relatively ad hoc fashion, must have had some of the default rules that cartels

of this kind have. I know my Lord will be familiar with from practice home versus foreign markets, incumbency principles, basic rules of thumb like that, which are then traded on, and things that might be in one person's pot is traded for as something else, and if someone's cheated, and they're caught cheating in return for cheating they had to give up some other project. There's all of that going on.

And all we say -- and this is as high as we put our case in relation to the IP, is that the IP in play was an important part of the overall cartel mechanics. Why? Because it provided opportunities for information exchange and mandatory contact between the parties; it provided opportunities for insight and discussion about prices; and it provided a cover for failing to bid or matters of that kind. We're not saying it's the only way that the cartel was implemented, we're saying it's one of the mechanics that was plainly in play, and the better we understand it the better we understand the way the cartel in fact functioned.

And there is more than enough in the material, which I'm now going to walk you through a little bit, to show you that that is what appears to have been going on. And there are some pretty plain instances of, for instance, licences having been refused as retaliation for what's thought of as excessively low pricing; licensing or licences being used as cover; and there's also more than a hint of variable licence rates within single territories. Now, one can well understand why there might be variable licence rates, let's say, as between the EU versus Japan, or the EU versus the US, but once you get variable licence rates within the EU in relation to the same patent for the same bearing, that begins to have the flavour of profit sharing or matters of that kind, or price control.

So can I ask you to pick up our submission from bundle 1? It's at tab D. I've actually taken mine out.

THE CHAIRMAN: D3, yes.

MR DE LA MARE: And I think we can pick up the story at paras.11 and following. What I'm going to do is I'm going to take you through some of these documents at relatively high level, and then in relation to three episodes I'm just going to drill down a little bit more into the documentation so that we can see what's going on.

THE CHAIRMAN: Sorry, just to -- I looked at the wrong document. Your submission is which? D1?

MR DE LA MARE: D1.

THE CHAIRMAN: Yes.

MR DE LA MARE: So the first point we make is that even before the official start date of the cartel there is evidence of discussions between the individuals in the various companies

who are the leaders of the cartel, touching upon the operation and use of IP. Now, this is, I would submit, plainly a case where the Commission has applied a somewhat arbitrary cut-off in relation to the cartel's start date. We don't seek to go behind that, but it's plainly a fact that they've chosen as the start date April 2004 as the first date when all of the multi-parties are involved in a single meeting.

The first document, tab 6, B6, relates to a period before then, but nevertheless it's similar fact, or indicative of what's going on. It's a meeting between JTEKT, JTEKT Koyo, and SNR, who are represented by Mr Sépulchre. And he is -- he's the cartelist, he's the cartel operator of SNR, the person who hasn't given any evidence today.

THE CHAIRMAN: This is the not licensing to anyone other than current suppliers.

MR DE LA MARE: Absolutely right:

> "Basic rule is that in the case of an existing model C/O design, or small changes, patent rights are not given to anyone other than current suppliers."

And that reflects, of course, the fact that very many OEMs will insist upon dual- or multi-supply for risk-modulation reasons, to ensure that if one factory burns down there's an alternative supply available, et cetera; and so they can also play off suppliers against each other in terms of cost bases, et cetera. So effectively what they're saying is, "We're not going to widen the competition for that work when it comes up for re-tendering, et cetera, any wider than it needs to be done." We say that's the beginnings of a pretty clear incumbency rule.

The second point to note, para.12 of our submissions, is that in the multilateral cartel meetings the patent rights are a frequent topic of discussion. Now, let's start analysis of that at tab B8. This is the document the Commission has identified as starting or evidencing the start of the multilateral cartel. A couple of forensic points to note in the beginning of the English translation: "Memo: Please destroy after reading."

Now, fortunately for us, JTEKT, the immunity applicant, did not do that, and that's why JTEKT has a somewhat richer source of documentation. But in relation to some of these cartel meetings we have one minute, we sometimes have two minutes, but there's certainly not a full set of minutes across the cartelists, no doubt because others either didn't take a minute or destroyed them.

Then you can see the attendees are split by territory, which is itself suggestive, and breaking down the code, "Maru S", you can see attendees from Europe, that's SKF; "F" is FAG INA Schaeffler, that whole group; "R" is SNR; and then on the Japanese side, "K" is

Koyo/JTEKT; "S" is NSK; and "T" is NTN, because at that stage NTN and SNR haven't merged. They merged in, I think, April 2008.

Most of this document is about the beginnings of a very close co-ordination on the APRs and steel price increases, but at the end of the document you can see that there is discussion that is manifestly about an RFQ. It's an RFQ in relation to PSA. Does my Lord see that? "Other information".

THE CHAIRMAN: Yes.

MR DE LA MARE: "'R'/'Maru S'," that's SKF, "said that 'PSA' recently faces 'S' and 'N'."

So facing Japanese entrants. And then there's a discussion of the next model of the 407, that's a Peugeot vehicle. And then you can see the discussion is about the "Extremely low price of 10-15% for magnetization DAC" -- that is the ASB patent -- "by 'Maru S'/'R'." So they're upset that, notwithstanding that the relevant RFQ is one in which there is an ASB patent, they are being undercut by 10 to 15 per cent, and that's still made clear from another version of the note we have.

And then they're also upset by the fact that NSK is offering productivity discounts of 3 per cent over 3 years. So each year an additional cumulative 3-per-cent discount. In short, they're very unhappy about the fact that they've been undercut on price even though it's ASB, and there are these productivity matters being discussed.

Now, I'm going to come back to that document in a bit, because the full story is that that is then followed by a refusal of patent licence to NSK in relation to the G9 project. And we say that it's more than a reasonable inference that the reason that that is referred is precisely because they're unhappy about the nature and extent of competition, and that refusal effectively occurs in parallel.

So there's one cartelist meeting dealing with that. There are a number of others we referred to in para.12 of the statement. If we look at tab 9, this is another non-multilateral, bilateral cartel meeting. And you can see on the agenda for the discussion on 21st June, which we know from other records is going to be a multilateral meeting, you can see that one of the topics for discussion at the multilateral meeting on 21st June is "SNR ASB patent". So it's an agenda item.

B10 is a meeting between NSK and JTEKT, in which from recitals or numbers 6 and 7 you can see that they're talking about the SNR patent situation. And then B16.

THE CHAIRMAN: Sorry, B10?

MR DE LA MARE: B10.

THE CHAIRMAN: Which paragraphs are you looking at?

MR DE LA MARE: 6 and 7, my Lord. 16 is then another multilateral meeting.

THE CHAIRMAN: B16?

MR DE LA MARE: B16. And if you look at (4) you can see at the end:

> "Note that 'R's'" -- that's SNR's -- "stance is that they will not grant patent to Japanese companies. (Is there no way but to persuade 'R' through a client?)"

In other words, is the only way we're going to get a licence granted to us by PSA or some other OEM applying pressure to compel the grant of a licence to enable a tender?

THE CHAIRMAN: Sorry, this is B16(4)?

MR DE LA MARE: (4). So it's the paragraph starting, "It will be difficult to submit an estimate on T7 within this week." Does my Lord have that?

THE CHAIRMAN: Yes.

MR DE LA MARE: And then at the end, "Note that 'R's' stance is that they will not grant a patent..."

THE CHAIRMAN: Yes, got it.

MR DE LA MARE: Now, if I can just unpack what we were looking at in the April meeting a little bit further, back to B8, you remember there was a complaint about price and a complaint about productivity.

THE CHAIRMAN: Mm-hmm.

MR DE LA MARE: What we know from Mr Mahieu's statement at tab 84, so that's in the second bundle, H2.

THE CHAIRMAN: Yes.

MR DE LA MARE: This is all -- the relevant passage starts on p.28 at 75 and following, and it's in relation to the G9 project. And what Mr Mahieu does is explain in detail the development of the bids for the first generation front wheel bearings, before going on to deal with the third generation wheel bearings.

And what you can see is NSK is in the mix in the various iterations of this RFQ, and indeed by 82, para.82, is offering the sharpest prices both on a 50 per cent and a 100 per cent market share. And then one sees that in parallel with those bids coming up:

> "Although NSK has been selected for this project, a disagreement later ensued between SNR and NSK about the ASB patent which had to be used for the front wheel bearing for the G9 project. SNR was in fact refusing to grant NSK a right to use that patent (see the minutes of the internal meeting [a PSA meeting] held on 10th March..."

Then over the page you can see the PSA attempted to persuade SNR to grant such a licence and they refused, and because of that NSK fell out of the mix.

Now, we say that where one knows that previously SNR has been prepared to licence the patent in relation to another project, as it was in 2000/2001 in relation to the D2 project which they licensed at 30 cents a bearing; and where that D2 project relates to the 407, there seems to be complaints knocking around that, in consequence of NSK offering prices well below SNR and SKF, and they're offering APRs of 3 per cent.

There's more than a credible basis to make the inference that the real reason for the refusal of the patent was not that they were unwilling to pay a reasonable amount, as they had been previously, but was rather that this was the way that had been decided upon or agreed upon to maintain higher prices. And effectively, the cartel agreement was being enforced or policed and the incumbency principles were being enforced or policed. That's the first example.

Back to the skeleton, in para.13 we say:

> "There are [also further] documents which indicate that the patent was used as a way of implementing agreed customer allocations."

So let's look at tab 7, the first bundle at B7. This is an interchange -- this is an interchange between Koyo/JTEKT on the one hand and SNR on the other. The beginning of the meeting -- Mr Orssaud is from JTEKT; Mr Sépulchre de Condé is from SNR. There's information exchange on the first page, and then Mr Orssaud, if you look at the bottom of the page, is bluffing, apparently, so the JTEKT author would have you believe, about the prices that they're going to propose on the DU3562 project, which is related to the DU2560 project for which SNR has the work. And the consequence of that would be that if they undercut on a later project, it will make it harder for SNR to sustain the prices it's already obtained.

And then what is obviously intended to happen from this is a conversation at a higher level between Mr de Condé and the relevant boss of Mr Orssaud, I think, who is Mr Sasaki(?):

> "It is highly likely," p.2, "that [you'll get a] call. If you get a call from him, in order to be consistent with what Mr Orssaud told, please tell as follows. [First of all], we will not undercut the price of DU2560 but have already given an approval to the Europe side to offer the price within the price level from E6.20 to 6.40.
>
> If [SNR] insists that we should not deal with PSA B58, we cannot withdraw from PSA unless it's a Give & Take deal."

In other words, they're trying to leverage themselves into a position where SNR will help them get other work. And then that immediately segues into the next paragraph of suggested lines to take:

"There is information that 'Maru S'," that's SKF, "has undercut the price for the front/rear for the next model of [something or another; another OEM] by 2 Euros or so compared to 'K''s price, but at least currently HUB3 of 'K' is adopted 100% for rear and want 'R' to refrain from giving the permission to 'S'" -- that's NSK -- "to use ASB and also from dealing with the same."

So one cartelist urging the other not to grant a patent licence so as to protect their incumbency. That's effectively what's going on there.

Next example in 13 is 13(b). The relevant documentation is at B13 and 14. It's a German communication for which the Hausfeld translation is at B14. And this is a case where FAG Schaeffler is again urging SNR to refuse to grant a patent licence to NSK so as to progress FAG's incumbency. You'll see that about three paragraphs down:

"SNR is being actively supported by Mr Nissl: Nissl is asking SNR not to give NSK the licence! SNR will remain adamant in any event and will do anything for FAG to keep 50% of the VA (front axle)."

So in other words, if they're going into bat for the incumbency rule identified by Mr Sépulchre back in 2003, which is that they will only grant licences to those who are already in on the project, and they will not allow someone else to come into the project, even to threaten a portion of the commerce they're not having, because that way the prices will be sustained.

Last one in this series is the one appended to the skeleton itself in tab E2. Can we start at the back of the email thread. This is about the proposed pitching for a non-PSA project, and there's lots of discussion as to how AUT and JTEKT is going to price this up, and you see point (5), the very last point in the document:

"This offer is valid in case that SNR gives us the parmission [sic] for their patent use."

So everything is conditional on the patent permission being granted.

And you can see where that then takes you in terms of the substantive discussion, if one turns back to p.1 to (2), where the relevant individual is reporting back on the contact they've had with SNR:

"I had contact with [SNR] on this issue after joint meeting among cousins."

"Cousins" are the cartelists. It's funny how the terms that cartelists and terrorists use seem to be very similar: "cousins", "weddings", et cetera. And then p.2 you can see the report----

THE CHAIRMAN: There might be objective genetic differences between the two categories of case.

MR DE LA MARE: There might be, yes. You can then see, when they come to the topic of the patent, how the meeting has gone:

> "In the meantime, [SNR] mentioned about ASB patent issue that the condition of this approval would be K's reasonable pricing (bit higher price than current suppliers)."

Not whether or not they were paying enough on the royalty fund. That would be the only legitimate topic for discussion. They're not interested in that; they're interested in the end price and moving the end price. And it's plain from that conversation that that is an instance of the patent being used to influence or leverage or set end prices. So pretty clear evidence of what we say is a reasonable inference under the circumstances as to what's going on.

Then para.14 we identify the fact that there are many instances or references to the ASB patent being used as a reason why suppliers did not bid on certain RFQs. Tabs B12 and 15 cited for that purpose. Let's look briefly at those and then I'm going to show you something else that shows even clearer, more clearly, the other side (inaudible).

Now, in relation to these, some of these may well be legitimate assertions of patent rights. We don't know, but we're entitled to enquire and to see whether or not what's going on is what it appears to be. So, for instance, tab B12 you can see the individual in question, there Mr Keiffer from NSK saying they have:

> "... received a request [from PSA] for quote for X7 wheel HUB project a few months ago. We did not quote due to SNR patent issue and....."

whatever that means. There's the patent being explained as the reason for non-bidding in the documentation.

B15, another NSK document. Just below the second hole-punch you can see:

> "PSA's understanding NSK patent issue and is ready to increase NSK market share on the D2/X6 program from 2007."

D2/X6, if you'll recall me saying earlier, is one of the instances where there was, back as far as 2000, a licence given, and therefore when the project was recast they were incumbents in being allowed to bid. And so PSA is trying to increase the share of the project because there are patent obstacles in relation to -- they're told -- in relation to the other projects where there is no such licence being granted.

So they're what looks like legitimate reasons, but then compare and contrast with the pretty strange or suspicious chain of correspondence at B17. Now, the backdrop to this is NSK's clear case that they never had anything to do with fixing any RFQs. They, of the three defendants, are the only one to have put in evidence from one of the participants in

the cartel, Mr Ichii, and his statement is at bundle 2, tab 6 and the relevant passages are at 19 to 22 where he says he never had any involvement in fixing prices or allocating customers or anything like that in relation to RFQs.

And at para.29, he says he never dealt directly with PSA. It's probably worth having a look at that to look -- just to see the categoric nature of the evidence given. Bundle H2.

Explains that:

> "Engaging in communications with my competitors," p.5, "was an error of judgment."

However, he says:

> "I never shared any of the information I learned through speaking to my competitors with Mr Keiffer or Mr Dos Santos."

So what he's seeking to do is to insulate the marketing sales guys from his participation with cartel managers: "I never told them what was going on. Thereafter, everything they did they were competing as hard as they could. They didn't realise that I was involved in these discussions."

It's a bit like the approach that SNR and SKF have adopted of simply putting up their sales people, one of whom, Valerie D'Inca of SKF has said in terms, "I knew nothing about the cartel." Mr Lefèvre from SNR has said nothing about whether he knows or knew anything about the cartel, but suggests he thought he was competing hard.

And then you can see in the rest of 19 onwards he says never shared any information:

> "Over the course of my discussions with competitors I never fixed prices with any of them in relation to particular PSA RFQs. I did hear about the results of some of my competitors' price negotiations with customers, but I never agreed with my competitors about what price [we] would charge, or try to charge, to PSA."

So they're getting closer to explaining the cartel mechanic:

> "I was never involved," 22, "in any 'bid rigging' in relation to PSA RFQs. I never agreed that NSK would not submit a response to a PSA RFQ to leave the way open for a competitor, nor did I ever agree that NSK would respond to a PSA RFQ with an uncompetitive price to try to mislead PSA into thinking it was getting competitive quotes when it was not."

So he's saying, "I never did any cover pricing either." Absolutely plain as a pikestaff what he's saying he didn't do.

Now go back to B17. What has happened here is that PSA has persuaded SNR, at least in theory, to issue licences, ASB licences, for this particular T7 project. And so when it is confronted with NSK saying that the reason it will not bid is that they have been refused

a licence by SNR, PSA has requested express confirmation of that. Does my Lord have the last page?

THE CHAIRMAN: Yes.

MR DE LA MARE: "Bonjour. Thank you for letting me know your position on this project. If you have a blockage relating to the licence, could you please forward me the refusal," is effectively what Mr Mahieu says. If one takes up Mr Mahieu's statement, you will see his evidence as to what was going on at the time in relation to this T7 project.

THE CHAIRMAN: Yes.

MR DE LA MARE: And that's in H2.

THE CHAIRMAN: Yes, I've got it.

MR DE LA MARE: And the T7 project is dealt with at 134 and following. And he splits up how he deals with it. First of all, in relation to the front wheel bearings at 134 -- 136, rather, through to 142; and then the rear wheel bearings from 143 onwards. Now, ASB is only required for the front wheel bearings. And you see the basic case he sets out at 138 is:

> "NTN, NSK and Koyo once again declined the consultation because of the SNR patent for the encoding seals."

Actually the story's a little bit more complicated than that. If you turn on to 148 what becomes apparent is that PSA is attempting to use its leverage in relation to the rear wheel bearings more generally to persuade SNR to be more generous in the patent licences it grants. And at the end of 148 you see:

> "Following phone calls between SNR and the Purchasing Department, SNR," and this is November/December 2004, "had accordingly confirmed to us in a document dated 1st December ... its agreement in principle to started discussions on granting the ASB licence to new entrants on the bearing suppliers panel of the PSA Group, subject, however, to a number of conditions..."

Condition 1, agreement on financial terms; condition 2 to be involved in an RFQ that they'd been excluded from to incentivise it to do exactly this; and condition 3 "Negotiation of the raw materials cost increases requested by SNR."

149 you see Mr Mahieu stating that, "We had doubts as to whether SNR actually wanted that process to succeed," but so be it. That is the backdrop to the request in relation to this very same project at the end of B17. That's why he's asking for confirmation that there's been a refusal, so that he can go back to SNR and say, "I thought you'd agreed we'd get patent licences to enable these people to quote."

And what then happens is that there is an internal scramble within NSK to work out what to do in the circumstances, and if you go back to B17 and look at the preceding page, about a third of the way down there's the email from Franck Keiffer, 17th May 2005:

> "We have received a request for quote from PSA two months ago regarding T7 front HUB 1," that's the ASB affected bearing. "Current suppliers" -- why is he saying "the current suppliers"? – "SNR and SKF."

And then,

> "I have been confirmed by Ichii-san," Mr Ichii, the man who he says he knows nothing about this, paragraph 29 of whose statement says he never deals specifically with PSA issues, "that NSK could not get the SNR licence for this bearing and for this project. During my last week meeting with PSA, I confirmed that NSK was obliged to decline this business opportunity due to the fact that we did not get a positive answer from SNR to use the licence... PSA having obtained from SNR that they will give the licence and the right to use the patent to all bearing manufacturers asked me to confirm what I said by written, [by writing]."

So he's basically saying, "What do I do? Now that they've called our bluff on this front, what do I do?" And then you can see above a little bit later on in the day, perhaps after a phone call, so the email's at 10.55 in the morning, and the reply is at 9.30 at night, he writes a further email to Ichii-san and to Ralf:

> "In order to solve this issue understanding that we don't want to write anything to PSA related to the SNR patent, my proposal is the following:
>
> (1) sent again the price quotation we issued to PSA in adding a 5% price increase. This quotation did not give us at the time any business opportunity due to the fact that the market price level information we got back from PSA was based on 6.00 Euros."

And then if you go over the page, that's then agreed to by everyone, Mr Duning at the bottom of the page. Mr Duning asks Franck Keiffer to add in the following argument: SNR is going to be cheaper because it's a carry-over of a particular project, so they've got no tooling costs. There is no new investment required, and NSK have to pay the licence fee and so they can't be competitive. And then that is enfolded into the answer that's eventually given.

That looks exactly like cover pricing. And what it is strongly suggestive of is that the ASB licence is the first line of excuse for not bidding in relation to a project in relation to which someone else is an incumbent; and that when that excuse no longer is available, the parties then resort to cover pricing.

Now, it's instructive to see how that was dealt with in the evidence, because NSK didn't deal with that at all in Mr Dos Santos's original evidence. It is, however, addressed in his second witness statement, bundle 10.

THE CHAIRMAN: Bundle 10?

MR DE LA MARE: Sorry, tab H10.

THE CHAIRMAN: Yes, got it.

MR DE LA MARE: Now, you will recall Mr Mahieu's statement I showed you didn't cross-refer to these particular emails. The dots probably hadn't been joined. So all that Mr Dos Santos does is reply to the passage in Mahieu that suggests that the reason why they didn't bid was patents. You see at para.21 and 22:

> "Mr Mahieu says that NSK declined to quote in response to PSA's RFQ for the front Hub 1 bearings due to SNR's patent for the encoding seals."

Paragraph 138 that I showed you.

THE CHAIRMAN: Sorry, hang on; para.21?

MR DE LA MARE: Of Dos Santos 2.

THE CHAIRMAN: I'm sorry, yes.

MR DE LA MARE: H10.

THE CHAIRMAN: I turned over H9 by mistake. Yes.

MR DE LA MARE: So he picked up the bit from the section in the front wheel bearings----

THE CHAIRMAN: Yes.

MR DE LA MARE: -- where he says they didn't bid because of patents; forgot that there was this provision about the licence overriding it all; and then he says this at 22:

> "SNR's patent was a factor in NSK's decision, but Mr Mahieu fails to mention that NSK's decision to decline this RFQ was also based on our design study, which is exhibited as [something] and provided to PSA on 14th February 2005. That design study clearly showed that the calculated life of our proposed bearings was below PSA's target."

THE CHAIRMAN: Yes.

MR DE LA MARE: When in fact the real reason actually had, in the end, nothing to do with patents and had everything to do with the prices that they had agreed in the space of 11 hours to inflate.

THE CHAIRMAN: Yes.

MR DE LA MARE: So I think my Lord has the flavour of where we're going with this material. In our contention, the suggestion that this is not relevant is simply unsustainable. And what

it really comes down to, so far as we can see, is two arguments: first of all, a pleading point. They say we haven't pleaded out our reliance upon the patents, and therefore they can't be relevant. And then allied to that it's said, well, this is a follow-on claim. Liability is established. We don't need to go into any of that material.

Now, the pleading point is frankly, a bad one. It is not incumbent on the party pleading a follow-on claim to plead out every single sub-agreement or sub-arrangement giving effect to the single and continuous infringement. It would be impossible to do so. There would be no useful purpose in it. We can't be expected to plead out speculatively, or in absence of the full sight of all of the facts, all of the potential mechanics that may or may not have been used to give effect to the broader agreement.

But what we are entitled to do is to test the evidence that is provided, and where there are documents that are suggesting that there are mechanics or a mechanic in play, to pursue that by way of relevant disclosure. And that's what we do. So the pleading point has no substance at all.

And as to the fact that liability has been established, well, my Lord has already shown there are no issues on that front. We don't need to show that these documents lead to an identifiable increase in quantum. If they have a bearing upon -- forgive the pun -- if they have a bearing upon the qualitative assessment that the court has to do in order to evaluate the differing quantitative assessments undertaken by the experts; if they have a bearing on the basic question "Is it plausible that this cartel generated an overcharge of 10 per cent on RFQs?" or, conversely, "Is it plausible that this cartel led to no increase in prices whatsoever across the seven years of its operation?"; if they have a bearing upon that question, which they plainly do, then they are relevant, notwithstanding that this is a claim about quantum alone. So in our submission, there is nothing in the relevance objections mounted against these documents being sought.

So then we come to proportionality, and it is perhaps here helpful to take this in stages. And remember the three limbs of the application, because in my submission there can be no proportionality response in relation to either the enclosures to or the documents cross referenced in the ATF documentation, nor in relation to the three documents that are in the ATF documentation but access to which have been refused on grounds of relevance. They have got documents, it's just a question of giving them to us. Nor, one would imagine, could there be any sensible proportionality objections in relation to those projects that are specifically identified in the evidence in relation to which the patent licensing fits, because one can only imagine that in the course of setting out the evidence in relation to why it was

the bid occurred or did not occur that the factors such as patent licensing which may have provided an innocent explanation or a not-so-innocent explanation, would have been investigated.

So really, the only subject for discussion from the perspective of proportionality are the wider searches that we request under 1(a) to (d). Mr Balmain's evidence is in bundle 1, tab C5, and he objects to the proportionality of this exercise on the basis that it's going to take approximately three to four weeks and cost in the region of £50,000 to £100,000. Now, this evidence was settled before we offered on 20th February 2018----

THE CHAIRMAN: I think their skeleton argument puts the figures at a more modest level.

MR DE LA MARE: Yes, yes. But this was settled before we made what we hoped was the sensible response, suggestion, that the date range of searches could be narrowed to start only from 1st January 2001, and you can see that in bundle 2 at, what is it -- K?

THE CHAIRMAN: Yes. I've seen the correspondence on that.

MR DE LA MARE: K7? In any event, after Mr Balmain's evidence and the skeleton we offered to narrow the dates to get rid of 1998 through to 2000. And so his evidence here so far as it relates to searches going back to 1995 is understandably overly wide.

It's K3, the letter's at K3. It's the letter dated 20th February.

THE CHAIRMAN: Yes.

MR DE LA MARE: But secondly, we say, even those figures would be justifiable in this multimillion-pound litigation in circumstances where, in consequence of the defendants' actions, the information about the cartel mechanics are necessarily scant. The defendants' actions include the destruction of the relevant documentation, and it's plain that most of it has been destroyed -- we will be able to show at trial that meetings occurred for which there were no minutes and such like -- and where the defendants have consciously chosen not otherwise to put up Mr Sépulchre, who's referred to in 6B, as a potential witness.

THE CHAIRMAN: Mm-hmm.

MR DE LA MARE: The contrast, for instance, with the *BritNed* case that's going on at the moment is quite striking. As we understand it, in *BritNed* the way that the argument that the cartelists didn't affect the single interconnecter project issue in that case is being addressed is by evidence from the cartelists involved in the cartel explaining how they operated the cartel and why therefore its operation didn't encompass that contract. We don't have any evidence like that. We don't have Mr Sépulchre coming to court and saying, "Well, we did run a cartel, but it was incapable of affecting these RFQs, or it didn't affect

these RFQs for this or that or the other reason." We've got a bit of that from Mr Ichii, and we've seen how reliable that was, but that's never been how they intend to defend the case. And with respect, therefore, in the context of arguments about proportionality, it's more than a bit rich that when we actually get closer to documents that give further insight into the cartel, they then say, "Oh, well, we might need to put in evidence." With respect, the moment for that has been and gone.

And then the last point to note: this exercise is all about approximately 50GB of disclosure. Now, as it happens, that's exactly the same size as the cache of documents that SKF discovered Mr Seubert, their main cartelist guy, had maintained. And my Lord will have seen the correspondence between us and SKF in which SKF identified they had a 50GB cache of documents, they'd gone through that and had found a host of new disclosure that they then provided to us. There was no suggestion that was impossible, infeasible, disproportionate, et cetera. And they did it within a pretty abbreviated time frame, and you can see the correspondence starts in the clip of documentation I handed up, at the back of the bundle, they became aware of the storage facility in mid-December; the date it was extracted in mid-January; it was reviewed in early February. They've apologised for their oversight in not doing it.

It's eminently possible to do, eminently possible, and all we're asking for ultimately is documents which will then form part of the submissions to my Lord on the documents about how the cartel in fact worked; it will form part of that enlarged written opening, and no doubt enlarged opening which will address the documents in the absence of any witnesses for those documents to be put----

THE CHAIRMAN: I don't know whether an enlarged opening from you is an incentive or a deterrent.

MR DE LA MARE: You're too cruel, my Lord, you're too cruel! If I promise we'll put it mainly on paper, perhaps that's more of an incentive than a deterrent, not least because the crisp and concise Mr Jones will draft it.

THE CHAIRMAN: Ah, well that's all right then.

MR DE LA MARE: So given that, there aren't any witnesses before the court who are going to have to address this material because they haven't put them up; it's not going to disrupt the timetable to require the provision of documents that we can then parse and analyse and feed into our submissions.

And of course those documents can then be put as appropriate to the defendants' expert witnesses to test the plausibility of their results from full sight of what is available by way of insight as to the quantitative aspects of the -- qualitative aspects of the cartel.

So we don't think there's any valid proportionality objection, and the fact that Macfarlanes have also been able, once the application against them was conceded, admittedly against a narrower base of relevant material, to conduct their searches of the ATF materials that they have done -- and they've obviously got a different group of ATF documents to SNR -- they've already searched the ATF documents, they've done other searches and they're going to go off and find the reciprocal patent agreements -- the fact that they can do those things suggests that this is eminently doable.

THE CHAIRMAN: Yes.

MR DE LA MARE: Unless there's anything else I can assist you with at that juncture, that's all I wanted to say now.

THE CHAIRMAN: Thank you very much indeed.

Yes.

MR KADRI: Sir, I should probably start by thanking Mr de la Mare for the preview of his opening, of which we have been sure to take careful notes.

THE CHAIRMAN: It's always entertaining.

MR KADRI: Sir, I propose to broadly follow the structure of the written submissions we made, beginning by addressing the relevance point, the witness evidence, expert evidence and then move on to the broader proportionality issues and taking account of the nature of the disclosure and the timing of the application. And I will finish off by addressing the more narrow disclosure requests that Mr de la Mare took you to.

THE CHAIRMAN: Yes.

MR KADRI: Sir, on the point of relevance, we say that's different -- that has to be determined by reference to matters that are actually in issue, and Mr de la Mare concedes that this is a strict follow-on action. That means that the claim is dependent on the decision. It's dependent on the findings of the decision, and that decision contains a description of the conduct.

So that description was arrived at by the Commission's investigation. That involved oral evidence on all of the participants. There were no fewer than five leniency applications.

Sir, as you'll know, there is strong incentive, and indeed a requirement on a leniency applicant, to give a full description of how the cartel operated, and every additional leniency

applicant must be sure that the material they provide is of significant added value; otherwise, they won't get a discount.

So we say the Commission had a very full picture of how the cartel operated, but it made no findings as to whether the ASB licence was an instrument of the cartel, I think was how it was put.

So, Sir, we say the claim relies on the description of that conduct----

THE CHAIRMAN: Can I just ask you: so do you say, therefore, that the Tribunal is bound to take the inference or the conclusion that the ASB licence was not part of the cartel?

MR KADRI: We say if that's a contention the claimants wish to make then it would be a standalone element of the claim.

THE CHAIRMAN: And?

MR KADRI: Therefore they must plead to it. So I think the point made by Mr de la Mare was that they don't need to plead what all the mechanics are, but we say this is outside the scope of the----

THE CHAIRMAN: Sorry, how do they do that? Let's assume that the starting point is the follow-on decision, which isn't, I don't think anyone's going to disagree that detail. It's not like a classic cartel case where you may have hundreds of pages of evidence. How would they be able to plead to something which at least at the outset they don't know about?

MR KADRI: Well, Sir, we see it: it's previewed at para.47 of their claim form. They reserve the right to further particularise on receipt of disclosure. Now, I'll take you later on, Sir -- this is more of a timing issue -- to statements made by the claimants that they fully intended to make further applications for disclosure, but they haven't done so, and here we are on the eve of trial and they're trying to get new documents, documents that would sustain a new claim, a new element to the claim, and we say that is the archetype of a fishing expedition.

So as I say, I think it's important, Sir, to just think about how the evidence in this case has been dealt with, particularly the economic evidence. Now, Mr de la Mare says he places great emphasis on the qualitative discussion of the experts. The reality is that Mr Holt, who is the claimants' expert, doesn't say anything about ASB licences in the context of anti-competitive behaviour. Evidently he didn't think it's relevant, despite the fact that, as we heard from Mr de la Mare, he appears to have a wealth of material currently available to him, and it's been available to him for 14 months, that allows him to make various inferences as to the role of ASB licences. But Mr Holt doesn't appear to care at all about this.

And, Sir, the approach that's taken by Mr Holt on the qualitative side is actually very important. What he does -- and this is what all the experts do -- is he determines whether or not a project is potentially affected or not affected by reference to the time at which it was negotiated. So I think Mr Holt takes the signing date. If it's inside the cartel period, he says that's potentially affected; if it's outside, it's unaffected, and then he makes a comparison. So all the experts do that in their quantitative analysis.

They all also discuss qualitative issues, and, as Mr de la Mare says, the reason they do that is to try to show that the market dynamics were such that a cartel overcharge likely could not be sustained, based on economic theory. But none of them discuss whether the ASB licences were part of a cartel mechanic. That's obviously not surprising, something I'll come to.

Now, Mr de la Mare says it may have a bearing, but surely this has already been part of the discussions the claimants have had with Mr Holt, because they've got all of this material that allows Mr de la Mare to reach these conclusions; why hasn't Mr Holt dealt with it? We say that's because it's not relevant. In fact, I think Mr de la Mare effectively admitted that it wasn't relevant to quantum.

MR DE LA MARE: No.

MR KADRI: Mr de la Mare is saying no, so I----

THE CHAIRMAN: I think the point being made is that the difference between the two parties on quantum is between zero and something 10, going north of 10, and that's based upon the experts' present economic analysis and that the Tribunal is going to have to either decide whether there was zero overcharge or 10 per cent or something in between, and trying to calibrate and between zero and X.

If the evidence -- let's assume for the sake of argument that there's a disclosure and the evidence shows that the IP rights have been misused with a view to deliberately suppressing those suppliers that undercut, and you get facts and figures and the Tribunal is able to build up a picture from the evidence -- this is a hypothesis, it's not based upon anything other than a hypothesis -- why wouldn't that be relevant enabling us to decide where on that calibrated scale between zero and, let's say, 11 or 12 per cent, the correct overcharge figure would be?

MR KADRI: Well, Sir, I don't say that it wouldn't be relevant at all, I say a number of things. The first thing I say, as I've already done, is that if this was important Mr Holt would have mentioned it. The second thing I say is that if it's important, then why aren't the claimants going to be allowed to consider the disclosure and re-report? That's no part of what the

claimants are suggesting. What they're suggesting is, we will hand over a whole number of documents, and then merrily trot off to trial, at which point Mr de la Mare will ambush every single witness liberally with the material that's been disclosed.

So it doesn't actually advance the Tribunal's thinking on any of the experts' analysis, because they won't have the opportunity to actually look at this material. And so this is a timing point----

THE CHAIRMAN: Let me put this to you. The way at the moment it seems to me the trial would probably proceed is that you would have all the witnesses -- you'd have openings, you'd have witnesses of fact, and then you do the experts. And in almost any civil trial or any case involving quantum, you do expect the experts to listen and become aware of the factual evidence. And it's commonplace that the experts have to modify their views as the trial goes on, because that's when the evidence comes out, and clearly it's part of an expert's duty to modify their views if the evidence requires them to do so. So why would they be taken by surprise? It's an ordinary trial procedure, it's not limited to competition cases; it would apply in any tortious compensatory claim where you have experts addressing quantum. They have to take account of the evidence that comes out in trial.

MR KADRI: Well, Sir, I accept that, but I think the other point is that there won't be any witness evidence on these documents because the witnesses won't have an opportunity to comment on them either. And the justification that the claimant has given now is that, "We don't want to put up any witnesses." Well, frankly, Sir, we don't know, because we don't know what the documents say.

It's not been any part of our investigation into the circumstances of this infringement, whether during the Commission investigation or as part of these proceedings, whether or not ASB licences had any bearing on the infringement. We haven't done that investigation. We are entitled, if this disclosure is ordered, to look at those documents, decide whether we want to adduce evidence and have the opportunity to do so; and, we say, we would be entitled for our experts to also make comment on these documents.

So as I said, Sir, it is a timing point, but I will come back.

THE CHAIRMAN: Yes, I understand.

MR KADRI: I'll come back to it.

THE CHAIRMAN: Yes.

MR KADRI: So I think you have the point that I make----

THE CHAIRMAN: Yes. Yes, indeed.

MR KADRI: -- that the claimants could by now have particularised the allegation, given that they've had all this material. What we've heard from Mr de la Mare is an extensive exposition of all the ATF documents which were disclosed 14 months ago, and we've also heard that the claimants' own evidence makes some mention of ASB licences in the context of negotiation. That was obviously something they knew about before the proceedings had even started.

Now, I think what's said but wasn't said much in Mr de la Mare's submissions but it was said in the written submissions that the defendants have to some extent put the question of ASB licences in issue. Well, we say that's definitely not the case.

So I'll go to Keiffer 1, which is the first example. It's at bundle 2, H4, p.9 of the statement.

THE CHAIRMAN: Yes.

MR KADRI: What Mr Keiffer is describing here is that NSK was in negotiations with SNR. They were offered a price; it was too high. PSA then intervened and SNR offered a lower price.

THE CHAIRMAN: I can help you with this. I have read the witness statements. I see the point made that when you take the references to the patent licences from the witness statements they don't -- they demonstrate that the licensing is part of the overall fabric of supply, which would be true in a case without a cartel.

I think the point that's made by the claimant is, even if that's the case, when you look at the documents as a whole what is clear is that the patents are part of the supply arrangement, and if the documents then, at least *prima facie*, suggest some misuse of IP rights, you look at everything in the round. I mean, I take your point that read in isolation the witness statements don't necessarily strongly indicate any sort of cartelisation in relation to the IP rights. But I think the point is, looking at it more generally in the round----

MR KADRI: Well, Sir, what we say is that -- what the claimants say is that they are entitled to test contentions made by the defendants. It's in our written submissions. We say the defendants don't make any such contention. But there's another point here, which is who exactly are the claimants proposing to cross-examine? And, Sir, you have the letter of 26th February.

THE CHAIRMAN: Just help me with that. When you say it's matter for you who you call----

MR KADRI: Well, Sir----

THE CHAIRMAN: If you don't call someone they don't cross-examine them, unless they're summonsed.

MR KADRI: Well, Sir, it comes back to the point that the criticism against us is spectacularly unfair, that we have not called witnesses to deal with these issues. We didn't know this was an issue until now.

THE CHAIRMAN: Right.

MR KADRI: So if we see these documents, why should we not have the opportunity to call the witness?

THE CHAIRMAN: Right, understood.

MR KADRI: We've been proceeding on the basis that liability is effectively not an issue. If you look at our own expert reports, Sir, our own experts assume against us that every cartel, every project that was entered and negotiated during the period, the relevant period, was potentially affected.

THE CHAIRMAN: Yes, no, I understand.

MR KADRI: That's our experts' starting position. Sir, I think you've seen our written submissions on the evidence.

THE CHAIRMAN: Yes.

MR KADRI: We say it's not a contention made by the defendants----

THE CHAIRMAN: Yes.

MR KADRI: -- we say that the claimants won't be able to effectively cross-examine unless there's an opportunity to adduce further evidence.

THE CHAIRMAN: Yes.

MR KADRI: And I made the point about the letter that was sent to the Tribunal earlier this week. Sir, I think you probably have the point I make.

Sir, the same goes for our witness evidence that Mr de la Mare took you to the point where our witness says he wasn't involved in.

THE CHAIRMAN: Yes.

MR KADRI: So what is he going to say? How is it going to advance the claimants' case to ask him a question about ASB licencing? We say it isn't, it cannot, because he doesn't know anything about it. If the claimants want to really get anywhere with this, they would have -- wanted to, they would have made the application earlier. There would have been an opportunity for witnesses to comment on it, and then we could go from there. So many of the points Mr de la Mare makes may have been good points if the application had been made a year ago, but they're not good points now.

So, moving on to the experts, I would like to go to some of the extracts that are cited.

THE CHAIRMAN: Yes.

MR KADRI: Beginning with Dr Rosati. He's for the third defendant, for us. It's at I2, bundle 2.

THE CHAIRMAN: Yes.

MR KADRI: Paragraph 126.

THE CHAIRMAN: Yes.

MR KADRI: And what he says, and this is the last sentence of that paragraph:

> "On multiple occasions, the claimants threatened to exclude NTN-SNR from future tenders to force it to licence its ASB technology to competitors."

He's referring to the claimants' evidence. That's obviously a matter that was well within the claimants' knowledge. Again, Mr Holt doesn't appear to care.

Dr Mazzarotto, for the first and second defendants, he does make more references to patent licences. It's the point raised, flagged by the claimants in their submissions is that frankly rather obvious point that access to patents would be a driver of differences in prices. So the claimants suggest that only -- that point is unreliable because it assumes that licensing issues were independent of the cartel. Well, of course it does, because it hasn't been a matter that's been put in issue until now, Dr Mazzarotto's reported.

So we say that this point, Dr Mazzarotto makes a number of points -- all the experts do, like qualitative issues -- this point, to the extent that they mention ASB licence, it is hardly central. It is not even peripheral to their analysis. We say it's a total non-point.

Mr Kalmus for the fifth defendant, he makes only the briefest mention of licensing. He notes quite correctly that the decision says nothing about the licensing. We don't really understand why the claimants think this is relevant. Mr de la Mare referred to the agreement between SNR and SKF. That was -- that dates from before the cartel period, so there must be some standalone element in whatever allegation he proposes to make. But, as I said before, Sir, what is really striking is that Mr Holt says nothing about this.

Now, the claimants' position is that -- appears to be -- that a revelation came to them in December 2017 as to the relevance of this material. We agree with that in part, Sir. We agree that a revelation came to the claimants, but the revelation was that this would be a good way of causing huge disruption to the defendants, and they've succeeded to some extent. But we say the Tribunal should not indulge them any further.

Now, if this is relevant, why is Mr Holt not going to comment on it again? He won't have time to update his report, that's only due in 12 days' time. The claimants proceed entirely on the basis that there will be no new evidence on these documents, whether from witnesses of fact or experts. We say that makes no sense if this is such an important issue.

We say an application at this stage of the proceedings for a brand new category of disclosure can only be granted if the claimants make the most compelling case for relevance. We say they are a long, long way from that.

And that leads me on to the question of timing and proportionality more broadly. Sir, the first point I make is about the exercise that's been proposed to the claimants, so the difference between the disclosure that's already occurred in this case. So you will recall the debates that were had about disclosure in the early CMCs, and essentially that was in order to control disclosure, to keep it proportionate, a sampling exercise followed by potential expansion.

What we have here is a proposal for a wholesale disclosure exercise. It's much closer to the type of disclosure you would see on a standard disclosure or issue-based disclosure exercise. We say this is not specific disclosure of any kind, it's a whole new category of disclosure, and that should inform the way the Tribunal thinks about it.

Sir, if I could take you to your ruling on disclosure.

THE CHAIRMAN: Yes.

MR KADRI: It's at J3. I think you will have happily forgotten the details, but essentially it's clear from p.4, para.7. I won't read it out, Sir, but what's clear is that----

MR DE LA MARE: Sorry, where are we in the bundle?

MR KADRI: Sorry, J3, p.4.

So the intention behind this ruling was to ensure that disclosure was carried out in a proportionate way, so we had sample of disclosure, then we would see whether further disclosure was merited. That was at the very outset of proceedings, Sir, so already there was concern to keep disclosure proportionate.

So we say at the outset of proceedings you can say that there is this category of documents. They are potentially relevant: let's have a sampling exercise, maybe further disclosure.

We've got the exact opposite situation here. What we've got is the claimants relying on a handful of documents -- some of them are frankly very tenuous, some of them predate the cartel period -- and they say that justifies a full-scale search and disclosure exercise. We say that searching for documents that are of no obvious relevance on the eve of trial, at this stage it's totally unwarranted.

So we have put in evidence about the scale of the exercise and the cost. I don't propose to say anything more about it, save to say that we do think the cost is material and, more importantly in many ways, it's the fact that this will be a drain on our resources. We are busy preparing for trial.

Now, the point against us is that a firm of the size of White & Case could marshal the relevant personnel to conduct the exercise. Well, Sir, it rather misses the point: it will inevitably require core members of our team, who are busy engaged in trial preparation, to be diverted onto this disclosure exercise. That disclosure exercise can only be conducted in a reasonably proportionate way if core members of our team of lawyers who are familiar with the case actually spend time reviewing it.

So we don't know at the moment how long the exercise will take, but I think it's agreed that it will take three to four weeks. Mr de la Mare referred to the exercise conducted by Macfarlanes. There's an obvious qualitative difference, in that that referred to a category of disclosure that had already been agreed between the parties, so Macfarlanes were under an obligation to disclose that material. But it took them three to four weeks to do that. So there didn't seem to be any disagreement between us on that.

So we think the criticism that's made against us -- it wasn't repeated this morning, but that was made in the written submissions -- that we have somehow failed to engage with this request in December, and therefore we can no longer complain about the delay, we think that really is strikingly unfair. Frankly, Sir, it's indicative of the way the claimants conducted this litigation, which is essentially in the belief that the defendants will dance to the claimants' tune at every turn.

What happened in this case was that the claimants wrote to us regarding this category of disclosure. We immediately wrote back and said it would not be entertained, in unequivocal terms. They could have made an application then; they didn't. They waited six weeks. We say it's all part of the strategy to distract us from our trial preparations. They made this request shortly after certainly our own expert report as part of what I can only describe as an avalanche of correspondence, on each occasion requesting responses within a short timeframe. Sir, I don't want to dwell on it because ultimately it may or may not become an issue for the costs judge in due course, but I make the point very lightly.

Sir, I think on any view -- I'm really focusing on timing now -- on any view this application has come very, very late. We heard an extensive set of submissions from Mr de la Mare, who has obviously forensically analysed all the ATF documents. Well, they've been available to him for 14 months. What have the claimants been doing since then? So I think it's useful if we go back to the first CMC in October 2016. It's J1. I'm at p.6 of J1.

THE CHAIRMAN: Yes.

MR KADRI: It's Mr de la Mare's submissions on ATF documents. It begins at line 15.

MR DE LA MARE: What page?

MR KADRI: Page 6 of J1.

MR DE LA MARE: Thank you.

MR KADRI: Beginning at line 15, Mr de la Mare says:

> "What is envisaged is that there will be subsequent applications for disclosure. These are effectively what the Commission think are the most relevant documents," he's talking about ATF documents, "about the cartel mechanic. Once we have understood the cartel mechanic we are then in the position to ask more sensible questions directed at quantum issues."

So two points there, Sir: firstly, it's clear that what they're talking about is quantum issues. I've already explained why we don't think this is relevant to quantum, and apparently none of the experts do. But the point is that, at that time, the claimants were fully intending to analyse the ATF documents and potentially make further applications for disclosure.

Go, then, to the second CMC, Sir, J2. I'm at p.4 this time, and it's Mr Jones, now, for the claimants. I've lost my line reference, but I think it's at line 30. So it's line 30 and onwards. Talking about the ATF documents, he says:

> "Where we have got to on those is that we have had disclosure..."

He's talking about liability documents, I beg your pardon, Sir:

> "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," that was in November 2016. "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."

Later on in the CMC, p.35, there's a further discussion about liability documents. It's Mr Holmes for the fifth defendant, Sir, line 28.

THE CHAIRMAN: Yes.

MR KADRI: He makes clear:

> "It is not our intention [...] to go away and do targeted further searches with the intention of finding documents concerning the infringement."

And on p.36, the other defendants agree with that position.

MR DE LA MARE: Could you read last two lines?

MR KADRI: Yes, sorry:

> "But insofar as any turn up and they are relevant of course they should be disclosed."

Now, I think Mr de la Mare talked about the proportionality disclosure in the context of projects that were already discussed. But, Sir, we say that the existing disclosure exercise

has covered that. Our position has been -- and this is the exact discussion that's taking place here -- there was RFQ disclosure. In the context of that disclosure, there may have been material revealed that related to the cartel mechanic. That exercise was -- this is talking about the sampling exercise -- that exercise was actually expanded at the claimants' request and search terms were run. Now, clearly, Sir, if there had been documents about the cartel mechanic that had been revealed, they would have been disclosed by now.

Then Mr Jones responds, p.36, line 24. He makes clear that the claimants' understanding was that there may be a step-by-step approach to liability documents. Sir, you took a neutral position on that, essentially saying that the parties have stated their case and it could be dealt with subsequently, i.e. by further applications or further agreements between the parties. So this is in the context of a disclosure exercise that is supposed to occur before any evidence is exchanged. That is the normal way of things, but the claimants have delayed and delayed and delayed and only make the application now.

So they say it's unfair to suggest that it should have been made earlier, because "the importance of patent has become clearer over time". Well, we say that's not the case, I'm afraid. Again, to the extensive exposition given about the ATF documents, disclosed 14 months ago, what have the claimants been doing since then? Frankly, we have no idea. The claimants' own evidence about the importance of ASB patents for suppliers wishing to bid: that was obviously something they knew about, but despite that, between the combination of that knowledge and the ATF documents, the claimants' witnesses don't say anything about this issue. What they do say, I'm at H2 now, Sir. H2, p.20. I beg your pardon, p.19.

THE CHAIRMAN: Yes.

MR KADRI: It's para.57 to Mr Mahieu's statement.

THE CHAIRMAN: Yes.

MR KADRI: He talks about various strategies that the claimants adopted to encourage SNR to grant other suppliers licences. So clearly they were alive to the fact that there was an issue. Some suppliers couldn't have -- needed access to licences to be able to place bids. Now, if you go further into Mr Mahieu's statement, p.59, para.179.

THE CHAIRMAN: Page 59?

MR KADRI: Page 59.

THE CHAIRMAN: Page 59, yes.

MR KADRI: Paragraph 179.

THE CHAIRMAN: Yes.

MR KADRI: Essentially he's saying that he now thinks -- I'll find the exact reference. It's about halfway down the paragraph, this is the second sentence:

> "Although the reasons discussed with the suppliers at the time seemed to me to justify each amendment..."

He's talking about price amendments, but the point is generic:

> "... I now think that the cartel between suppliers may have distorted many negotiations."

So he's quite happy to suggest that negotiations were distorted. Doesn't say anything about ASB licences, whether that was part of it. We say it's not credible that this was not an issue that the claimants could have been alive to and could have been raised in the proceedings at an earlier time.

So we also say it's clear from the CMC submissions that the claimants were fully intending to make further applications. They haven't done. There's no explanation for why not. They can't have this disclosure at this late stage when they don't even intend for any expert or any witness to comment on it. It simply makes no sense, unless one looks at it from a strategic perspective.

We don't accept the criticisms that we haven't put witnesses up on matters that are currently in issue. We should have the opportunity to do so once we ourselves have conducted an investigation of what these documents say. We have no idea. We have no idea how many documents there are, if there are any.

Essentially, the claimants' contention boils down to, "We should have a load of documents that we can then liberally use to cross-examine your witnesses." Well, apart from the fact we say that it won't take them anywhere, we say that that is simply unreal.

Sir, we've already made the point about our trial preparation being disrupted. We say that's the whole point of the application. We say it's consistent with the strategy that the claimants have adopted so far, which has been consistently to put time and cost pressure onto the defendants. That started with trying to have a speedy trial, very limited disclosure; once disclosure was ordered it was the claimants that sought to expand the exercise. That is why the trial was delayed by three months. Now we say this is another chapter in that book.

Sir, we think it may well be the case that the claimants actually would rather see the trial delayed altogether, which would be the obvious consequence if we are allowed, as we should be, to put in further evidence on these issues. So we say it is incoherent for the claimants to suggest that these documents are important, not to suggest that there should be any more witness evidence, not to suggest there should be any more expert evidence.

So I turn briefly to the narrower categories of disclosure. Sir, our position on this is really a relevance point: we say that even a document -- even if a document is mentioned in a witness statement, there is no unfettered right to inspect. So you can get this from the CPR. There's a note to CPR 31.14.

THE CHAIRMAN: Yes, I'm familiar with that.

MR KADRI: Sir, I think you have the point.

So we say if we can't -- if they can't have the broader disclosure on the grounds of relevance, then they can't have the narrower disclosure either. I mean, I think to the extent the point is made against me, if the only request from the claimants had been for the documents referred to in the statements, we obviously wouldn't be here today.

More specifically, we say that the mention -- the first mention of licences by Mr Lefèvre is too vague to bite, for 61B to bite. They don't get every licence just because of that. The SKF/SNR licence, it's been disclosed, as you've heard, Sir.

As regards to the ATF documents, the point again is very straightforward: it was agreed that the defendants would apply a CPR 31.6 filter. We say they're not relevant. If none of this is relevant, they are not relevant. The point stands and falls with the broader category of disclosure.

Sir, unless there's anything else I can assist with, those are my submissions.

THE CHAIRMAN: Thank you very much indeed.

MR DE LA MARE: So on relevance, my Lord, it's understood my learned friend's arguments to have developed. His first argument seems to be that, unless the Commission makes specific findings about the ASB, any attempt to invoke patent licences or that kind would amount to a standalone claim. He effectively invited you to infer that if it's not mentioned in your decision, it can't be referred to be one of the mechanics of the cartel; therefore, any attempt to invoke it's a standalone claim, and that has to be pleaded.

One only needs to pick at the seams of that logic to see how that falls apart, because precisely the same logic would apply, for instance, to any one of the potentially thousands of sub-arrangements or sub-agreements that are caught up in the single and continuous infringement: any deal, for instance, to trade a cover price on RFQ 1 in return for a cover price from the other side, one RFQ 2, and thereby share the market in those particular RFQs; any trade of that kind would amount to an agreement caught by the arrangement. But unless, on my learned friend's logic, it was pleaded out, any attempt to identify that in a subsequent damages claim would amount to a standalone claim.

That has to be the logic of his position, and you merely need to state it to realise it has to be wrong. And it has to be wrong both as a matter of principle and policy, because the whole point about a follow-up decision is to permit the infringement identified, that is the single and continuous infringement, to be speedily and effectively litigated.

And if you can play that game of simply putting in a settlement decision pitched at the very highest level of generality, and then say, well, anything that attempts to identify how in fact those arrangements panned out as against particular customers is a standalone claim, then a follow-on claim, particularly a follow-on claim in relation a settlement decision is not a viable option. That simply can't be right.

Now, what we're not seeking to do -- and I think this is where my learned friend fell into legal error -- what we're not seeking to do is to build a claim based upon the invalidity of the patent licences. That's not our case. That's why we're not interested in 2000 or 2001; we're not making a claim in relation to those periods. What we're seeking to do -- we're not even seeking to invalidate the patent licences. That's no part of our claim. We're not saying that they're unlawful, even though that might follow from the application of the relevant block exemption. That's not our case. We're simply saying that the licensing is being used as a mechanic or cover for the underlying cartel everyone accepts existed. Of course, the block exemptions are removed in the case of any price fixing and allocation in any event.

So once you appreciate that's what we're saying, it's obviously not a standalone claim. We're not trying to build a claim off that separate agreement which may have a separate span. And it may well be that the patent licences were perfectly valid in 2000 or 2001 or 2002 or 2003, and only came to be improperly used during the currency of the cartel.

So after that pleading point, what is his response? And, with respect, one listened in vain for any attempt to engage with the careful review we just conducted of the underlying documents. There was no real attempt made by my learned friend to suggest that the documents I took you through were not sufficiently suggestive of misuse of contact through the licences, or arrangements through the licences, as to give rise to an inference that they were part of the cartel mechanic. He didn't attempt that exercise. So beyond the pleading point, there was no response on the merits of relevance.

His real argument on relevance then effectively collapsed into saying -- and he said it a fair few times -- that because Mr Holt hasn't built some qualitative case based upon the licences, it must follow that he accepted that the licences were entirely irrelevant. Now, that, with respect, is a non sequitur of glorious proportion on two levels: first of all, a wise

expert never advances a thesis on the basis of incomplete documentation, something the defendants' experts may be cross-examined about in due course. But it would not even be necessary for Mr Holt to have opined upon the relevance of the patent licences for them to be relevant if -- and, as is the case -- the defendants' experts have opined upon patent licences and their relevance.

And I can take you through the expert reports if you want. Dr Kalmus has reached a view effectively that they're outside the scope of the decision. He's taken a pleading point and says nothing more about it. That's one end of the range, through to the Mazzarotto report, and I can take you through the excerpts in that that do build a thesis based upon the patent licensing that seeks to suggest that they are an innocent explanation for why the market unfolded as it did. And once that thesis is adopted and advanced on a qualitative front, we are entitled to join issue with it and we do.

It's also not strictly accurate to say Dr Holt doesn't address the question of patents -- he does -- but it's no part of my case to suggest it's any (inaudible) part of his qualitative thesis. Indeed, we accept that his approach is to treat qualitative factors as very much secondary to his econometric analysis.

So the experts issue can't help my learned friend, and it certainly doesn't make irrelevant what is otherwise relevant; and it can't make irrelevant the cartel mechanic when understanding has to be -- as my Lord put to my learned friend -- has to be at least one factor the court considers as to where to draw the line either at the poles or at somewhere in between. Because at the end of the day, this is not an exercise, as people so often mistakenly assume, of choosing one expert over the other, and either doing one or the other: the court will, if necessary, find justice between the two experts, understanding that this is a process of approximation in the assessment of damages. So that's why qualitative considerations are so very important, particularly when you have poles as widely set as the two sets of experts have set them.

So what it really collapses into, in my submission, is a complaint about timing. That's the real thrust and the point that my learned friend made time and again. First of all, he points to the CMC materials and says, "Ah, we were threatened future applications and they were never made"; then he points to the timing of this application and he invites you to make a pretty strong inference that this whole application is an abusive disruption tactic.

Now, generally before I make an allegation of that kind, which is quite close to the wire in terms of what one is saying about the other side, I'd like to have some pretty good evidence for making that allegation. It's a strong allegation. There is no substance in it at all. The

complaint, if it is a complaint, about lateness of the application has to be seen against two things: first of all, the fact that the application was threatened in a detailed fashion in December, and was then promptly seen through. And it would of course have been open to the defendants to accede to it at that stage, in which case we would not have been so close to trial. Indeed, if, for instance, SKF had taken the steps that they belatedly took, we would have had the documents from them back in January or thereabouts. So the idea that somehow this is some cunningly laid plan to disrupt them and divert their litigation resources six weeks before trial is simply not credible.

But if there is any force in the charge of lateness of appreciation of the saliency of this patent material, the question is: is it unfair or unreasonable to seek to require them to accommodate it if the material is otherwise relevant at this stage in the proceedings?

And in terms of the logistical exercise, it is simply not credible to suggest that somehow this is going to derail the White & Case machine the best part of eight weeks away from trial to undertake what is on any analysis, however it's dressed up, a relatively modest exercise.

One can't imagine, for instance, that licences of this kind, if there is any halfway decent internal legal organisation, should be difficult to find. Generally, patent licences are relatively carefully kept: they're important documents.

MR KADRI: Sir, I hesitate to rise, but I don't think I took a proportionality point on the patent licenses.

MR DE LA MARE: I'm grateful for that.

So there is no proportionality point of the patent licences, and what one then comes down to is the search for the negotiations, successful or abortive, that surround them. And what's absolutely clear from the documents is that Mr Sépulchre is at the heart of all the patent licences (inaudible), allied to and assisted by the legal department.

And you can see that from the document at -- I think it's B7 -- sorry, it's at B11 -- that set off the chain for identification of specific documents. This is an ATF document. B11. If you look at the parties to it -- it's an RFQ document, I'm so sorry -- you can see the parties from SNR and indeed NSK. It's Mr Ichii, again. You can see he's the same person as in that B18 document. He's the counterpart on licencing issues. You can see the individuals in question: Mr Hervé Brelaud and Isabelle Scheyder and René Nantua, along with Mr Sépulchre, and we understand them to be individuals within SNR's legal department. And one can see the references to the individual documents in question.

Proportionate searches around those types of documents and those known attempts to negotiate licences -- and there are a number of known events through the witness statement

evidence, and most of them, the very great part of them, concern NSK -- that is not an unduly burdensome exercise. It's not some unfocused or unassisted hunt.

So then if the burden, the exercise, is not unfeasible and can be reasonably done, and we think it can be done sharper and shorter than three to four weeks -- the Macfarlanes example is by reference to an entirely comparable volume of documentation, and don't seem to have been in any great hurry in doing that exercise which wasn't related to ASBs -- if there is no unfeasible logistical objection, the only question is a question of witness evidence.

My learned friend hasn't made any such application, but if the real truth of his objection is that he wants to call Mr Sépulchre to give evidence on the subject, or to reserve the right to do so, we would be delighted to see Mr Sépulchre recalled. Absolutely delighted. We would be very surprised, because now that he has moved on to run the industry body, we suspect the last thing he's going to want to do is to turn up and explain his central role in an eight-year-long cartel. But if he is persuaded to come and give evidence, notwithstanding that, we will be very pleased to see him. We have quite a few questions for him. We think it most unlikely that he will attend. But if that's my learned friend's submission, he's asking for permission to call an extra witness, Mr Sépulchre, to address these issues, then he should be free to do so. We don't think it's required.

And I do point out, this is not some new objection on our part, the absence of witnesses dealing with the cartel mechanics; it is something that we flagged up immediately upon receipt of my learned friend's evidence. If you turn to bundle 1, tab E3. Upon receipt of the original witness statements we wrote to point out that they had chosen not to call any of the witnesses involved in the cartel or to provide any explanation as to their stance as to how it operated, and we invited them expressly to address that in reply, even though that would ordinarily be outside the topic of reply evidence, and they chose not so to do.

That's why I say, and I stand by what I said, that it is unattractive in the extreme for them to be crying unfairness when their litigation tactic has plainly been to say as little as possible, as little as possible, indeed nothing in the case of SNR, about how the cartel operated.

And my learned friend opened by pointing out, "Well, you can assume there's been a comprehensive investigation by the Commission because they've had all these immunity applicants." He didn't tell you that his client is the only one that wasn't an immunity applicant: sought no immunity discount, obtained no immunity discount. So there is no basis to infer that his client has given such a full account, no basis at all.

So if there is any fault on ours in not having spotted the relevance as a qualitative factor of the patent issues, the answer is: can that issue be sensibly and fairly accommodated now?

And we do point out, in response to my learned friend's reliance upon the Mahieu statements, that effectively all that was being said there was that patents were a feature of the business, they were a feature to explain why people didn't bid. There was no suggestion then that we thought -- indeed, it wasn't the case that we thought that the patents were inherently suspicious. It's only when you get into the level of really granular analysis of the big picture and you start joining up the evidence with the RFQ documents and the ATF documents in the way that I have given my Lord a full taste of, that you begin to see that there's something there. The minute we saw it we made the application and we explained the basis for it.

And in those circumstances, there is no proper basis to criticise us for having asked for the material at the end of December and then having pursued it promptly, having received no substantive response, in effect, after our letter of 18th January. We pursued it promptly on 2nd February. We're here now, requests could be accommodated; it should be accommodated.

Unless there's anything I can assist you with further, those are our submissions.

THE CHAIRMAN: Thank you very much. What I'm going to do is I'm going to give this some thought. I'll give a ruling on this at 2 o'clock, but I'll give more detailed reasons later. Thank you very much.

(A short adjournment)

THE CHAIRMAN: What I'm going to do is to give a series of rulings and directions. You don't need to take very detailed notes, because we've tried to reduce it into hard copy for you, but you'll want to just get the gist of what I'm about to say.

I make the following orders on the claimants' application dated 2nd February 2018.

(1) By 9th March, that is in one week, 2018, the third defendant is to disclose and provide inspection of -- and I'm not going to read them out now, but these are categories of documents which are readily accessible and include various hard-copy licences, and various letters, and you'll see these are set out in the note that you'll be given very shortly.

(2) And this covers the residue of the documents, by 23rd March, that's to say in three weeks, the third defendant is to disclose and provide inspection on a rolling basis, but using best endeavours, of all other documents. Again, these are set out in the note, but this covers the other categories of documents the subject matter of the claimants' application.

(3) If so advised, by 30th March, that is to say in four weeks, the third defendant is to file and serve any supplementary factual or expert evidence which it wishes to adduce at trial relating to the materials disclosed.

(4) If so advised, by 6th April -- that's five weeks from today and one week from any evidence provided by D3 -- so by 6th April the claimants are to file and serve a short supplemental report of their expert witness, of no more than five pages in substance, explaining his view of the relevance, if any, of the materials disclosed.

(5) By the same date, 6th April, claimants are to file a schedule identifying which of the materials disclosed pursuant to the order they intend to rely upon at trial, and that should be on an item-by-item basis, and the relevance or inferences that they draw from such documents.

That's the basic thrust of the order. We'll provide copies to you now. The draft which is going to be provided to you is subject to your joint elective editing and improvements.

We're going to leave it to the parties to perfect the order. It will require some tidying, but we've tried to just get to the details of the disclosure requirements into some form of drafted order.

There's one other observation to make in relation to the claimants' schedule: the schedule to be provided by the claimants is to reflect claimants' best case as at the relevant date, namely 6th April, of the relevance. In other words, it does not preclude development of the case later. The purpose is to provide maximum transparency to the defendants of the case they are to meet on these documents. So it's not intended to preclude or bind, but it is the claimants' best case at that point in time. So it's a form of pleading, and it will enable the defendant to know precisely what the case is against it at that stage.

As I say, we'll leave it to the parties to perfect this. There may be quite a bit of tidying-up you wish to do. We will gratefully accept all efforts at tidying up.

MR DE LA MARE: My Lord, as I understand it the purpose of that, as much as anything else, is to make the heavy written element of the case as effective as possible, because it allows the parties to join issue effectively early.

THE CHAIRMAN: Yes. Yes.

MR DE LA MARE: Well, we will do our level best to be as full as we can at that juncture.

THE CHAIRMAN: This timetable runs in parallel with the existing timetable.

MR DE LA MARE: Yes.

THE CHAIRMAN: There may be complications: we don't have the fifth defendant here, and it wouldn't be appropriate to start adjusting the other parts of the timetable without the other

parties here. But this is at the moment a discrete issue between the claimant and D3. There may, as with other aspects of the case, be ways in which the parties want to get together to see if they -- put it this way, I'm not averse to there being changes to this if it fits in the parties' agreement.

MR DE LA MARE: I think spirit of what you've indicated is very clear and we'll liaise with Mr Kadri and the other defendants and seek to give effect to that spirit.

MR KADRI: I'm happy to okay that.

MR DE LA MARE: A couple of remaining matters, my Lord. First of all, can I apologise on behalf of Mr Jones who is not here, but feared that not only having run out of oil he wouldn't be able to get home unless he complied with----

THE CHAIRMAN: Can you cope without him?

MR DE LA MARE: I just about can. I will struggle. (Inaudible).

The second matter, my Lord, it's probably sensible to give you a very general indication as to where we're going on timetabling in the case. Obviously we've got the PTR coming up in the last week in March. But at the moment, the thinking is that we're going to be considerably nearer a five-week trial than a six-week trial, not least because the early indications from the defendants are that they don't want much more than a week with our witnesses, and we are providing the very great bulk of the witnesses of fact in this case. And therefore we're hopeful -- and the parties are again liaising closely about this -- we're hopeful that the first week of the six-week window can, with a bit of juggling, be allocated to time for pre-reading and matters of that kind.

THE CHAIRMAN: Yes.

MR DE LA MARE: Not least because there are some complications arising from French Easter holidays and witness availability as well, so we're going to try and juggle around.

THE CHAIRMAN: Yes.

MR DE LA MARE: It may be that we start the opening at the back end of that week or something of that kind.

THE CHAIRMAN: Yes.

MR DE LA MARE: But I just thought I should give you forewarning of that. And then the last matter is----

THE CHAIRMAN: Well, what I will say -- I mean, I've skim-read some of the witnesses of fact. It seems to me there's quite a lot of repetition, quite a lot of it should be uncontroversial, and I would be surprised if it took a week to cross-examine those 20-odd witnesses.

MR DE LA MARE: We're delighted to hear that, my Lord. We agree, and as much as anything else, it's just to explain matters that probably can't be argued about.

THE CHAIRMAN: Yes.

MR DE LA MARE: Then that leaves the question of costs. Now, when we made the application, the draft application in the case of costs in the case, if there had been a prompt acceptance of the merit of our application, we would have left matters there, but we've been driven to coming here and driven to having this argument. We've won the application. We've taken a clear view that we were right to identify the matters as being relevant. The arguments on proportionality have been rejected, and in the ordinary way we would ask for our costs of this application.

THE CHAIRMAN: Now, your costs -- are these the costs attributable only to D3----

MR DE LA MARE: No.

THE CHAIRMAN: -- or are they global costs?

MR DE LA MARE: No, that's a fair point, they're not. (After a pause). It's confirmed they're the cost of all three and liaising with all three defendants.

MR KADRI: Sir, I wonder whether we can cut across this and simply say that costs should be left to be assessed if not agreed, rather than troubling your Lordship.

MR DE LA MARE: So you concede the principle and costs to be assessed if not agreed. Well, absolutely.

THE CHAIRMAN: That seems sensible.

MR KADRI: I'm grateful.

THE CHAIRMAN: Yes. I make an order for the claimants' costs to be assessed if not agreed.

MR DE LA MARE: I'm grateful.

THE CHAIRMAN: Just in terms of the trial, I know there's a pre-trial hearing in about three or four weeks' time.

MR DE LA MARE: I think it's 29th March.

MR KADRI: The 27th.

THE CHAIRMAN: The 27th. And obviously all I've done so far is skim-read the documents.

MR DE LA MARE: Yes.

THE CHAIRMAN: Now, I know, and we expect there to be, a substantial reduction of issues between experts so we can actually focus on what one really -- no, not crossed fingers!

MR DE LA MARE: Well, I know your views, my Lord, and we have borne them in all mind at all stages and we will continue to bear them in mind and we will do our level best to ensure that that's----

THE CHAIRMAN: I mean, I've read them and I can see where the main fault lines between the parties are, perfectly reasonably, and it's possible to identify those. There are some big issues between them, absolutely fine.

MR DE LA MARE: Material issues and non-material issues.

THE CHAIRMAN: Material issues and non-material issues, and again there may be scope for disagreement as to non-material.

MR DE LA MARE: Yes, absolutely.

THE CHAIRMAN: But parties should be -- experts should be able to agree even on the scale of immateriality or materiality.

MR DE LA MARE: Absolutely.

THE CHAIRMAN: We need experts' views on those sorts of things.

MR DE LA MARE: Well, Mr Holt, as I can say, is well aware of the need, and I think it's evident from his first report, he has tried to identify the points of counsel of perfection versus the areas of difference which are not going to produce big issues.

THE CHAIRMAN: Yes.

MR DE LA MARE: We will move that approach through the reply evidence and hopefully through the joint memorandum.

THE CHAIRMAN: Yes. So this is a case where it's likely that there will be fairly extensive openings, because a lot of the groundwork, on both sides, will -- but if we have a lot of the stuff in writing in advance and have got reasonable pre-reading, it may well be the first three, four, five days are taken up with openings.

MR DE LA MARE: I think it not unlikely that we're going to require something in the region of two, two and a half, maybe as much as three days to open for that very reason, not least because at the moment, so far as I can see, the defendants, subject to their responsive points to the schedule we're going to be filing about licences, are going to have very little to say on the mechanics of the cartel, because they've actually got no positive case beyond that contained in the settlement decision. But anyway----

THE CHAIRMAN: But, you see, no doubt you will be able to produce some form of descriptor document.

MR DE LA MARE: We're doing exactly that.

THE CHAIRMAN: And if the defendants wish to challenge it, they will adduce evidence so to do. I mean----

MR DE LA MARE: Or argument.

THE CHAIRMAN: -- a lot of it can be based upon documents----

MR DE LA MARE: Yes.
THE CHAIRMAN: -- and inferences to be drawn from documents as to how the cartel operated.
MR DE LA MARE: Yes. I think there's likely to be relatively extensive legal argument on that very topic of inferences.
THE CHAIRMAN: Oh yes, but that will be really for us to decide at the end of the day and judgment as to what we decide we can infer or conclude from the documents.
MR DE LA MARE: Yes.
THE CHAIRMAN: As supplemented by further evidence.
MR DE LA MARE: Yes.
THE CHAIRMAN: Yes. And once we have an understanding of how the cartel operates, which, you know, we've all seen cartels before, there's nothing mystic, mystical or magical about them, and I, from what I've seen, I could probably begin to sketch out its broad terms already with the assistance of the Commission decision. So there may not be a huge amount more. But, you know, the number of meetings, the way in which the parties operated, the sorts of things they discussed; well, you can begin to see that from the documents already.
MR DE LA MARE: Yes. Again, by contrast to a conventional case, what we miss is detail of the bigger picture, so to take another cartel, let's say a widgets cartel, very often you will have insight and access to exactly what they've been doing to your competitors as well. So you'll see that they've been doing X, Y, Z, let's say. In relation to the other OEMs, you'll know that they've been stitching up BMW or Volkswagen in this way. We don't have access or insight to any of that, so it's very much inference as to the how the cartel more broadly operated.

And of course you can see how a project for, say, PSA might be traded for one of, say, for the sake of argument, VW, or the document that shows that might be in the VW rather than the PSA documentation. That's a further complication, given the documentary matrix.
THE CHAIRMAN: Yes. Well, it may just come down to the standard of proof.
MR DE LA MARE: Yes.
THE CHAIRMAN: We will simply -- you'll be putting forward a model of the way you say it works and the defendants will say either we agree or disagree and we will decide on those aspects where they disagree when we get there.
MR DE LA MARE: Indeed.
THE CHAIRMAN: And thereafter there's the three main issues of causation, overcharge and passing on.

MR DE LA MARE: Yes. Passing on is, as we understand it, the law effectively as decided by this Tribunal, subject to what's been argued in parallel in the Court of Appeal.

THE CHAIRMAN: Yes. I ultimately came to this conclusion: I think five weeks is generous.

MR DE LA MARE: Probably is. Probably is.

THE CHAIRMAN: Because it's really openings, which will deal with the documents; witnesses of fact, which will be entertaining, but which will add a certain amount of----

MR DE LA MARE: I wouldn't get your hopes up too much, my Lord, particularly now some of the witnesses won't be coming. I think it might be markedly less entertaining.

THE CHAIRMAN: I suspect my -- and then there will be the experts.

MR DE LA MARE: That's right.

MR KADRI: Sir, the only caveat I would add is merely to echo what Mr de la Mare said about witness availability. We are doing our best to firm up dates to avoid unnecessary gaps in the middle of the trial. I don't want to say too much because I can't speak for Mr Singla, who is obviously coming out of one trial and simultaneously preparing for this one, but I think there will be some more clarity in the next week or so.

THE CHAIRMAN: But there may be availability issues on the Tribunal's side, but we'll all have to just manage that.

MR DE LA MARE: Yes.

THE CHAIRMAN: That might be perhaps why five weeks is a reasonable time.

MR DE LA MARE: I think we may have a fallow day here or there, because I think all of the parties have predominantly French or French-based witnesses, and there our issue is of strange post-Easter holidays. Depending on what district you are in, in Paris or in France, you get to take your holidays in different weeks, and that's impacting, along with a healthy array of French public holidays in May: Bastille Day, et cetera. Or not Bastille Day (inaudible). We're going to have to navigate all of at that, but I'm sure where there's a will there's a way.

THE CHAIRMAN: Very good. Good, anything else?

MR DE LA MARE: No.

THE CHAIRMAN: Well, I'll produce reasons for the decision next week sometime.

MR DE LA MARE: I'm grateful.

THE CHAIRMAN: Thank you all very much indeed for your assistance.