IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1357/5/7/20 (T)

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP
(Remote Hearing)

Monday 14 June 2021

Before:
The Honourable Mr Justice Jacobs
(Chairman)
Professor John Cubbin
Eamonn Doran

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Stellantis N.V. (formerly Fiat Chrysler Automobiles N.V.) & Others

Claimants

v

NTN Corporation & Others

Defendants

A P P E A R AN C E S

Paul Harris QC (On behalf of the Claimants)
Robert O'Donoghue and Hugo Leith (On behalf of the Defendants)

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Monday, 14 June 2021

(10.30 am)

(Proceedings delayed)

(10.38 am)

MODERATOR: We are now live. Case 1357T Stellantis N.V. and others and NTN Corporation and others.

THE CHAIRMAN: Good morning, everybody. As you can see, the Tribunal is here together in the courtroom at the CAT. I hope you can hear me, Mr Harris, Mr O'Donoghue; can you? Good.

We have all read the materials and we have had a preliminary discussion, but obviously we will be interested in what you have to tell us.

Just before we start, just a couple of points.

A full Tribunal has been constituted in the light of the disagreement between the parties as to how to approach matters. It seemed to me to be the sensible thing to do and as I understand it, Mr O'Donoghue, you do not object to the full Tribunal dealing with the application; is that right?

MR O'DONOGHUE: My Lord, yes. On a number of these points there is a risk of being too Cartesian. We want to be pragmatic and we have no objection.

THE CHAIRMAN: Good. All right. Secondly, Mr Harris, in your opening submissions there is reference to your

considering reserving your position as to whether you are making a strike out application. You say it is dependent on certain things and certain course of conduct thereafter, but as I understand it, you are effectively making a strike-out application or summary judgment application; is that right?

MR HARRIS: It is right, Sir. I do have a comment to make about trial timetable and I will make that at the end of my introductory remarks in just a few moments so as to make the position 100 per cent clear.

THE CHAIRMAN: Good. The other thing which I want to raise -- and we can do it at the end of the hearing -- is this: we have now seen the witness statements which have been served, obviously we have not seen any evidence yet, but we are interested, if I can put it this way, neutrally in whether the hearing is actually going to last ten weeks. We have four factual witnesses relatively short statements, I appreciate there is some expert evidence to come, and I think we would like both of you to address us at the end on what a realistic timeframe is for the actual hearing, including pre-reading, but we can come on to that.

MR O'DONOGHUE: Certainly it was the point, if you recall, I raised at the last hearing as to whether indeed we would need all this time. I sincerely doubt it, but we

will come back to you on that.

THE CHAIRMAN: Good. All right. Thank you.

Mr Harris, I think it is really your application, so you can start. Just in terms of timing, it is our aim to finish everything within the morning and give us, the Tribunal, some time, so I think you can have equal time between you, we can have a break. I would not have thought that you would necessarily need to be more than half an hour, 45 minutes, or something like that.

MR HARRIS: Well, Sir, with your permission, we had provisionally agreed an hour for me, short break, Mr O'Donoghue for an hour with a very short reply, but I am hoping not to take a full hour. I think you may have a hard copy core bundle which some authorities at the back and then I think that you may have electronic access to the bundles from 10 May hearing. I did not appear on that occasion, as you will recall my junior Mr Woolfe appeared and Mr O'Donoghue appeared for the defendants.

May I simply make a housekeeping enquiry: do you see me satisfactorily on screen? I was told earlier by a colleague that I was not appearing in the centre screen.

THE CHAIRMAN: Yes, we see you fine.

MR HARRIS: Good, I am grateful.

Opening submissions by MR HARRIS

MR HARRIS: May I just begin with a very quick reminder of how we got here? On 10 May, there was a disclosure application and four categories of disclosure were sought by Mr O'Donoghue's clients and significant evidence was adduced by both sides and judgment was reserved on the four categories. Now, I do not propose obviously to say anything about the four categories or to go back over previously filed evidence, save only to say that three of those categories related to this plea that we are now debating of mitigation by way of so-called costs reduction, but one of them did not, one of them was simply about pass on of costs. As far as I am concerned, all of that is water under the bridge and one category is totally irrelevant for today, so that is just a matter of the Tribunal giving its reserve judgment.

What happened, as I have been instructed, at that hearing was at the end of the full argument, based on the evidence on the four categories, my learned friend Mr O'Donoghue said that there was possibly a relevance of a judgment that was expected imminently in Royal Mail and indeed the hearing was on 10 May and that judgment did in fact emerge three days later on 13 May. Obviously, most of this in my oral submissions will be

about that judgment and their application to this case, I will come on to that in a moment.

Just one day before that judgment emerged -- and importantly for today's purposes two days after the full argument had been had on the disclosure hearing -- my learned friend's team produced something calling itself voluntary further particulars and obviously that is going to feature later on in my oral submissions, but it is just important to remember what the chronology was. It was produced after the hearing, after the full argument and indeed before the judgment in Royal Mail which came the very next day. Then, of course, what happened was you, Sir, Mr President, directed that there be argument, as I have clearly understood it, today limited to the implications or the impact of Royal Mail. Nothing that was already argued, nothing about other aspects of allegedly unsatisfactory disclosure and I simply raise that for this reason, that in the period since the 10 May hearing and up until today there has been, to my great regret, oodles of correspondence about alleged unsatisfactory this and non-provision of that and all of the sorts of stuff that I simply do not propose to address any of it unless it is addressed by Mr O'Donoghue, in which case I will deal with it very briefly in reply.

As far as I am concerned today's hearing is about Royal Mail and its implications on the reserved judgment. That has two particular aspects to it. There are the implications of the Royal Mail judgment upon the existing amended defence that you will find in the hard copy bundle at tab 5, I will turn to that in a minute and then the implications of the Royal Mail judgment upon the so-called voluntary further particulars that appear in the hard copy bundle, over three pages, at tab 6.

If we could just turn up the tab 5, you will see, I hope in red on the page SO24, a paragraph 41c of my learned friend's amended pleading. This is the first part of the submissions that I am going to be making. It says in red, brackets, in the third line down:

"(Including, without limitation, through reducing their other costs)."

That is the full extent of other costs mitigation. That's it in the pleading. Then you will see that that is essentially repeated in red four lines up from the bottom:

"(... otherwise mitigated it, including through reducing their other costs)."

The final sentence is less relevant, it is just the implication for disclosure and burden and I do not

propose to address that.

In outline, my submission is the Royal Mail judgment that came out after the argument on 10 May very substantially supports the oral and written submissions that were made by Mr Woolfe on 10 May for and on behalf of my client that the amended defence that I have just shown you was totally insufficient, totally defective and insufficient, and indeed Mr Woolfe on that occasion used the phrase "liable to be struck out" and as I shall develop in just a moment, I do say it should now be struck out.

Then, just so that you know, on tab 6, having no doubt heard the difficulties that faced him on his case at the document on tab 5 that was before the court on 10 May, Mr O'Donoghue's team produced two days later three pages of so-called particularisation of those eight words in red that we just looked at. After the hearing was completely over. I shall come on to submit that the Royal Mail judgment does not provide any support for them. Indeed, they should be struck out as well. Or permission, more accurately, permission should be denied to allow them to be adduced, if you like, into the case in whatever form you consider they really take.

In a moment, that is going to be the bulk of my submissions, albeit fairly short.

Just before turning to them and at the conclusion of these introductory remarks, can I just, please, thank the Tribunal for convening in full. I have nothing else to say about that in the light of your opening remarks.

Then, secondly, there is the point that you asked me about at the very beginning. We do have a substantial concern about trial timetable. As you know, this case is set down at the moment for 10 weeks starting in mid-January and we do not want to see that date shifted at all.

The concern that we have is that if I am successful today, particularly in striking out a part of a pleading before the full Tribunal, then at least in theory my learned friend could seek permission to appeal and the concern that my client has is that if I were to win and if my learned friend were then to seek permission to appeal, in our respectful submission it should not be allowed to have any impact upon the trial timetable. It should not shift the date that's set down and has been set down for a long time in mid-January.

Now, of course, if I lose there is no particular problem because the Tribunal will either order more disclosure or it will not and if there is to be an order for disclosure then that will have to be dealt with by my team in prompt order, and if there is any need for

any further witness evidence from either/or both sides again that will have to be dealt with promptly.

What we respectfully contend cannot be permitted is if I were to succeed and then my learned friend seeks permission to appeal, he then turns to this Tribunal and says "oh well, of course, now because I am seeking to appeal on a matter of substance in the pleadings, the trial timetable has to be postponed".

I raise this point now because I have clear and expressed instructions that if the Tribunal were not minded to carry on with the trial in January 2022 in the circumstances that I have just outlined, then my client would not like to press the Tribunal today to make a formal order for strike out. If you are not minded to carry on with the trial in the circumstances I have just outlined, then we do not seek to press for a formal order striking out the plea. Instead, if you are not minded to carry on with the trial regardless, I will be making the same substantive submissions about the weakness of the plea in those 8 words in red in tab 5 and the weakness of the pleas in the voluntary further particulars at tab 6 and instead of asking you to make a formal strike-out order, I would instead be submitting that for the same reasons of substance that they are so weak, those reasons of substance should be taken into

account by this Tribunal as reasons why it is disproportionate and unreasonable and not the right thing to do to order any disclosure.

So I hope that that is clear.

I appreciate, of course, that it is not easy for this Tribunal to say now at the end of my opening, introductory remarks in opening submissions, that it will definitely do one thing or another in the event that I were to succeed and my learned friend seeks permission to appeal. Nevertheless, those are my clear instructions and I hope I have at least conveyed them clearly.

THE CHAIRMAN: Right. Let me just say a few things.

First of all, the disclosure application which you have referred to which obviously is something which I am dealing with and I am entitled to deal with on my own, it was argued before me, and I do not mind letting you into a secret that actually I did draft a judgment the day after the hearing and then things developed as they have and I have not therefore released any judgment and it seemed it me that I should wait and see how this whole debate developed before I did that.

The disclosure part of it remains with me, not with the full Tribunal, but obviously will be impacted by any decision that is made in relation to the strike out

application.

As far as the future conduct of the case is concerned, the position at the moment is that the hearing is scheduled to take place in January and there has been no application by Mr O'Donoghue and his clients to adjourn that and I tend to think myself -- and I have not discussed it with the other Tribunal members -- that you, Mr Harris and your clients, have to decide whether you are making an application. If you are making an application to strike out or summary judgment, whatever you want to call it, then you make that application. The Tribunal will deal with it on its merits and will decide whether it has sufficient merit.

One consequence may be that possibly, if you are right, that this gets struck out and then, if Mr O'Donoghue wants to apply for permission to appeal or whatever, he can do that and if he wants to make applications consequential upon that application, he can do that and the Tribunal will deal with that as and when it arises. The way I see it for myself -- and I have not discussed this with the Tribunal members, it is quite simple -- you must decide what application you are making, the Tribunal will decide the merits of that application. If there are then consequential applications which arise, the Tribunal will deal with

those on their merits as and when they arise, but I do not think we should now get into an argument about contingencies, which may or may not arise.

MR HARRIS: I understand. I am very grateful to you, Mr President. Subject to any contrary instructions that I receive electronically, because I am having to do this hearing from home, I will press on and make the application for the strike out and I am going to do it in three parts, fairly briefly. I am going to identify four propositions out of the Royal Mail judgment. That is part 1. I am then going to say in part 2 that the eight words repeated twice in tab 5 are hopeless and should be struck out. Then I will deal with why the voluntary further particulars, so-called, do not survive Royal Mail either.

The first of the propositions -- I am not going to go into Royal Mail at any length because, of course, the Tribunal is familiar with it and has had an opportunity to read and discuss it.

THE CHAIRMAN: Could I just say: I think, as far as I am concerned and I suspect from the perspective of my Tribunal members as well, at least the way I see it is that the eight words, if those were all there were in the amended defence, if that was all we had there would be a big problem in relation to Royal Mail for the

defendants and I think Mr O'Donoghue's service of particulars in a sense reflects or anticipated that problem. I am not sure you necessarily need to spend a huge amount of time on the eight words, I think the Tribunal is much more interested in the voluntary particulars and whether that, if you like, takes the case away from Royal Mail.

MR HARRIS: I am very grateful and in that case part 2 of my submissions is already complete. That is to say the eight words by themselves would not survive.

But the first proposition from Royal Mail, in my hard copy bundle it is tab 38 and I would invite you, please, just to turn this up. It is the first of four short propositions. It is at paragraph 35 of the judgment. If anyone wants the page number it is SO524. That proposition is to be found in the first sentence.

"... it cannot be enough for a defendant to plead that a claimant's business input costs as a whole were not increased, or that as part of the ..."

These are the critical words:

"... as part of the claimant's business's ordinary financial operations and budgetary control processes its overall expenses were balanced against sales so that profits were not reduced."

It goes on.

"There must be something more...

"There must be something more to create a proximate causative link..."

That is proposition one and it is of central importance to today. The reason it is proposition one -- and my respectful contention obviously correct statement of the law -- is that because ordinary behaviour would have happened anyway, that is why it is ordinary and if it would have happened anyway, it cannot sensibly be said to have been triggered by or caused by or provoked by the infringement or the overcharge.

The second proposition is to be found in a number of places in this judgment. One is on the same page at the bottom of paragraph 33. There must be "some basis other than pure theory", that is one place it is found and the same proposition is also to be found in paragraphs 36, you must have "something more than broad economic or business theory", and it is also repeated at paragraph 43.

So that is the second proposition.

The third proposition is that there must be something in the facts of the case to establish sufficient proximate or direct causation and that something must be a "plausible factual foundation" and here I am quoting from paragraph 43 of the judgment.

You have to have something in the facts, you cannot just have pure economic theory and what you do have in the facts must be both plausible, or another way that it is put at paragraph 37 is there is a "degree of conviction". In my respectful submission they are essentially synonymous for today's purpose. Plausible carries a degree of conviction and what is that plausibility or conviction; what does it go to? It must go to the question of sufficient proximate link, i.e. causation. If it is plausible facts about something that is not causation, it is neither here nor there.

That is the third proposition.

Then the fourth proposition is that sometimes relevant facts can be pleaded from which a reasonable inference of sufficient proximate causation can be drawn and the CAT in that case, Royal Mail, identified four examples in paragraph 42 of the judgment so I am now on that page and they were as follows:

Number 1, the victim's knowledge of the nature and the amount of the overcharge. Of course with a trucks case was also a secret cartel and a follow-on damages action. So they are highly analogous. Number 1, victim's knowledge.

Number 2, that there might be a high proportion of

spending by the victim on the cartelised product. The inference to be drawn from that is that the higher the proportion of that expenditure, the more likely that the victim will have tried to do something about it.

Number 3 is that there might have been what the CAT in that case called the relative ease with which the claimant's business could be expected to reduce certain input costs, and I am going to be addressing that one in terms because Mr O'Donoghue seems to try to rely upon it.

Then the last one is that the victim tried to cut other costs in response to the overcharge. The other is important of course. What they are talking about is you are mitigating the supposed damage on one cost and the victim turns to other costs and reduces them. That is said by the cartel, as defendant, typically to amount to a mitigation, but it is critical that its other costs are allegedly reduced in a sufficiently proximate manner.

Those are the four propositions that I draw from Royal Mail and, of course, that is part 1 of my submissions finished.

Part 2 is the eight words. Well, none of those points apply to the eight words and so the eight words on their face are hopeless, there is simply no basis at

all for sustaining the plea in paragraph 41(c).

No facts at all, not even any general economic theory, there is no proximate causation and not a single one of the four bases for drawing an inference is pleaded or even attempted to be pleaded. End of story.

That then takes me on to part 3 of my oral submissions which is what difference do the so-called voluntary further particulars make, if any? As a preliminary matter, certainly on one view, the voluntary further particulars, as they are so-called, provide no assistance because you can only particularise that which is in your existing pleading and my submission is that existing pleadings should be struck out in limine as it is hopeless. On one view, that is the end of this strike-out application.

However, just in case you want me to address you in more detail on the substance, my submission is that the so-called voluntary particulars suffer from many of the same flaws as the main pleading and that is why I identified the four propositions. Let us take those four propositions and apply them to the documents at tab number 6.

I do not propose to read it all out. You are familiar with it and it is only three pages.

Being familiar with it, you will see, in my

respectful submission, that it amounts to no more than a plea of "ordinary financial operations and budgetary control processes". That is what I cited as my first proposition from paragraph 35.

If you were, for example, to turn to the top of the second page of the particulars at tab 6, you would see that the facts that are relied upon do not and cannot amount to anything other than ordinary controls and processes. It says that 3a):

"At all material times:

A) FCA sought to control the cost of inputs..."

Well, what is extraordinary about that? Nothing. Not only is there nothing extraordinary about it, but there is no plea that it is extraordinary. On the contrary, it says at all material times this is how FCA behaved. Yes, it is. That is how. That is what FCA's evidence says and, what is more, that is what my learned friend's evidence for trial says. It did behave like this, it behaved like that in a normal and ordinary course of events by way of financial operations and budgetary control processes.

Exactly the same applies to 3b). I beg your pardon, "to control these costs FCA would..." Exactly. We accept that that is what we did. We did it all the time as a matter of our practice and there is not a plea to

say otherwise. It is not even suggested that this is bizarre, unusual, extraordinary or out of the norm. Again, I rely on FCA's evidence but you have had regard to the factual evidence for trial and you can see this is how FCA behaved in an ordinary course of events.

Next fact, 3c): "These costs targets were set prospectively." Yes, agreed. Again, totally ordinary, run of the mill, that is how we behaved, our evidence has not said otherwise.

Then it applies to 3(d) and 3(e). Benchmarking, yes.

"FCA also had in place various systems for monitoring supplier performance in the EEA."

My principal submission is that this does not get past first base, it does not get past the first position identified from paragraph 35 of the Royal Mail judgment. Again, I just reiterate: why is that important? It is important because if something is ordinary, it happens in any event, it just happens every day as a matter of run-of-the-mill operations, then it cannot have anything resembling a sufficiently proximate causation to the overcharge. It happens anyway and that is the end of my learned friend's entire document.

It does not end there because the next proposition that I rely upon as against my learned friend's document

at tab 6 is that there is obviously no knowledge on our part of this being a cartel, so that is not pleaded. There is no suggestion that this was a large proportion of our costs and if you wanted the reference to that there is uncontroverted evidence, I will not read it out, the percentage figure is tiny, but for your note the reference is paragraph 53 of Ms Whiteford's first statement, which was in support of the disclosure hearing on 10 May and you will find that in the disclosure hearing bundle, tab 8 at page 0395, and it provides you with the tiny percentage that the bearings costs make up of the cost of a car which is hardly surprising.

What we do not have is a plea that we knew. That was one of the points from paragraph 42 of Royal Mail and we did not. What we do not have is a plea that it was a great or significant or indeed any proportion of our costs, but so that you know the proportion was tiny and I have just given you the evidence. What we do not have is any plea that it was extraordinary or unusual or out of the ordinary or anything and it was not. Even on my learned friend's own pleading it was not. So three out of four of the points that he might potentially rely upon are simply not present and he does not suggest otherwise, his pleading does not suggest otherwise so

that only leaves the fourth possibility that I said I would come back to. That is the one in paragraph 42 of Royal Mail that talks about "Relative ease" of cost cutting.

I respectfully invite you to peruse at your leisure as many times as you like the document at tab 6 and search for the word "ease" or "relative ease" and you will find that it is not there and there is nothing synonymous with "ease" or "relative ease".

There is no plea of the fourth type of example given by Royal Mail judgment at paragraph 42. There is simply no plea about anything. The ease, the difficulty, the relative ease, the relative difficulty or anything to do with how FCA can control or cut its other costs. Just not present.

I also invite you to note that not only is it not pleaded, although my learned friend somehow now, as I apprehend it, seeks to rely upon that aspect of paragraph 42, but as you will have gleaned during the course of the case management of this case, NTN -- and as indeed set out in the trial witness evidence -- NTN is a long-term supplier of bearings to my client for many, many years, decades in fact. Indeed, Mr Linati, for my learned friend's side, seeks to make a virtue of how close and long-standing the relationship has been

and yet notwithstanding the longevity and closeness of that relationship on both parties' evidence, my learned friend's team has found itself unable to plead anything to do with ease or relative ease.

Now, it could have potentially, at least in theory given the longevity and closeness of that relationship, said that: "we, NTN, we do actually reduce the costs of our other supplies to you" and that would be prima facie evidence of other cost mitigation. It would be particulars of the eight words in red at tab 5, that, "we, NTN, we reduce our other costs when you complain to us about the costs of bearings." There is no such plea in this document. It does not exist.

Now, it might be potentially that NTN does not supply any other things apart from bearings. Well, if so, that is not capable of being pleaded, but it equally has not been able to plead that he has facts concerning the reduction by his client of the costs of other material supplied to us. So that is off the table.

Notably, that was the same position that DAF faced in Royal Mail, you may recall. DAF did, in fact, supply other things beyond trucks to Royal Mail and was not able to say that it had factual evidence of Royal Mail seeking to reduce the costs of those other

supplies, supplied to it by DAF, but the same is true here so that fails.

Notably, NTN, again very long-standing and close relationship so the evidence says, it also has not been able to do the following in its voluntary further particulars, it also has not said "well, you know what, FCA, we have knowledge that you, FCA, have faced increased costs on some other supply..." -- I do not know, windscreens for the sake of argument -- "... and you FCA have turned to us, NTN, and you, FCA, have said to us, NTN, 'I want to reduce my other costs' those other costs being bearings in this example and you, NTN, you now have to reduce those other costs." NTN has not pleaded that either.

It is just not present.

So whichever way you look at it there is no plea of ease, there is no plea of relative ease and there is no plea of any fact even remotely resembling other costs mitigation, reduction of other costs and that is notwithstanding that long-standing and close relationship.

So, in my respectful submission, what that means is there is absolutely nothing in these voluntary further particulars so-called and in this regard, I will not turn it up you have seen the reference in my skeleton,

just respectfully remind the Tribunal that in any event, voluntary further particulars cannot, in my submission, cure a defective pleading and the reference to that is paragraph 52 of the Barrowfen case which is to be found at tab 37, and although you do not need to turn it up, the relevant passage simply reads:

"It is not possible for a party to avoid the deficiencies in a statement of case or the need for an application to amend by serving further voluntary information and CPR Part 18.2 does not permit a party to do so".

That, in my respectful submission, is what my learned friend is seeking to do here. He is seeking to take a wholly defective pleading that cannot stand on its own two feet and essentially amend or alter or supplement it by this late document. I say that is not a proper course, but in any event, on the substance when you run through it, it amounts to absolutely nothing.

For good measure and nearing the end of this part of the submissions and then that is nearly the end of my submissions, we say there is nothing at all in the final point, paragraph 9 of the document at tab 6, an attempt to rely upon the heavy evidential burden as referred to in the Sainsbury's case in the Supreme Court. There is nothing in that it is just a makeweight because if

you do not have a proper pleading, which is what the argument today is about, there is no obligation to make any disclosure or provide any evidence. If and insofar as either in correspondence or in oral submissions that we are about to hear in this document my learned friend is somehow seeking to rely upon the evidential burden, it is back to front. He has to have a proper pleading before there is any burden on me to do anything.

Then, finally, I rely upon some further slightly more detailed submissions in our written case and you will find them at tab 2 of this hard copy bundle. I beg your pardon, tab 1. It is page SO5 of the bundle and it is paragraph 7.5. I only do this for the sake of completeness. For the sake of completeness, I continue to rely upon what my learned junior and I wrote at paragraph 7.5 which is on top of the reasons that I have already given as to why the so-called voluntary further particulars are unsustainable, in any event, they are riddled with holes just on the internal logic. They require a series of unpleaded premises. I will quickly run through them lest there be any question, but they are fairly straightforward.

The logic or the supposed logic of the document at tab 6 is that the costs target operated as a hard cap which could not be exceeded, but there is no basis for

that. There is no factual basis for that. On the contrary, the document begins by suggesting that these are benchmarks at which FCA sought to aim, that is why it says at tab 6, paragraph 3a) "FCA sought to control the costs of inputs purchased from its suppliers." It does not say -- and nor could it – "FCA always succeeded 100 per cent in the time in achieving its benchmarks." That would be a wonderful thing if we could do that, but sadly that is not life for my client and in any event it is not pleaded. Yet that is an unpleaded premise of the document.

The second premise -- and this is at 7.5.2 at the bottom of page SO5 -- the second premise is that the claimants, that is my client, otherwise ran their costs at or above the costs target because what my learned friend is saying is you were then able to -- or appears to be saying -- you were then able to bring them down. But if we already controlled our costs below the target, then even on my learned friend's voluntary particulars there is no basis for suggesting that we would be able to negotiate them down yet further.

He could have tried to plead both of these premises if he had not had any facts, but notably they are not pleaded and secondly, he does not have any facts.

Then that takes me on to the third and fourth

premises at the top of page SO6:

"The third unpleaded premise is that [my clients] negotiated down [our] costs only to the extent required to meet the target, and not as far as they were able."

So it is very close to the second premise, but there are no facts supporting that premise and it is not pleaded.

Because, of course, if we negotiated down all our costs as low as we could in any event, then it does not follow that an increase in one cost, ex hypothesi the bearings, would be able to cause, let alone on a sufficiently proximate basis, us to negotiate down other costs. They were already as low as they were going to get. My learned friend's pleading ignores all this and yet it must be part of his case.

Then the fourth and final premise is that -- unpleaded, of course -- somehow the internal logic must be that we could only meet a cost target by negotiating down other costs and my learned friend needs that, that is a critical part of his plea. Mitigation of other costs requires us to negotiate down other costs, otherwise the plea fails. Of course, there is no basis for alleging and no facts are pleaded to allege that we might not have done something else. For example, the example we give in the pleading is we might have reduced

other discretionary spending. For example, on design of the product, producing a lower spec product. What we know from Sainsbury's -- and I do not need to turn it up, I have given the reference there -- is that reduction of these other types of discretionary spending is not other costs mitigation. It is irrelevant to my learned friend's case.

My point, by way of conclusion, is that we have got the four headline points from Royal Mail and my learned friend is not able to meet any of them. He does not even appear to try to meet three of them that we knew we were a victim, that there was a very large proportion of our expenditure or that the four particular examples that were given in paragraph 42, the most he seems to suggest in his written argument is that it is somehow a case of "relative ease" but that is hopeless because he does not use the word "ease" or "relative ease" and even if he did, or anything synonymous, there is no factual foundation to it. To the contrary, this is just ordinary business. On top of all of those difficulties, there are the internal illogicalities of his plea that he is not able to address that I have just outlined and that are written down in paragraph 7.5.

Then, as a subsidiary and final matter, as we say in

paragraph 8 of that document, we also rely upon the unusual lateness of this document. I say that because it is relevant, we say, to your discretion and whether or not you admit the document.

These pleas are said to be other cost mitigation of the variety that is talked about in Sainsbury's, the Sainsbury's judgment came out on 17 June last year, so almost exactly a year ago, and yet the voluntary particulars emerged one month ago with the trial set down, as you know, in January of next year. We say there is no basis and no proper basis has been put forward for why these pleas were not adduced a lot sooner and, of course, the Royal Mail judgment cannot be the answer because these were produced prior to that judgment, albeit by one day.

Those are the submissions that I wish to make unless there are any further questions. I have been told by those instructing me that there are a couple of much more minor housekeeping matters at the very end, but I do not need to address them now.

Questions from THE TRIBUNAL

THE CHAIRMAN: All right. Let me give my colleagues a chance to ask you any questions. Professor Cubbin? Right, okay.

Can I ask you a couple things, Mr Harris.

MR HARRIS: Yes.

THE CHAIRMAN: In paragraph 42, you have referred and the other side referred to the relative ease with which the claimant's business could be expected to reduce certain input costs or input costs generally, and you said that there is no plea in relation to that.

Why is it that that factor would support causation? Why is the Tribunal there saying that that factor would support causation? Is it saying that that fact on its own would support causation or is it saying that it is something which might in combination with perhaps some of the other factors that would support causation. Can you help us on that?

MR HARRIS: Yes, I am delighted you asked me that question, Mr President, Mr Chairman. The answer is by itself it could not support, it could not be sufficient and the reason is that you must have, in any event, sufficient evidence of direct or proximate causation and the mere fact of ease or relative ease does not amount to sufficient or direct or proximate causation.

I 100 per cent agree with the proposition that you are putting to me and I therefore interpret paragraph 42 to mean that relative ease on any given fact pattern which fact pattern as well allows you to link an approximate sense the relative ease with the fact of the

infringement or the overcharge. I accept that it does not say that in that final sentence of paragraph 42, but it does say elsewhere that you must have a sufficient causation and perhaps the best place to see that is paragraph 36 with the underlined word "and". What that one says is one of the examples where it says:

"Something more than broad economic or business theory to support a reasonable inference [must exist] ... and [which is underlined] that the steps taken by it were triggered by, or at least causally connected to, the overcharge..."

The only fair way of reading paragraph 42 is even if there were ease or relative ease and there were facts to support it, by itself it would not be enough unless it also could be said to support an inference of the second part of 36, namely triggering or causally connecting to the overcharge.

My learned friend has that difficulty as well. That is my answer to your question, Mr Chairman.

THE CHAIRMAN: Okay. The other thing which I want to ask you is: is your paragraph 7.5 --

MR HARRIS: Yes.

THE CHAIRMAN: -- in your written submission page S05 and you have drawn attention to the absence of certain pleadings and I think you are saying the pleading is

deficient. Do you have a broader point which is based upon this paragraph 7.5 which is, I think, related to how causation actually is said to work? I mean, because you say elsewhere that everything is speculative in terms of the theory which NTN is advancing. The theory which NTN is advancing is that because there is this process of aiming at a target, it therefore follows that costs were reduced if there was some unknown overcharge in the bearings charges.

I just want to understand how these points relate. Is this paragraph 7.5 simply a pleading point? Does it relate to your other arguments about the speculative nature, as you characterise it, of the cases put forward? Could you just explain how you see it or is it just a pleading point?

MR HARRIS: No. They came last at the end of the submissions because the principal submissions are the ones based upon the four propositions from Royal Mail and, in particular, this is all just ordinary, so there cannot be a causal connection.

These points, if you like, I still rely upon them but they are subsidiary to those principal points and I would not describe them as nothing but pleading points, they do go to the speculative nature of my learned friend's case because what he is seeking to

invite you to infer is that there must be a causal connection and he has to do that, otherwise he fails and what these paragraphs, sub-paragraphs, do is just identify that even on his own case there could be lots of other things going on and he would need to overcome all of these points as well, but he cannot.

Interestingly, not only can he not do it, but he has not even tried and he does not have the facts. It is a pleading point in the sense that to overcome these points he would have to plead facts and then plead "well, it cannot be this, it cannot be that, it cannot be the other, therefore it must be what I want". He cannot do that and he has not done that. Again, you do not need, in my respectful submission, to have regard or to place any reliance upon these points in 7.5 if you are already with me on the fact that fundamentally he has got a problem in establishing anything resembling proximate causation because he just does not have the facts.

THE CHAIRMAN: Yes. I mean, in due course, if there were to be a trial on this, you would no doubt be saying that there are all sorts of possibilities as to what led to the alleged cost reductions pursuant to the targets and unless it can be shown positively that they were a consequence of the overcharge of bearings, the case

1 does not get anywhere. I mean, that is your fundamental
2 point, as I understand it.
3 MR HARRIS: Yes. If they were to survive that is right and
4 so you have exactly got the main point. There is
5 nothing in here and nothing in the documents that shows
6 anything other than just ordinary -- if I go back to the
7 very first proposition -- financial controls and
8 ordinary budgetary processes.
9 If one takes a step back and asks: Is that remotely
10 surprising? Answer: no. It is not remotely surprising,
11 that is exactly what you would expect a well-run large
12 OEM, such as my client, to try to do every day of the
13 week; control its costs carefully, employ financial
14 controllers and budgetary controllers to do that which
15 the evidence sets out that it tried to do.
16 THE CHAIRMAN: Okay. All right. Thank you very much,
17 Mr Harris, there is nothing else I want to ask.
18 Shall we take a ten-minute break now? Is that the
19 agreed plan between you and Mr O'Donoghue and I think I
20 may have approved that.
21 MR O'DONOGHUE: Yes, more for the shorthand writers.
22 THE CHAIRMAN: Yes.
23 MR HARRIS: Yes, I am very grateful. Sir, can I just make
24 two housekeeping pleas? The first is: can I use that
25 ten minutes to obtain any further instructions -- there

may not be any because I am working remotely -- and secondly, with great respect, may I have permission to remove my jacket because I am here in my home office and I am now turning into a bit of a beetroot?

THE CHAIRMAN: Yes, of course. Of course you can. That is no problem.

MR HARRIS: I am very grateful. Thank you.

THE CHAIRMAN: There is no simultaneous transcript; is that right? We will get that at the end of the hearing?

MR O'DONOGHUE: Sir, I think that is right.

THE CHAIRMAN: Yes, okay. Good, let us take ten minutes and I will see you then.

MR HARRIS: Thank you.

THE CHAIRMAN: Thank you.

(11.29 am)

(A short break)

(11.41 am)

MR O'DONOGHUE: Mr Chairman, members of the Tribunal, are you ready?

THE CHAIRMAN: Not quite. We are just, I think, waiting for the live stream to start. Yes, we are okay.

MR HARRIS: Sir, I have taken instructions, I have got one further very short point to draw to your attention on the factual matter.

My learned instructing solicitors just invited me to

respectfully remind the Tribunal that, of course, on the topic of relative ease or ease, as you know from previously hearings, this an industry in which there are long-term supply contracts following requests for quotations and once the supply contract is entered into, you are locked into it and my learned friend has not pleaded and appears, therefore, to be unable to plead that in the context of long-term fixed price supply contracts, his client even faced a request from my client to reduce costs, let alone other costs, which is what he needs, and certainly has no evidence that having faced that request his client did reduce costs.

I simply draw that factual matter to the attention of the Tribunal on this topic of ease or relative ease on top of the submissions that I have already made.

Then, finally, I am in a position to address you on the ten-week time estimate, but I do not want to do that now. If that is not convenient, we can do that at the end.

THE CHAIRMAN: Why do you not just tell us what your position is on that and then Mr O'Donoghue can say something about it at the end of his submissions.

MR HARRIS: I am grateful.

Very briefly, then, our position is, as matters stand before the Tribunal today, there are three witness

statements of fact from my side and one from my learned friend's side, but we do not yet have any indication for instance whether my learned friend will reply with three, four, five witnesses or just one or a different one.

It is a difficult matter to gauge trial estimate just on factual evidence and we will not get that evidence until 21st June. Of course, we do accept (break in transmission) --

THE CHAIRMAN: Could you say that again, Mr Harris, because you were cutting out rather badly, I did not quite catch that.

MR HARRIS: Maybe I will take these earphones out. Is that better taking the earphones out?

THE CHAIRMAN: Yes, slightly.

MR HARRIS: Yes, does that work any better?

THE CHAIRMAN: Yes, I think so.

MR HARRIS: Sorry, it may have been the link to the earphones.

Very briefly, then, we do not yet have any reply witness evidence, we have three from my side and one from my learned friend's side. It may change, he may reply with two, three or four and they may be new or different. It is difficult to gauge trial time length against that parameter that is not yet complete. On top

of that and in any event we do not have the expert evidence. What we apprehend from my learned friend's team's factual evidence-in-chief is that they are going to be loading a lot of pressure upon their expert evidence, so that may mean lengthy and/or complex.

We will not know that until they are served on 10 September and the first experts meeting will not be until 29 October. My submission is that the sensible course, if I may respectfully put it like this, is at the moment to maintain the ten-week estimate, but that I can, as a responsible advocate, no doubt my learned friend as well, we could correspond with the Tribunal in July once all of the factual evidence is in and say, doing our best, we think it should now be an eight-week estimate for the sake of argument.

You might want us also to do the same in, say, towards the end of September when we have had sight of the expert evidence. What I respectfully suggest is not a prudent course at the moment is to just have a look at the factual evidence-in-chief and say "well, it could not possibly be ten weeks, therefore we will reduce it". But I am conscious, of course, of the need to be a responsible advocate to keep time estimates up to date and that it is inconvenient for the Tribunal generally and the specific members of this constitution to have

ten weeks blocked out for an unnecessarily long period of time.

Unless I can assist further, those are my submissions.

THE CHAIRMAN: No, supplemental statements are coming next week. Mr Harris, on your side, are you going to have additional witnesses apart from the three that you have put in giving supplemental evidence, or is supplemental evidence to be adduced from the existing witnesses?

MR HARRIS: I missed the beginning of that, but I cannot say at the moment that there is, unless I get a message in the background, there is any intention to adduce supplemental evidence from us from additional witnesses. Different additional witnesses.

THE CHAIRMAN: Right. I will ask Mr O'Donoghue the same question because I think if we proceed on the basis that we are going to have four witnesses of fact, plus a couple of experts, and anticipating that the expert evidence is going to be very detailed but we will have a chance to read into that, it seems to me that on that basis realistically we cannot be looking at more than say a six-week time estimate including giving us a good week to pre-read into the materials. I cannot see that you are going to then spend more than four weeks on four witnesses and two experts. I mean, it just seems

unrealistic, plus then some time for closing submissions at the end.

I think I would be inclined -- perhaps to keep your position under review -- certainly before the end of July to ask you both to give an updated time estimate in the light of the factual evidence and how things are really shaping up because I think it does make a personal difference to me in terms of my diary, I am sure it does for my colleagues, ten weeks versus five or six weeks is rather different. I think we should proceed on that basis. I will hear what Mr O'Donoghue says. I think we when we had a chat, my colleagues and I, earlier we were thinking that really this is a sort of four, five-week case.

MR HARRIS: Sir, I understand all of that. It all makes a great deal of sense, if I may respectfully say. We can update the Tribunal in July. My instructions are that we are considering one additional factual witness in reply, but only one and we have not finalised that. Maybe the thing to do is to write at a date you direct in July once all the factual witness evidence is in, including the reply witness evidence and update the Tribunal.

THE CHAIRMAN: Right. Let us do that. I will pick a date at random, 15 July. I will ask the parties to liaise

and to try to agree an updated time estimate by that time and if there are disagreements, then you can explain what they are in a letter to the Tribunal.

MR HARRIS: I am most grateful. Thank you.

THE CHAIRMAN: Mr O'Donoghue, sorry, we have distracted into a slightly different topic, but it is something which I am going to ask you to address in due course anyway.

Opening submissions by MR O'DONOGHUE

MR O'DONOGHUE: I can deal with it now. I wholeheartedly agree that anything more than five to six weeks for this trial, as things stands, is ridiculous. I mean, if one thinks about this: three to four days for openings would be very generous; a week for factual evidence which seems, at the moment, pretty tractable, four/five people at most; say a week for experts, that is a total of three weeks and even allowing some time for written closings, I do not see how we get beyond five weeks as matters stand.

THE CHAIRMAN: Well.

MR O'DONOGHUE: We will revisit that. What I can tell the Tribunal is we do not envisage, like Mr Harris, having more than one or two reply witnesses unless some great chasm in the case which will be opened up next week. That will be reasonably limited. We think possibly two, certainly one.

As matters stand, we say the Tribunal, certainly by July, can make a very confident prediction about the shape and size of this trial.

For what it is worth, I did the only trial in a follow-on case which has actually taken place, BritNed, and in that case where the expert evidence was at least as complicated as this case, we did all of the experts in one week.

THE CHAIRMAN: Right. How long was the BritNed trial actually?

MR O'DONOGHUE: It was longer because there were quite a few factual witnesses and I cross-examined one of them, I think, for three or four days. He was the main cartel guy, so it was a slightly different kettle of fish. Certainly on a bottom-up basis for this case, it is very hard to see how one gets beyond five weeks and from our perspective, quite apart from cost, the sooner we grasp that nettle the better for everybody in terms of planning purposes.

THE CHAIRMAN: Right. As I say, 15 July you can seek to -- there is a bit of interference, I wonder if someone needs to mute.

15 July is a date by which you can write to us having discussed matters with Mr Harris. I think the only thing which I would say from my perspective, I have

not talked to my colleagues but I think this is the way I would like to proceed, I would like everything to be dealt with within whatever the time period is, let us say five weeks, so that that allows for written closings, which I will probably page limit, which the Tribunal has a chance to look at before the oral closings and to consider and I would ask both of you to leave sufficient time for your oral closings.

There is an unfortunate practice which seems to have developed, in the Commercial Court certainly, of people putting in very long written closings and having sort of half a day with the judge. It is a time which I think is important at the end of a case after all the evidence for the Tribunal to ask questions of counsel, make sure that they understand everything that is being said.

The timetable should allow for that. Even then, I think that I would have thought five weeks is probably about right, but you can let us know. Okay. Right, Mr O'Donoghue, do you want to turn back to the main item on the agenda?

MR O'DONOGHUE: We digress. Can I start with a mea culpa? I have a chest infection, so if I descend into spontaneous spluttering it is not some sort of Basil Fawlty-esque filibuster, it is a genuine ailment. Please bear with me I think I should be okay, but I just

wanted to give the Tribunal warning. Can I start with a couple of legal points on the standards to be applied by the Tribunal in its application. At least in his reply Mr Harris, at paragraph 3, said that the legal principles in summary judgment under R24 of the CPR were not relevant that it was all within Royal Mail, but Royal Mail, of course, itself at paragraph 22 does itself cite the leading case summary judgment of Mr Justice Lewison, as he then was, in Easyair. The Tribunal would also note in Royal Mail at that point in terms of the legal applicable test was common ground, so we do not understand, with respect, where Mr Harris's point is going here.

Now, a second point which I will develop in more detail of course, the Tribunal in Royal Mail applied the summary judgment principles, but it is also critical to understand that the principle of effectiveness in that case was, we say, a decisive factor in terms of disallowing one of the amendments and I will develop my submission on that. We say that point has not been raised here and could not be raised here.

Can I take the next point very rapidly because I think the Tribunal will be familiar with this? The Tribunal in terms of the principles to be applied has our skeleton paragraph 7 which outlines the Easyair

judgment. If we can quickly turn to the judgment just to remind ourselves. It is at tab 32 of the bundle for this hearing and it is paragraphs 15 and 16.

15 sets out the principles. For those in the electronic bundle it is SO207. (i) has to be a realistic chance; (ii) some degree of conviction; (iii), avoid a mini trial; (iv) does not have to take everything said by the claimant at face value in the statements of case.

(v) is important, it is not just the evidence before the Tribunal today, but also the evidence that can reasonably be expected to be available at trial including, we say, witness evidence elicited through cross-examination.

(vi) is important:

"Although a case may not turn at trial not to be really complicated ... the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome..."

(vii), then, is really the other side of that coin which is, on the other hand, essentially if there is

a point of law construction, why not grasp the nettle if the court has all the evidence before it. You will then see about two-thirds of the way down into (vii):

"If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success."

Before we close this, I would also note at 16 now in Easyair itself, Mr Justice Lewison, as he then was, did grant summary judgment, but you will note at 16 he made all the factual assumptions in OpenAir's favour and essentially the case turned, for summary judgment purposes, on a simple question of or on a question of construction.

A couple of further points before I get into the meat of my submissions. First, just to refine the point of the burden of proof. I will give the Tribunal the reference. There is a copy of part 24 of the White Book in the bundle. It is in the correspondence bundle at tab 218 and it is paragraph 24.2.5 which deals with the burden of proof. The Tribunal can review that in its

own time, but let me just give you the headline points.

First, the overall burden of proof is obviously on Mr Harris. Second, the standard of proof on the Respondent is not high. Third the court should be wary of trying issues of fact on the evidence. That is really a question for the trial judge. Finally, the court should not apply the standard that will be applicable at trial, namely the balance of probabilities. It is a lower standard at this stage.

THE CHAIRMAN: Could I just ask you, I mean, the way it seems to me at the moment is as follows: you may argue that your original eight words are sufficient to constitute a valid plea which would survive summary judgment. As you will have gathered from what I said earlier, I am a bit sceptical about that, so what really matters is your voluntary particulars.

MR O'DONOGHUE: Sir, Mr Harris sought to itemise the case and he was shut down pretty quickly. One has to look at this in a composite fashion. Mr Harris at one point suggested it might be open to the Tribunal to accept the voluntary particulars but somehow strike out 41c. With respect that is completely unrealistic. These have to be looked at in a composite fashion.

THE CHAIRMAN: Yes, but it does seem to me that you are effectively asking for permission to adduce the

voluntary particulars in order to supplement what at the moment seems to me to be an inadequate plea in the light of Royal Mail. Therefore, the appropriate standard is the one which applies to, if you like, permission to amend where you have got to show a realistic prospect of success.

I do not think burden of proof necessarily is something which one wants to go into in a great deal of detail, the test is real prospect of success as it would be on a summary judgment application. I mean, that is just the way I see it at the moment and I just wanted to raise that with you in case you wanted to say --

MR O'DONOGHUE: Sir, I essentially agree with that. The reason I start at paragraph 22 Royal Mail was there the Tribunal set out that it is essentially the test for amendment which in turn is essentially the test for summary judgment. It looks like that is now common ground. I did not detect from Mr Harris's reply that it was common ground, but certainly from my perspective I am content to proceed on that basis.

One final legal point before I get onto my core submissions. Summary judgment, we say, is inappropriate where the law is in the course of development and that is the Intel case. If we can turn to that very quickly, it is in tab 31 of the bundle for this hearing.

Sir, I will run through this pretty briskly. For those in the electronic bundle it is S0172.

The Tribunal will see from paragraph 2 this was a patent infringement claim by Intel and by way of defence and counterclaim Via Technologies said that Intel had breached competition law and that it was obliged to license Via the patent under competition law.

So that is 2.

Then over the page at 4 you will see that Mr Justice Collins, as he then was, struck out the defence and counterclaim.

Then if we flick onto paragraph 30, you will see the overarching legal issues in sub-paragraphs (i), (ii) and (iii) which were before the Court of Appeal. Then paragraph 32 is the main paragraph of interest.

A couple of points. First of all, the Court of Appeal notes that articles 81 -- about a third of the way down:

"... cases involving Articles 81 and 82 [as they then were, they are now 101 and 102] often raise issues of mixed law and fact which are not suitable for summary determination."

He then adds a couple notes of caution and you see at the end of that paragraph the point I mentioned as the headline submission that the law may be extended or modified as things progress.

A couple of final references. At 51, in the middle, the court notes that on the defences:

"Whether or not they will do will depend on the findings of fact made at the trial."

Then at the end:

"Further it is one which, in my view, should be disposed of at trial."

Just for the Tribunal's note, at 87 there was the -- the article 101 defence in that case was also struck out -- and then at 87 you will see that was also reinstated, so both summary judgments granted were effectively reversed.

Then at the end of 94, Lord Justice Mummery has a mini judgment and you can see at 94, Sir, at the end of the last sentence, I mean he was pretty unimpressed, to put it kindly, with the defence and counterclaim. He said that:

"... there are serious difficulties ... But it is too soon to have sufficient confidence in the ultimate outcome to decide summarily..."

Then 96 at the bottom of the page:

"This question necessarily involves a factual investigation into Intel's licensing policy..."

Now, this, of course, is not a special principle applicable to competition law. In tab 33 you have the

Altimo judgment at 84 which makes the same point in the context of general legal principles.

Now, Mr Harris, at least in writing, sought to make something of the point that Sainsbury's and the Supreme Court did not change the law. I do not accept that. What is certainly clear is that there have been no competition damages cases in which a mitigation defence has reached the stage of judgment and the manner in which this defence would actually work in the real world, as opposed to in an arid summary judgment discussion following a trial, has not been developed in the case law either, so this is essentially virgin territory.

We also note in this context that FCA itself only pleaded its mitigation point in the trucks litigation after the Supreme Court judgment in Sainsbury's. That is in tab 23 of the bundle. We are rather surprised with the submission from them that Sainsbury's changed effectively nothing. If that is right, why were they amending post Sainsbury's? Indeed, in Royal Mail itself the amendments also followed the Supreme Court judgment in Sainsbury's and no delay point was accepted by the Tribunal.

But in any event, FCA completely misses the point in our submission. Even if the Supreme Court in

Mastercard and Sainsbury's did, in reaching some of its findings, rely on some earlier English cases, the critical point to note is that it decided, we say for the first time, a range of issues concerning pass-on mitigation in competition law cases, including the point of principle that we are concerned with today at least in terms of whether this is a permissible type of pleading as a matter of principle, so to that extent, it is certainly novel or sufficiently novel.

Sir, that is what I want to say about legal submissions.

Just to give you a roadmap, I am going to say a couple of things about Royal Mail itself, it has been covered in some detail in writing and orally, and I am then going to give you my key submissions on why we say summary judgment should not be granted and I can wrap up then.

If we can quickly go to Royal Mail. Mr Harris rather cantered through it at some haste. I want to pick up on a handful of points. It is at tab 38, the back of the bundle. If we can pick up the paragraph 20. There the Tribunal will see the actual amendments at issue in that case. For those in the electronic bundle I am at S0518.

The Tribunal will see that the first half of 20 sets

out the original amendments. There was then some refinement of those amendments at the hearing. You will see the refined amendments at the bottom of page 8 and over the page to page 9. Unhelpfully, this judgment does not give detailed reasons for the amendment it permitted and it is not clear if there is going to be a second reasoned judgment on that because, as the Tribunal will understand, the amendment in 30c was not allowed, whereas the amendment in 30d was allowed. Of course, one of the difficulties is in some ways the amendment which was allowed is no less interesting -- and we say more interesting -- beyond the fact that it was allowed, we do not have detailed reasons on why it was allowed except to note the contradistinction with 30c.

Now, 30c is really the critical amendment. I would simply ask the Tribunal at this stage to note just how vacuous that amendment was. You will see at 23 at the last sentence DAF.

"... is not in a position to plead how Royal Mail and BT mitigated [their] loss arising from the overcharge but nevertheless it contends that they 'would have' done so."

It was put in rather tentative, we say, vacuous terms.

Then 25 and 26, obviously the Tribunal accepted, as it was bound to, that in principle the mitigation defence is a good one in law and it also noted at the bottom of page 11, just before 27, the point about the heavy evidential burden.

Now, in our submission, it is important to be clear about the point of principle that the Tribunal in Royal Mail actually decided and then applied. As I have said, the Tribunal did refer to principles of summary judgments from Easyair, but what it then went on to explain was that the principle of effectiveness could potentially be infringed in that case if a defendant could plead a very general mitigation defence based purely on economic theory and indeed we say this is the key point made in the judgment and it is a key point which is absent in this case and that is a reason in itself, in our submission, why summary judgment should be refused.

So just to make good that point. If the Tribunal could start at paragraph 33. You will see the principle of effectiveness cited cross referring to the Supreme Court. That is at the bottom of the page at paragraph 33.

Then over the page, the critical passage:

"We have considered whether this principle may be

contravened in certain cases by such a burden imposed by the pursuit of a claim for damages against a cartel such as DAF. In some cases, including many of the other trucks damages claims, there will not be degree of quality of arms that exists in these claims, where not only DAF but also the Claimants are very well resourced. There is a very real risk, in our view, of infringement of this principle unless there is some other basis, other than pure theory, for believing that a defence of mitigation has some factual basis for it and so can properly be pleaded."

So what the Tribunal seems to be saying here is that leaving aside the CPR rules on amendments and summary judgment and so on, a pleading may be impermissible if it infringes the principle of effectiveness. It is the principle of effectiveness that is the issue, we say the touchstone, of the reasoning in Royal Mail. For the Tribunal's note, knowing the equality of arms point is pursued in the present case and indeed for an 80 billion euro company such as FCA, we would be surprised if such a point were made.

If there is to be a point about whales and minnows, then for today's purpose we are the minnow, so there is no inequality of arms point.

We say in the present case that it would be

hopeless -- and we note it is not seriously suggested -- that FCA's right to pursue a remedy for the breach of the competition rules would be rendered impossible or excessively difficult which is the effectiveness test set out in Sainsbury's at paragraph 188. Indeed, FCA simply cannot show and it has not even tried to explain how it would be excessively difficult for them to enforce their rights bout what pleading was permitted. This is because unlike Royal Mail, NTN's case is based on a specific business tool from within FCA's own business, the cost targets. It is not some kind of very broad or general all-encompassing defence at large and secondly, it is based on concrete facts and indeed facts that FCA has admitted and that emerge from its own evidence and documents notably, of course, in the disclosure application.

Now, FCA was, of course, invited by the Tribunal to serve evidence in support of this application and it has served no evidence at all on this issue. I will come back to that, but I just want to tee up the point.

Finally, just to conclude Royal Mail (break in transmission) core submissions, the other critical point, apart from effectiveness to note in Royal Mail, is, in my submission, the relatively low standard which has to be met by the respondent in a summary judgment

case.

So if we then go on to 41, the first sentence. It is a pretty stark set of affairs. DAF identify no factual support, just general economic theory. Then at 43, second line: "... broad economic theory and nothing more".

Just to round off on Royal Mail, then at 48 and 49, you will see that there was no further disclosure scheduled in Royal Mail, but DAF was permitted to come back with a better amendment if there was further disclosure. That is at 48 and 49. Even on the amendment in 30c which was disallowed, there was a possibility, perhaps not an invitation, that DAF could come back with an amended pleading that cured some of these deficiencies.

Now, in terms of how Royal Mail (break in transmission) we made five submissions and that is effectively then the end of my submissions for today.

The first submission is that if one compares the amendments refused in Royal Mail, there is no serious comparison with what we have pleaded in the voluntary further particulars. Royal Mail's refused amendment, as I noted, was vacuous, nothing more than an assertion of the highest level of aggregation based on general economic theory. It was an amendment to be refused for

the simple reason that it was wholly unparticularised and had no pleaded factual basis.

The point by contrast that we have taken is more focused and is based on the real world. It is an actual mechanism used in realtime by FCA, the existence of cost targets and monitoring of them, and as to which we have given some detail, or at least sufficient detail at this stage.

We do not simply have a theory. We have a case based on evidence, documents and admissions that a particular budgeting tool was used to keep costs within a specific target per vehicle and for parts of vehicles. Mr Harris is simply wrong to say that all we have pleaded is ordinary financial operations and budgetary control we have gone much further than that.

The second submission that it is also important to note the amendment in mitigation which was permitted in Royal Mail, that is paragraph 30d. If one looks at that amendment which we just saw in paragraph 20, we say that whilst it had a bit more specificity than the one which was refused, it still falls a long way short of our case where again a specific actual mechanism used is pleaded and detailed, our case is a fortiori, we say.

Indeed, even on the amendment which was permitted by the Tribunal in Royal Mail, it is important to note

that the evidence there was basically also primarily based on economic theory. The Tribunal expressed significant misgivings about that amendment notwithstanding the fact it was permitted.

We sent to the Tribunal this morning the transcript of the Royal Mail hearing. I do not know if that has made its way to the Tribunal. I can read out the quotation and I can give you the reference.

These were e-mailed to the Registry this morning, I think around 9 o'clock, days 1 and of Royal Mail. They are available online in any event. I am happy, as I said, to read out the quotations, but I hope that they are available to the Tribunal.

THE CHAIRMAN: Which tab did it go in, do you know?

MR O'DONOGHUE: Well, Sir, I think, since it was only sent this morning, I am not sure it has been tabulated.

THE CHAIRMAN: Oh, right.

PROFESSOR CUBBIN: Is it page 69 of the transcript?

MR O'DONOGHUE: That is absolutely right.

THE CHAIRMAN: Okay.

MR O'DONOGHUE: That is absolutely right. It starts where it says "Hodge Malek QC" and he says:

"If you are going to amend ..."

So this is on the 30(d) amendment, which was permitted:

"If you are going to amend, you have to have some evidential basis and what you are telling me is that you do not currently have the evidential basis and you hope to get that from disclosure, which looks as though you are hoping something may turn up."

And then do you see, further down, the President piles in and he says:

"Well, this evidence is theory, working on the basis of an economic theory. It is not actually factual evidence about DAF's prices at all."

Then Mr Beard:

"No, it is not factual evidence, I completely accept that..."

And so on. So we say that we are a country mile ahead of even the amendment which was permitted in Royal Mail as a perusal of that amendment and this part of the transcript clearly demonstrates in my view.

The third point the Tribunal essentially has, which is it is important to emphasise that whilst Royal Mail did refuse permission for one of the two mitigation amendments it did not set out a particularly demanding test in this regard consistent with summary judgment. The distinction as I noted was that DAF, had no facts, only general economic theory and we saw the test in paragraph 43: some plausible basis, some plausible

factual basis.

I also note from paragraph 43 the Tribunal said the Respondent did not need to have a document evidencing the plausible basis. Well, we already have some documents in this case, in particular of course the documents disclosed in the disclosure application with Ms Whiteford's statement. The Chairman will remember those from the last hearing, the presentations on the cost targets and so on.

I would also ask the Tribunal to note at paragraph 42 of Royal Mail that they noted that the plausible basis could be based on inference which could vary from case to case and, again, our pleading is well beyond that. We rely on particular mechanisms which were contemporaneous to the applicant.

The penultimate point I wish to make is that, as I have outlined earlier on, the central rationale for the judgment in Royal Mail, in our submission, was that allowing a very broad mitigation pleading would place too great and wide-ranging a burden on Claimants and would breach the principle of effectiveness; and that problem simply does not arise in the present case. We are focused on a single mechanism and our disclosure requests have been made and they are not unduly onerous in the way that the Tribunal was concerned with in

Royal Mail and we say it is particularly important in this context that our case focuses on a single business tool for managing costs, the use of targets for managing procurement costs.

There is not a wide-ranging pleading of the DAF variety. DAF's pleading was entirely general in nature and that was objectionable on effectiveness grounds because the Claimant simply would not know what case it was having to meet and it would have to give evidence and disclosure as to all parts of its business relating to other supply costs. We say it is important to be clear that where such concerns as to effectiveness do not arise in the Supreme Court judgment in Sainsbury's makes a defence of mitigation through cost reductions in principle available and if there is a case that passes summary judgment, as a matter of principle, then it should -- subject to the concerns in Sainsbury's, which do not arise here -- be permitted to proceed.

The final point is that it is also important to recall in our submission that we are talking about summary judgment here. We say that there is no dispute in principle that our mitigation defence is good in law, that is common ground and in contrast to Royal Mail there is no point taken as to effectiveness. The only issue is whether there is, at this stage, a plausible

factual basis that is good enough to go to trial.

Now in addition to the points I have already emphasised I wish to make three further points. First, the evidence we rely upon so far comes not from NTN but is based on evidence disclosed by FCA from its own contemporaneous documents, so we are in a rather upside down world where FCA is seeking summary judgment on a factual matter and the facts opposing the application come from its own evidence. Now, it was of course open to FCA to put in evidence in support of the application seeking to persuade the Tribunal that the evidence we rely upon should be discounted, but they chose not to do so and in that case the only evidence before the Court goes one way. Indeed we say it would have been very hard indeed for FCA to gainsay our main point since paragraph 71 of Whiteford 1 says:

"FCA does not contest that it sought to control input costs nor that one way it did so was to set cost targets related to particular vehicles or particular parts."

So that is uncontested evidence. It is also important to look at the factual evidence, which has been served in the main case, a couple of points. First of all, again, FCA has chosen to say nothing about the mitigation mechanisms we rely upon in our voluntary and

further particulars, despite them being based on FCA's own documents. No doubt of course this was deliberate on its part but it does mean that there is an issue on the evidence that we will need to explore with their witnesses at trial. We say it would be unfair and wrong in principle to shut us out now.

Second, there is a further point which emerges. If I can ask the Tribunal quickly to turn to tab 11 of the application bundle. Sir, this is our main witness for trial, Mr Linati. So at tab 11 and it is at paragraphs 72 and 73. This may well be confidential, so I would invite the Tribunal to read it to itself. It is really the quotation at 72 which is significant and also paragraph 73. So if I can invite the Tribunal to look at that. (Pause)

We say this is another example of a cost target which has emerged in the evidence for trial and again it is yet another cost target which is based on FCA's own contemporaneous documents.

Now, the bulk of Mr Harris' submissions were essentially a series of factual assertions by him and my short answer to all of that is: well, that is all fine and dandy, but that is what the trial is for. He may well have a point. As we saw on Intel Lord Justice Mummery did not think very much of the defence and

counterclaim in that case, but he says it should go to trial and all of Mr Harris' submissions were essentially points that he may wish to make at trial and he may at that stage have a good point. But that is not for today, that is for the main trial.

Before we leave Mr Linati, the other point that Mr Harris made at the conclusion of his submission he said: Well, because the supply contracts are long-term contracts effectively the suppliers and the purchaser were locked in and therefore there was no scope to bring about further cost or price reductions during the period of the contract. Again, if one goes back to Mr Linati's statement, I will just give you the references, it is paragraphs 44 and 47. There he details -- why do we not quickly turn to those.

At 44 to 47, he sets out the concept of what he calls re-sourcing, which is they would effectively shift or partly shift suppliers even if there is a contract.

Then at 65, you will see Mr Linati's evidence on the supply conventions which we saw in the context of the disclosure application and then at 66 it starts:

"Fiat also takes the opportunity ..."

Then you will see paragraph 80, the last line, there is the situation where lump sum payments may be demanded by the buyer of the suppliers [break in transmission.]

Then at 108, an example of re-sourcing where on a particular project NTN was the incumbent, and effectively the buyer took some of the designs and gave them to another supplier and effectively switched to reduce his costs during the period of the contract.

So there is a wealth of factual material set out even at this stage in our factual evidence none of which has obviously been responded to by FCA and there is a complicated and multifactorial factual assessment to be made of the whole issue of buyer power for the main trial. The Tribunal has my main point which I have made from the outset of this case; the automotive OEMs are the absolute taskmasters at procurement. They are among the most sophisticated procurers in the world and the entire buyer power story, and in particular how it interacts with the particular mechanism in relation to cost targets in this case, will be a fundamental battle at the main trial and we say that has to be looked at in a composite and integrated way and to shut us out at this stage, given the wealth of prima facie material, most of which, as I said, comes directly from the horse's mouth, from FCA itself, would be fundamentally unjust.

We say that if one stacks this upside by side with Royal Mail, there is no serious comparison and indeed,

as I indicated, in relation to the amendment which allowed we are light years away from that amendment because of the specificity and contemporaneous documentation we have provided.

So, Sir, those are my submissions. I just wanted to wrap up on two short points.

First, Mr Harris made a faint point about delay and lateness. I apprehend the Tribunal wants to deal with this on the merits and is not particularly interested in lateness points, but I mean, for the record, the amendments were made in March 2021 because we were awaiting FCA's amendments. The same thing as I noted happened in Royal Mail; there were amendments which followed the Supreme Court judgment. In any event, even in Royal Mail itself the Tribunal will see that the question of delayed lateness formed no part of the Tribunal's reasoning, so to the extent that point is pushed it is a bad point. This needs to be tackled on the merits.

The final point is really what I would call the elephant in the room because we now have in tab 7 of the bundle FCA's own pleading. In one of the Trucks cases and on mitigation, and it is completely threadbare, certainly in comparison to our voluntary and further particulars is completely hopeless. So if we are struck

out they are, by parity of reasoning, completely doomed. We did ask them if they were dropping that pleading and they declined to say so. You will see that at page 441 of the correspondence and it is a forensic point but we say it would be unacceptable for FCA to try to be on both sides of the same point in different proceedings and to say its summary judgment is appropriate in one of them.

Now, it is a forensic point but it is quite something for FCA to stand before the Tribunal today and say that it should get summary judgment in relation to a pleading that is light years ahead of their own pleading in the Trucks case.

So, Sir, those are my submissions unless I can assist the Tribunal further.

THE CHAIRMAN: Let me ask my colleagues, John, have you got anything you want to ask?

PROFESSOR CUBBIN: No, there is nothing I want to ask at this point, thank you.

THE CHAIRMAN: Eamonn? No. Mr O'Donoghue, thank you very much for your submissions. There is nothing I want to ask. Thank you very much indeed. Mr Harris, is there an agreement that you should have a short break or are you ready to carry straight on?

MR HARRIS: I can make a very short reply now and then we

finish.

THE CHAIRMAN: Okay.

Reply submissions by MR HARRIS

MR HARRIS: First point, my learned friend suggested that this was virgin territory. With respect, proximate causation is far from virgin territory and were that submission that he made correct, then of course DAF would not have been struck out on one of its pleas, so there is nothing in that point.

The next point is my learned friend said, something like three or four times, that he is only seeking one specific business tool disclosure and sought to draw this distinction with the DAF Royal Mail case, but of course he is actually seeking four categories of disclosure with all the documents in each of them. So the submission that he is only seeking disclosure of one specific business tool is factually unfounded.

He then said as his principal submission just compare Royal Mail with our case. We have got an actual mechanism, that was his phrase, with actual monitoring -- another phrase of his -- and we have got ample evidence and fact. Of course, that completely misses the point with great respect, the facts have to go towards showing sufficient and direct and proximate causation. A mere instance of pleading a fact is

irrelevant. It has to be a relevant fact and what he has not done in his pleading is identify the key points which is sufficient and direct proximate causation.

When he submitted next that somehow he is better off than the plea at 30d of DAF's proposed amendments that was allowed -- I beg your pardon, the one that was not allowed -- he did not relevantly explain how and that failed because it did not show sufficient proximate causation, but that is the same reason that my learned friend's pleading fails; it does not show sufficient and direct proximate causation. Of course it does not for the key reason that I gave which Mr O'Donoghue, with respect to him, was unable to address.

The key reason was that all of the things that are pleaded and all of the things that we have just seen in Mr Linati's statement are ordinary. They are not extraordinary or unusual. They are ordinary financial controls and ordinary budget control processes. Indeed, Mr O'Donoghue rather shot himself in the foot, he said the OEMs are archetypal examples of people who go around controlling their costs. Exactly. That is why, when he quoted my evidence, when we admit that that is what we do, I freely admit it and indeed I do in support of my own application. That is exactly what we do on a day-to-day ordinary basis, control our finances and

our costs and there is not one thing in his voluntary further particulars that is either unusual or extraordinary and he does not plead the opposite.

He does not say anywhere in that document that this is unusual or it is approximately related or one can infer that it is proximately related or it is extraordinary and therefore should be viewed in a different way. The reason he does not plead that is because he does not have those facts. They are not.

Then he said that his case was good in law. Well, that, of course, is the very issue we say these pleadings are not good in law and therefore should be summarily dismissed, so that begs the question.

Then he ended with a few miscellaneous points. He said item number 1, the evidence comes from FCA, the facts that I plead on behalf of NTN come from FCA. So what? It does not make any difference where the facts come from, they still have to show that they are unusual, extraordinary and/or and that they show sufficient direct proximate causation, but they do not.

He then complained, with respect to him, that we had not responded in our evidence for the trial as it stands in later tabs in the bundle. Of course we did not because this plea is defective. The plea stands to be struck out, so we did not respond to a plea that we are

seeking to strike out, we will have to deal with the implications if it is not summarily dismissed, as I said at the outset, by appropriate directions in short order.

Then Mr Linati, the particular examples, I have read them all carefully, 44 and 47, 65, 66, paragraph 80 and 108. There is not one example of any of those which must be the high watermark of my learned friend's case which is, even in Mr Linati's evidence, said to be extraordinary or unusual or absent or outside normal financial control processes and of course, obviously, it does not go anywhere in Mr Linati's statement, in any one of their examples, or anywhere else, to say: This shows sufficient or proximate direct causation or even that you can infer that. He does not even make that allegation and it is little wonder.

Then finally, last but not least, the so-called elephant in the room. Mr O'Donoghue, to give him credit, he was forced to acknowledge, twice, that this was a mere forensic point. It is, with respect, a hopeless makeweight forensic point. I am not instructed in that case, nor are my instructing solicitors. We do not know anything particularly about it and, more importantly still, this Tribunal we have no idea how this other plea on behalf of FCA is going to be dealt with by another constitution of the Tribunal at

some future date in light of Sainsbury's and the Royal Mail case. For all I know, it will be struck out. So what? It does not make any difference to today. It may be amended, it may be some... I do not know. It does not help today.

So unless I can assist further -- and may I just check my e-mail? I am very grateful. I will just go on mute and check my e-mail. Thank you. (Pause)

I do not have any more instructions, so unless I can assist further, those are the reply submissions.

THE CHAIRMAN: Right. Thank you very much. Well, we will consider our decision and I would hope that we will be able to let you know what the position is on this during the course of this week, I would hope, and also in relation to the disclosure application, which is obviously impacted by what has been argued today, and if it is not this week it will be at the start of next week.

MR HARRIS: I am very grateful. Can I thank the Tribunal again for its indulgence regarding my jacket? I have been wrongfully identified as a supposed contact case, so I have to sit at home twiddling my thumbs and it is slightly frustrating because there is absolutely nothing one can do in those circumstances. It is like -- I will not even go into it...

MR O'DONOGHUE: Sir, I just thought that Mr Harris was giving submissions with custom vigour and that was the explanation for that. I realise there is another explanation.

THE CHAIRMAN: All right.

MR HARRIS: Yes, thank you very much.

MR O'DONOGHUE: Thank you.

THE CHAIRMAN: Thank you very much. We will all leave now. Thank you very much and I look forward, I think we all look forward to seeing you in January but for a shorter time than is currently set out.

MR HARRIS: Thank you.

MR O'DONOGHUE: Thank you.

(12.37 pm)

(The hearing concluded)