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4 **IN THE COMPETITION**

Case No. : 1347/5/7/20

5 **APPEAL TRIBUNAL**

6  
7 Salisbury Square House  
8 8 Salisbury Square  
9 London EC4Y 8AP  
10 (Remote Hearing)

11 Friday 17 December 2021

12  
13 Before:

14 The Honourable Mrs Justice Cockerill  
15 (Chairwoman)

16  
17 (Sitting as a Tribunal in England and Wales)

18  
19  
20 BETWEEN:

21  
22 Jaguar Land Rover Ltd and Others

Claimants

23  
24 v

25  
26 MOL (Europe Africa) Ltd and Others

Defendants

27  
28  
29  
30 **A P P E A R A N C E S**

31  
32 Tristan Jones (On behalf of the Claimants)  
33 Josh Holmes QC and Anneliese Blackwood (On behalf of the Defendants)

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Friday, 17th December 2021

(10.30 am)

**MRS JUSTICE COCKERILL:** Good morning, everybody. Before we get going let me just give you the traditional warning. That's that these proceedings are being livestreamed and of course we have a number of people joining us from Microsoft Teams. So I must give you the warning that these proceedings are proceedings in open court as much as if they were being heard before the Tribunal physically in Salisbury Square House. An official recording is being made and an authorised transcript will be produced but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as a contempt of court. That extends to all forms of recording, photography, broadcast, screenshotting. All of those things. I trust that everybody has paid good attention to that warning and will observe it. Thank you very much.

**MR JONES:** Madam, thank you for that and good morning. I appear for the Claimants and you will have seen that Mr Holmes and Ms Blackwood are representing all of the Defendants.

**MRS JUSTICE COCKERILL:** Yes. Thank you.

**MR JONES:** Subject, Madam, to any contrary view from you I was proposing to take the issues by reference to the orders, because there is a great deal of agreement between us and I think the easiest way to show you both what is agreed and then to pick up on what is not agreed as we go through is to do it really by -- rather than taking it in the sequence in the agenda to do it by reference to the sequence in the order.

**MRS JUSTICE COCKERILL:** Yes. I am content with that. We may want to just go through and run through the agenda at the end to make sure we have covered everything, but I am very happy to go through the order.

**MR JONES:** Very well. I am very grateful for that. The first order I should just show you, although it is agreed, is the one at tab 2, which is the confidentiality order.

**MRS JUSTICE COCKERILL:** Yes.

1 **MR JONES:** This has been subject to discussion between the parties, of course. It is in what  
2 one might call the standard form for confidentiality orders. It sets up an inner ring and an outer  
3 ring, depending on how sensitive the material is. There is the usual process whereby essentially  
4 it is for the disclosing party to categorise documents into one of the rings and then there is  
5 an arrangement for that to be challenged by the other party if they think that's appropriate.

6 **MRS JUSTICE COCKERILL:** Yes.

7 **MR JONES:** So, Madam, as I say, that has been agreed. Unless I can assist on any particular  
8 questions, I was going to turn then to the case management order.

9 **MRS JUSTICE COCKERILL:** Yes. That's fine.

10 **MR JONES:** The case management order, the best one to look at is the one Miss Blackwood  
11 and Mr Holmes appended to their skeleton, which is tab 5A.

12 **MRS JUSTICE COCKERILL:** The one thing I have printed off is a version of the order  
13 which has the parties' respective contentions which I think is the one that was attached to the  
14 skeleton argument.

15 **MR JONES:** If that's the one in colour.

16 **MRS JUSTICE COCKERILL:** Yes. That's the one.

17 **MR JONES:** So, Madam, that's at tab 5A. It shows the parties' respective positions. Also,  
18 things had moved on slightly at this point from earlier orders. So that's the reason for that one.

19 **MRS JUSTICE COCKERILL:** Yes.

20 **MR JONES:** So, going through that, you will see, Madam, the Claimants' points have been  
21 highlighted in blue and the Defendants' in green. The first point at paragraph 1 is showing as  
22 a disagreed point. We don't disagree. It is just that this was a late suggestion. It is:

23 "The Claimants to serve this order on the Defendants by 4.00 pm on 22nd December."

24 Of course, it depends when the order is settled, but if it is settled today then there is no problem  
25 with that as far as we are concerned.

1 **MRS JUSTICE COCKERILL:** I believe that that provision is redundant, because it will be  
2 served anyway.

3 **MR JONES:** If it is served by the Tribunal. I have missed an opportunity to win a point there,  
4 in that case we disagree with that amendment by the way.

5 You will see at 2 there's then a provision which is agreed, but which is related to the so-called  
6 non-party addressees. So these are the addressees of the Commission Decision who have not  
7 been made Defendants to these proceedings, but who, therefore, obviously have an interest in  
8 particular in certain types of confidential information that might be disclosed. So 2 is just  
9 a process for telling them about the order and they can challenge that.

10 **MRS JUSTICE COCKERILL:** Uh-huh.

11 **MR JONES:** We then come on to what is possibly the main and certainly the most consuming  
12 disagreements between the parties, which are the points relating to disclosure.

13 **MRS JUSTICE COCKERILL:** Yes.

14 **MR JONES:** I am going to take these together. Madam, it may be that once I have made  
15 submissions on these points, that would be a good moment to pause and for Mr Holmes to  
16 respond.

17 **MRS JUSTICE COCKERILL:** Absolutely.

18 **MR JONES:** I was going to take paragraphs 3 to 8, as it were, in one chunk.

19 **MRS JUSTICE COCKERILL:** Yes.

20 **MR JONES:** I will just show you firstly what they cover and then develop some submissions  
21 on them.

22 3 and 4 relate to the Decision. Broadly speaking 3 provides for a process again for the  
23 non-party addressees to be told that the Decision is going to be disclosed, the confidential  
24 version of the Decision is going to be disclosed and gives them an opportunity to highlight any  
25 information which they say should properly be withheld on these quite narrow categories of  
26 confidentiality which are recognised in the case law. So that's what 3 is about. Then 4 is just

1 that it will be disclosed. There are disagreements about dates, but I will come back to those at  
2 the end of my submissions.

3 **MRS JUSTICE COCKERILL:** Uh-huh.

4 **MR JONES:** One then sees at 6 through to 8 there are similar processes there for documents  
5 and they are documents which broadly speaking were provided to the Commission and some  
6 of which made their way on to the Commission file.

7 **MRS JUSTICE COCKERILL:** Yes.

8 **MR JONES:** But in broad terms there is a process there for some of those documents to be  
9 raised again with the non-party addressees, their documents essentially, and then for a staged  
10 disclosure process.

11 I was going to address you on these points in three stages, firstly, just to draw out the  
12 substantive issues on disclosure; secondly, to show you what was ordered in the *Daimler*  
13 proceedings, because that provides a helpful background and shows what has already been  
14 done by some of the parties and non-parties; and, thirdly, to come back to this order and look  
15 at it in more detail and explain in a bit more detail what the dividing lines are.

16 **MRS JUSTICE COCKERILL:** Yes.

17 **MR JONES:** On the substantive question there are three broad categories of documents that  
18 we are concerned with here. One can see that I think most helpfully from the letter at tab 81,  
19 page 562. It is an Arnold & Porter letter. I am going to the second page of it.

20 Madam, you will see that this is a letter which follows a much lengthier chain of  
21 correspondence, but I think we can pick it up here, because this is essentially I think where we  
22 get to. 562 you will see at paragraph 4:

23 "You are correct that the Access to File documents are a sub-set of the total Commission File.

24 As we understand the position, the Access to File documents were shared with all of the  
25 addressees of the Commission Decision. The broader Commission File included further

1 documents that had been submitted to the Commission by each of the addressees or otherwise  
2 obtained by the Commission."

3 So that's the first category: Access to File Documents. They were shared with all addressees.  
4 You see at 5(a) they say: "There are a total of over 500 Access to File documents although  
5 many of these are composites of more than one document."

6 That first category we all agree should be disclosed. So that's Access to File Documents.

7 There is then the second category, which has already been referred to in this letter, which is the  
8 other documents on the Commission file, and picking that up you will see further down, 5(b):  
9 "None of the Defendants has access to the full Commission File, as it contains confidential  
10 documents submitted by other parties, including leniency statements and settlement  
11 submissions. The Defendants have access to an index to the Commission File, which includes  
12 2,264 unique document identification numbers (although we haven't yet ascertained how many  
13 of these are composites of more than one document), 85 which are listed as 'deleted' ... " and  
14 so on.

15 So there are around 2,000 documents there, although when they say they have not ascertained  
16 how many are composites of more than one document, what often happens in Commission  
17 investigations when documents end up on the file, is that the Commission doesn't list the  
18 documents in the way that one would see them listed here, for example, in the disclosure lists.  
19 They are often I am sorry to say jumbled up and put together in pdfs which it is sometimes  
20 quite difficult to disentangle. Of course, I don't know how complex the exercise is here but  
21 one can understand that there may be some difficulty in working out precisely what's on the  
22 file. The position is, as you see here, at the moment they don't know.

23 The main point as regards documents on the Commission file is that we from the Claimants'  
24 perspective want to ensure that the Defendants disclose, subject to confidentiality, all of the  
25 documents that they have access to on the Commission file. I see Mr Holmes nodding. It may  
26 be that we are concerned about a problem which doesn't arise, but let me just explain.

1 **MRS JUSTICE COCKERILL:** I had understood that that wasn't contentious. It is only the  
2 timing, whether it is two stages.

3 **MR HOLMES:** That is correct, Madam.

4 **MR JONES:** Madam, I will not spend long on this in that case, but it does feed into the  
5 drafting of the order and I will show you when I come back to the order why I was a bit  
6 cautious.

7 The first category was Access to File Documents. The second category is the Commission file  
8 documents. The broad point here is it is possible that the Defendants only have access to other  
9 documents on the Commission file if they themselves gave those documents to the  
10 Commission. That is possible, but it is also possible that they accessed the file more widely,  
11 that often happens in Commission investigations, and that they therefore have not all of them,  
12 we know they don't all, but one or two of them might have access to a wider number of  
13 documents.

14 That's a point we have been trying to explore in correspondence and the answers have not been  
15 entirely clear. Indeed, I should say one of the parties, KK, was not involved in that  
16 correspondence. So we have not heard from them in any event. I will pick it up when we go  
17 back to the order. I think we are agreed on the principle, but it is just a point to make sure we  
18 pick that up.

19 The third category then of documents is other documents that were provided to the Commission  
20 by the parties but which did not make their way on to the Commission file. In respect of those  
21 the normal position we entirely accept is that the Commission, when it is conducting its  
22 investigations, seeks to put all relevant documents on its administrative file.

23 **MRS JUSTICE COCKERILL:** You say in this case because it is a settlement decision it has  
24 really just done effectively a kind of audit or it may just have done a kind of audit and so  
25 a variety of things that you might otherwise expect to find on the Commission file may well

1 not be on the Commission file in this case and so you want all the documents which were  
2 supplied to the Commission.

3 **MR JONES:** That's it in a nut shell. I'll underline why. We obviously don't know what the  
4 Commission did. They are humans at the end of the day going through their administrative  
5 process.

6 **MRS JUSTICE COCKERILL:** You say the Commission being humans and not actually  
7 having to produce a decision themselves because of the settlement, may well have done a less  
8 thorough job than they would have otherwise in terms of papering up their file.

9 **MR JONES:** And of course the context is the reason why one focuses on Commission file  
10 documents is only for proportionality reasons. One often ends up needing to go wider than the  
11 Commission file or documents provided to the Commission. We hope we will not need to do  
12 that, but we are concerned that the first step here should be sensible in light of the process  
13 followed by the Commission. The Decision was, of course, very recent.

14 So we anticipate that the Defendants when they gave documents to the Commission would  
15 have kept records. Their solicitors we think must have kept records of what was given and  
16 this, therefore, should be quite a simple first step for them to go through.

17 Now I reiterate, Madam, because you saw in the Arnold & Porter letter, they don't know what's  
18 on the Commission file because they have got the index, but they have not yet been able to  
19 unravel it and link it to documents, and because they don't know what's on it, they can't say  
20 "We know for sure that all the relevant documents went on it". They can say and do say "Well,  
21 the Commission tends to put relevant documents on it", but we simply say that's not enough.  
22 The court on this occasion should not just take the Commission's review as a sufficient review.  
23 The parties themselves should do one.

24 Can I show you how this was dealt with in *Daimler*, Madam?

25 **MRS JUSTICE COCKERILL:** Yes.

26 **MR JONES:** I need to start with tab 17.

1 **MRS JUSTICE COCKERILL:** Uh-huh.

2 **MR JONES:** So this is July 2019. It is an order of Mr Justice Robin Knowles. It is only  
3 against MOL. So this particular order was against one of the defendants. If one turns firstly  
4 to paragraph 4, page 190, it starts here with the Commission Decision. Now our order at tab  
5 5(a) was heavily based on this order. So that's why they look so similar. One sees there that  
6 in paragraph 4 they had the process of notifying the other defendants, because this order was  
7 only made against one defendant. So they had to notify other defendants and the non-party  
8 addressees about the intended disclosure of the confidential version of the Decision and they  
9 then had the process of raising objections. That covers everyone who we say needs to be  
10 notified under our order. It is the same set of people.

11 Now that's important, because that's the timing point really, that this exercise has already been  
12 done in *Daimler*. So that was paragraph 4 on the Decision.

13 If one then goes forward to paragraph 7, you come to the Commission file documents. Again  
14 at paragraph 7 there is a provision whereby again the same set of people get notified that this  
15 is going to be disclosed. This relates to all documents on the Commission file, not just the  
16 so-called Access to File Documents. You see that in 7(a). They will disclose the Commission  
17 file. At 8:

18 "The First Defendant shall disclose ... and provide inspection of the Commission File ..."

19 For the avoidance of doubt you see at 10:

20 "The Commission File includes ... pre-existing documents submitted to, or obtained by, the ...  
21 Commission ... from any source."

22 That's agreed now by Mr Holmes that our order should cover that, but one point to pick up here  
23 is that that was done in one stage in *Daimler* and that the process has been gone through, and  
24 that is one of the disputes between us when I come back to the order, is how many stages we  
25 should have, but it was just one stage for all the documents on the Commission file. It wasn't  
26 Access to File and then other documents on the Commission file. So that was MOL.

1 What then happened was that MOL settled. As I read these orders, that must have happened  
2 before it provided the disclosure, because what then happened was that WWL stepped in  
3 essentially and one sees that from tab 20. The order at tab 20 essentially rolls over the order  
4 that we have just been looking at and makes WWL responsible for this process instead of MOL.

5 **MRS JUSTICE COCKERILL:** Uh-huh.

6 **MR JONES:** One sees that paragraph 1. It is going back to the previous order. They  
7 essentially have to do the same process.

8 **MRS JUSTICE COCKERILL:** Yes.

9 **MR JONES:** At paragraph 4 one has the first definition here of Access to File Documents.

10 So WWL is disclosing Access to File Documents, which are defined as all:

11 "the documents within the Commission File to which the WWL Defendants were granted  
12 access".

13 So that could mean only what I have called the Access to File Documents, the 500 that they all  
14 had access to. It may be they were not given access to any others. Obviously if they were  
15 given access to others, then they would have needed to disclose those as well. Madam, as you  
16 see, it was the same order which was rolled forwards.

17 The next one I want to show you is at tab 21, which is an order of February 2020, an order of  
18 Mr Justice Bryan. This is where my third category --

19 **MR HOLMES:** I am extremely sorry to interrupt. I have been asked by some of those  
20 attending remotely whether you might be able to give page numbers, Mr Jones, so that those  
21 that are following on the electronic bundle can easily find the documents to which you are  
22 referring.

23 **MR JONES:** Absolutely. I certainly will do. In case I forget, I understand that the pdf is also  
24 tabbed in case that assists anyone, but I will try to do both as I go through.

25 **MRS JUSTICE COCKERILL:** Yes, please, because certainly the page numbers do not  
26 marry up with the virtual bundle pages, if you see what I mean. So page 228 of the virtual

1 bundle is actually -- page 228 of the bundle is actually at page 265 in the pdf. So please do  
2 keep giving the tabs, because I am finding it helpful.

3 **MR JONES:** I am grateful.

4 So the next one then was at tab 21. I can only give the hard copy pages. I have page 233.

5 **MRS JUSTICE COCKERILL:** Yes. 269 of the pdf.

6 **MR JONES:** I am grateful. February 2020, Mr Justice Bryan. This is, as I say, where the  
7 order was expanded slightly to cover some of the documents that I have said fall within the  
8 wider category of documents provided to the Commission. One sees that firstly at paragraph 8  
9 where it is said that:

10 "The 12th Defendant", that's CSAV, who actually we have now settled with, so they are no  
11 longer in these proceedings, "shall ... give disclosure and inspection of any relevant documents  
12 provided by the 12th Defendant to the Commission during the course of its investigation ...  
13 including but not limited to any such documents contained on the Commission's administrative  
14 file."

15 The same provision then is included in respect of NYK at paragraph 9.

16 **MRS JUSTICE COCKERILL:** Uh-huh.

17 **MR JONES:** Now there is not the same provision in respect of the Defendants that we now  
18 have here, but there is a slightly different provision for WWL at paragraph 12. Madam, you  
19 will see they had to give disclosure of a different wider set of documents provided essentially  
20 to other regulators so that the scope was made wider in that sense.

21 **MRS JUSTICE COCKERILL:** Uh-huh.

22 **MR JONES:** So that's how it is dealt with there. Now the point has been made that in the  
23 *Daimler* proceedings there was a sort of standalone element. The pleadings are not in the  
24 bundle, but I accept that there was, as it were, a standalone element. It was, in particular,  
25 a slightly longer cartel was being alleged and there were other points around the edges, if I can  
26 put it that way.

1 Nonetheless we say the principle still stands, the principle that I explained earlier, which is that  
2 we simply want to ensure that proportionate disclosure is given. We are only at the first stage.  
3 We have been told the number of documents on the Commission's index seems very small to  
4 us and for those reasons we think it would be appropriate to have a wider order here.

5 Can I take you back to the order itself to show you how this comes together. It is tab 5(a),  
6 which is page 40. I need to pick it up at paragraph 3.

7 **MRS JUSTICE COCKERILL:** Yes.

8 **MR JONES:** These date issues, Madam, you will see are in the scheme of things relatively  
9 minor, but, of course, the point that we make is certainly as regards the Decision this is when  
10 we understand it has been done in *Daimler*. The same parties have been approached. They  
11 have had an opportunity to raise their concerns. For that reason we think that the end of  
12 January, 24th January, for anyone to raise concerns and 7th February for disclosure should be  
13 plenty of time.

14 In relation then to disclosure of documents could I firstly explain the Claimants' approach,  
15 which is the blue text, and then come back and read it differently on the Defendants', because  
16 one needs to see it in the round. It is a little bit (inaudible) to take it, as it were, word by word.  
17 On the Claimants' approach paragraph 6 is intended to cover everything which is on the  
18 Commission file. So it would include what I called Access to File Documents, or Arnold &  
19 Porter called Access to File Documents, but also any other documents on the Commission file  
20 that any of the Defendants have access to. We have said that that could be done by 24th  
21 January, because again that seems something which has been done or largely been done  
22 already.

23 **MRS JUSTICE COCKERILL:** Uh-huh.

24 **MR JONES:** Paragraph 7 goes with paragraph 6. So paragraph 7 -- paragraph 6 is giving the  
25 non-parties an opportunity to comment and paragraph 7 is the actual disclosure.

1 Paragraph 8 then on the Claimants' approach in blue is intended to capture any other documents  
2 provided to the Commission, but not on the Commission file.

3 So then, rewinding, the structure is slightly different for the Defendants because they say on  
4 paragraph 6 -- you will see, Madam, that they have included a definition there so that it is still  
5 documents granted access to by the Commission but that's where they put in Access to File  
6 Documents. That was the cause of my concern. I understand it was not intended but that is  
7 where we want the order to be clear that this is not limiting it to what Arnold & Porter called  
8 Access to File Documents. It is, in fact, all documents on the file.

9 **MRS JUSTICE COCKERILL:** Yes. I mean, they have done that via 8, haven't they?

10 **MR JONES:** Yes. No, not quite, Madam, in the sense that then 8 on their approach captures  
11 documents provided to the Commission and on the Commission's file, as it were.

12 **MRS JUSTICE COCKERILL:** So you have in 6 Access to File and the Commission file  
13 documents. Mr Holmes has in 6 Access to File and in 8 Commission file documents. You  
14 have in 8 documents provided to the Commission to which he says no.

15 **MR JONES:** Yes, that is right.

16 **MR HOLMES:** Sorry to interrupt. Just to be clear, in 8, we see that as covering documents  
17 within the Commission file without qualification as to how they were provided. The focus is  
18 on the Commission file more generally. I am not quite sure that I understand Mr Jones' concern  
19 on the text. If he could explain, then I can address you on it.

20 **MR JONES:** Yes. I think it may just be a point which needs clarifying in the text, but the  
21 point is, and if one rewinds to paragraph 6, just to be clear, if that is only Access to File  
22 Documents in the sense of the 500 documents identified in Arnold & Porter's letter, if that is  
23 all it was covering then one goes to 8 and Mr Holmes says that that would cover all documents  
24 whoever gave them to the Commission, but the problem is if one reads that:

25 "[D]isclose by list and provide inspection of the documents within the Commission File (not  
26 otherwise encompassed by paragraph 7 above) within their possession, custody or control

1 | which were provided by ... the First to Eighth Defendants to the Commission during the course  
2 | ..."

3 | I accept I am only -- this particular point is just something which has fallen through the cracks.  
4 | I don't want to -- the.

5 | **MRS JUSTICE COCKERILL:** I think that's a just a drafting problem. Mr Holmes does not  
6 | disagree with you.

7 | **MR JONES:** Doesn't disagree.

8 | **MRS JUSTICE COCKERILL:** He would take out "any additional documents", etc. He  
9 | would make that "Commission file documents" and leave you without the other documents  
10 | which you have supplied. So I think the drafting may have gone wrong, but your broadly ad  
11 | idem on Access to File and Commission file documents. How you tie that up is a matter for  
12 | you and the only real issue relates to documents provided which are not on the Commission  
13 | file.

14 | **MR JONES:** Madam, that is absolutely right. That point we were discussing was only  
15 | a drafting point and we are on the same page on it.

16 | **MRS JUSTICE COCKERILL:** You can sort that out one way or the other.

17 | **MR JONES:** We can sort that out. So that's the scope of the disagreement.

18 | There is one very small point I should pick up, which is a slightly different point, which is if  
19 | one goes back to 6 we are in the context here of non-party addressees having a right to raise  
20 | confidentiality concerns. We are agreed that they can raise any of the points which are listed  
21 | in (b) apart from in green. If we go through this, I am picking up in the fourth line. They can  
22 | highlight issues:

23 | "they wish to redact or withhold on the basis of any, or all, of Leniency Statements, Settlement  
24 | Submissions, Privileged Materials or irrelevance."

25 | That's another disagreement we have, because we entirely accept that the Defendants only need  
26 | to disclose relevant material. So the Defendants, certainly, that's what they are going to be

1 doing, but, you see, this here is about the rights of third parties to raise objections. We say they  
2 are entitled absolutely to raise these recognised confidentiality concerns, but we really don't  
3 see why they should be raising points about relevance. It is not really for them. It is a matter  
4 for the Defendants. That's why there is a dispute over that.

5 **MRS JUSTICE COCKERILL:** I have quite a lot of sympathy with that view.

6 **MR JONES:** Madam, unless I can assist further, that's the Claimants' submissions on these  
7 paragraphs of the order.

8 **MRS JUSTICE COCKERILL:** Hang on. You don't want to say -- you have said what you  
9 want to say in relation to additional documents provided by the Defendants.

10 **MR JONES:** Yes.

11 **MRS JUSTICE COCKERILL:** You say because it looks like a small harvest from the  
12 Commission file because of the nature of the Decision, all those points we dealt with, and  
13 because you are only seeking relevant documents and it is not a terrible imposition, I should  
14 go ahead and order that now?

15 **MR JONES:** Yes. Madam, I would underline that last point about it not being a terrible  
16 imposition. We are at the first stage of disclosure. We are trying to target a proportionate first  
17 step, but I think we all agree that we only in this case are going to need one more CMC. It is  
18 not a case which is or should have rounds and rounds of disclosure applications and further  
19 applications and so forth. It is in our submission -- given that the documents were provided so  
20 recently to the Commission and it has not been said that there is going to be any difficulty in  
21 identifying them or reviewing them, it is clearly a proportionate step at this stage to require  
22 these documents and we can think later about documents from other regulators or other  
23 searches. Hopefully that won't be necessary but this will be a sensible first step and therefore  
24 may be the last step.

25 **MRS JUSTICE COCKERILL:** Thank you very much. Mr Holmes.

1 **MR HOLMES:** Madam, I will address you on the points in this order, if I may. I will start  
2 with the scope of the disclosure to be given, that's to say which categories of documents should  
3 be covered; secondly, I will consider how the disclosure should be split or sequenced; and,  
4 thirdly, I will address you on the practicalities, the specific steps to be undertaken and when it  
5 is realistic to order them by.

6 So starting with scope, this is largely but not completely agreed. I can set Mr Jones' mind to  
7 rest I think on at least one of the categories. As far as the Commission Decision is concerned,  
8 it is of course common ground that the Claimants should receive a confidential version of the  
9 Decision, subject to any necessary redactions on the agreed list of grounds.

10 Secondly, there are the Commission file documents. Those are documents relevant to the  
11 Decision which the Commission obtained or prepared during the course of its investigation and  
12 the parties agree that these also should be disclosed subject to exceptions which again I think  
13 are agreed.

14 They break down into two sub-categories. On the one hand there are the Access to File  
15 Documents. Those are documents which all addressees of the Decision receive. They are the  
16 key documents on which the Commission actively relied in support of its Decision. So those  
17 were provided to everyone with the exception of leniency and settlement submissions, which  
18 were specific to individual Defendants and are subject to a kind of privilege arrangement,  
19 which means they cannot and should not be disclosed.

20 The Access to File Documents are at the core of the Commission's case and they are obviously  
21 the most useful in understanding its proper context -- the proper context of the infringement as  
22 found by the Commission.

23 On the other hand, there are a wider set of documents which the Commission collected during  
24 the course of its investigation, and these are documents listed on an index provided by the  
25 Commission. Different Defendants have varying sub-sets of the file in their possession and  
26 control. So there's no pre-existing corpus of materials in contrast to the Access to File

1 Documents. The file needs, therefore, if you like, to be reconstructed by reference to the index,  
2 looking to see what each of the Defendants has in its custody and control.

3 Now to correct one point from the discussion with Mr Jones, it is not correct to say that this  
4 wider file was in any sense abbreviated or differs from files in any investigation of this kind.

5 To see that one needs to go to the Commission procedure which is set out in the Decision  
6 annexed to the Particulars of Claim. That is at tab 8. The Decision starts at page 65 of the  
7 bundle numbering. Do you have that? I am not sure I am afraid what the numbering of the  
8 rolling pdf is. It is Annex 2 of the Particulars of Claim. It starts at page 65. No. Sorry.  
9 Page 101 of the pdf.

10 **MRS JUSTICE COCKERILL:** Thank you.

11 **MR HOLMES:** If you turn in that to page 74 of the rolling bundle numbering, which is  
12 page 110 of the pdf numbering, you see that there is there the procedure set out. You see that  
13 the case was started by an application for leniency by one of the Defendants, MOL. At recital  
14 20 you see that:

15 "In September 2012, the Commission carried out unannounced inspections", at some unnamed  
16 addressees' premises, and will have collected documents during the course of that.

17 There were then, recital 21, over the page, "several rounds of requests for information ...  
18 between September 2012 and November 2015". So there was a lengthy investigation on the  
19 normal track for a case (inaudible), during which information and documents will have been  
20 provided in various rounds by various of the Defendants.

21 Then on 12th October 2016, some four years into the investigation, the Commission initiated  
22 settlement proceedings. As part of those settlement proceedings an abbreviated Commission  
23 file, the Access to File Documents, will have been prepared and provided.

24 The short point is that in the prior stages, a Commission file of usual proportions was prepared  
25 and that is reflected in an index which can be used by the Defendants to reconstruct the  
26 Commission file insofar as its contents are in their possession or control. So the Commission

1 file is not some short form of document. It will contain the corpus of documents that the  
2 Commission regarded as relevant throughout the course of its investigation.

3 We accept that the Commission file should be disclosed. The relevance of the documents  
4 would not be to prove liability in this case, because this is a follow-on claim, and the Claimants  
5 rely on the Commission Decision to do that. Nor will the documents be the basis for showing  
6 causation and quantum, at least the primary basis. For that the parties will rely on expert  
7 evidence analysing whether there was any effect on price during the infringement period, but  
8 the Commission file may nonetheless provide further context and colour to the findings in the  
9 Decision. For that reason, the Defendants fully accept that it should be disclosed where  
10 relevant and subject to the agreed redactions.

11 So on the scope of disclosure there is no dispute, as you have rightly apprehended, Madam,  
12 that the full Commission file should be the subject of disclosure.

13 The only disagreement between the parties is as to whether the Defendants should be ordered  
14 to disclose a much wider and more diffuse category of documents, that's to say all the  
15 documents provided to the Commission, but which the Commission did not consider relevant  
16 for inclusion either in the short form Access to File set or in the broader Commission file.

17 This category is not agreed. There are three points we would make in this regard. First, the  
18 disclosure would be burdensome. This is not a pre-existing corpus of readily available  
19 materials. The Commission investigated over a number of years. There were unannounced  
20 inspection visits, at which documents were seized. There were repeated information requests  
21 and multiple submissions. The documents provided to the Commission is therefore a large and  
22 amorphous category of documents, the boundaries of which are unclear.

23 These documents have not been collected together for the purposes of disclosure in any  
24 previous proceedings. There was no order to give disclosure of documents provided to the  
25 Commission made against any of the present Defendants in the *Daimler* claim.

1 To make that point good we should go back I think to the *Daimler* orders starting with the order  
2 in August of 2019, which I have at page 196 of the bundle.

3 **MRS JUSTICE COCKERILL:** 196 is the confidentiality ring order, isn't it?

4 **MR HOLMES:** I am so sorry.

5 **MRS JUSTICE COCKERILL:** You want tab 17, which is at 187 I think.

6 **MR HOLMES:** That's quite correct. I am grateful. That's right.

7 The point about this is if you look at the documentary disclosure under this order starting at  
8 paragraph 7, it is clear from the heading above paragraph 7 that the disclosure inspection being  
9 offered was of the Commission file.

10 It is true, as Mr Jones showed you, at paragraph 10 the Commission file was specified to  
11 include various matters, which is true as a matter of fact. It does contain pre-existing  
12 documents submitted to or obtained by the European Commission. It does contain requests for  
13 information. It does contain responses to requests for information and the index, but if you  
14 look at what was actually ordered in paragraph 7(b), it is quite clear that the Commission file  
15 that is being referred to here is the documents to which MOL, the First Defendant, was granted  
16 access. So it is not all of the documents provided to the Commission by MOL as a separate  
17 and standalone category. It is the documents to which MOL was granted access by the  
18 Commission as part of the Commission Access to File.

19 If you turn on then to the next order, which is at page 233 -- no, hang on. There is the  
20 intermediate one. Forgive me. The October order of 2019, which begins at page 226 of the  
21 bundle.

22 **MRS JUSTICE COCKERILL:** 262.

23 **MR HOLMES:** I am grateful. If you look at what was ordered in that case, you see at  
24 page -- this covers disclosure and inspection of the Commission file and the short point at  
25 paragraph 4 is that it was again the document file to which the WWL Defendants were granted  
26 access by the Commission.

1 Turning on to page 233 of the bundle, this is the order of -- sorry. Forgive me. Turning on to  
2 page 233, you have the order of February 2020. That's page 269 of the pdf numbering. You  
3 see at page 235 at paragraph 8 that there starts a section headed "Disclosure in Agreed  
4 Categories".

5 In paragraph 9 you see that a wider order was made against NYK, which was that provided the  
6 parent company, NYKK, confirmed that it was willing to provide relevant documents that it  
7 provided to the Commission, they would be disclosed by its UK subsidiary, which was the  
8 subject of the claim. That was including but not limited to any such documents contained in  
9 the Commission's administrative file.

10 At paragraph 10 you see a similar order in respect of CSAV. I am so sorry. There is a similar  
11 provision in relation to CSAV. I can't for the moment locate that. I will come back to that.

12 **MR JONES:** I apologise. I think this is paragraph 8 which we went to, Mr Holmes.

13 **MR HOLMES:** I am grateful. That's correct. Paragraph 8, yes.

14 The point is that in these proceedings, neither NYK nor CSAV is one of the existing  
15 Defendants. We don't know the circumstances in which they agreed to this order. It is fair to  
16 say that CSAV, which is a Chilean company, was an extremely peripheral part of the  
17 Commission procedure. We don't know whether there were any documents which conform to  
18 this paragraph. In any event, NYK settled out of the proceedings before disclosure was given  
19 in the *Daimler* proceedings and is also not in these proceedings. Neither of those parties is  
20 here. None of the existing Defendants has undertaken the exercise which is described. So that  
21 means that the present Defendants would need to undertake the process of assembling these  
22 documents throughout the Commission procedure. They were not recently provided. They  
23 were provided over a number of rounds through unannounced inspection visits and through  
24 various requests for information. That's the first point.

25 The second point is that the material that was provided to the Commission but which did not  
26 find its way onto the Commission file, the wider Commission file, is much less likely to be

1 relevant than the Access to File Documents or the documents that made their way into the  
2 Commission file.

3 The Claimants accept in principle that the Commission generally puts materials which it  
4 considers to be relevant on to its administrative file, as you would expect. So the most relevant  
5 documents will, therefore, be provided. You have my point that the documents will not be the  
6 main focus of these proceedings. In any event, there is no case to prove as to liability and  
7 quantum will depend on econometric modelling of market data.

8 The Claimants say that if the documents are irrelevant, then they will not need to be disclosed,  
9 but we say that ignores the proportionality of the disclosure. If the documents are unlikely to  
10 contain additional relevant material, it would be wasteful and unnecessary to spend time and  
11 money assembling and reviewing them.

12 The third point is that there is another CMC agreed for April or May of next year. The main  
13 focus of that will be on disclosure topics.

14 **MRS JUSTICE COCKERILL:** Can I just -- so the idea is that this essentially triages some  
15 preliminary disclosure, which will inevitably have its primary focus on the liability point,  
16 because that's really what the Commission had in its eye at the time. We then come back for  
17 the CMC and deal with wider disclosure, which will be focused on the main issues in these  
18 proceedings. What Mr Jones will say is "Well, there's bound to be material in what was  
19 provided to the Commission which will be relevant to those questions." The question is  
20 whether that is the sensible way of getting it out or whether you do it some other way.

21 One potential route through this would be for you to provide the requests -- have you provided  
22 yet the requests for information which were provided by the Commission, because if you have  
23 a load of requests which were plainly only designed to generate documents which go to  
24 liability, then that may help answer the question of whether that's a sensible route forward?

25 **MR HOLMES:** Fully agreed, Madam. We certainly favour a staged approach and the  
26 Commission requests for information and the responses to those requests are, as I understand

1 the position, in the Commission file index and will therefore be disclosed under the agreed  
2 order to be given.

3 **MRS JUSTICE COCKERILL:** Right.

4 **MR HOLMES:** We don't accept that any of the materials provided to the Commission are  
5 likely to be relevant either to liability or quantum. Insofar as they are relevant, they will already  
6 be on the Commission file we apprehend. What we would suggest is that Mr Jones' clients go  
7 away and look at the documents that will be coming on the wider Commission file. That we  
8 say will be sufficient for them to understand the operation of the infringement and that will be  
9 sufficient for their economists to situate their econometric analysis by reference to the  
10 infringement as it operated.

11 If they are unhappy and they feel that they need other documents, then the sensible course and  
12 the proportionate course is for them to come back in the second CMC, which is scheduled for  
13 five months' time and is intended to deal with quantum and effects, and to explain why they  
14 need more documents at that point.

15 That, of course, matches the approach in *Daimler*, because, as you have seen, there were  
16 a series of orders across time. We don't accept that the *Daimler* proceedings are analogous,  
17 because they were much wider. They ran back to at least 1997 and they covered routes  
18 worldwide. So they were very different both in temporal and geographic scope, but in any  
19 event they did involve a staged process in which documents were given progressively over  
20 time.

21 There is a second CMC. We say leave the question of whether anything wider than the  
22 Commission file is required to that second CMC and don't incur the costs which we do say will  
23 be significant of assembling those documents at this stage. So those are my submissions on  
24 scope.

25 I then have submissions on the split or sequencing of disclosure. I am not sure how far  
26 Mr Jones presses this point, but there does appear on the order to be a bit of a dispute as to

1 whether this is done in one or two tranches. I think his clients' proposals are that both the  
2 Commission Decision and the Access to File Documents should come across in a single round  
3 whereas we suggest doing this with the Commission file documents or a wider set if he were  
4 to succeed on that, coming across in a second round.

5 You have seen we have broken it down into three stages: Commission Decision first; Access  
6 to File second; and the wider Commission file third.

7 The only reason we suggested that was so that the early material could be provided sooner on  
8 a realistic timetable, but we are not wedded to it. If Mr Jones would prefer both the Access to  
9 File and the Commission Decision material to come in a single tranche, so be it, but we do say  
10 that in that case sufficient time would need to be allowed for the process of consulting non-party  
11 addressees.

12 That brings me to the third topic, the practicalities and the dates. Can I just start with the  
13 practicalities and spend a moment looking at what's provided for under the order.

14 **MRS JUSTICE COCKERILL:** Uh-huh.

15 **MR HOLMES:** So going to the colour-coded version, which I think you have loose, Madam,  
16 starting at paragraph 6 with the disclosure of the Decision, as Mr Jones explained, it is common  
17 ground that there should be a process of liaison between the Defendants and non-party  
18 addressees before any of this disclosure can take place. That's to allow for all addressees of  
19 the Decision to be able to identify certain established categories of redaction from the Decision  
20 and the Access to File Documents.

21 Now for the Decision the relevant categories of redaction are specified in paragraph 6(a):  
22 leniency statements, settlement submissions and privileged materials. It is a very minor point,  
23 but those aren't confidentiality redactions. They are redactions of material which is in effect  
24 privileged and which doesn't get disclosed at all even within the confines of a confidentiality  
25 ring.

1 I am so sorry. I should have taken you to 3(a) for the Decision. You see there the categories:  
2 Leniency statements, settlement submissions, privileged material and Pergan material. The  
3 non-party addressees are then invited to give their views by a specified date with reasons. You  
4 see that in 3(b).

5 **MRS JUSTICE COCKERILL:** Uh-huh.

6 **MR HOLMES:** The Defendants prepare a disclosure set subject to the redactions requested  
7 by the Defendant themselves and the non-party addressees again by a specified date. There is  
8 to be a reasoned document explaining why redactions have been made and by whom they are  
9 requested.

10 Then in paragraph 6 you see that echoed in relation to Access to File Documents, but there are  
11 two additional grounds for withholding documents. The first is that it's agreed that the  
12 documents may be withheld on grounds that the material is irrelevant. That's the provision in  
13 6(a)(iv). The second is set out at the conclusion of (b):

14 "Non-party addressees and the Defendants must consider whether documents must be  
15 designated as either inner ring confidential or outer ring confidential or as non-confidential."

16 That will affect how wide a group of individuals the documents are seen by. The process again  
17 involves the Defendants notifying the non-party addressees by a specified date, the non-party  
18 addressees commenting by a given date and the Defendants then preparing a disclosure set with  
19 reasons why documents have been redacted or withheld and identifying confidentiality  
20 designations in the inner and outer ring.

21 Now while we are on paragraph 6 you will see there is a dispute I think, although Mr Jones  
22 will correct me if I am wrong, about whether this procedure involving non-party addressees  
23 should extend to Commission file documents generally. The Claimants' position -- we are not  
24 sure whether the Claimants resist the text in green whereby we limit this to Access to File  
25 Documents -- Mr Jones will tell me if that's the case. We say to make this provision workable  
26 it must be confined to Access to File Documents, because there is no pre-existing corpus of

1 documents which comprises the Commission's wider file, and non-party addressees will not  
2 know which documents within the Commission file the First to Eight Defendants were granted  
3 access to. So this process would be simply unworkable if it extended to the wider Commission  
4 file.

5 One would have to envisage some sort of arrangement where the Commission file were first  
6 reconstructed and then provided to non-party addressees for them to comment on. We say  
7 there's no reason to undertake that exercise and it would be unworkable in practice. So we do  
8 say that paragraph 6(b) should be confined, as we have suggested, to the Access to File  
9 Documents.

10 We heard what Mr Jones said about irrelevance and we do accept on reflection that it is not  
11 necessary or appropriate to consult non-party addressees on the relevance of the (inaudible)  
12 documents to these proceedings.

13 Then paragraph 8, as you rightly apprehended, is the paragraph which covers in our version of  
14 the order the wider documents within the Commission file. That's provided for at a later date,  
15 because of this process of reconstruction which I have described, which will require the  
16 Defendants liaising, considering the documents they have that fit within the index, pulling those  
17 together and providing them on a de-duplicated basis to Mr Jones. So those are the  
18 practicalities.

19 I don't know whether you want me, Madam, to address you now on the dates. Mr Jones did  
20 not really canvass the dates. It may be that we should tackle the issues of principle and then  
21 see where we get to before confirming the specific dates for any of these steps, but I am very  
22 much in your hands.

23 **MRS JUSTICE COCKERILL:** Yes. Thank you very much. Let me just be clear about the  
24 practicalities and the steps.

25 So you are currently contemplating the Commission Decision first, Access to File Documents  
26 second and Commission -- so three.

1 **MR HOLMES:** Yes, Madam, that's right, but, as I said --

2 **MRS JUSTICE COCKERILL:** But you are not wedded to that.

3 **MR HOLMES:** Exactly.

4 **MRS JUSTICE COCKERILL:** Okay. Yes. Thank you. Mr Jones, I think it is over to you.

5 **MR JONES:** I am very grateful. Could I start then with these substantive points, and I have

6 four points I want to run through in reply on the substance.

7 The first is the relevance question. Why are we accessing these documents at all. I think they

8 were described by Mr Holmes as essentially liability documents, documents relevant to

9 liability, but, of course, we are here only -- I apologise. Someone appears to have their

10 microphone unmuted. I am not sure who that was.

11 **MRS JUSTICE COCKERILL:** Yes. Let's have a look. UK London CR External is you.

12 So I think we are now okay.

13 **MR JONES:** Right. We are only concerned in these proceedings with quantum. It's

14 a follow-on case. The reason why these documents are relevant to quantum is that what they

15 show is how the cartel was operated in practice. So one sees in the course of the

16 discussions -- of course, I anticipate here, I have not seen them -- but what one tends to see

17 when one gets these documents, is information about, for example, which routes were being

18 targeted, which customers were being targeted, were my clients particular targets of any of the

19 discussions, the nature of the price discussions, the price fixing that went on, and all of that is

20 vital information for quantum, because it feeds into an assessment of how much this cartel will

21 have impacted on my clients and their routes.

22 So one brings all of that together and at the hearing, of course, econometric evidence will be

23 vital, but econometric evidence in the facts that we see about how the cartel was operating and

24 how it was targeting clients and in particular my clients. That's why these documents are

25 disclosed as a matter of course in follow-on cases, not just in standalone cases.

26 Now that was my first point.

1 The second point is just a point about what is said in the Commission Decision, because  
2 Mr Holmes took you to that. I just want to go back to it because there's a couple of points to  
3 pick up on how the process was described.

4 It was in tab 8, page 75. Mr Holmes took you through the background and got I think to recital  
5 22.

6 **MRS JUSTICE COCKERILL:** Uh-huh.

7 **MR JONES:** And was explaining that the process had gone on for several years and there  
8 were rounds of requests for documents, requests for information, etc. On the back of that  
9 Mr Holmes said "Well, the Commission therefore will have established its normal file".

10 The first point I want to make is that is not what is actually said here. The Commission does  
11 not say that they put the full file together. It is an inference, but that's what we are concerned  
12 about, the extent to which one can have confidence that they will have done exactly that.

13 Then in 23, which I think, Madam, you have not seen, there is a description which  
14 unfortunately is slightly redacted, so it is a little bit difficult to make sense of it, but:

15 "Following each party's confirmation of its willingness to engage in settlement discussions, the  
16 settlement meetings between each party and the Commission took place ... During those  
17 meetings, the Commission informed the parties of the objections that it envisaged raising  
18 against them as well as the main facts supporting those envisaged objections and disclosed to  
19 them a selection of evidence on file that the Commission relied on to establish the envisaged  
20 objections ..."

21 That I think is what's being called the Access to File Documents:

22 "The parties had access to the relevant parts of the files at the Commission premises, including  
23 the oral statements. Later the parties were also given a copy of the relevant pieces of evidence  
24 to which they already had access as well as" something redacted "in the file and were also  
25 offered the opportunity to access all the documents listed. The Commission also provided the  
26 parties with an estimation of the range of fines likely to be imposed by the Commission."

1 As I say, it is slightly unclear exactly what they were given. I think what is redacted there must  
2 be some reference to some sort of index, but it is not clear from this that there was a full file  
3 put together in the way it would ordinarily have been put together.

4 The concern which we have in broad terms is simply taking it as read when what has happened  
5 here is, as I have said, a process of settlement before the Commission.

6 My third point relates to the *Daimler* orders.

7 **MRS JUSTICE COCKERILL:** Uh-huh.

8 **MR JONES:** Mr Holmes took you back through those. I simply wanted to make  
9 clear -- I hope I had made this clear when I went through them and it was not inadvertently  
10 misleading you, Madam, because I was intending to make clear that those first couple of orders  
11 were focused on the documents in the Commission file and that it was the last order that we  
12 then came to, the February 2020 one, which went wider. As I sought to stress there, when it  
13 went wider to documents which had been provided to the Commission, I entirely agree and I  
14 tried to make clear that that order applied to CSAV and NYK and that different orders were  
15 made, for example, in relation to WWL.

16 So I entirely accept, to be clear, that those wider documents have not been disclosed by these  
17 Defendants, and the point which I was making was simply that once that process had unfolded  
18 in *Daimler*, they clearly got to a stage of realising that it would be proportionate there to do  
19 a wider exercise. That's the point which essentially we come on to here.

20 **MRS JUSTICE COCKERILL:** Yes.

21 **MR JONES:** Fourthly on the substantive points, Mr Holmes emphasised that this would be  
22 an onerous exercise. Now we have some difficulty with that. The difficulty that we have is  
23 that we have been trying in correspondence at some length to understand what the documents  
24 are and who has them and how we can get access to them and it has been difficult.

25 What has been said to us is that the documents which are on the Commission file include all of  
26 the relevant documents. That was the point which was emphasised, all the relevant ones. We

1 don't have anything from the Defendants explaining the points which Mr Holmes has made  
2 about how burdensome this would be. So it is not a point which I can challenge at this stage,  
3 apart from to say in general points we have made clear repeatedly this is what we are after and  
4 it is very much a first step, because when one then talks about triaging this and coming back in  
5 the Spring for a second CMC, we don't want at that CMC to be saying "Well, we need to edge  
6 it out a little bit further to cover documents given to the Commission, but then there might need  
7 to be some further step of going even wider than that". We want now to be able to say we have  
8 done what clearly seems to be a sensible and proportionate first step and, as I said before,  
9 hopefully the last step.

10 Could I address the point Mr Holmes made about the split, sort of three stages. On this I don't  
11 think there is any issue of principle. Mr Holmes has three stages proposed. We also have three  
12 stages proposed. It is just we have different things in each stage. The reason for that is we  
13 want a bigger universe of documents. Clearly what's important to us is not how they are sliced  
14 up. It is, firstly, that we get them and, secondly, of course the dates.

15 So there is a question about how quickly they come. As to that, I have emphasised that  
16 certainly the Decision and the Access to File Documents we think should be very easy to  
17 provide because it is a small number and the process has essentially been done already, but  
18 I take the point that the documents provided to the Commission, Madam, if you are with me  
19 on that, would need to take a bit longer. That point we concede. That may be a bigger exercise.  
20 Madam, I think, unless there is any particular point I can help with, those are my submissions.

21 **MRS JUSTICE COCKERILL:** What about the non-party addressees and the Commission  
22 file to -- the non Access to File Documents -- the wider universe? Do you accept that it doesn't  
23 need to be -- you don't need to have the three ring circus with the non-party addressees?

24 **MR JONES:** I think this may be a ships passing in the night point but let me explain how  
25 I see it and Mr Holmes can say if this is wrong.

1 Clearly the Access to File Documents, so those 500 documents will contain some documents  
2 from the non-party addressees and that is why they should have the opportunity to comment in  
3 case there is anything which I have been calling confidential but which, as Mr Holmes has  
4 explained, means non-privileged, etc. That is why they need that opportunity.

5 If there is a wider set of disclosure, there's a prior question. Might that wider set of disclosure  
6 include other documents from the non-party addressees. If it doesn't, then the issue, of course,  
7 doesn't arise, and I think Mr Holmes -- some of his clients at least have made clear they don't  
8 think it will. So perhaps that is the position, but if it does include confidential information, you  
9 know, Pergan, settlement, leniency, whatever it is, from non-party addressees, my  
10 understanding is that they would need to be given an opportunity to comment on that. So that's  
11 why we have drafted the order that way. Of course, it won't be my clients disclosing it. In one  
12 sense, if Mr Holmes' clients are happy to disclose that material without giving it to non-party  
13 addressees, that may be more a matter for him than for me, but certainly our understanding has  
14 always been that, before that sort of information is disclosed, people should have  
15 an opportunity to comment and that's why we have drafted the order in that way.

16 **MRS JUSTICE COCKERILL:** Yes. Mr Holmes, do you want to say something quickly  
17 about that last point?

18 **MR HOLMES:** Certainly, Madam. Can I also just very briefly pick up a couple of other  
19 points, if that's convenient, on which I have had factual instruction?

20 **MRS JUSTICE COCKERILL:** Okay.

21 **MR HOLMES:** So the first is we were provided with an index, as I think we have explained  
22 in correspondence. So we have an index to the wider file. Secondly, requests for information  
23 and responses to requests for information are on that wider file in response to the question that  
24 you raised earlier.

25 **MRS JUSTICE COCKERILL:** Yes.

1 **MR HOLMES:** In relation to whether there is a need for comment by third parties on the  
2 wider file, it is very difficult to see how it could logistically be accommodated. I think we  
3 would need to reflect on how it could be done, but until we have actually reconstructed the file  
4 it is difficult to see how we could take -- receive input from any third parties, because they will  
5 not know what we hold and what we are proposing to disclose. So it may require a little bit of  
6 reflection. It is a point on which I think I should take instruction, if I may?

7 **MRS JUSTICE COCKERILL:** Okay. Thank you.

8  
9 **RULING ON DISCLOSURE**

10 **MRS JUSTICE COCKERILL:** So what is really the main point is the documents provided  
11 beyond what is on the wider Commission file. I am not going to order that disclosure at this  
12 point. It is basically a proportionality argument at this stage. The material which I have, based  
13 on what I have seen in the decision, does show that there would be quite a lot of material; in  
14 that there was a fairly full enquiry incorporating, as the decision shows, over a number of years  
15 unannounced visits, information requests and so forth. The Commission got to the point where  
16 it was in a position to effectively show quite a detailed file and get to a point where they were  
17 able to estimate the range of fines likely to be imposed.

18 Now while Mr Jones says that one cannot be sure that there is a detailed file, the indication is  
19 that if the Commission got to the point where they were able to estimate fines, they'd got quite  
20 a long way down the road. So we do have a reasonable indication that what is on the  
21 Commission file is not going to be next to nothing and is probably going to be not unadjacent  
22 to the normal kind of file which the Commission would put together. Although what is then in  
23 the Access to File documents may be a smaller subset, but the file itself ought to be significant.  
24 Then in relation to the relevance and proportionality, what the Commission will have been  
25 focusing on, of course, is essentially the liability phase, and while it is possible and indeed to  
26 some extent likely that there will be some documents which will go to the matters which are in

1 issue in this claim, there will be an awful lot which isn't relevant, and there will be, if there is  
2 a significant amount of material which has been called for, quite a lot of work to do to split out  
3 the relevant material.

4 We do want to ensure that the disclosure exercise which is performed is one which is  
5 proportionate and that costs are not incurred unnecessarily. Obviously these matters always  
6 have a lot of money in issue and there are excellent teams, but that is not an excuse for  
7 generating costs that do not need to be spent. It seems to me that the best way of going forward,  
8 given that the requests are going to be on the file, is going to be to look at the file and see what  
9 is on the file and what is recorded as having been called for. One can then consider the extent  
10 to which what has been provided which is not on the file is likely to be of relevance to the  
11 issues in this case and whether, given the format in which that has been provided, that is going  
12 to be the best way of winking out those documents or whether there is a better way to provide  
13 them.

14 So I am not going to order those at the moment.

15 Having said that, once that material has been provided I do expect the parties to work together  
16 in the spirit of cooperation, and if there is an information request which is plainly going to have  
17 generated documents which are an easy route through to some of the questions in this action,  
18 not to hang about until the next CMC before doing something about providing them. So just  
19 a hint there.

20 So that's the point of principle. In relation to the split or sequence, it seems to me that to the  
21 extent that one has to liaise with non-party addressees it would be better to just have one round  
22 of liaison with non-party addressees, because it is a bit of a three ring circus, and the more  
23 people you have involved, the more scope you have for delays. So it is just better to put it all  
24 together. We can talk exactly about dates on that.

25 So far as including non-party addressees in relation to the Commission file, Mr Holmes needs  
26 to take instructions on that. Provisionally I would suggest that there is some mechanism

1 incorporated whereby if it becomes apparent that it is necessary to notify non-party addressees,  
2 there is some notification and there's a back-up plan or something of that nature, but you can  
3 talk about that and I am sure you can work out something sensible.

4 So does that cover what we need to cover on those questions?

5 **MR JONES:** Madam, I am just looking, but I think the answer is yes, it does, and it may be  
6 that me and Mr Holmes can talk about the issue, which is obviously for him, and also the dates  
7 and see whether we can come back and not have to take your time with that.

8 **MRS JUSTICE COCKERILL:** Thank you. While I remember, I have been asked, orders,  
9 can you always provide draft orders in a Word format. We only have the pdf at the moment.  
10 I know you are going to do some work on it and you will be providing further orders, but if  
11 you can make sure those keep coming in a Word form as well.

12 **MR JONES:** Yes.

13 **MRS JUSTICE COCKERILL:** Thank you.

14 **MR JONES:** Madam, it is often useful I think to break for five minutes for the stenographer.  
15 I don't know whether that's --

16 **MRS JUSTICE COCKERILL:** Yes. It is a very good time to take a stenographer break. So  
17 I will leave and go out into the retiring room and we will come back, shall we say at 11.50?

18 **MR JONES:** Yes, I am grateful.

19 **MR HOLMES:** Thank you, Madam.

20 **MRS JUSTICE COCKERILL:** Thank you.

21 **(Short break)**

22 **MRS JUSTICE COCKERILL:** Yes.

23 **MR JONES:** Thank you, Madam. We are back then on the order. I was going to continue  
24 going through the order picking up in tab 5(a). We have gone through the disclosure points up  
25 to paragraph 8.

26 **MRS JUSTICE COCKERILL:** Yes.

1 **MR JONES:** There are then some general provisions, which are not controversial, which are  
2 related to disclosure, Statement of Truth and so forth. Those are paragraphs 9 to 12.

3 **MRS JUSTICE COCKERILL:** Uh-huh.

4 **MR JONES:** The next controversial point is paragraph 13, which is experts, where you will  
5 see we are agreed that "The Claimants and Defendants shall have permission to rely on expert  
6 reports in the field of competition economics."

7 In blue we say:

8 "The Claimants shall have permission to rely on one expert in this field and the Defendants  
9 shall have permission to rely on one expert in this field collectively."

10 The Defendants think that they should have one each. That's the dispute between us.

11 So, Madam, if I address you on that, it is not as involved as the documents issues that we were  
12 just discussing. We say the starting point here is that the Defendants are jointly liable for all  
13 losses. They are not only liable for, as it were, their own sales. They are all liable for each  
14 other's sales and indeed for sales by other people who are not being sued, but whose sales form  
15 part of the claim.

16 Also, of course, all of the experts will be in the inner confidentiality ring and all of the experts  
17 will be subject to the usual obligation to make sure that they tell the other parties all material  
18 instructions that they receive.

19 So in light of all of that, we say that it is not right to approach this by saying, as Mr Holmes  
20 says in his skeleton argument, that the Defendants have different interests because there may  
21 be contribution proceedings and that they, therefore, in effect may prefer particular approaches  
22 to the expert issues, and he says there are confidential issues between them relevant to each of  
23 the Defendants.

24 We say the Defendants' experts here are clearly not going to be approaching this on the basis  
25 of particular interests of their clients. They are going to be approaching this with their -- I see  
26 Mr Holmes shaking his head. I hope I have not misrepresented. I think the point I am

1 addressing is the suggestion that because of the differing interests of the Defendants that factors  
2 into their need to have different experts.

3 No doubt the experts here will obviously be approaching this with quantum foremost in mind,  
4 their duties of independence. Because of that and because they will be focusing on losses  
5 which all of these parties are jointly and severally liable for, and because they shouldn't be  
6 having access to material confidential information that the other parties' experts don't have  
7 access to, we say that it is appropriate for them to share an expert on questions of overcharge  
8 and pass-on.

9 The point I am making is particularly strong in relation to pass-on and I accept there is  
10 a distinction here, because one point which Mr Holmes makes, and I accept as a matter of fact  
11 is likely to be the case -- I only say likely because it happens in most of these cases -- is that  
12 the Defendants' experts will be, as we understand it, likely to be focusing on each Defendants'  
13 group's set of data. Although they are jointly liable for all losses, we would anticipate, and  
14 I think I detect this from Mr Holmes' skeleton argument, they may nonetheless choose to focus  
15 on each Defendant group's set of losses. Mr Holmes also makes the point that they have been  
16 instructed for a while and so will have been involved in that.

17 Now we see those points. I am not, as it were, resiling from my overarching submission that  
18 they nonetheless should share one expert, but I do want to emphasise that those points only  
19 relate to overcharge, because when you come to pass-on we are talking only about, firstly,  
20 Claimants' data. So the pass-on analysis will not involve looking at any Defendant-specific  
21 data. It will be done entirely on the basis of what the Claimants disclose. It also will not vary  
22 Defendant by Defendant, because, as I say, it is not a Defendant-specific exercise. It is entirely  
23 looking at the amount which the Claimants -- the amount, if any, that the Claimants have passed  
24 on to their downstream customers.

25 Finally, also it is not an exercise that any of the Defendant' experts can have started on yet,  
26 because we have not got to any disclosure on any of these topics.

1 Now what we have in this case, the Claimants certainly intend to rely on just one expert to  
2 cover overcharge and pass-on, and as I understand Mr Holmes' clients would also intend each  
3 group to have one expert for overcharge and pass-on, but, of course, they are very distinct  
4 topics, and one often has in these cases different experts. One party might have one expert on  
5 overcharge and a different expert on pass-on.

6 The reason I emphasise that is simply to drive home the point that these are entirely separate  
7 and separable topics. They don't need to be dealt with in same way. We don't see any reason  
8 why the Defendants should all have a different expert analysing the Claimants' data and making  
9 separate analyses of the Claimants' pass-on.

10 So, Madam, those are my submissions.

11 **MRS JUSTICE COCKERILL:** Yes. Thank you.

12 **MR HOLMES:** So, Madam, just to emphasise the common ground. The parties agree that  
13 evidence will be required from an expert in the field of competition economics and the topics  
14 that that evidence will cover are also agreed. Where the order does not currently make  
15 provision for that we agree with the description of the matters to be covered in Mr Jones'  
16 skeleton argument and that could be incorporated in the order if you were minded to do that.

17 The only issue at this stage is whether each of the Defendant groups should be permitted to call  
18 its own experts, so that would involve three experts on the Defendant' side, one for the First  
19 Defendant, one for the WW Defendants, who I think are the Second to the Seventh, and one  
20 for KK, the Eighth.

21 The short point is that the Defendants have separate and divergent interests and they should  
22 each be allowed to defend their interests by adducing expert evidence of their own. That's the  
23 standard approach in follow-on damages claims.

24 Mr Jones and the firm for which he appears today have made a submission in favour of a joint  
25 expert in a number of previous cases and that has always been rejected because the Defendants'  
26 interests may diverge.

1 A key issue for the expert evidence is overcharge. Did the Claimants pay more than they would  
2 have but for the infringement? The expert evidence will test that through analysis of market  
3 data and it will look at whether prices were higher controlling for other variables, in particular  
4 costs. The Claimants have alleged that each Defendant they bought from overcharged them.  
5 Now whether that is true will depend on what each Defendant charged, its individual prices in  
6 response to tender; and to determine whether the infringement affected the Defendant's prices  
7 paid by the Claimants, one would need to control for that Defendant's costs.  
8 It is commonly the case if the data allows to conduct a specific econometric analysis on a  
9 Defendant-by-Defendant basis as well as or instead of a market-wide basis.  
10 Now in theory, of course, one could have a single Defendant's expert who conducted a series  
11 of separate econometric analyses in respect of each Defendant, but there are two difficulties  
12 with that.  
13 The first is that the design choices of a particular expert in implementing their analysis will  
14 affect the results differently from Defendant to Defendant. Obviously they will be acting  
15 independently and doing what they see fit, whoever is instructed, in accordance with their  
16 duties to the court, but it gives rise to an obvious potential for conflicts of interest between the  
17 Defendants. So fairness requires that they are permitted to call evidence by an expert of their  
18 own choosing to defend their own separate interests.  
19 Secondly, once one recognises that there may be multiple econometric analyses on a per  
20 Defendant basis, there is no obviously efficiency in having only a single expert on the  
21 Defendants' side. The work will need to be done whether by separate experts or whether by  
22 a single expert.  
23 The Claimants' response is to say that the Defendants have a joint or a common interest,  
24 because liability is joint, but that submission is we say, with respect, detached from the reality  
25 of the litigation. There will need to be an allocation of any damages awarded between the  
26 Defendants at the conclusion of any trial and that will be so whether or not contribution claims

1 are brought. It would obviously be affected by evidence as to the extent to which any particular  
2 Defendant was shown to have overcharged.

3 Of course, there is also the very real possibility of settlement discussions occurring along the  
4 way to trial. They are often conducted bilaterally between the Claimants and individual  
5 Defendants. They are often conducted in parallel and expert analysis specific to a particular  
6 Defendant is important in the context of those discussions, because it provides the obvious  
7 measure for that particular Defendant's settlement. In those discussions the Defendants'  
8 interests are again divergent. The discussions are usually conducted on a confidential and  
9 without prejudice basis and a Defendant may need to consult the expert on a particular point  
10 as to the calculation of damages and that would put a single expert instructed by multiple  
11 Defendants in a difficult position.

12 It is for all these reasons that Defendants in follow-on damages claims are typically allowed to  
13 call their own experts. In this case we say that a plurality of experts would be manageable.  
14 There would be a maximum of four experts at trial, assuming the case against all Defendants  
15 reaches trial. It is a tractable number and that's particularly so given that the evidence in the  
16 Tribunal is typically heard concurrently led by the expert economist by means of a hot tub  
17 without the need for lengthy individual examination of each expert. It's a procedure which  
18 leads automatically to an avoidance of duplication and an avoidance of repetitious  
19 cross-examination.

20 The Defendants' experts can and will, of course, liaise to avoid duplication at trial. They are  
21 responsible professionals and they will behave cooperatively. The Defendants also liaise  
22 where their interests are aligned, as you can see from the conduct of today's hearing skeleton  
23 and a single counsel appearing for all of the Defendants.

24 Now Mr Jones has trailed a sort of halfway house, as he called it in his skeleton argument,  
25 whereby the Defendants would be obliged to combine on the separate issue of pass-on. It is  
26 true that pass-on involves Claimant rather than Defendant data and disclosure. We accept that.

1 But it still may be Defendant-specific in the circumstances of this case. The Defendants  
2 transported vehicles to different downstream markets, which may require their own separate  
3 economic analysis.

4 The degree of pass-on is influenced by factors such as whether the cost is a common industry  
5 cost and that will depend on how many cars in a given market are imported. It will depend  
6 also on the billing arrangements, whether there's a separate -- it may depend on billing  
7 arrangements, whether there are separate line items, how matters are dealt with from national  
8 market to national market.

9 There are, moreover, practical difficulties with the halfway house. It wouldn't be efficient, we  
10 say, to require a further and separate expert to be instructed by the Defendants only on pass-on.  
11 That would increase the number of experts if you are with me on overcharge.

12 **MRS JUSTICE COCKERILL:** It strikes me that potentially if one were heading in the  
13 direction of halfway house, it would be more likely to be something to be worked towards.

14 **MR HOLMES:** Indeed, Madam. You anticipate my next submission. It is possible as the  
15 trial progresses that it would be possible for one expert to take the lead. We would only caution  
16 against any directions to that effect too early on because of the risk of settling out. If  
17 a particular Defendant's expert were appointed to take the lead a long way in advance of trial,  
18 the risk is that Defendant might never run the course.

19 Now I think reference has been made to the *Trucks* litigation where it is true that there is some  
20 sharing of experts on the topic of pass-on, but that's quite a different situation in which the  
21 Defendants all wish to call a separate discipline in relation to pass-on. They want to have  
22 a forensic accounting expert and they have shared that. So there there has to be another expert  
23 and they have shared that, but they have all reserved the right to make separate -- to put in  
24 separate evidence of an econometric nature in relation to pass-on insofar as is necessary at trial,  
25 using their existing separate economic experts.

1 So in my submission it wouldn't be appropriate to direct us at this stage to share experts in  
2 respect of the economic analysis.

3 **MRS JUSTICE COCKERILL:** Thank you. Mr Jones, anything in reply there?

4 **MR JONES:** Madam, just a few short points. Mr Holmes said that -- I think he was alluding  
5 to other cases where we had been arguing a similar point on these sides of the arguments.  
6 *Trucks* -- Mr Holmes may be thinking of a different *Trucks* case because he is in more of them  
7 than I am as a Defendant. The one which -- oh, Mr Holmes is shaking his head. Maybe I have  
8 the wrong end of the stick.

9 **MRS JUSTICE COCKERILL:** I am not sure it takes this any further.

10 **MR JONES:** I am not sure it takes it any further. I apologise, Mr Holmes. I apologise.  
11 My understanding of where matters stand in *Trucks*, if it makes any difference to this, but in  
12 light of what Mr Holmes said, is that Mr Justice Roth and the other members of the Tribunal  
13 expressed at the last CMC against what the Defendants were arguing, a preference for there to  
14 be one shared expert on pass-on and that that issue is going to be decided at the next CMC.  
15 That's my understanding of where matters have got to.

16 The references which Mr Holmes made to the design choices of different experts really  
17 highlights our concern, because if different experts are making different design choices, even  
18 when they are looking at different Defendants' overcharges, then inevitably what one has when  
19 one gets to the hearing is a set of different approaches driven by the different design choices  
20 that the experts have made, and, as Mr Holmes has said straightforwardly, with behind the  
21 scenes particular Defendants having different interests in different approaches.

22 So that is really the cause of duplication, not simply having multiple people speaking on a topic,  
23 but having multiple people having made different design choices, because they have  
24 approached it in their own judgement, but they have approached it from different perspectives.

25 Now at the hearing it may well be that it is appropriate to have a hot tub. We agree with that,  
26 but there would be separate sessions for overcharge and for pass-on. They are separate topics,

1 and when one comes to pass-on, it is not only that one is analysing the Claimants' data, but it  
2 is also the case that to the extent that one has to look at downstream markets that some  
3 Defendants may have been active in, some may not, it is very difficult to see where a conflict  
4 arises there or where different design choices may be made, because there is just one question,  
5 which is did these Claimants pass-on to their downstream customers in this set of markets. The  
6 notion that the Defendants' experts might take different design choices leading to different  
7 results in different countries, we say, is far-fetched.

8 On a narrow practical point it wouldn't in the circumstances involve any duplication if the  
9 Defendants were to instruct one separate expert for pass-on. That wouldn't be difficult. It  
10 would simply mean that there are other experts not addressing pass-on. Furthermore, if they  
11 wanted all to instruct one of their existing three experts to cover pass-on, then we don't see why  
12 the difficulty arises if it turns out that the Defendant who has also instructed that expert for  
13 overcharge reasons settles the case. We don't see why that poses a difficulty. The expert  
14 remains instructed by the other Defendants for the pass-on issue which he or she has been  
15 instructed on by all three of them collectively. So we don't see what the practical problem is  
16 and we think it is unnecessarily duplicative, certainly in relation to pass-on, to have several  
17 people addressing the same topics.

## 18 19 **RULING ON EXPERTS**

20 **MRS JUSTICE COCKERILL:** Thank you very much. Well, while the point has been put  
21 very attractively by Mr Jones, I am not going to confine the Defendants to a single expert or  
22 indeed endorse the halfway house at this stage. Instinctively one would say that the Defendants  
23 are entitled to call their own experts; and that instinct is backed up by analysis.

24 That relates to the jobs which have to be done, the different interests which are involved, the  
25 potential impact on settlement; and, as we all know, these kinds of claims do tend to involve  
26 settlement discussions at some point with some Defendants maybe going and some staying.

1 In relation to overcharge you have Defendant-specific points which may be nuanced, just in  
2 the way one approaches it. I entirely understand Mr Jones' approach about "we don't really  
3 want different design bases", but different design bases may lead to a better means of  
4 interrogating the claims which are being advanced and a fuller basis of knowledge for the  
5 tribunal in due course.

6 So far as concerns the question of pass-on, while I entirely see the attractions of a halfway  
7 house, a fourth expert is just going to add to costs because they have to be briefed as well. The  
8 question of requiring one of the Defendants' experts to cover overcharge leads similar issues  
9 which arise in relation to overcharge. There may also be some Defendant-specific issues even  
10 in relation to pass-on, though it seems they are likely to be tangential in the extreme.

11 I do see that the parties do want to think about working towards a situation where, if at all  
12 possible, one of these experts can essentially take the lead on pass-on as it develops, but I am  
13 not going to force a structure at this very early stage in the game.

14 **MR JONES:** Madam, I am grateful for that.

15 The next topic then on the list in the order is effects and quantum disclosure process. This is  
16 paragraph 14. I think I can take this quickly, because although there are disputes, it may be  
17 that it is more a ships passing in the night point rather than a point of principle, but I should  
18 take you through it to make sure we have fleshed out the points.

19 You will see that 14(a) relates to the provision of a list of contracts, RFQs and tenders by the  
20 Claimants.

21 **MRS JUSTICE COCKERILL:** Uh-huh.

22 **MR JONES:** And also we say the Defendants should provide the same, but I will come back  
23 to that point, but that is the nature of the difference there is the question of who should provide  
24 the list.

25 (b) is the suggestion that the parties' expert/economic advisers then exchange letters setting out  
26 their proposed methodologies and documents, it is said, by 2nd March.

1 Just to see how it all comes together, (c) they meet to discuss their proposed methodologies  
2 and the dates there are 14th February or 9th March. Then they are to produce a joint statement.  
3 Then it leads through to (e), that they then seek to agree categories of documents, data and  
4 information to be disclosed by each of the parties. I don't think there's a dispute really -- "by  
5 each of the parties" that should stay in for the purpose of the economic experts' analysis. So  
6 that's the process.

7 The two points which have been highlighted as disagreed, can I take 14(b) first?

8 **MRS JUSTICE COCKERILL:** Uh-huh.

9 **MR JONES:** This is a point where I think we can clear this up reasonably quickly. We don't  
10 have any objection in principle with this. Our concern was not to make this process over-  
11 engineered and in particular so over-engineered that the timetable is dragged out longer than it  
12 needs to be. So we think it could be done, but for our part this could be done very quickly,  
13 certainly by the end of January, because this is simply the first step in the experts telling each  
14 other what they are intending. So, as I say, I don't object in principle to this, but we do think it  
15 should not be left until 2nd March. That was much too late.

16 (a) is the point where it may be ships passing in the night or it may be something bigger. So  
17 let me explain that in a bit more detail. We, of course, do not have any objection to providing  
18 a list, as far as we are able to, of our contracts, RFQs and tenders. This is not a contractual  
19 claim, but clearly they are very important to the contract.

20 **MRS JUSTICE COCKERILL:** Uh-huh.

21 **MR JONES:** And the claim form itself identifies that the purchases themselves were all made  
22 under framework agreements. Clearly that needs to be done.

23 I should also make clear that we are confident that that list, when it is provided, will be  
24 comprehensive or nearly comprehensive. This is not a case where there are big gaps we think  
25 in the documents. So that's not the concern. The concern is that we don't want to fall into the  
26 trap of it then being said that once we have provided everything that we are able to, the list that

1 we can at this moment, that that somehow limits the scope of our claim and we are only looking  
2 at purchasers within the scope of the claim. I see Mr Holmes shaking his head. Maybe I don't  
3 need to spend time on that. If there is not a trap we are going to fall into, then there may be no  
4 disagreement between us.

5 **MR HOLMES:** If it assists, we certainly are not suggesting that this will be the final and  
6 comprehensive statement of relevant contracts and RFQs. It is simply that the Claimants have  
7 obviously undertaken this exercise in identifying the volume and value of commerce, which  
8 they have set out in accordance with the requirements of the Tribunal's rules as part of their  
9 estimation of loss in the claim form, and it just seems most efficient to us that they should  
10 provide that really by way of a response to request for information or simply as a list in  
11 accordance with the directions.

12 So I think I can set Mr Jones' mind at rest. We accept it will be a living document and that it  
13 can be supplemented, but it will, we say, frame the experts' task in understanding the scope of  
14 the claim.

15 **MR JONES:** That is very helpful and in that case there is not a disagreement then about the  
16 point of principle. We can provide it. Whether it is helpful at some later stage for the  
17 Defendants to add to it is something that can be reviewed in due course. We don't need that  
18 order now.

19 On the timing, we think that we could do that on the date which is set out there, 31st January.  
20 We can do it by then. The only issue then really is about the other dates in these  
21 paragraphs, where, as I have said, we think (b), if it remains in there, and we are happy for it  
22 to remain in, can be brought forward to the end of January so far as we are concerned. Madam,  
23 you see the other dates which are there in blue.

24 **MRS JUSTICE COCKERILL:** Yes. If I can just interject here before Mr Holmes says  
25 anything, my own feeling would be to go for earlier dates so far as possible for this reason.  
26 You want to be in a position when you come back for the CMC to have made good progress

1 and you want to leave plenty of time for a particular date to slip potentially but also for what is  
2 developed to then be worked on and further progress made.

3 So, Mr Holmes, I will hear what you have to say, but I would like to you try to work towards  
4 something a little earlier than what you have put down.

5 **MR HOLMES:** I am very grateful for that indication. To be clear, we also see the value and  
6 the benefit of getting this done in good time before the next CMC.

7 So perhaps the easiest thing would be, subject to your views, Madam, for the parties to take  
8 this offline and see whether they can find mutually agreeable dates.

9 **MRS JUSTICE COCKERILL:** Yes.

10 **MR HOLMES:** Then if there is any disagreement, which seems unlikely, that can be  
11 addressed in written submissions with the order, but I would hope that we can find agreement.

12 **MRS JUSTICE COCKERILL:** I am content with that. Can I just say at this point I would  
13 really like to thank the parties for their cooperation before the hearing and also during the  
14 hearing. It has been a real pleasure to see the way you are working together and listening and  
15 acknowledging each other's concerns. It is, you know, not something one always sees and it is  
16 pleasant when one does. So yes, please.

17 **MR JONES:** Madam, with that then, I will move on to the other points in the order.

18 **MRS JUSTICE COCKERILL:** Yes.

19 **MR JONES:** 15 is again largely agreed. The parties will serve disclosure reports and EDQs.  
20 There is a disagreement there about the dates. Given that me and Mr Holmes are going to try  
21 generally to cooperate with each other, perhaps that can also be taken off your list for today.  
22 If there is any issue with it, we will raise it with you in due course.

23 We then come to the procedural timetable, 16 to 20.

24 **MRS JUSTICE COCKERILL:** Uh-huh.

1 **MR JONES:** The big question here, Madam, for you, the disagreement, is whether the trial  
2 should be listed, and that's at paragraph 16. We have said it should be listed now for six weeks.

3 I will come back to that in a moment.

4 Just to run through the other paragraphs that are in this section, you will see there is a provision  
5 then for a further case management conference.

6 **MRS JUSTICE COCKERILL:** Yes. I think 29th April is the date that I can best do, if  
7 I recall correctly. I will be told if I have got that wrong.

8 **MR JONES:** Madam, I am grateful. That is helpful, because I think that will feed back into  
9 the earlier stages in this process when Mr Holmes and I discuss.

10 **MRS JUSTICE COCKERILL:** Yes.

11 **MR JONES:** So, Madam, that's helpful. Mr Justice Bryan is in there you will see in blue.  
12 I don't think there is any big argument over that. It was only that, when we first drafted it, we  
13 thought that one of the judges who had been involved in these cases should remain involved.  
14 The Defendants have suggested that that should be you. Of course we don't disagree with that,  
15 but we just have (overtalking).

16 **MRS JUSTICE COCKERILL:** The truth is you are stuck with me now. Mr Justice Bryan  
17 is off presiding on the South-Eastern Circuit and he is incredibly hard to get hold of, so it is  
18 me.

19 **MR JONES:** I am very glad, if I may say, to hear that, Madam. So that's that.  
20 Witness statements of fact in 18. We have said the date for that will be decided at the next  
21 CMC, as will the timetabling, and as will a pre-hearing review.

22 You will see in paragraph 20 if necessary the listing of the trial, which will be necessary if you  
23 are not with me on paragraph 16.

24 **MRS JUSTICE COCKERILL:** Yes.

25 **MR JONES:** Paragraph 16 then, whether the trial should be listed, the point which we make  
26 essentially is that experience suggests that listing a trial and listing one further CMC imposes

1 a discipline on the parties, because it gives them a date to work towards, and that if a date isn't  
2 set, the risk is that we come back at the second CMC and by then other things have slipped and  
3 the point is made that now we can't make the date, which at the moment seems realistic, which  
4 is March 2023.

5 **MRS JUSTICE COCKERILL:** I mean, I totally see that, and I totally see that if we come  
6 back and we list a trial at the next CMC, you will not be looking at a date in March of 2023 or  
7 April of 2023. You will be looking at a date probably in 2024 --

8 **MR JONES:** Yes.

9 **MRS JUSTICE COCKERILL:** -- which, you know, means that things drag out. The  
10 problem which I have is the extent to which a trial date listed now is a robust one, not in terms  
11 of reaching it, because that can always be managed by imposing discipline, but whether your  
12 estimate is right, whether the discipline which would be necessary would end up having to be  
13 extraordinary and so forth. You know, is six weeks the right amount? Can you be confident  
14 of that now and, if so, why?

15 **MR JONES:** Well, Madam, the way we see this at the moment as a claim is, if I can put it  
16 this way, it's a bog-standard follow-on damages claim. Because of that, it is possible to make  
17 some informed judgments about how long it is likely to take.

18 Firstly, there is the question of the Claimants' factual evidence. I have identified in my skeleton  
19 argument which topics they will be covering, but none of that will be remotely surprising to  
20 my learned friend, because it is the sorts of topics which Claimants cover in all of these cases  
21 relating to their purchasing and so forth, and, of course, their downstream pricing pass-on.  
22 Those are the principal issues.

23 Now it is true to say we don't know how many experts there will be on those topics, but that's  
24 not because we don't know the size of the topics. That's just because we don't know whether  
25 one person will be able to speak in full to the topic or whether it will require two. So the fact

1 that we are not sure about the numbers does not affect the overall scope of the evidence that  
2 they will be giving.

3 **MRS JUSTICE COCKERILL:** Uh-huh.

4 **MR JONES:** So we do say one can allocate that on a provisional basis. My suggestion for  
5 timetabling purposes is that those witnesses would take about two weeks. Now that might be  
6 generous, but of the six weeks, I have anticipated that long for the Claimants' factual witnesses.  
7 Now the Defendants' factual witnesses, they have not told us who or indeed what topics, but  
8 again one can make an informed assessment of this because, in my experience, what invariably  
9 happens or almost invariably is that they call factual witnesses to talk about how their pricing  
10 was done and about their relationship with the purchasers. One can allocate approximately  
11 a week for cross-examination of those factual witnesses.

12 Now it is true that if, unusually, they decide to call people who were involved in the cartel,  
13 then that would potentially mean that we would need another week. I accept that, but that is  
14 extremely unusual and it has not yet been suggested that that's what's going to be done. So we  
15 get to three weeks. Experts, overcharge, pass-on, I have allocated two weeks -- again that  
16 might be generous -- and that leaves a week then for submissions.

17 Now by way of comparison, the *Daimler* trial was listed, then settled, but was listed for ten  
18 weeks, and Mr Holmes has emphasised the differences between this and that, but, Madam, as  
19 you see, we think this can be confidently predicted at this point and that it would be helpful to  
20 put the date in the diary now.

21 **MRS JUSTICE COCKERILL:** And in terms of the stages, I mean, if we are coming back  
22 in April to deal with the rest of disclosure -- obviously we are not putting dates in the diary -- but  
23 just being realistic, the rest of disclosure is not going to be before, say, the middle of June.  
24 Mr Holmes goes "Oh" in a kind of ... I know, but you were saying it is going to take much,  
25 much longer than that. I'm thinking about you then have to get witnesses of fact and experts

1 in. If we list for April of-- if we list for March 2023, are we setting ourselves up for  
2 a timetable that just is already too tight?

3 **MR JONES:** Well, no. That is a point where I would go back to the point which I made about  
4 imposing discipline on the parties, because it is clearly true that if in April the parties come to  
5 the CMC with a big gulf between them on disclosure and neither of them really having made  
6 any start on what are clearly agreed categories of disclosure, which sometimes unfortunately,  
7 as you will know, Madam, does happen, if the parties come in that state, then I would agree  
8 that things then become difficult, but if the parties come in April, having had sensible  
9 discussions to work out what is agreed and what is obviously necessary disclosure, and having  
10 taken, starting now, the steps necessary to look into their documents and to coordinate  
11 effectively between themselves, then it is manageable, because one can --

12 **MRS JUSTICE COCKERILL:** Okay. So you think it is manageable. Obviously I am not  
13 asking you, you know, to commit to dates, but the shape that is in your head that makes  
14 March 2023 manageable is what?

15 **MR JONES:** Disclosure would be -- I agree with Mr Holmes. Disclosure wouldn't be one  
16 month after the CMC. It would need to be at least two months after the CMC. I completely  
17 agree with that. So we would definitely be looking end of July.

18 **MRS JUSTICE COCKERILL:** July. Witnesses?

19 **MR JONES:** We would be looking at witnesses end of September.

20 **MRS JUSTICE COCKERILL:** Yes.

21 **MR JONES:** We would be looking at expert reports end of November, but that then still  
22 leaves a few months for the experts to do reply reports, a joint expert report.

23 **MRS JUSTICE COCKERILL:** Okay. Right-o. What else did you want to say on it,  
24 Mr Jones?

25 **MR JONES:** I have been handed a note. Can I just take thirty seconds to see? I may have  
26 missed something important.

1 **MRS JUSTICE COCKERILL:** Of course.

2 **MR JONES:** No, that's everything. I am grateful.

3 **MRS JUSTICE COCKERILL:** Yes. Mr Holmes.

4 **MR HOLMES:** So, Madam, our concern is the practical one that you have identified, whether  
5 the Tribunal can at this stage be confident of a six-week listing by March of 2023. We have  
6 concerns on both the length and the listing. We don't yet know how many factual witnesses on  
7 either side there will be, and it is quite difficult in those circumstances with any degree of  
8 confidence to say that six weeks will definitely be sufficient. We are not clear whether the  
9 estimate includes judicial pre-reading time. We are not clear whether it allows for any time for  
10 preparation of written closings, which are a useful and a frequent feature of business in the  
11 Competition Appeal Tribunal. So six weeks, we think, may well prove to be inadequate, and  
12 if one does feel it is necessary to list at this stage, it would be safer to list on the basis of seven  
13 or eight weeks. That's the first point.

14 The second point as to timing is that we really just -- this is just based on experience of how  
15 quantum disclosure unrolls. It takes longer than you would think, because it involves data  
16 going back over many years, market data going back over many years, documents from the  
17 Claimants as well as the Defendants on issues like financing -- there is a financing claim here  
18 and a compound interest claim -- on issues like pass-on, about how particular items are billed  
19 on downstream markets. The idea that we could get this done by June or even July with any  
20 confidence I am afraid we don't think is clear at this stage.

21 One also needs to bear in mind that there are sometimes then specific and targeted follow-up  
22 requests for disclosure, which are required to complete the picture, the evidential picture, and  
23 which the experts find that they need. Where there are gaps in the data, you need to consider  
24 whether there are other possible alternatives and it simply takes time.

25 So we do say any timetable would need to be robust and it would need to factor in some scope  
26 for slippage so that it doesn't come unstuck and the exercise of provisionally listing does not

1 prove to be a wasted one because it tries to fit this case into a straitjacket, which does not  
2 ultimately prove manageable.

3 If disclosure stretched on into September, which I think is a realistic possibility, you would  
4 then find it hard to get through the stages for two potential rounds of factual evidence and  
5 expert evidence in several rounds, given that it is absolutely at the core of the case, in good  
6 time before a PTR and a trial in March. So we are just concerned that as a practical matter  
7 what is being proposed may not prove to be right.

8 If one does list now -- and I understand your concern -- we say that it should be done in a way  
9 which builds in some slack and that March is not a safe date.

10  
11 **RULING ON LISTING OF TRIAL**

12 **MRS JUSTICE COCKERILL:** Yes. Well, I have to say that I have quite a lot of sympathy  
13 with that view. I would provisionally -- and you may need to see what the diary is like -- but  
14 I would have thought that May and seven weeks at this point, to be narrowed at the next CMC,  
15 is more realistic, but I would like to get a date in, because, as Mr Jones says, this is not the  
16 world's biggest and most complicated case, and I am very unattracted by the idea of waiting  
17 the best part of six months until we meet again before we set a trial date, which then isn't before  
18 (because Octobers always get busy, 2024).

19 So, Mr Jones, do you want to try to persuade me that I really should take a punt on March with  
20 the risk that we then have to vacate it?

21 **MR JONES:** No, Madam. I am grateful.

22 **MRS JUSTICE COCKERILL:** I will give you a date, but I will have to talk to the authorities  
23 at the Competition Appeal Tribunal, because they have provided me with details in relation to  
24 the March date. We have not talked about a May date, but I think we need to look at basically  
25 seven weeks from whenever they can give us a window around then.

26 **MR JONES:** I am very grateful.

1 So then, Madam, back on the order we pick it up under the heading "Amendments to Statements  
2 of Case" on page 40.6 at paragraph 21.

3 **MRS JUSTICE COCKERILL:** Yes.

4 **MR JONES:** This is all agreed. In summary, the Claimants are amending because we have  
5 settled with one of the Defendants, and there's a draft of our amendment, which is agreed.

6 The Defendants wish to amend, possibly to respond, but I think more significantly to amend  
7 their pleadings on mitigation. So there's an agreed process for that.

8 I think the costs provision at 23 is agreed.

9 **MRS JUSTICE COCKERILL:** Uh-huh.

10 **MR JONES:** There is liberty to apply at 24. I see another provision for service, which perhaps  
11 also should come out, at 25.

12 **MRS JUSTICE COCKERILL:** Yes, exactly so.

13 **MR JONES:** Madam, the only other point which I am aware of is the point about forum. The  
14 Tribunal I think always tends to agree at the first CMC and make a direction as to the forum.  
15 We are, of course, agreed it should be England and Wales, but I think that normally goes in the  
16 order, so should be added to the order.

17 **MRS JUSTICE COCKERILL:** Yes, exactly. Let me just run through -- I have various  
18 annotations on the draft order -- and make sure that we have covered everything that I had  
19 down that we needed to cover. Yes. So far as I am concerned I think we have covered the  
20 things I wanted to cover.

21 **MR JONES:** Madam, just before Mr Holmes jumps in, there is a very minor point, but it is  
22 I have been asked to ask you whether it would be preferable for Mr Holmes and myself to liaise  
23 now and come back perhaps after lunch with any disagreements, or whether we should simply  
24 raise any disagreements on the dates in writing hopefully today, but otherwise I suppose it  
25 might drift over to Monday.

1 **MRS JUSTICE COCKERILL:** Why don't you do it in writing by not later than Monday  
2 lunchtime? I am around next Monday and Tuesday, but I would definitely like to get this  
3 signed off on Monday, if possible -- today, if possible, obviously, but not later than Monday.

4 **MR JONES:** Understood. Thank you.

5 **MRS JUSTICE COCKERILL:** Yes. Well, thank you both very much for your extremely  
6 helpful submissions and thank you to your wider teams for all the work that has gone into this  
7 morning. That has been a very productive CMC. Thank you.

8 **MR JONES:** Thank you.

9 **MR HOLMES:** Thank you, Madam.

10 **(12.36 pm)**

11 **(Hearing concluded)**

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