IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1528/5/7/22 (T)

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 15th March 2023

Before:

Sir Marcus Smith
(President)
The Honorable Mrs Justice Cockerill
Bridget Lucas KC
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Volkswagen AG and Others

Claimants

v

MOL (Europe Africa) Ltd and Others

Defendants

A P P E A R AN C E S

Brian Kennelly KC & Philip Woolfe (Instructed by Slaughter and May) on behalf of the Claimants in Case No. 1528/5/7/22 (T)
Mark Hoskins KC, David Bailey & Matthew Kennedy (Instructed by Arnold & Porter) on behalf of the First and Tenth Defendants in Case No. 1528/5/7/22 (T) and the First to Third Defendants in Case No. 1339/7/7/20
Anneliese Blackwood (Instructed by Cleary Gottlieb Steen & Hamilton) on behalf of the Seventh to Ninth Defendants in Case No. 1528/5/7/22 (T) and the Fourth Defendant in Case No. 1339/7/7/20
Daniel Piccinin (Instructed by Steptoe & Johnson) on behalf of the Rule 39 Defendant in Case No. 1528/5/7/22 (T) and the Fifth Defendant in Case No. 1339/7/7/20
Sarah Ford KC & Sarah O'Keeffe (Instructed by Scott+Scott UK LLP) on behalf of the Class Representative in Case No. 1339/7/7/20
Josh Holmes KC (Instructed by Baker Botts) on behalf of the Sixth to Eleventh Defendants in Case No. 1339/7/7/20
Sarah Abram KC (Instructed by Wilmer Cutler Pickering Hale and Dorr) on behalf of the Twelfth Defendant in Case No. 1339/7/7/20

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Wednesday, 15 March 2023

(10.30 am)

Case management conference

PRESIDENT: Mr Kennelly, good morning. Before you begin, the usual live stream warning. The proceedings are being broadcast on the live stream and an authorised transcript will be produced, but it is prohibited for anyone to make an unauthorised recording, audio or visual, transmit or photograph the proceedings and that rule, if breached, would be punishable as a contempt.

I'm sure I don't need to say that, but I will.

Mr Kennelly, with that, I will hand over to you. We have read the written submissions of all the parties and we have looked at the other material which we have either electronically or in paper version, for those who are less handy with electronic matters.

We think, but we will leave it to you how you introduce matters, that the first question is really the extent to which there is an overlap between *McLaren* and *VW* that needs to be considered and we probably want to hear from those who have an issue with, in some way, merging the cases, first.

If there is an overlap, the next question is how best to deal with it and that, I think, would be the second item on the agenda and once one has those issues resolved, we will move to a more granular sense of what directions are needed but that, by way of a steer, is how we see things but I don't want to take you out of your order.

MR KENNELLY: We're all very grateful for that steer which no doubt corresponds with how we'd intended to proceed.

Just by way of introduction, to go through the formalities. As the Tribunal sees, I appear with my learned friend Mr Woolfe for the Claimants in the *VW* proceedings.

In the *VW* proceedings and in the *McLaren* proceedings, we have for MOL -- these are the abbreviations in the pleadings -- Mr Hoskins KC, Mr Bailey and Mr Kennedy. For K-Line, Ms Blackwood. For NYKK, Mr Piccinin and then in the *McLaren* proceedings but not in the *VW* proceedings, for WWL, Mr Holmes KC, for McLaren, Ms Ford KC, with Ms O'Keeffe, and for CSAV, Ms Abram KC.

So turning then to the very first of the points that the President has directed us to address. It is my submission, it is what I try to say today, to persuade you not to order a UPO and certainly not that sought by the Defendants. And I will begin by addressing the very limited extent of overlap in the subject matter. There is some overlap and one can see why the Tribunal has considered that a UPO might be appropriate but our case is that the UPO proposed by the Defendants is inappropriate and contrary, we say, to the Tribunal's governing principles. And if I may, and I appreciate they're very familiar to you, go very briefly to them and then to the pleadings.

If we could just very briefly turn to the Authorities Bundle and recall the governing principles. We say these inform the Tribunal's application of the Practice Direction on Umbrella Proceedings and the governing principles are in the Tribunal's Rules and they are at tab 1 of the Authorities Bundle.

And one sees at 4(1) the obligation that:

"The Tribunal shall seek to ensure that each case is dealt with justly and at proportionate cost."

And you will anticipate my submission that there is real concern on the part of VW that if the UPO is ordered in the form sought by the Defendants, our case will not be dealt with justly and at proportionate cost, whatever (inaudible) by *McLaren*. And then 4(2):

To deal with each case justly and at proportionate cost includes, so far as it is

practicable, ensuring the parties are on an equal footing, saving expense and dealing with the case in ways which are proportionate by reference to the factors set out below and ensuring - and we stress this - that it is dealt with expeditiously and fairly.

And I ask the Tribunal to recall those principles as we go through the submissions that I am about to make.

And we say there are three main reasons why the UPO as formulated by MOL and that has been endorsed by the other Defendants, should not be ordered. And the first is as regards the overcharge and I shall be addressing the overcharge issue and the pass-on issue separately. As regards the overcharge, the UPO as formulated by MOL, does not even capture the infringement alleged in the *VW* case. That Ubiquitous Matter will not resolve the *VW* case on overcharge, even in respect of the overlapping vehicles in the United Kingdom.

The second point is that in any event, we say there is no material risk of inconsistency on the question of overcharge between *VW* and *McLaren* and, thirdly, as regards pass-on, while there might be an issue of principle in common -- and I will come to that -- the impact of any inconsistent finding is very limited because of the very limited overlap in vehicles. And the risk of such limited inconsistency is, we say, outweighed by the massive cost and waste that would result in following MOL's proposal.

So as to the first point that I have just made, I would ask you to turn up the UPO as formulated by MOL and that's in the MOL Observations on Ubiquitous Matters in the Supplementary Bundle, behind tab 15. Tab 15, page 165.

In paragraph 8, we see the designation of Ubiquitous Matters set out and it's in relation, we see, to the provision of deep sea carriage services, as defined in the decisions, limited of course to the infringement as found in the Commission decision

for Volkswagen branded new vehicles -- which is a defined term; we will come to what that covers -- registered in the UK during the period from October 2006 to September 2015. And the two questions are: did the Infringement cause any overcharge in the prices charged to the *VW* Claimants and if so, what was the level of any such overcharge? You will see that "Infringement" is capitalised and then: if there was any such overcharge, did those Claimants or any of them pass it on and if so, to what extent?

These are important definitions. The infringement is the one found in the European Commission decision. We see that in the reference to the decision in the below definition of "Infringement" and over the page at 166, we see that "Vehicles" are defined as "all Cars and Light and Medium Commercial Vehicles", not trucks and heavy vehicles and as we will see, the scope of VW's claim is much broader.

But in particular, I ask the Tribunal to bear in mind the definition of the infringement in its limited meaning when we come to look at VW's pleaded case and I ask you to go to that next in the first CMC Bundle behind tab 6. Tab 6. It's page 31. It begins at page 31. My point here is that the *VW* claim as pleaded pleads a much wider and more pervasive breach of competition law than that found by the European Commission. The period is different, the geographic scope is different, the nature of the breach itself is different.

Now, you have seen in MOL's submissions that they suggest these differences had not been pleaded or are liable to be struck out but the Tribunal sees right away from this document that these have been pleaded, we say fully, since 2020 and no attempt has been made to strike them out. They are and have been always, our pleaded case.

So to go, then, to the particulars of claim, paragraph 1, you see the relevant period. This is a claim for damages for loss suffered as a result of the cartel in the provision

of the carriage by sea of motor vehicles, cars, but we include trucks and high and heavy vehicles and we say the cartel operated from at least February 1997 until September 2012 and we saw that the infringement found by the Commission, the one in the *McLaren* claim, is pleaded from 2006.

Then we go to paragraph 2, where the unlawful arrangements in our case, the *VW* case, are defined. Paragraph 2:

During that longer period the undertakings participating in the cartel, the cartelists, entered into agreements and/or concerted practices.

The various aspects of those are then summarised. I will skip right down, if I may, to the end of that paragraph:

"These agreements and/or concerted practices are referred to … as the Unlawful Arrangements."

We distinguish those from the infringement as you saw defined in the MOL's Observations on Ubiquitous Matters. Of course, we say at paragraph 4 that we rely, among other things, on the European Commission settlement decision which we note was for a more limited period and more limited geographic scope.

Then at 5:

"In further support of this claim, the Claimants will also rely on decisions by, settlements with, and plea agreements entered into by foreign criminal and competition authorities under their respective national laws in respect of the Unlawful Arrangements."

Which we describe compendiously as the Foreign Regulatory Materials.

Pausing there. Again, you saw in the MOL Observations on Ubiquitous Matters, they say our reliance on this is liable to be struck out on the basis of the principle in *Hollington v Hewthorn* but we have never said the principle in *Hollington v Hewthorn* doesn't apply, it's not a new point. We rely on the decisions to identify the evidence

which is before those authorities but much more importantly, and this is set out extensively in this pleading, we rely on the admissions made by the Defendants before foreign regulators and courts which we say are admissible and those are pleaded extensively. I won't take the Tribunal to them. We have several pages of detailed particularised pleaded admissions by these Defendants before foreign regulators and courts and we rely on them properly. In any event, unless and until they are struck out, they are our pleaded case.

To go on then, if we may, to paragraph 35, to page 43. Paragraph 35 explains where the unlawful regulatory action fits in in respect of what we plead are Unlawful Arrangements. We say that these materials demonstrate the admissions made by the Defendants -- extensive admissions -- demonstrate that the arrangements were not confined to the period from October 2006 in which the Commission considered it had jurisdiction to impose penalties but applied throughout our relevant period from as early as February 1997 and to the provision of carriage by sea of motor vehicles beyond the geographic scope of the EC settlement decision. And in fact, immediately above paragraph 35, you see the list of jurisdictions --

PRESIDENT: Yes.

MR KENNELLY: -- which we have pleaded. And we plead in respect of carriage by sea to and from these jurisdictions, whereas the *McLaren* claim is just about shipping into the EEA.

PRESIDENT: Mr Kennelly, I want to, I hope, assist your submissions by either knocking down or reinforcing a couple of straw men because I think it would assist you to understand where we're coming from on the management of these cases.

First of all, just to take a point against you, the question of overlap. The source of the Umbrella Proceedings Practice Direction and the concern about ensuring a consistency of outcomes really has its genesis in the three Interchange Fee cases

which were heard in this Tribunal and in the Commercial Court in 2016 and 2017.

Now, in all three of those cases, there was no overlap in the strict sense; it was open to each Tribunal in that case to reach different outcomes because the factual matrix in which the Commission decisions and the interchange operated were technically different and so there wasn't even a persuasive element in the earlier decisions to bind or even persuade the later judges to follow what had been decided earlier.

So what one got was three judgments which, quite properly, because the judges were hearing different evidence, reached remarkably different conclusions on subject matter which was, to the competition lawyer on the Clapham omnibus, remarkably indefensible in terms of outcome and it did competition law and this jurisdiction no credit to have those decisions at first instance on the record. And that is no reflection on the judges who decided those cases and I say that quite deliberately because I was one of them.

So we're not really interested in actual overlap, we're interested in ensuring that similar cases which ought, because of their factual background, to be decided in a similar way, to be decided similarly and a very good example is in the Interchange Fee litigation, where one has got -- and we have said this on the record, so I can say it to you -- we have factually different cases in terms of Interchange Fee claimants. Temporally they're different, but the fact that we could, quite properly, decide these cases radically differently, doesn't persuade us that that is the sensible thing to do; indeed, it persuades us that it is not the right thing to do. So we see overlap as meaning something much broader than the technical question of the same issue arising in separate proceedings.

So that is the first point which really is why we are all here today. However, to knock down a few straw men or people, we clearly can't shoehorn a claim that your clients have chosen to bring, into some sort of pre-defined template. That would be unfair

to your clients and we are not, here, going to debate about questions of whether allegations that you have pleaded might or might not survive through to trial. This is not a strike-out application. You have pleaded your case and your clients are entitled to have it heard in the manner that it is put.

So that is a constraint, as we see it, on the question of how one approaches these questions of broad overlap.

The other two constraints that we have very much in mind is, first of all, that the cost of litigation should not be unduly increased by trying to sort out the intractable question of overlap and, secondly, the dealing of overlapping issues should not cause undue delay in trying each case individually.

So those are matters which we have well in mind and bearing those four points in mind, we are wondering whether the proper approach for today is not to argue about what should and what should not be ordered as a Ubiquitous Matter today, but to put the Tribunal or the Tribunals and the parties in both sets of proceedings in a position such that Ubiquitous Matters can be declared when the cases have reached a stage of articulation, such that one can actually say: well, these issues, looking at them broadly, ought to be heard together to avoid precisely the sort of inconsistency that did occur in the Interchange Fee litigation five or six years ago.

So it may be that the question is not, do we go about making an order along the lines of the one you took us to in the Supplementary Bundle, but do we impose upon the parties today, a process whereby at some point within the next year, one has an ability to understand what Ubiquitous Matters Order could be made.

If we approach the matter in that way, the question becomes, I think, split into three or possibly four elements.

First of all, when do we try both sets of proceedings? We have already given a very strong steer that *McLaren* should be dealt with in the first quarter of 2025. Now, let

us suppose that we articulated the whole of that term for the resolution of both sets of proceedings, however configured. We would just have that term marked out in the diaries of everyone for the determination of these matters.

Now that we can debate, I'm just putting it out there as something to assist your thinking.

The next question is, if one has, as it were, an amorphous blob of a series of weeks for trial, how does one allocate the issues within that blob for trial? And the first issue that arises in that regard is who is going to do the trying?

Now, at the moment, we have two separate cases which have the overlap that I have articulated. It's not the legal overlap that you have been articulating but it is an overlap that troubles us. So what we have in mind is that we would constitute two Tribunals, one in *McLaren*, one in *Volkswagen*. The *McLaren* case would be chaired by Ms Lucas on my right, with the other members being Mrs Justice Cockerill on my left and an economist.

The *Volkswagen* proceedings would be chaired by Mrs Justice Cockerill and the other members would be Ms Lucas and the same economist.

In that way, we have an ability to funnel issues during the trial window that we have articulated, according to which particular Tribunal ought to deal with it. Either the *McLaren* Tribunal, if it is a *McLaren* issue. Either the *Volkswagen* Tribunal, if it's a *Volkswagen* issue, or, what is nominally a different Tribunal but actually the same Tribunal, if it is a Ubiquitous Matter requiring resolution in both. And we don't need to work out today what goes under which heading because we have bought ourselves the flexibility to ensure that consistency is maintained, where appropriate, but that if there are *McLaren* or *Volkswagen* issues that don't require the attendance of many of the parties here today, why then, they don't attend.

Now, dialling back from that 2025 aliquot of time, we then have to ask ourselves how

do we get ourselves into a position where the issues are articulated? And here it may be that the *McLaren* tail wags the *Volkswagen* dog, if I can use that metaphor. You will have seen, because we ensured that you were copied in, that in *McLaren*, we have indicated that we are going to adopt a process of parallel formulations of cases to deal with the concerns articulated by the Court of Appeal in *McLaren*, that the Tribunal had not grappled sufficiently with the *Microsoft* process issue that was raised on appeal to the Court of Appeal in *McLaren* and what we have indicated we are going to do is each side is going to put together their complete case on overcharge and pass-on, timetable to be discussed. That positive case will be exchanged amongst those parties who choose to put one in, on a date to be set. There will then be a response, a negative response, which will effectively carve chunks out of the positive case, to the extent any party wishes to do so.

Again, that will not be pleadings alone, it will be all of the material that is necessary to try the matter. We will then have, in *McLaren* at least, an absolutely clear understanding of where we sit and how one tries the case. In particular, a clear understanding of the rival articulations of how overcharge is to be calculated and how pass-on is to be assessed.

The beauty of the approach is that we move away from the pleadings and into the arena which really matters, which is what the experts have to say.

Now, the question is, does one translate or read that process across into *VW* and say: what we're doing in *McLaren*, we do in *VW*? Now, one wouldn't normally do that. One would allow matters to take their ordinary course but because of this question of overlap, in this way we will, at the conclusion of the negative case submission, have an ability to understand what actually are the common questions that need to be resolved and what are the *Volkswagen*/*McLaren* specific questions that can be dealt with within those cases.

We don't, therefore, need to address today, on that basis, whether a Ubiquitous Matter Order is made or not. That would come at the end of the articulation of case process and at that point, the economist in the two Tribunals would take a step back. I would come back in and we would hear, because it's important to decide these things following a due process, the question of whether the Ubiquitous Matter should be declared, what its scope would be, so as to shape the trial or trials or hearings, however you want to put it, in 2025.

Now, that, as it seems to us, buys the flexibility that you want. You're not committed to having your case shaped by other people's definition of what is a Ubiquitous Matter. There is, as we can see it, no evident increase in cost or delay because, frankly, we were looking to try both these actions in 2025, ideally in the front end, but we are putting ourselves in the position where, if there is a danger of inconsistency in the broad sense I have articulated it, that can be dealt with, just not today.

So I apologise for interrupting you at that length, but I wouldn't want you to direct your fire power to the way Ubiquitous Matters have been framed today because that may very well not be something that we are minded to order today because we think there is a way of dealing with it in the future, in a manner that would be more satisfactory to all parties.

And just to finish with one further short thought for Ms Abram. We have well in mind that you have a preliminary issue to which Ms Ford has significant objection. We would not anticipate dealing with that until after an articulation of the cases in the way suggested.

Now, Ms Abram, you may well say on that: we don't want to put in a positive case, we want to get out now. That's something I think we can deal with, in that we would make it clear that your preliminary issue would await the articulation by others of the cases and we would then deal with the preliminary issue to get you out or not out at

that stage. If you get out, then of course, no problem; if you are in, then there would be the problem of whether you needed to articulate some sort of case going forward. But that is also something which we see as being better resolved later, provided everybody knows the direction in which we are heading, rather than to say now: no preliminary issue or a preliminary issue or we will decide it before we actually know what it is we are talking about.

So that's by way of a lengthy articulation of how we see these things going and I don't, Mr Kennelly, want you to pull back from objecting to that course but I do want you to understand that there are certain points that you quite rightly were attacking which are not really on our minds at the moment.

MR KENNELLY: I'm very grateful for that indication. Please make no apology for its length. It's very helpful and far from objecting to it, subject to instructions or being kicked by my learned junior, we would respectfully agree with much of what the Tribunal has said. We agree, respectfully, that the issue is not ripe today to order a UPO, Ubiquitous Matter, certainly not in the terms suggested by the Defendants.

We respectfully agree that the right time to consider whether there should be a Ubiquitous Matter is when the cases are sufficiently developed, to see whether in fact there are issues of principle which are common, because we understand very well the point that the President makes, that even where there is a limited or even no factual overlap, if there are common issues of principle, it may well be appropriate to order a UPO with Ubiquitous Matters, subject to the balancing of proportionality test that I mentioned in opening. So we don't for a moment suggest that because the factual overlap is limited, that's determinative. Not at all. In Interchange, on the contrary, there was strictly speaking, no overlap but it was still important to have a common resolution.

And the idea of addressing it at that point is precisely what we have been urging upon the Tribunal. The concern which we have is the suggestion that we would be ready to produce disclosure and expert evidence which is critical, in the timetable envisaged for *McLaren*. And that's why it was necessary for me to take you to our proposed econometric analysis, how our experts propose to deal with this, because it is not possible neatly to carve out a UK-specific data set and address overcharge and pass-on in a neat, discrete way that would allow us to move more quickly if we were simply looking at the UK vehicles alone. We cannot do that. That's why, unusually, we produced evidence not only from the economist but also from the VW representative, Dr Hemler herself, anticipating this very issue.

So that's really a question of timing. Again, subject to instructions, we have no concern with the point of principle made just by the Tribunal but we are concerned about timing because the Tribunal made the point that we shouldn't be forced into a disproportionate or unnecessary template, except for *McLaren*, it may be perfectly good for *McLaren*, but if we were forced to produce disclosure and expert evidence by, say, December of this year or shortly after that, it would simply be impossible and the Tribunal would get a product that was not fit for purpose. And that's the matter, I think, which I would need to revisit with my clients but it depends, really, on what the Tribunal envisages for the timetable, whereby *McLaren* and *VW* move reasonably in parallel to allow for a point at which Ubiquitous Matters can properly be considered.

The end of the negative stage, as the President mentioned.

PRESIDENT: Mr Kennelly, if I may say so, that is extraordinarily helpful. We quite deliberately didn't put in place a timetable in *McLaren* because we knew that the case management hearing today was coming up. So we did float the suggestion of a July 2024 date and I think that was reacted to with uniform horror by all of the

protagonists in *McLaren* and that was where we got the first quarter of 2025 date which is one, to be clear, we would want to maintain but we obviously need to hear from the *Volkswagen* parties as to whether that is doable. That was certainly a doable date for *McLaren*.

So the stepping stones to an aspirational 2025 Q1 date are up for grabs. What I wouldn't want the parties to get hung up on is disclosure as a self-standing step in the proceedings.

In competition cases, disclosure is a rather dangerous term to use and one is often talking not about disclosure of documents but the identification, articulation and agreement of data, and data and documents are not necessarily the same thing.

I anticipate that no one in this room would want several electronic equivalent articulated lorry loads of invoices or documents which, once they are processed, are capable of being reduced into a spreadsheet, agreed and then deployed at trial.

We want to cut out the process of disclosure where it is simply leading to agreed data, the significance of which is then discussed at trial. We want to cut that out. We want to move straight to the articulation of the data that, frankly, it is the economists who will need it and it is they who ought to be articulating what it is they need to see in order to perform their very important work in calculating what the overcharge is and how any overcharge was passed through the line, in terms of who sustained what loss.

Now, that is why we are minded to say it is going to be two key deadlines, the exchange of positive cases and the exchange of negative cases, and we are entirely flexible as to when those dates are put down.

What you will get before the positive case is articulated is every assistance from this Tribunal, ensuring that every party has the documentation and material and data that they need, in order to put together that positive case. So I don't want this to be

framed in the conventional way of: well, we will have pleadings, we will have disclosure, we will have witnesses of fact, we will have experts. That, I don't think works generally in competition cases and it certainly doesn't work here. So what we need is: each party's economists to work out, really, very quickly what it is they want, to then make demands to the extent that their client doesn't have that data, demands of either third parties or other parties in the proceedings to produce that material. If the material exists, why then they can produce their reports.

If the material doesn't exist, in other words, if either a party in either the *McLaren* or *VW* proceedings just doesn't have the data or there is no third party susceptible to the jurisdiction of this Tribunal who could properly be ordered to produce it, well then your economists are going to have to think again and that's true of all the parties. But that is how we want the timing and pacing of this to be run, rather than disclosure being seen as a separate, self-standing question.

So you can call it expert-led disclosure if you like but it is really a question of framing the data that each party needs to put together their positive case, then subsequently, the negative case, so that disclosure is folded up into that process.

Now, I don't know if that makes your job any easier or harder in terms of articulating the milestones that VW can live with up to an aspirational trial date, as I have indicated, in early 2025, but I hope that's a good indication of how we see the process working at least.

MR KENNELLY: Sir, in respect of that issue, I mentioned Dr Hemler's statement and I did it for precisely this reason, because it is the data, it is producing sufficient data that is the problem for VW. It's not simply a question of producing millions of emails. On the contrary, the Defendants and the *VW* Claimants have made progress in agreeing a proper approach to disclosure between us and although there are some points still in dispute, if I may say so, a constructive approach has been taken

by all parties and much progress has been made in a draft order that we can show you later today or tomorrow, if that's what the Tribunal wants to see.

But on the issue of how quickly can VW be ready for this amorphous blob, where we're all ready for trial at the same time, could I take you to Dr Hemler's statement because I appreciate the Tribunal has a plan in mind which may run up against just this obstacle of fact which is what's set out here.

It's in the Supplementary Bundle behind tab 4 and it begins at page 63. Sorry, I will just show you first of all the first page. It's page 58. We attached it to our skeleton. It's the witness statement of Dr Caroline Hemler. She explains who she is at paragraph 1. She has the conduct of the proceedings on behalf of the Claimants. She instructs Slaughter and May and she sets out in this statement -- and the Tribunal may have already read it.

PRESIDENT: Yes, we have read it but this is a point that is important enough for you to take your time to expand it because I think it's going to come as no surprise to you that we are going to be holding all of the parties' feet to the fire and it is really a question of discerning the difference between what is difficult and what is impossible that we are interested in.

MR KENNELLY: I understand. So in this statement she explains at paragraph 2 -- she wants to explain why it's not realistic that the Claimants will complete disclosure of the documents' data, including data and information, and relevant to pass-on in particular, before September 2023, which is the earliest date we could commit to in our draft timetable.

And bearing in mind that similar orders have been made in respect of *Daimler* and *Jaguar* and so the Tribunal is familiar with the industry, this statement is produced to explain what's different about *Volkswagen*, why Volkswagen has encountered particular problems here that may not have arisen in the other cases. And she

explains that the Volkswagen Group is unusually large and complex. There are multiple different systems and databases and extracting data from these has proved very difficult. It has posed significant technical challenges and to continue it will take a significant amount of time.

And over the page at data sources, paragraph 6, she explains that the Claimant group derives from eight different brands across the world. Each is an independent business unit, with its own corporate structures and internal processes and the identification and extraction of data obviously has to be done in accordance with the internal approval processes and regulations in those jurisdictions. It is complicated by the fact that, of course, the beginning of our claim period is 1997, so there are significant gaps, not least because the VW Group itself changed its technology radically, as we set out in our EDQ from earlier this month. And we explain this in our disclosure report also, there's no need to go to that. We have multiple different databases or systems.

Now, in view of the complexity of the task and the duty that Volkswagen has to the Tribunal as a Claimant, we engaged Deloitte last year, to assist us with identifying the repositories of potentially relevant data. Even VW, with its own massive internal resources, could not do it. Deloitte were instructed to identify the repositories of relevant data. This is not documentation or emails, this is the data, the raw data and Deloitte have been investigating, with about 100 interviews and follow-up interviews, on how to obtain this data, how to gather it. And she says in paragraph 11 this is an iterative process. When a data source is mentioned by an interviewee, we have to then follow up and see where that data is. Sometimes it isn't a good lead and when it is, then we obtain internal approvals to get the data source and that's often, again, limited by the fact that we're dealing with people who are not familiar, nor are directly responsible for gathering data and in foreign

languages.

And the added complexity at paragraph 12 is the fact that we need data in relation to "different aspects of a vehicle's production and sale". Because of the nature of the regression analysis, the extent of the data that's sought is extremely broad and complex.

Now, at 13 she says:

"The extensive and commercially-sensitive nature of the data … has understandably often raised internal concerns regarding the confidentiality of the data".

This is obviously the most sensitive data that Volkswagen has in its business. Therefore, we have been delayed by the need to explain and reassure internal stakeholders in relation to confidentiality.

And you have the point, it's in the middle of this paragraph, that the data we're seeking covers a 15-year period from more than 25 years ago and affects Claimant entities from around the world.

Now, we have identified, you see at paragraph 14, highly relevant data sources and others that are less relevant and we think there is good coverage across a number of different jurisdictions, affected by the cartel and in respect of the time period. And she says that we have spent about "EUR2-3 million" just in this attempt to identify data. That's a fraction of the cost that we have spent generally on disclosure and everything else. This is just the data exercise and then for data extraction, she explains in relation to the PROFIS FAB database alone, one of several databases she's mentioned, there are approximately three terabytes of data. This is far more than the articulated lorries the President mentioned. The volume of data covering this period, and covering the extensive nature of the claim, is truly vast and requires particular systems to analyse.

It's not something that can simply be given on a laptop, it requires particular work

stations in order even to access the data.

Paragraph 18 is particularly important:

"The process of extracting data from PROFIS FAB will be further complicated by the fragmented nature of the data within that database. PROFIS FAB comprises several different datasets, many of which contain millions of data points (as they relate to the costs and prices of millions of vehicles and parts)" and we are to extract and combine data from a variety of these data sets in order to have a full picture of each data point.

She says:

"the volume and complexity of the data held on PROFIS FAB means that extracting a single year of data will require approximately two to three weeks of work by the relevant IT department alone."

I should add we're constrained by the fact that those with expertise in relation to extracting data, the individuals concerned, are often a very small pool. It's not a question of spending more money, often the individuals who can do it are necessarily a limited group and we can't simply throw in extra Deloitte consultants, they just can't do it, we have a limited number of people that can do the job.

Then 19:

"The process of extracting data from ISAC is complex due to how it is used differently within the Volkswagen Group and its staggered introduction by importers."

And these are two out of the several databases we see at paragraph 20 that we identified as relevant. So 21:

"The extraction and transfer processes for each data source identified also have significant lead-times" because we have to liaise between Oxera, Deloitte and Volkswagen (Oxera being the economists) and that's even more difficult where the

potentially relevant data has been transferred to archives, as the data first has to be restored.

And we see this in other cases, the extraction from archives and restoration can often be -- again, one imagines surely it can be done instantly. It's a technical fact that it can't.

And then data processing:

"The potentially relevant data is required for the experts' analyses … [and] extracting and reviewing the extracted data is not sufficient for the purposes of disclosure; it has to be in a form useable by the parties' experts", but because it's so complicated and fragmented, there's a further significant processing process.

So it has to be matched. For the data to be of any use to anyone, it has to be cleaned and matched and I use those words, they don't begin to describe the complexity of the task and that has proved in this case much more complicated and difficult than it has been in other damages cases. In fact, more complicated than in other RoRo damages cases:

"It is important that extracted data is processed properly as unprocessed data will be unusable by the parties."

We can disclose the unprocessed data more quickly but it's of no use to anyone and it will just waste time and costs. It has to be given in a useable way.

Then 25: It's common ground between the experts that the relationship between changes in costs and changes in prices needs to be identified using empirical analysis. In order to be useable for the pass-on analysis, cost data and price data will need to be matched, so the relevant data points can be identified in respect of relevant vehicles and the databases don't use the same underlying coding.

This matching exercise is a nightmare because the coding is different and has contributed significantly to the delay and cost on our side. And so it is necessary to

convert extracted data used to common coding before it can be merged. This process may require extraction of further datasets to be used as intermediary steps and this requires powerful computers and the use of cloud platforms for storage and manipulation of the volume of extracted data.

So she says in conclusion:

"The process that must be completed for the Claimants to disclose pass-on data to the Defendants is complex, resource-intensive and time-consuming" which means that despite their best efforts.

And the Claimants are well aware of their duties. They are the Claimants, this is their claim, their duty is to do it as quickly and effectively as possible. Not to stinge on the resources that are required to do it but despite their best efforts, it's not possible to complete the disclosure of the pass-on data, just the data, before September 2023.

And she reassures the Tribunal that the Claimants are expending and will continue to do so, significant resources to identify, extract and process this relevant data and if there are breakthroughs, if the news improves, we will be delighted to tell the parties and the Tribunal but there's no sign of that.

PRESIDENT: No, indeed and, Mr Kennelly, I think we should all proceed on the basis that IT problems don't get better, they get worse. It may be that this case would be the exception, but I don't think we should bank on it, so we are certainly happy to proceed on the basis that this is a difficult job that is not going to get lightened in terms of burden by a breakthrough that we can't articulate now.

So that isn't a point that we are going to press you on, nor is the very helpful articulation of process that Dr Hemler has articulated. It's very helpful to have this material and we're very grateful to you to remind us of it, but there are, I think, two points that are, entirely, unsurprisingly, not addressed in this statement.

First of all, it is an underlying assumption of this statement that the disclosure process is a unilateral one. In other words, it is incumbent upon VW to produce disclosure to other interested parties in order to enable them to articulate their cases in opposition to VW's.

So we have, essentially, two things going on. One is the articulation of the material that VW needs to make good its case and the other point, which is where particularly, VW's duties arise in spades, is the duty to ensure that a 'cards on table' approach is adopted and the parties in opposition and that may well in this case include *McLaren* parties, have the opportunity to articulate their cases.

Now, the assumption of this statement is that the work done by the parties in opposition, as I will call them, who were interested in the work product of VW, will do their work after 30 September 2023 and that is an entirely understandable assumption on the part of Dr Hemler because that's the way we normally do things but you're going to have to be very persuasive, I think, to persuade us that that is how we do things here.

It seems to us that we need to have the articulation of what, parties interested in, VW's data much sooner than September 2023 and what we would want is an engagement by the expert economists, really from here on in, saying: "what we need is the following data. Tell us what you have in this area, how do we produce the following data? We know you can produce that; we're just not interested in it." In other words, one rolls up into one process the obligation of VW to produce material that VW thinks the other parties might want to see and one meshes it with what the other parties actually want to see.

Now, that is likely to produce quite significant savings in time and it's why I am very keen to focus on the date for positive cases, because it forces all of the parties to think about what it is they need to run their case and to mesh the disclosure

process -- not that it would be a disclosure process -- to mesh that process with the needs and demands of the parties who themselves have to produce a positive case. And it does seem to me that that is not the prism through which Dr Hemler has approached matters. That's not a criticism, that is simply a reflection of the fact that she's articulating, quite properly, the normal burdens that exist on a litigant in very heavy commercial litigation.

The second point that I would want to push back on is the question of confidentiality. I'm on the record in a number of cases that the confidentiality regime that is imposed in both High Court and Competition Appeal Tribunal cases has become a cottage industry, and the emphasis is on industry rather than cottage, which is going to have to stop. We are wholly opposed to a situation where the parties are spending as much time working out what can be disclosed consistent with a confidentiality ring, versus working out what actually is disclosable because it is useful to the other side. We want to have a situation where there is an absolute understanding that the rule against collateral use is one that will be fairly brutally enforced in this Tribunal. Rule 102 we think is a significant and important rule, and we don't see why there should be any particular concern about redaction or confidentiality if those documents are produced to external experts, who are in the first instance going to be the people who need to see it.

So our question there is, do we need to worry about confidentiality at this stage? So, very much putting your clients' feet to the fire, we would like to see thought being given to a rather different process to the one here articulated and, frankly, we're not sure that the positive case articulation process can't be done by the end of the year. Now, that's giving you two months beyond 30 September 2023, but it is not confining the parties interested in the data to a two-month period to produce their positive cases. Instead, we start rolling now and the parties will be saying: "well, how exactly

are we going to make good our positive case? What do we need to see? Who do we need to see it from? " And one has a process of engagement that commences, as I say, as of now.

My final point on this is have the parties considered the use of what I will term, for want of a better phrase, a data consultant? Someone -- an organisation that is retained by all of the parties to assist in the synthesis of data, so that the harmonisation and the matching that you have quite rightly articulated as a major problem, is dealt with in a manner that not only satisfies VW that the data is properly produced but rather more importantly, satisfies the other parties who are going to be quite sceptical about VW's production, that in fact the data is robust and reliable.

And, in addition to that, synthesises that data with whatever data exists in the hands of the other parties because we don't want production to be siloed through to, let us say, 30 September 2023 and for the parties then to disclose mutually, documents which have never, as it were, spoken to each other and are meeting each other for the first time. We don't want that. We want the parties to be articulating synergies in the data from well before the exchange of terabytes of material.

So that is quite a firm pushback on Dr Hemler's really very helpful statement and it's why we are seeing the September date as one that is not, at the moment, an obstacle to a Q1, 2025 trial.

MR KENNELLY: May I straightaway --

PRESIDENT: Please do.

MR KENNELLY: In Dr Hemler's defence, I'm not sure you need to push back. Dr Hemler is only talking about what could be achieved in relation to data. We want a 2025 trial. You have seen our proposed timetable. We are the Claimants who want to get this on as quickly as is feasibly practicable.

The four points you made, Sir, the first is, really in substance, can she be helped?

Can the Defendants help us do the job outlined in her statement? That I don't know. It's not something we have addressed. I suspect the tasks that she describes there are tasks that only VW and its agents can do. I will be corrected. Obviously, I will take instructions. It may not be possible for the Defendants, even with the Tribunal's encouragement, to move that process along. That's not to say they can't do things in the meantime but the particular obstacles that she describes may not be fixed or fixable with the Defendants' assistance.

So let's assume, Sir, for the moment, we're stuck with those problems. That does not mean that everything else stands still. We respectfully endorse the Tribunal's view that the Defendants, in the meantime, can progress their own work and indicate to us what they want and where they seek particular data being of significance.

That is something which can be progressed in parallel and it would obviously help us move towards a 2025 trial. Again, the confidentiality concern that the Tribunal has raised is not the one that Dr Hemler raised. That was a point raised really as a subsidiary point by her. It just goes to the sensitivity of the data and the fact that it has delayed us gathering it internally because the internal stakeholders required explanations and reassurance, it couldn't just be taken from them. We respectfully agree that confidentiality should not unduly delay this. We are not insisting an onerous or time-consuming confidentiality protection has delayed us in the past. We are at one with the Tribunal's view on that. It should not be an obstacle and so that's not a pushback against Dr Hemler, but we respectfully agree.

Finally, the data consultant, anything that moves this along in a proportionate way, where the parties cooperate, is welcome news for Volkswagen. We have not considered it, as far as I am aware, but no doubt we will have to discuss it between ourselves but in principle, we have no objection to it. It may mean that we can share the cost that we would otherwise be incurring on our own and it would help the

experts and their consultants to coordinate.

PRESIDENT: Indeed. That is exactly the point. I don't want us to move away from the adversarial model that serves us so well in terms of trials but what the parties perhaps ought to think about is how far within that adversarial model a cooperative process can be incorporated, to enable everyone to cut time, cut costs and produce the deliverables that they're all obliged to produce and synthesis of data, extraction in a manner that is satisfactory to all concerned, is critical to this sort of process.

It goes back to the questions of electronic searching of universes of electronic documents. The fact is that because there are many different ways of doing it, a receiving party is not necessarily going to be persuaded that the producing party has done matters in the way that it would find satisfactory and there's a lot to be said for translating the burden to the receiving party to do the search. And that's not what I am proposing here but what I am suggesting is that it is very important that all of the parties get stuck into each other's material, to understand the constraints that exist in production of reliable material, so that we don't have a further process post, let us say, 30 September 2023, where all of the parties are lining up and saying to VW: "well, why didn't you do this? Why didn't you do that? Where is this data?" And I'm sure there will be answers to all these questions but those answers should be articulated and framed during the process, not after it, because otherwise we will be adding three months to working out that Volkswagen actually did the best job it could and that there are very real constraints on doing any more. Well, those three months we would like to have back for proper work.

MR KENNELLY: As the Tribunal has seen from our proposed timetable, we envisage a trial in early or mid-2025. Appreciating how difficult that is in view of the obstacles we have identified but we also want those to be overcome. I have one final obstacle to place in the way of the Tribunal's planning and I need to raise it now

and it's the time my experts will need to do the work, having received that useable data from Volkswagen and Mr Noble, in his letter to the Tribunal which is attached to our skeleton, explained why he needed a period of approximately six months to produce his first expert report and I'm not going to take you to that now because I see the time and my learned friends will want to address you.

The important point is the nature of the analysis he will need to do is extremely complex because of the size and scope of the *VW* claim and so it's not appropriate to imagine that he can move as quickly as the experts in *McLaren*, for example. And you have seen the difficulties with the VW data which obviously has its own built-in delay and the limit to what Mr Noble can do until that data is ready. He's obviously not idle and, with the Tribunal's indication, whatever can be done in the meantime should be done but six months, as he explains, is what he will need.

And the challenge for the parties and for VW, I think will be that pending that report, in order to get ready for a trial in early or mid-2025, the challenge will be what can he usefully do, how can the experts usefully liaise before this report is complete. And that, I'm afraid, I need to take instructions and discuss with my clients. We see what the Tribunal has in mind, that we shouldn't follow the standard iterative way that one has in adversarial proceedings but he says that that report cannot be completed sooner. And so, to the extent that the Defendants say: well we can't do anything until we get that report, if the Defendants are right about that, there is a roadblock there.

But I think the Tribunal is suggesting that we have to be realistic and pragmatic in what could be done and if statements -- as the experts have done already, if liaison can be undertaken, if joint statements can be prepared, that ought to be done to narrow issues and progress litigation in the meantime, even if the formal trial expert reports are not complete.

I'm just going to quickly check if I have missed anything before I sit down.

Sir, I think that's probably all I can say without taking any instructions from anyone.

PRESIDENT: Mr Kennelly --

(overspeaking)

MR KENNELLY: -- also want to say something, I'm sure.

PRESIDENT: -- that's been extraordinarily helpful and I do apologise for throwing so much at you.

What I am minded to propose is this: that we rise, we need a break for the shorthand writer anyway, but that we rise for a little longer than usual, say half an hour, to enable you in particular, to think through what is and is not doable. Of course, that goes for all of the other parties as well, but before we rise, I think it would be right to throw open the floor to anyone who has a root and branch problem with what the Tribunal is proposing. In other words, not the matters that you're going to be thinking about over half hour break but more fundamental objections as to the broad way in which we are aligning the tectonic plates to trial that we ought to consider and give a steer on, before you think about the slightly smaller but, nonetheless, very significant and important questions to a trial in -- well, not set in stone but aspirationally Q1, 2025.

So is there anyone who wants to rise to make that sort of point? Mr Hoskins?

MR HOSKINS: Not for the first time, I fear I'm going to be a grave disappointment to you, Sir. We are not keen. Let me try and break it down.

The UPO, the reason we suggested the UPO was not just a concern about inconsistency, although that plainly is there.

The other potential benefit of a UPO is that it might create efficiencies and it also might aid the practicality of trying the many issues that one finds in both these cases.

Now, as you have seen from our submissions, one of the reasons we were

suggesting a UPO was a good idea was we thought it would facilitate settlement, both in *McLaren* and in *VW*.

Because clearly, a Tribunal finding on pass-on, albeit in relation to *VW*, is going to be incredibly powerful evidence in terms of a general approach to pass-on in *McLaren* and you would have the finding in *VW* by definition.

Similarly, in relation to overcharge, we have all read Mr Noble's letter, but the point is even if a global regression had to take account of different -- extra route pairs, as well as the inter-EEA route pairs, quite clearly the basics of a regression model dealing with these RoRo services would be greatly assisted by a Tribunal judgment in the UPO in relation to overcharge.

So if one goes instead to a model in which one has the two trials at the same time, or one after another but your suggestion, and the UPO is part of that process rather than being a separate and earlier part of the process, one is giving up any possibility of using the UPO to facilitate settlement.

I know you will be tired of people standing up and talking about facilitating settlement, et cetera, and I know it wasn't the same model but we have just had Trucks and that wasn't even a UPO. It was just: we will have one Trucks trial and then we will have another Trucks trial and then we will have a third Trucks trial. So that wasn't even as focused as what the option is on the table before the Tribunal today and you will know what happened. We had the Trucks 1 trial. A judgment was produced and lo and behold, all the parties settled the second trial.

So the power of the Tribunal looking at related or similar issues because the whole point about the Trucks trials is they weren't the same. It was a bit like Interchange in a sense but probably the differences were even greater, given the nature of the Claimants. But that's a very powerful and recent example of the fact that in these big competition cases, one way certainly, is to try and put everything together and hear it

all at once and have a mega trial and that's one of the things we suggested in Trucks and in fact, the Tribunal rejected that suggestion and thought it was too cumbersome.

That's one of the reasons why we just don't like the idea of: we're going to have two trials, the UPO is going to be at the same time because any possibility of using a UPO to facilitate settlement is done away with.

Mr Kennelly took you to the CAT's guiding principles. He probably didn't need to, I'm sure you're well aware of them, but in terms of saving costs in terms of the parties' costs, in terms of using the CAT's resources efficiently, it just seems, if I may put it bluntly, a very great shame to give up the possibility of the parties actually managing to resolve this between themselves with the benefit of a UPO and going straight to what, on any basis, would be a mega trial.

PRESIDENT: Mr Hoskins, just to articulate that a little further and you're absolutely right, Trucks 1 is a poster child for how these very big trials can be resolved because, yes, Trucks 2 has evaporated. The trouble is one cannot and one should not anticipate a settlement or one hopes (inaudible) and courts are very keen to ensure that they create a terrain where settlement is promoted, not discouraged. But the converse of your Trucks 1 example is the Interchange trials in 2016/2017, where there was a first trial which said: look, this is how you do it.

The parties didn't settle and one got three trials which were inconsistent. So in a sense, your Trucks example is no more than the flipside of what happens when it goes wrong.

MR HOSKINS: To use -- it's an opportunity rather than a certainty. The question is whether the Tribunal wishes to avail itself of that opportunity.

PRESIDENT: Quite.

MR HOSKINS: That brings me to another point which is the reason why or one of

the reasons why the first judgment in Interchange didn't lead to settlement was -- one of the reasons was because we got that first judgment about two-thirds of the way through the second trial and that's another of my points which is, if one is to have this opportunity, then of course that, as again, you have seen from our written submissions, you have to leave a sufficient amount of time between the first judgment and what follows, in order to allow the parties to see if they can come to a settlement.

And that's another reason why you lose that advantage, if the UPO is just part of the mega trial.

PRESIDENT: Entirely --

MR HOSKINS: In respect of losing the opportunity.

PRESIDENT: The trouble, though, is that you have the difficulty -- assuming pessimistically, no settlement -- of the non-Ubiquitous Matters which have to be tried afterwards -- assuming they don't settle, having to be tried after. Leave on one side the taking up of resources and Tribunal time that that entails because one is hopeful that a settlement will avoid that, but assuming no settlement, in addition to the time and money, one has got the problem of inconsistency, if the parties in an area where they are not bound *res judicata* or issue estopped, are able to say: "well actually, my case is not as per the Ubiquitous Matter, that was a small subset of my case, my case is actually this." And one then gets the risk of inconsistency within the same case. In other words, you decide the Ubiquitous Matter, including *Volkswagen*, in one way and then Volkswagen say: "well, yeah, but that's a small part of our case. Actually, we're running it for the rest of the matters in this way." And you then get an inconsistency not between cases but within the same case that is coming later and that's really what I was articulating when I was talking to Mr Kennelly about the danger of shoehorning cases into a pre-defined template.

So is it really a case that we are having to weigh different, unpalatable outcomes and work out which in this case is best or is it more than that?

MR HOSKINS: Sir, if I may be so bold, if I may say that risk of inconsistency that you have just suggested is, to use your own phrase, a straw person.

Because if we have a UPO judgment in relation to the specifics, then each of the parties will look at that -- and you're absolutely right, sharp litigators act in the interests of their clients. The first question they will ask themselves is: can we do better than that? And the only way they can do better is to show that the particular case that they want to do better on is different from the UPO, and they will have to satisfy the Tribunal that the other case, whatever it is, let's call it a different brand, let's say we're talking about Mazdas rather than Volkswagens, they will have to show that there is a material difference in the way in which the cartel impacted on the carriage of Mazdas as opposed to Volkswagens.

If they can't show you it's different, then the Tribunal is going to adopt the same approach as in the UPO. If they can show you it's different, then there is no inconsistency because you're treating different cases differently. But the fundamental point is the benefit of the UPO is you're starting with a judgment in which the CAT has heard evidence and delivered a judgment on the proper approach to overcharge and the proper approach to pass-on and that is valuable.

So with respect to that point, I would suggest there is no inconsistency, for the reasons I have described.

PRESIDENT: You're putting it there's no excessive risk of inconsistency or the risk of inconsistency is one we ought to live with, given the benefits of a smaller but, nevertheless, influential trial.

Just help me on this: how does or where does that leave *VW*? That would mean that you have -- assuming we stick to a positive/negative case approach that is pretty

much written into the *McLaren* process, *VW* produce a positive case that is confined to the Ubiquitous Matters defined as of now and the rump, even though we hope it will go away because people will learn the lessons, the rump is kicked off to very late 2025 at the earliest, probably better, 2026. Is that a fair articulation of where you see it going?

MR HOSKINS: Sir, it is my submission that the *VW* case, whatever model one is using, whether it's the one you have articulated as a possibility this morning or the one I am articulating now, *VW* is not going to be ready for trial until late 2025 in any event.

Mr Kennelly sort of tentatively put forward why they would be in difficulty with January. There's actually far more fundamental problems with that and perhaps I can just highlight some of those now because this spins in, it seems to me, into the question of what's an appropriate model and you very fairly said what happens to *VW*.

Well, can we look at VW's proposed timetable to trial which on their basis, would take us to a March trial. I think you can find it in the Supplementary Bundle at tab 4. The timetable begins, as long as your copy is the same as mine -- the heading is at the bottom of page 6 and it's paragraph 13 of that draft order.

PRESIDENT: Yes.

MR HOSKINS: So first of all, there is the question of repleading. Now, I absolutely agree, Sir, we don't and we can't get into today, the question of whether the current pleading in relation to the foreign regulators is liable to be struck out or not. That wasn't our intention, but what you will have seen is that we raised the point and that Volkswagen, in their CMC skeleton, said: we're planning to apply to amend in any event because they are getting disclosure of foreign regulatory materials. So not surprisingly, if you're Volkswagen, having seen the Tribunal's judgment on the status

of foreign materials, they have said: we're going to replead and, effectively, it's pretty clear they're going to plead a stand-alone case. That's what's going to happen.

Now, the proposed timetable for that, 13.1, 13.2 and 13.3, and there's two points I would like to make in relation to that. You might just want to refresh your memory as to what they propose.

PRESIDENT: Yes.

MR HOSKINS: Now, there's two aspects in relation to that. The first one relates to the permission they seek because what they are seeking is permission in advance to make amendments to their case which none of us have seen.

Now, clearly they can't have that, so the normal process would be they would produce a draft of the amendments that they wish to make. We have some time to say whether we agree to them or not and if they don't agree, the Tribunal will have to rule. But that is one element that has not been built into the timing of this process of the repleading.

The second point is that they have suggested that they will produce the pleadings, so one presumes, effectively, now, this would have to be the draft. They say they will produce them on 27 October 2023 and they have suggested that we would have one month to plead back to that.

Now, it's certainly the case that certain of my clients, and the same applies to the other Defendants, were involved in those foreign regulatory matters. Some went further than others. They're all of a different hue but what is undeniable is in order to plead back to whatever allegations Volkswagen puts, we're going to have to have sufficient time to liaise with clients to take instructions. That is not going to be a simple matter.

So a month is not going to be enough, so already, you have a situation where we're not going to have the close of pleadings until after December 2023 because you

need to build time in for the draft, you need to build time in for the Defence. So on Volkswagen's own timetable, we're not closing the pleadings until sometime probably in the first quarter of 2024 and clearly, given the global nature of Volkswagen's claim, if they are going to be pleading stand-alone claims which go well beyond the EEA, that is a very different beast from a follow-on claim and raises issues in relation to factual witnesses as well, which is a very different matter.

Now, there is a question of data. Having an expert-led approach to data is becoming more and more commonplace. I don't think anyone is going to push back on that. I think it is recognised that that's the sensible way to do it these days but even with an expert-led approach, the sorts of problems identified in Dr Hemler's statement still exist and you don't need me to tell you what they are. It's a well-trodden path but you have to identify the data, you have to see whether it can be extracted. Often with old data, you have to try to reconstruct it. You then have to clean it. So those sorts of practical problems will exist in any event.

For example, having a data consultant is not going to solve that problem. Those are still going to exist.

A data consultant might help but the process of synthesis is usually very client intensive because what one usually has is a set of figures that look or data that looks like it might be similar to the other data but what you have to do is to interrogate the clients to find out to what extent they are the same and what one often finds is that when one looks and thinks: "oh, there's two apples, excellent", often because of the way internal costs are dealt with, that the apple is in fact a pear. And that process requires a lot of intensive input from clients. That might be possible to do that with a joint consultant but that might be difficult because of the need to deal with clients. That's just a practical issue but in any event, synthesis is only the element that comes after everything else that the Hemler statement identifies, so the data process

is going to take time.

In the draft order, the *Volkswagen* draft order, can I ask you to look at paragraph -- 13.3, you have seen, so the close of pleadings on this is 15 December 2023. I have explained why that, in fact, will have to be later. Then at paragraph 13.5, as they currently have it, they suggest that witness statements are exchanged a month after pleadings close. In our submission that's patently not going to be long enough, particularly if we're dealing with the stand-alone global cartel allegations. So the process of witness evidence is going to take a lot longer than a month after close of pleadings, so you have that problem.

In relation to experts, you have been told by Mr Kennelly and you've seen that Mr Noble says he's going to need six and a half months after the end of disclosure to prepare his report.

What's proposed in this timetable, you see 13.9 is: the Claimants to file their expert evidence - April 2024, and then it's suggested that our evidence would follow up on 21 June 2024 which is about two and a half months later.

Of course, it's absolutely correct that we can work on our positive case in the meantime. Indeed, that's what you want everyone to do, if you do your directions but one has to remember that when one gets the positive cases, in order for the experts to produce a negative case, what often has to happen or necessarily has to happen is you have to deconstruct the other sides' models and that itself is a time-consuming process which requires the experts to liaise with each other and it's something that is -- necessarily, iterative questions are asked and it takes place over time.

But whether one adopts the standard form of disclosure or whether one adopts the *McLaren* style, one is going to have to allow sufficient time for the negative case for that to happen.

There is also a humanity issue, a personal well-being issue. I know we're all sitting

here instructed by our glamorous city firms, I know city firms have manpower, but the suggestion that we all, on this side of the room, prepare a trial which requires us to deal with all the *McLaren* issues and all the *Volkswagen* issues in January 2025, is brutal.

Preparing one of those trials would be a large job. Preparing both of them, because we're talking, in reality, about a 20-week trial probably, there is a limit to what you can do by simply throwing manpower at a trial and there comes a stage where that sort of mega trial really just becomes something that even money cannot solve. It's just a question of the human beings involved and the capacity to deal with things.

And that's perhaps not a popular view in this sort of high-level commercial litigation but it is the truth; we have all seen it.

The other problem with a mega trial, so if we're talking 20 weeks, is, in our submission, that is likely, actually, to create greater expense because, yes, one can try to identify and cut it up, salami slice it and say: on that day, *McLaren* doesn't have to come and on that day, *Volkswagen* doesn't come but it's not possible to do that with precision. What will actually happen is that if the counterfactual is a *McLaren* trial, a separate *McLaren* trial and a separate *Volkswagen* trial, having a combined *McLaren* and *Volkswagen* trial, I would put heavy money on that being more expensive than the sum of separate *McLaren* and separate *Volkswagen*.

The final point on the Tribunal's suggestion is, and it echoes something I have already said, which is if we are to have -- again, I'm sorry to use your own language -- the blob, call it the mega trial and if during that window, one is to have the full *McLaren* trial, the full *Volkswagen* trial and any Ubiquitous Matters heard, then actually, what's the point of having the UPO? You could just consolidate them. You could have one big trial. Having a separate UPO in that sort of context risks adding further complexity and that's not me coming to the end of my submissions,

saying: "oh, you're absolutely right, we shouldn't have a UPO at all." It brings me back to where I started which is the great advantage of a UPO is it potentially -- well, it will avoid the mega trial and introduces not just the safeguard against inconsistency on the overlapping issues but also the very real possibility that we may not have to have either the *McLaren* trial and/or the *Volkswagen* trial in any event.

And it's for those reasons that I am afraid to report that we do have a fundamental opposition but I hope I have put it in polite terms.

PRESIDENT: You've put it very politely but very helpfully and emphatically, Mr Hoskins, so we're very grateful.

So in terms of the options on the menu, we have the Tribunal's proposal as framed with Mr Kennelly, which is essentially an all-in, variable geometry trial in Q1, 2025, which loses the chance of settlement that arises out of a sequential Trucks 1 approach and also, and entirely separately, may not be doable, depending upon just how capable Mr Kennelly's team are in writing or rewriting the timetable that is expressed in the order you've just taken us through. So that's option 1.

Option 2 is the one you're advocating for, Mr Hoskins, which is a limited UPO trial, essentially *McLaren* plus bits of *VW* that are Ubiquitous Matters, which loses the danger of inconsistency between Ubiquitous Matters but gives rise to the potential of inconsistency within *VW* itself and in any event, shunts *VW* to 2026, so far as the non Ubiquitous Matters are concerned --

MR HOSKINS: Can I just respond to those two points.

PRESIDENT: Of course.

MR HOSKINS: You have my point on internal inconsistency, which I didn't accept.

PRESIDENT: I do. You didn't accept it --

MR HOSKINS: You might not accept that; I understand that. And the second point is, on my submission, if *VW*, in any event, is taking place at the end of 2025, then

this option isn't to shunt them there because it may well be your first option, the Tribunal option, can't take place until the end of 2025 anyway, so it's not necessarily a difference between them.

PRESIDENT: We will have to hear from Mr Kennelly about just how far his shading of early to mid-2025 is really mid- to late-2025. On that, we will obviously need some help but what I was articulating was that our proposal, option 1, has the two downsides of losing the chance of sequential settlement and shunting off -- well -- and not being --

MR HOSKINS: Doable.

PRESIDENT: -- capable of achievement. Option 2 has -- it may not be real dangers but it has the prospect of moving off *VW*, separating it from *McLaren* and the Ubiquitous Matters. You may say -- we will see what Mr Kennelly says -- that that is what would happen to *VW* anyway. Well, we will see.

The third option, which I don't think anyone is pushing for, is that there are, essentially, either separate trials completely, we just do *McLaren* and *VW* separately, or we ditch the UPO question and have a mega trial of everything together. We don't even try to apply the variable geometry in Q1, 2025; we just all rock up and it's tried as one genuine blob.

Now, we're not going to rule on those options now, clearly. We think that Mr Kennelly is entitled to some time to think just where he's coming from, because there is clearly a choice in terms of how fast he thinks he can go, and we will obviously want to hear from others but I just want to check that we have heard, as it were, all of the ranges of options from the parties.

If there is a fourth option.

MR HOSKINS: I think I have finessing rather than new options in a sense. There is an option that we raised which is you can have a UPO only in January 2025 and the

benefit of that would be it wouldn't just facilitate settlements in *Volkswagen*, it could facilitate settlement in *McLaren*.

PRESIDENT: Yes, that's the option 1, I think, isn't it? You're saying just a UPO.

MR HOSKINS: Exactly. So you've identified, quite rightly, there is a January 2025 UPO-*McLaren* and there is another option which is just UPO because that gives you the benefit of *McLaren* might settle, following that UPO judgment. So that's the sort of two types of that same option. Just to put a gloss or another aspect to the Tribunal's option, which is *McLaren* plus *VW* plus UPO - question mark - in first quarter 2025, you could have that option in last quarter 2025 and our preference is for a UPO in early 2025, either UPO alone or UPO plus *McLaren*, for reasons I have described and our next best would be the Tribunal's option but in Q4, 2025, for all the reasons, again, I have described and won't go through.

PRESIDENT: Just to be clear that the notion which is always attractive to Tribunals but never wise, of kicking the can down the road, doesn't exist here because we are here framing what the parties are going to have to do, effectively, from tomorrow, going forward. In other words, one of the virtues, as we saw it, of the proposal that we put to Mr Kennelly was that we would get to see the colour of everyone's money before making proper dispositions as to what fell within which camp.

Your point is that that involves such an enormous amount of work that first of all, you don't think *VW* can do it. We will hear from them but more to the point, you think that would be imposing an unfair, excessive burden on the other parties. You're not saying you can't do it but I think you are saying that it would be, in welfare terms, not something that is particularly commending of that proposal.

MR HOSKINS: There is that burden point. There is another aspect to it which is if the Tribunal decides upfront we want to have a UPO because of the possibility of settlement, the reason for doing that is because it may well save a lot of time and

money and, therefore, if one is attracted by that, the sooner one decides that there is going to be a UPO and how to define it, the better because immediately the work is focused on that, you do that work, whereas if, under your model, if you have positive case/negative case and then UPO, the benefit of the UPO is not entirely gone but it's materially dissipated, for reasons I have described.

So I would urge that, if the Tribunal is attracted by the UPO as a potential efficiency, the sooner that is grappled with the better.

PRESIDENT: Yes.

Thank you very much, Mr Hoskins.

(Pause).

Ms Blackwood, I don't want to shut anyone out. What I am keen to establish is the battle lines. So Mr Hoskins has very helpfully identified a different way of ordering the tectonic plates. We're not going to come back after our break and say: "here is how we're going to do it" but we do think that it is important that Mr Kennelly has a chance to articulate just how far his proposals in terms of timetable can be adjusted, given that the order that Mr Hoskins has taken us through is very much a conventional order and not one that is looking at the approach of structuring the cases of the parties that we have in mind.

So we will hear from the other parties after the break but we will rise now for 30 minutes, until a quarter to 1. We may run into the short adjournment so that we can get a further sense of where others say we should be going but we think that Mr Kennelly does deserve a degree of time to consider the points that we have put to him and also, Mr Hoskins, the points that you have put in his mouth about the possibility or not of a trial of the scale that you are talking about being achievable at all. Because if Mr Kennelly comes back and says: "look, we can't do it", then that of course makes a difference in terms of how we approach matters because we're not

in the business of imposing impossible burdens and only with reluctance are we going to impose burdens that are achievable but inappropriate, given that there's no massive urgency about these things. We want them done as quickly as possible but there are limits to that desire also.

So we will rise until a quarter to. Thank you all very much.

(12.18 pm)

(A short break)

(12.45 pm)

PRESIDENT: Mr Kennelly.

MR KENNELLY: Thank you, Sir. I'm on my feet but it may be that others want to speak before me, where they need to, where they didn't have the chance to do so before the break. Just to say that I will, when it's the appropriate moment, respond to what Mr Hoskins says and address the points that the Tribunal directed us to before the break.

PRESIDENT: We will come to you, Mr Kennelly, in due course.

Ms Blackwood.

MS BLACKWOOD: K-Line adopt the submissions of Mr Hoskins. I just wanted to add two very quick points on the ability for us to have a trial in *VW* in March 2025. I think the first point is in relation to how quickly disclosure could be completed. I'm aware, Sir, that you were raising points that the experts should be liaising and lists of disclosure should be promptly outlined.

We do, actually, already have a Joint Expert Statement. That's in Bundle 3, tab 74, where the experts have set out the material that they consider that they need.

PRESIDENT: Bundle 3, tab 74?

MS BLACKWOOD: I'm sorry?

PRESIDENT: Bundle 3, tab 74?

MS BLACKWOOD: Yes. So the parties' experts have already liaised on the issues in the case and set out a document stating the information that they consider would be required for the analysis and off the back of that, VW and the Defendants have been liaising to identify the appropriate disclosure. That's an issue that might come on before you later today but, hopefully, we are still liaising and the issues will either be agreed or very much narrowed, hopefully.

The point there being that it won't be the identification of the documents for disclosure that is likely to hold up the process but, rather, the practical task of going through the material and extracting that material, the relevant information, and I know that Mr Kennelly will address you on Dr Hemler's report and how quickly they can do their disclosure but I am instructed that we are also in difficulty in not being able to do our parts of disclosure prior to September 2023. And we have agreed what we are prepared to disclose, so we know the parameters of that and we don't anticipate it would be possible to complete it more quickly.

And then just the second point --

PRESIDENT: Just to be clear, Ms Blackwood --

MS BLACKWOOD: Yes.

PRESIDENT: -- when that disclosure is produced at the end of September of this year, that will be a form of disclosure that won't have any surprises for the receiving parties and won't be subject to any questions as to what more could be produced because of this dialogue that has taken place that you have taken us to?

MS BLACKWOOD: I can't guarantee that there will be no questions at all but certainly on certain issues where we anticipate that we might need further disclosure or be asking for further targeted disclosure, we have asked for material that they're providing to be brought forward a little bit. We will come on to it later but there are issues surrounding, for example, interest and what they're providing in relation to that

and we have asked for that material to be provided at an earlier date, so that if we do have further disclosure requests, they could be made in good time and we won't hold up the overall process.

And the second point is simply the repleading process. I am conscious that VW does want to replead its claim in light of the Foreign Regulatory Materials. We anticipate that could be very large-scale amendments and we want to emphasise that we will need time to respond to that in our Defence. Four weeks is simply not enough. We have to liaise with our clients, take instructions across different time zones and that process, that time for proper pleading to be allowed is necessary to be built into the timetable and that will need to be done before the positive and negative cases are put in, otherwise we won't be in a position to know what positive case we should be putting forward.

So there is that delay because of the circumstances of VW's case, that they have stand-alone claims that they need to expand upon and explain and plead to that's going to delay the process.

Sir, thank you.

PRESIDENT: I'm grateful, Ms Blackwood. Thank you very much.

Mr Piccinin?

MR PICCININ: Yes, Sir. I have two points of clarification and then two short points of concern with the proposals that have been aired so far.

The two points of clarification and I'm sorry, it's not very traditional to ask questions to the Tribunal, but all the same, I think it would be useful to have answers.

The first one is what is meant by the distinction between the positive and the negative case in the context of a cartel damages claim and, in particular, if one of the Defendants did not advance a positive case on overcharge, for example, so did not put forward any regression analysis, trying to calculate what the overcharge might be

or to show that it's zero, would they be permitted, is it envisaged that they would be permitted, as part of the negative case, to put in a regression analysis that responds in some way to the regression analysis that was put forward by the Claimants or is the intention that if you're going to put in a regression analysis, it needs to be in your primary case?

PRESIDENT: Well, you're asking the usual question of what is a rebuttal of a case that is run --

MR PICCININ: Yes.

PRESIDENT: -- and what is a positive averment of an outcome. Now, what you're saying sounds to me very much like a positive case, so if there were to be a Claimant case of overcharge at X amount and your position was simply that the analysis was wrong, then of course, go for it, that's a negative case but if, on the other hand, your position is that whatever the virtues or otherwise of the positive case and they're bad, you would say, you say that the outcome actually is X, then that sounds to me very much like a positive case.

MR PICCININ: Presumably the same thing then would apply for pass-on. The burden is on the Defendants in the *VW* proceedings. VW, if it wants to put forward any analysis at all, would need to put forward a regression analysis in its positive case rather than waiting for the negative.

PRESIDENT: That's it, so that all parties know what is actually being contended for. So the way we are framing this is that negative is an entirely destructive approach, so that if you choose not to put in a positive case but are simply going on the attack, what you end up with if the attack is successful, is a destroyed case from the other side but an inability to make any kind of positive findings arising out of that, based upon some other methodology.

MR PICCININ: Okay, I'm grateful, Sir, I think that does answer my question.

The second point of clarification was just what was intended by your proposal in relation to the status of disclosure and witness statements and expert reports that are produced over the next year or so in each of these two separate proceedings. Is it envisaged that everything that anyone produces will be shared with everyone, regardless of which case they're in and also, will there be an ex-ante disapplication of Rule 102, such that everything that is provided can be used in either of the cases, even if the Tribunal ultimately makes no UPO at all, or not?

PRESIDENT: That's an excellent question. The answer is it would ordinarily depend. Clearly, if one has some kind of joint variable geometry trial, it would follow that everything would have to be crossing the line between the two cases.

The harder case is what would happen if one had, let us say, a *McLaren* case followed by a *VW* case, with, let us say, no Ubiquitous Matters at all. Now, our provisional thinking on that is that although, normally, there would be no movement across, we would, in these cases, be minded to order a more or less total movement across, certainly in terms of the question of disclosure.

In other words, we would expect that requests from, let us say, McLaren to VW for information going solely to the *McLaren* case would be responded to by VW and vice versa but we will stick with the *McLaren* going first instance, even if there was no participation at all by VW in the *McLaren* trial.

So, to that extent, we regard the same bedrock of mutual exchange as being the same. It may be that the details would be limited, depending on which particular option one goes down but basically, we would be regarding the information gathering process as being common to both.

MR PICCININ: Yes, and indeed, when we reconvene after the positive cases are all exchanged, to discuss what the scope of the UPO would be, it would seem obvious that everyone would need to see all of those positive cases.

PRESIDENT: Well, that is right. The question would be which particular option one goes down. If one were to say which is not -- would have to say, top of the list of the desires of the Tribunal -- one were to say that *McLaren* and *VW* just have to be dealt with separately, not even any Ubiquitous Matters, then one might say: well, what's the point of showing the cases in the two disputes to the other sides?

But I think we would be inclined to think that even if we were to order a segregation of *McLaren* from *VW*, we would want the opportunity of a buy-in later on, to see that if the materials, having been articulated in positive and negative cases, there was some room for a common hearing of certain matters, that that would not be precluded by what we order now.

MR PICCININ: Yes, I'm very grateful. That's clear as well. That takes me on to my two concerns with the Tribunal's proposal.

The first one which I will articulate in a moment is a concern about us not knowing now or at least soon, which issues, if any, are going to be heard in common and then the second concern, which I will deal with next, is that in this approach of just proceeding to full positive cases, we're missing an opportunity to elucidate what these cases are about and to find opportunities to try these proceedings in a more efficient way, in particular with preliminary issues, on points that are pivotal.

So just taking the first point first, just to unpack what I understand the Tribunal's proposal to mean in practice, what would happen is that my clients and the clients of everyone sitting to the right of me, so that's another two parties, would have to produce full parallel witness statements of fact and expert reports dealing with all of the issues in the *VW* claim and also all of the issues in the *McLaren* claim and those expert reports, just to focus on those, where I think the issue is most acute, would have to be packaged as stand-alone documents which could be taken to a separate *McLaren* trial if need be and a separate *VW* trial if need be, because at the time that

they're produced, we won't yet know whether there is going to be a UPO or not and if there is going to be a UPO, what its scope is.

So that seems to me to be a very expensive, very difficult and unnecessarily inefficient way of going about it.

PRESIDENT: Well, yes, but you're colouring it in a rather peculiar way. I mean, let's suppose that your clients, because you of course, are a Defendant in both *Volkswagen* and *McLaren* --

MR PICCININ: We're actually a contribution Defendant --

PRESIDENT: Rule 39, same thing. Now if the position is that -- let us say on overcharge and pass-on, your economist's methodology is, actually, exactly the same in the two cases, that's how your experts choose to parse it and the data across the two cases is mutually reinforcing, why then, we would be a little bit surprised if you had two separate tracks. You have one corpus of material.

If you have a situation where there is a large overlap, then we would expect the large overlap to be articulated in a single body of documents relevant to both and the bits that are outside the overlapping parts of the Venn diagram to be dealt with separately.

Now, we can't say because first of all, we don't know and, secondly, the last thing we want to do is shoehorn the parties into a process that they themselves probably don't know the outcome of. We are, yes, leaving it unarticulated but I think the pushback is on the inefficiency. We would anticipate that the efficiencies will emerge, but to impose them on parties is, in and of itself, we would think, inefficient.

MR PICCININ: Sir, just to push back a little bit on that, my concern is that, actually, that proposal is potentially even messier and more difficult to work with than how I understood the first proposal to be, which is that we produce two separate packages. Because as I understand what you have just said to me, each of the

parties will be preparing the material in a way that separates out what they consider to be the overlapping material that is the same and could be tried jointly and they produced their full evidential case in that way, so that parts of it are in separate documents marked, you know, "UPO", effectively, and other parts of it are marked "*VW* only" and other parts are marked "*McLaren* only."

But, of course, if we all do that separately rather than reaching agreement or having an order from the Tribunal, deciding in advance what is common and what is not, then we're likely to end up with disagreement between the parties as to what is truly overlapping and what isn't. So you will have -- when we come back in 2024 sometime and look at all of the reports that everyone has produced, they're not all going to have been produced on the same basis. It may be that VW just produces a single overall regression that covers the whole of the infringement period, the alleged infringement period in *VW* and they don't produce a separate one for the *McLaren* material at all.

And perhaps likewise with the pass-on, I don't know what they would do, because no one has said yet what they're going to do.

On the other hand, you may have some of the Defendants that say: well, look, MOL for example, has said that they want to produce an analysis for a trial where they have one set of analysis that deals with the Ubiquitous Issues across both of the claims and then separately, they will have analyses that deal with the other points that are specific to each one.

But at that point, if you only decide at that point how you're going to try the case, it's going to be very difficult, I would submit, to tease out and identify which bits of which reports are going to be tried together. How do you deal with a situation where the VW expert has not engaged with the Ubiquitous Issues separately and the MOL expert has? I'm just not sure how one would do that. So my concern is that, by not

making this decision now, either you're going to have a very messy and difficult situation, where you need to tease out and unpick, unscramble all of these six or so different eggs next year, or actually, perhaps worse than that, it's going to be a *fait accompli* that you're not going to be able to order a UPO that you might otherwise have ordered, than if you had done it in advance by reference to people's cases, rather than deciding what the trial is going to be after you have all of the evidence.

So that really is my first concern.

My second concern is of a different nature and it actually applies, even if you were otherwise minded to go down the route of a single trial with variable geometry. That's the way you put it, Sir. And that is that sending us off to produce the full evidential case for that trial first, without procuring any more elucidation as to what each party's case actually is, then we're going to miss the opportunity that we otherwise would have to find more efficient ways to try these proceedings.

And, Sir, you will know from your experience in the Interchange Fee litigation that you referred to before that in those cases -- and I don't mean now the first wave, I mean the second wave claims -- that you're managing those proceedings very actively indeed and there is a three-day evidentiary hearing, for example, coming up, I think it's in May, the whole point of which is to elicit from each party what types of evidence are they going to be adducing at trial, so that you know that in advance, so that you can make directions if any of the proposals are inappropriate or if there are particular ways that changes could be made to render the whole proceeding more efficient.

Now, I accept that every case is different but I do say that here, in these proceedings, there is at the very least one critical issue now that we can already see is common to the *McLaren* and the *VW* cases. Common without a shadow of a doubt and in respect of which some elucidation would be very helpful indeed and

that is the question of what is the measure of pass-on. And, Sir, you will remember that that's the issue that the Court of Appeal described as being pivotal to the *McLaren* case.

To be clear, I'm not suggesting that there be any rerun of the arguments that were had before the Tribunal on the strike-out standard or before the Court of Appeal on the same standard or on the *Microsoft* test. What I am envisaging here is first obtaining some more clarity as to what each says about it and then, secondly, if, when you look at what each party says about it, you see that the factual compass of the dispute is narrow, it may be that a preliminary issue trial of that question, that pivotal question could be ordered which may take just a day or two, depending on what the evidence is, and could bring one set of proceedings to an end.

Even if it doesn't do that, Sir, I do say it will have been a useful exercise to clarify what each party's case is because once you know what each party's case is going to be in advance, rather than waiting until the end of the year or early next year or whenever it is, to find out what their case is, that could inform a lot of the work that you're doing in the meantime on disclosure, including third party disclosure, and in preparing your own positive case, whereas the situation at the moment is we're all shooting, to some extent, blind, not knowing what the other parties are intending to do.

And it would be possible to improve that situation very simply by directing each party to say in just a page or two is all it would take, it couldn't really take more than a week or two, what exactly is their case on the measure of pass-on and also, what are the facts that they intend to prove that they say give rise to the legal conclusion that that is the right measure of loss.

Perhaps could I just show you what VW says about this in their pleading, so you can see how stark the issue already is.

PRESIDENT: Of course.

MR PICCININ: The relevant pleading is the Reply for VW and that's in the CMC Bundle, tab 10, page 157. We don't need to look at all of it but if you could just look at paragraph 10.3.1, we can see that VW says that the relevant price for the purposes of accessing alleged passing on of the overcharge losses is the total price received by the Claimants, that's VW, in respect of a delivered vehicle, including all elements, such as the base vehicle price, including discounts, delivery charges for finance or leasing costs.

Then in the next paragraph, 10.3.2, they say that they did not set the prices of new vehicles by reference to the cost of production distribution. Rather, they set them by reference to conditions of supply and demand.

Then at 10.3.3, they say without prejudice to that, the delivery charges were set on a flat basis which is not varied by reference to the actual costs of transporting the vehicle in question.

Now, VW's case, it's clear, is therefore diametrically opposed to that of *McLaren* which says that the proper measure of loss is the difference between the delivery charge which a Class Member in fact paid for their vehicle and the delivery charge they would have paid in the counterfactual world, absent the cartel. So we say it's, at the very least, worth exploring whether that is an issue between the parties that can be decided first, rather than everyone running off and embarking on their full evidential cases in relation to how that measure of loss would be quantified at a trial.

PRESIDENT: But Mr Piccinin, aren't you just saying we should be choosing before a trial whose claim to strike out?

MR PICCININ: I'm sorry, Sir?

PRESIDENT: Aren't you just suggesting that we decide before a trial whose claim we should strike out?

MR PICCININ: No. No, Sir. What I am suggesting is once we know what facts are relied on in support of each party's case as to what the measure of loss is, we could have a trial, not a strike-out application but a trial, to determine that question of what the right measure of loss is, what the right measure of pass-on is.

PRESIDENT: Yes. But, Mr Piccinin, even the Court of Appeal have said that the PCR has framed its own case well. The problem the Court of Appeal had was that there wasn't given house room for what the Defendants were saying which was that the incidence of the loss was at a different level, so as to prevent the Claimants from claiming.

Now, yes, of course you need to resolve that, it's fundamental, but how you resolve that without a trial, I confess I have some difficulties.

MR PICCININ: Not without a trial, Sir, with a trial just potentially -- potentially is all I'm saying, a preliminary issue trial but perhaps I could just show you exactly what the Court of Appeal did say --

PRESIDENT: Yes, of course.

MR PICCININ: -- because I'm not sure I accept the paraphrasing that you just gave it, Sir. Sir, it's in the Authorities Bundle and it's tab 27 and it's page 539.

PRESIDENT: Yes.

Yes.

MR PICCININ: And if we just start at paragraph 50 for my purposes. What the Court of Appeal says is that the CAT identified the battle lines, the battle lines on this pivotal issue we're talking about but said the battle along those lines was for trial and the Court of Appeal says that saying that was an error in approach. Once it had decided to grant certification, the CAT should have gone on to address the ramifications of the challenges to this Class Representative's methodology because at that stage it was clear that this was the pivotal issue in the case.

And if you move on to paragraph 51, it actually addressed the issue even-handedly. It said that if the CAT was of the view that it lacked sufficient information to perform this elucidatory role, it could have directed the Class Representative to set out more fully its response to the overall pricing case as presented by the Appellants. So that's one possibility. The other possibility it says is, if however, it considered that the Appellants, so that's us, had not sufficiently particularised or evidenced their overall pricing case, it could have directed them to provide further detail and then directed that the Class Representative respond to that:

"Either approach would have enabled the CAT fully to exercise its gatekeeper role and at the outset lay down a more developed judicially approved trial preparation pathway. Instead, we consider that the CAT did err in simply stopping in its tracks when confronted with two starkly opposing pricing theories and holding that they were for trial."

And then in paragraph 52 the court says that's why it was remitting the issue now for the CAT, "before additional significant steps are taken by way of preparation for trial."

And the Court of Appeal goes on to explain why it was doing that. Said there was a number of reasons. One was that further consideration, as in, further consideration of this pivotal issue in the case by the CAT at this juncture, in other words before further substantial steps are taken to trial, will provide substantial clarity to the parties going forward. It would sharpen the focus on disclosure and evidence preparation and in due course should improve the management of the trial and assist in making the proceedings more efficient and less costly.

Now, it's true, I absolutely accept at the end of this page it goes on to say that they're not seeking to prejudice in any way how the CAT goes about addressing the remittal or as to the conclusions that you might arrive at in relation to the trial of this pivotal

issue. I'm not suggesting that the Court of Appeal is saying that you had to issue an RFI one way or the other or conduct a preliminary issue at trial at all but what I am saying is it's not consistent with what the Court of Appeal has just said, for us all to go off and do all of the disclosure and witness statements and expert reports to present a full positive case. Those are very significant steps in preparation for trial without any further clarity at all having been obtained on the parties' cases on this pivotal issue.

Just very briefly to explain what I say is the lack of clarity at the moment.

PRESIDENT: Yes.

MR PICCININ: On this pivotal issue, there are really two points. One point is that as I just said before, the Class Representative's case is that the measure of loss resides in the delivery charges that were paid by Class Members, but while that might sound clear enough at the very high-level of abstraction, once one looks at the facts of the case and realises that it's common ground that there are a number of brands at least, for which there are no separately identified delivery charges at all, it's very unclear what they mean by that.

So, if there are no delivery charges in the invoices and there are no delivery charges in the brochures, in those circumstances, we know that the Class Representative still says that the measure of loss is the "delivery charge" and we know that they plan to calculate one in some way, using a competitive benchmarking process but what I don't know is what does that measure of loss actually mean? What is the delivery charge that is paid by a person who has never been presented with one?

The second point is, well, what is the factual basis for the claim that the right legal measure of loss is the one that they have identified? And it wouldn't take much to write down a list of clear factual propositions about who accounted for what in what way, what was published or communicated in what way, that they say give rise to the

legal conclusion that the measure of loss is what it is.

And, as I have said before, at the outset, if you had that, then there are two things you could do with it. One thing you could do which I think it would be wrong to discount now, is if the compass is narrow, you could conduct the preliminary issue trial with, say, the evidence of one or two witnesses on those points. It could be done within a day or two, save an awful lot of trouble. But even if you're sceptical about that and even if that turns out not to be right, you will certainly have provided the parties with clarity, with the benefits that the Court of Appeal outlined in paragraph 52 of its judgment, for sharpening the disclosure process and, in particular, troubling third parties, if we understand what case it is that we're trying to meet.

So those are my submissions on that second point.

PRESIDENT: Very grateful. Thank you very much.

MR HOLMES: Sir, Josh Holmes for the WWL Defendants. We're only now in the *McLaren* proceedings and not the *VW* proceedings and we, therefore, do not face the practical challenges which have been described by the Defendants you've heard from so far in preparing the cases in parallel.

Our starting point is that there is an important overlap of principle and that it would be suitable for a UPO to be made in these proceedings in due course.

The approach that you have canvassed, Sir, would leave the option open for that. It would involve an aligned timetable for positive and responsive cases in both sets of proceedings and reserving time in the diary for the hearing of *VW*, *McLaren* and if appropriate, any Ubiquitous Matters and, therefore, it would be consistent with the approach that we would like to see taken.

If I may, Sir, I will focus on the practical implementation of that approach if the Tribunal were minded to adopt it. One of the questions on which you invited

submissions was when we can realistically try both sets of proceedings and we are concerned, Sir, that the first quarter of 2025 is ambitious. There are two points here. First, Volkswagen has said that it needs until September 2023 to assemble pass-on data and documentary disclosure. We consider that this is likely to be important in both the *McLaren* and the *VW* cases. There is currently a lack of evidence from suppliers, from manufacturers, about their pricing practices and no data which would allow a quantitative analysis of pass-on in relation to any downstream link in the chain.

We will also wish to advance a positive case on pass-on and the *VW* pass-on disclosure will be helpful to that. If that data is coming in September, then a December 2023 deadline for a positive case would be challenging.

From our perspective that militates in favour of a window later in the course of 2025.

Second, we would also favour a process of expert engagement along the lines the Tribunal proposes, and it would be sensible to allow time for that even working, as you say, from today and as fast as possible. It would be, as we understand it, a more granular exercise than simply the preparation of a joint expert statement. It would involve the experts really canvassing from an early stage what data is available or may be obtained from their respective clients, sharing that information, saying what each thinks is necessary and time would be then needed to assemble and share the material.

Some data and documents identified by the experts as relevant to the *McLaren* proceedings might need to be sought from third parties and the timetable needs to allow for that.

Volkswagen's current proposal is late March 2024 for its expert evidence, bearing in mind the time needed to assemble the pass-on data, and that sounds reasonable to us working forward from the September 2023 date. We would therefore propose, at

earliest, a date at the end of March 2024 for first round positive cases, and that would then suggest the end of October 2024 for responsive cases.

Time would then be needed to decide upon how the trial time was to be used. It's possible there might need to be short supplemental reports following the second-round responsive statements, and from our perspective all of that would militate in favour of a trial at earliest in the second quarter of 2025.

That only leaves the question of how to allocate. The constitution of the Tribunal is a matter for it, but we would respectfully agree with the approach that was proposed, Sir, in the comments you canvassed with Mr Kennelly.

Subject to any questions those are WWL's submissions.

PRESIDENT: I'm very grateful.

MR HOSKINS: Is that a proposal for a *McLaren* trial or a *McLaren* plus *VW* trial?

MR HOLMES: We're in the fortunate position of only being concerned with what is doable in *McLaren*. I appreciate that what is doable in the context of *Volkswagen* may be different, but the timetable should be aligned so as to lead to a common block of time which would allow for a UPO, and so Mr Hoskins is absolutely right to clarify, I am speaking only in terms of what seems manageable from my perspective as a participant in the *McLaren* proceedings. But the end point would certainly be a UPO across the two sets of proceedings within the time reserved at some point during the course of 2025.

PRESIDENT: But to be brutally frank about it, you're less bothered about a UPO provided *McLaren* comes first and has its issues determined before *VW*. The importance of the UPO is that it binds *VW* and that is the real difficulty we're facing. So in a sense, as you rightly acknowledge, your position is easier because you just want to have the *McLaren* issues properly resolved and fairly resolved. You're very helpfully articulating how Ubiquitous Matters can be fit into that timetable so that we

get the benefit of such consistency as can be achieved, but at the end of the day you have less issues than those who are either just in *Volkswagen* or those who are in both.

MR HOLMES: Well, Sir, that's not quite my position.

PRESIDENT: No.

MR HOLMES: We do positively contend for a UPO because we see it as important to achieve consistency across these proceedings. We have been at the sharp end, now, of several claims by suppliers who have all articulated a case in relation to pass-on which they say is based on their pricing practices, which is directly inconsistent with the case that we face in the *McLaren* proceedings which rest on an assumption of 100 per cent pass-on down the line so that all of the loss rests not with the OEMs, with the manufacturers, but with their customers further down the chain.

Moreover, there is a lack of data, a lack of information on the basis of which the *McLaren* case can be tackled and the *Volkswagen* claim, which raises these overlapping points, will provide a source of material which we apprehend will be extremely useful, so we would positively contend for a UPO. It's simply that, in considering the practicalities of how one might reach an end state that allows for a UPO, our concerns are a bit more parochial. Our focus is what can be done in the context of *McLaren*. I hope that clarifies our position.

PRESIDENT: That does assist, but a considerable number of your concerns -- although not all of them -- would be resolved if we were to direct, by way of hypothetical example, a *McLaren*-only trial but with disclosure across both sets of proceedings so that you have the material from *Volkswagen* into *McLaren*. It wouldn't get you all the way but it would get you quite a long way.

MR HOLMES: It would certainly be an important point and an important matter in

ensuring a fair resolution of the *McLaren* proceedings, but after the positive cases come, for example, we will see experts' evidence from a number of parties including Volkswagen and factual evidence that has been marshalled, quite possibly witness, factual witness evidence which is relevant to the question of how pricing is done by a major manufacturer and that material should be tested in a trial that would allow us to address it, so we do see there as being quite an important positive case for reasons of fairness in having a UPO and not merely sharing disclosure across the two sets of proceedings.

PRESIDENT: Thank you very much, Mr Holmes.

I see the time and I'm very conscious that we have already transgressed on the shorthand writers' break, as well as ours.

What we will do is we will rise and we will resume at 10 past 2, because I am conscious that there is quite a bit more left to be said on this issue and it's not the first, it's not the only issue. It is the first that we have to address today.

So until 10 past 2. Thank you.

(1.33 pm)

(The luncheon adjournment)

(2.10 pm)

PRESIDENT: Ms Abram.

MS ABRAM: It's my turn. I will be very short. I don't want to say, I don't need to say anything at all about the UPO. You have seen we're not a Defendant in *Volkswagen* and so I don't need to add anything to what others have said about the UPO.

I would like to say something just very short, if I may, on my pet subject which is how the CSAV preliminary issue fits into the bigger picture.

We're really grateful for your indication in respect of that. That's been really helpful,

it's enabled me to take instructions and we absolutely hear what the Tribunal is saying. May I just explain why we thought it would be of utility for the preliminary issue to be heard before the positive position statements.

By "before", I don't mean that it has to be heard next week. We think it could be done quite quickly. We have proposed a timetable that we think allows enough time under which it could be heard in May but if that isn't convenient to the Tribunal, of course, or to the parties, it could perhaps be heard later in the summer or even in the autumn, before the positive position statements is the point I am really making.

The reason for that is that as matters currently stand, the case against CSAV on causation and loss will have to be based on two possible permutations. The first is that the Class Representative is right and CSAV is liable for all of the damage flowing from all of the infringements, so we're jointly and severally liable with everyone else and no separate case is needed in respect of CSAV.

The second is that CSAV is right on the preliminary issue, in which case we're only liable for damage, whatever that may be, flowing from the bits of the infringements that we were found in the decision to have done.

On that basis, a separate case specific to that bit of the infringements for which CSAV is jointly and severally liable is required and that will start to bite at the positive position statement stage, particularly for the Class Representative because they will have to put forward their positive case as to the Defendants as a whole and their alternative case that they have said in their skeleton argument for the first time that they would want to run against CSAV specifically.

So what we would say is that it might be quite helpful to determine the preliminary issue before that because that will save costs and we're particularly conscious that we're talking here about a class of opt out Class Members who aren't able individually to direct what their representatives are doing and so perhaps it's all the

more important that the claim should be litigated in an efficient way.

PRESIDENT: We can see that. The reason we made the proposal as we did was because we didn't want to close out at a stage where the *McLaren* Class Representative was not ready to say so, the notion that there might be a separate case against your client. So if, and we're not pressing for this, but if Ms Ford were to say: "look, it's all or nothing, we will run the claim against your clients as if the findings were as against all the others", then one can see the sense in having a preliminary issue sooner rather than later.

If, on the other hand there, is a -- well maybe we will actually frame a variance -- separate case against your clients, then the logical point in time is either never or after the positive case has been set out, so you can work out what the parameters are. So if the positive case is no separate case, then you know where you are, there's nothing more to be said and one can deal with the preliminary issue there, so that was our thinking.

But presumably, you would agree or I will ask you to see if you do, if there's a risk of a separate case being run at some point in the future, having a preliminary issue now really makes no sense at all. Would that be fair?

MS ABRAM: I respectfully disagree with that and in fact, I might be able to help with what the Class Representative's case is because we had an extremely useful exchange of correspondence over the weekend, in which the Class Representative did confirm that if we are right, if CSAV are right on the preliminary issue, they would want to raise an alternative case against CSAV and that might be that CSAV is still liable for the same damage as the other Defendants or it might be that we're liable for a smaller amount of the damage.

What I say about that is that really underlines why a preliminary issue trial would be useful before positive position statements because if the Class Representative is

right in their primary position that CSAV is liable for the damage resulting from the whole infringement, they will never need to put forward that alternative case. So the cost to the Class Members, ultimately, of assembling that separate, CSAV-specific case on loss will never arise. If I am right, on the other hand, if CSAV is right and CSAV isn't liable for all of the damage flowing from the whole infringement, that case will be necessary but equally, I then won't have in my positive and in particular responsive position statement in reality, to address the Class Representative's primary case as to what damage the wider infringement causes.

So I say, actually, whatever the result of the preliminary issue, if you hear it before positive position statements, it will save costs.

PRESIDENT: Yes, thank you.

MS ABRAM: I'm very grateful.

PRESIDENT: Ms Ford.

MS FORD: Sir, dealing first with the UPO point, we have two primary concerns in terms of case management, and they largely accord with the two indications that you, Sir, raised in an exchange with Mr Kennelly.

The first is that the Class Representative shouldn't be obliged to attend or participate in a hearing of the determination of matters which are not relevant to the collective proceedings and that seems to accord with the point that you, Sir, made, that the cost of litigation should not be unduly increased.

The second is that the case management of the UPO shouldn't hinder progress in respect of the vast majority of the collective proceedings which are not overlapping and that, it seems to us, accords with the point that you, Sir, made, that the UPO shouldn't cause undue delay in trying the individual claims.

It seems to us that the Tribunal's suggestion addresses both of those concerns. We understand that we would still get the trial in Q1 of 2025 that the Tribunal strongly

indicated would be in the diary at the CMC last February and we anticipate that the UPO issues could be managed so as to permit us only to attend those parts which are relevant to the overlapping issues and not to attend those parts that are not relevant to the collective proceedings, so the Tribunal's proposal for us does address our concerns.

Moving on to comment on the alternative model which was advanced by Mr Hoskins. Mr Hoskins' concern, as we understand it, was to permit the opportunity to settle, insofar as that might arise out of the UPO proceedings. Now, that is fine by us, if what is being contemplated is the UPO issues plus the *McLaren* proceedings in Q1 of 2025 and, indeed, if anything, that would be more favourable to us, in the sense that it would mean we wouldn't have to engage in the exercise of deciding which bits to attend and which bits not to attend. It would all be relevant to us and that would be resolved so that, again, is a proposal which we would be fine with.

What we do resist strongly is any suggestion that the UPO in isolation should take place in Q1, 2025, with a consequence that we lose our provisional trial date. In our submission, it may well be optimistic to expect the UPO to drive settlement of the collective proceedings as a whole because, of course, VW is only one of many brands that are in issue in the collective proceedings.

Of course, it may well be that the answer comes out differently in respect of different brands and that's not necessarily a concern about inconsistency that needs to be resolved in the context of the UPO proceedings. That simply reflects potential differences in the circumstances of the different brands. So we say on any view, it's somewhat optimistic to envision that the UPO is going to be driving settlement in the collective proceedings in the way that's been suggested but in any event, we say we should not be trading off that possibility against the loss of our trial date. It's not a good reason for us to lose our trial date.

Concerns have been expressed as to whether or not *VW* could be ready to make that date and that's something that we're obviously not in a position to comment on but, again, we do say the possibility that the *VW* parties might not be ready for that trial date should not, in our submission, jeopardise the trial date for the *McLaren* proceedings. And, indeed, we're quite conscious that there are risks in allowing the *McLaren* timetable to be too tightly tied to the *VW* proceedings. *VW* might well settle out, in which case we will find that we have been tied to proceedings which then evaporate or, alternatively, it's conceivable that the proceedings slip and that that then leads to delay in trying the *McLaren* proceedings, when they would otherwise have been ready for trial.

So we say there are risks in tying them too tightly together.

What we understood Mr Holmes to be making submissions on was the ability to meet the timetable in the *McLaren* proceedings. That, in our submission, was something that was debated and decided at the last February CMC in the *McLaren* proceedings, so in our submission, that should not be reopened now. We do have directions to a trial in the Q1, 2025 period.

Finally, on the UPO, Mr Piccinin suggested that the Tribunal should seek further elucidation on the correct measure of pass-on. We have said previously we don't accept there is any lack of clarity as to our case. On the contrary, it has been debated extensively before this Tribunal and, again, before the Court of Appeal. The Tribunal also determined at the last February CMC the way in which it was minded to address the concerns addressed by the Court of Appeal and in our submission, the structure of positive and negative cases that the Tribunal has set out does address the concerns that Mr Piccinin showed you in the Court of Appeal's judgment.

The fact that *VW* now, or in any event, wants to take a different approach to pass-on

than the *McLaren* Class Representative doesn't, in my submission, justify revisiting any of these matters --

PRESIDENT: We have made our position clear on *McLaren*, Ms Ford.

MS FORD: I'm grateful, Sir. In that case, I won't push any further on that particular point.

That then leaves Ms Abram's preliminary issue.

PRESIDENT: Yes.

MS FORD: In relation to that, we agree with the Tribunal's suggestion that the appropriate time to decide whether there should be a preliminary issue or not is after the exchange of positive position statements and we say that for two reasons.

The first is that by that stage, both the Class Representative and the Tribunal can expect to have greater clarity as to the factual situation.

Our primary case against CSAV is that having found to have participated in an infringement, they're jointly and severally liable for the entirety of the damage that is caused by that infringement and it's not open to them to start trying to pick and choose which elements of the loss are attributable to their particular conduct and which elements of a loss can be traced back to somebody else's conduct.

CSAV's challenge to that is not just one of law. It includes an important factual assumption and that is that there is some distinction as a question of fact between the loss that's caused by the wider infringement, the global infringement and the loss that's been caused by conduct in which CSAV has been found to have participated.

And it's said because we haven't separated out those two things, our case is in some way defective. That is, in our submission, an assumption of fact. It's one which needs to be tested one way or the other by reference to disclosure and by reference, potentially, to witness evidence, to the extent it addresses those issues.

At this stage, when we haven't received disclosure yet and we haven't seen the

witness evidence, we don't know whether it's right or not and we say there are a number of reasons to think that it might not be right.

One is that the loss caused by the different elements of the conduct might not be severable and distinct in the way that CSAV assumes it is. It might be interrelated, and it might be mutually reinforcing in the concept of a global infringement.

Another possibility is that the conduct in which CSAV participated is the conduct that caused the loss, not the conduct that it didn't participate in. Again, those are questions of fact. We're not in a position to express a view on them now and as the Tribunal is aware, the effort needed to identify relevant facts and the extent to which an issue can be decided on the basis of agreed facts and the extent to which factual disputes might impinge on the value of a preliminary issue are all the criteria that the Tribunal needs to take into account in deciding whether or not to direct a preliminary issue.

So in our submission, if we wait until positive statements have been exchanged, the Class Representative and the Tribunal will have the benefit of the disclosure, contemporaneous documents which underpin the Commission's findings of infringement and potentially of witness evidence and will be in a better position to take a view as to those factual issues, the extent to which there is any dispute on those factual issues and how they might impact upon any preliminary issue.

The second reason we say the right time is after the exchange of position statements is that the Tribunal will then have clarity as to the extent of the parties' positive cases. And the reason I say that is it's become evident from CSAV's correspondence and, indeed, from Ms Abram's submissions this afternoon, that it now accepts that the preliminary issue will, in any event, not be dispositive of the case against it.

It says: well, the utility of this preliminary issue is just to give the parties clarity to the

case they need to advance. We will be saying that the fact that this preliminary issue is not dispositive is a big black mark against the utility of actually having a preliminary issue in the first place. But in any event, if the debate is about whether the Class Representative has or hasn't advanced sufficient case against CSAV, that's a debate which is better conducted once the Tribunal has seen what is the positive case that the Class Representative is going to advance because otherwise, that's a debate which takes place on the present state of the proceedings and it's likely to be superseded, as and when parties produce their positive case statements. So in our submission, the right time for this determination is after the positive case statements are exchanged.

Sir, those are my submissions.

PRESIDENT: Very grateful, thank you very much.

Mr Kennelly, we end where we began.

MR KENNELLY: Thank you very much. Three headings. Three things I need to address before you. The first, I need to respond to what Mr Hoskins said for MOL in urging you to deviate from your initial view because of the loss of the opportunity to settle the whole of the *VW* proceedings, following the resolution of Ubiquitous Matters.

The second is the suggestion that *VW* cannot get to the larger trial that the Tribunal suggested, even by Q2 of 2025 and finally, our proposal. Upon the indication of the Tribunal, we have taken instructions and spoken to our experts and I have a proposal to offer to you but I will leave that to the end if I may.

Because I want to begin by urging the Tribunal to stick with your initial view and not to adopt MOL's proposal. Mr Hoskins said if there was a Ubiquitous Matters judgment, it would be very difficult to reopen those issues, unless you could show that your particular case was different from the one determined in the Ubiquitous

Matter -- I am quoting directly from what he said -- in a way that showed that the cartel impacted that brand differently.

Mr Hoskins, my learned friend, is only thinking about the *McLaren* case because in the *VW* case, there is no prospect that a judgment in his Ubiquitous Matter would lead to a settlement of the whole of the *VW* action because as the experts agreed, whatever finding is made in relation to the Ubiquitous Matter that he proposes would be root and brand specific and specific to the time period. It would have very limited read across to the rest of the *VW* claim, the 98.2 per cent of the *VW* claim that is left.

Mr Hoskins didn't take you to any expert evidence or his own experts or the methodologies but I wish to do so, if I may do so briefly and take you to the Joint Expert Statement, where his points about methodology being route specific, brand specific and time period specific are addressed. The Joint Expert Statement is in the second CMC Bundle volume behind tab 74.

I would ask you to go, please, to row 23 on page 813. Here the experts are addressing overcharge and they're examining how to estimate the overcharge and at 22, just above it, they refer to econometric regression analysis. The Tribunal knows, of course, that regression analysis will use variables, reflecting the question the economists are asked to address.

Then the 23 row says that other factors, other factors that will be used, potentially include demand and supply shifters, as well as time specific - and I will pause there - the Tribunal has my submission about the very different period of time in the *VW* case, as opposed to the *McLaren* case. Route specific. The *McLaren* case, the Ubiquitous Matter Mr Hoskins suggests is obviously just into the EEA, whereas we have a much broader range of geographies around the world or carrier specific factors, such as the carrier's cost and capacity.

One sees there each of the experts agreeing with that proposition, including

Mr Hoskins' expert and there is further insight in this same volume from NYK's expert, Mr Godek or Professor Godek and if you stay in the same volume and go back to tab 72, page 774.

Page 774, it's near the bottom of what's paragraph 7, just above paragraph 8. Here, Professor Godek is addressing overcharge and he makes the point that:

The regression model that's determining overcharge in the *VW* case will "allow for the calculation of implied "but-for" rates [I'm about halfway down the part of paragraph 7 that's on page 774] that would have prevailed but-for the alleged cartel."

And pausing there, of course, the alleged cartel that we plead in *VW* is much broader than the one in the EC decision:

The set of appropriate explanatory variables, the inputs into the regression model, "are likely to include the volume of the shipment, fuel prices, relevant exchange rates".

These are all going to be different. Each one of these will be different, depending on the factors that follow:

"Demand intensity measures".

Of course, our plea includes the question of demand in China, the demand in India, the demand in Brazil and the United States and perhaps others:

"Given various sets of carriers [says Professor Godek] competing along any given route and the varying effects of any alleged agreement, I would expect the overcharge estimates to differ substantially across routes and across carriers."

The read across from this Ubiquitous Matter will be minimal for the purpose of the vast majority of the routes that VW claim.

Then going on to paragraph 12 in Professor Godek's statement, he makes the point -- this is now pass-on, over the page:

"The amount of pass-through is also likely to depend on how much of the supply of

the product in question is affected by the cost increase."

He says:

"When a cost increase is imposed on a subset of suppliers that account for a small share of sales in a market, a higher portion of the cost increase is likely to be absorbed by that subset of suppliers."

So how much of the supply is relevant and here, again, in the *VW* case, as you know, we are claiming the overcharge not just for the deep sea shipping but also the short sea shipping. So even for vehicles in the United Kingdom, where they have been shipped, for example, from the United States to Rotterdam, that's deep sea shipping, we claim for that overcharge.

Then they're shipped from Rotterdam to Felixstowe, short sea shipping. We, for VW, claim for that overcharge also in respect of the same VW vehicles that are overlapping. Short sea shipping forms no part of the *McLaren* case, so even in this limited respect, pass-on may well be different.

But then at 14 over the page, 776:

In general, "the pass-through rate would be expected to vary by the proportion of vehicle sales at the destination market that are accounted for by ocean-borne imports, as well as other factors affecting the elasticities of demand and supply in the destination market. It follows that the pass-through rate is likely to be specific to each destination."

And there are vastly different destinations in the *VW* claim, so the determination of the Ubiquitous Matter will not have the read across that you would need to prompt settlement. On the contrary, it would be effectively useless in the *VW* claim which is why we're so concerned about the waste and cost involved.

What Mr Noble said, I'm not going to take you to his letter because you have seen it already, is that if he is directed to do an expert report that's specific to UK vehicles,

then of course that would be a rather artificial exercise. Once the Ubiquitous Matters are resolved, he would have to do a further broader model, constructed on a completely different basis, with different variables, covering a much broader *VW* claim, with all the different inputs required.

And so one would have, on Mr Hoskins' approach, a trial in Ubiquitous Matters, where experts would have these, certainly from VW's perspective, artificially narrow models, with limited inputs, giving a partial, incomplete view of the world. Experts would be then cross-examined on those and then for the main *VW* trial, we would need new models, new regression analyses broader, with a much richer data set, possibly revealing flaws in the first, more limited ones and the experts, the same experts, would be back, cross-examined, in the main *VW* trial.

And the waste, the duplication involved in that is obvious.

My second point was the suggestion that *VW* couldn't be ready in time for a trial, even in Q2, 2025. And Mr Hoskins based his submissions mainly on the need for repleading. He suggested that we would have to replead a stand-alone claim. I find that submission, if I may say so respectfully, rather unreal because I showed the Tribunal that we have, since 2020, pleaded an extensive stand-alone claim, in addition to the follow-on claim.

In that respect, we resemble the recent *Allianz* litigation in the Foreign Exchange case where a combination of a stand-alone and follow-on claim was pleaded and, as in *Allianz*, we relied heavily on admissions in foreign proceedings and the repleading exercise is really a gap filling exercise. We have already pleaded extensively but we are getting foreign regulatory documents and foreign documents from the Defendants and we will replead, using those to expand our case on liability.

The question of overcharge and pass-on are primarily for the experts. The repleading is focusing on liability.

PRESIDENT: Just to use the language of pleading positive case and negative case, the pleadings will deal with the liability questions and the positive and negative cases will deal with broadly the overcharge and pass-on questions. Do I have that --

MR KENNELLY: Indeed, Sir. In my proposal we have indicated how that would work. Just on a point about the pleadings because Mr Hoskins suggested this was a massive thing and until we pleaded our new stand-alone case, nothing could be progressed, the Defendants would need to take time and instructions to respond to it.

I'm afraid that's simply an unreal submission because when you see our pleading -- I will take you back to it if I may.

PRESIDENT: Of course.

MR KENNELLY: It's in the first volume. I will take you to the plea of the broader cartel, but the detail we have already given begins in page 79 of Annex 2. I was going to take you to that this morning but we were rather side-tracked onto something more important but I do need to show you this, in view of the submission Mr Hoskins made about the nature of the repleading exercise. You see at the beginning of page 79, in respect of each of the jurisdictions where we claim cartelised routes, one has detailed pleas in relation to the admissions made by these very Defendants or companies in their groups or their parents to the unlawful arrangements that we pleaded.

And there are pages and pages of detailed particulars based on the admissions and plea agreements that they have made. In particular, if I just show you one at paragraph 88, the United States. Page 80 of the Bundle and you see a table there showing you the plea agreements and the periods involved, the dates of the plea agreements, where admissions were made and the infringement periods there.

Under the plea agreements, in the italicised sections, we have the content of what

was pleaded. And in the first italicised part, under paragraph 89, there is an admission that these Defendants entered into a conspiracy to and from the United States and elsewhere, in violation of the Sherman Act. Similarly for Australia, admissions of the same nature are made, covering the same period, beginning from February 1997.

So what we will do in our repleading is we will use the documents we're getting to expand our plea and liability but there won't be any surprises, for two reasons. First of all, they have a detailed picture of what we are already alleging and, secondly, the documents they're giving us are their documents, so one would imagine they need less time than would ordinarily be the case to work out how to answer what we plead.

And in the *Allianz* case, where a similar approach was taken, there was no need to show a draft pleading before permission was given because the exercise was as I described, as it will be here, which was given and then the drafts were produced. That was a constructive and cooperative process which is precisely the kind of constructive cooperation that I understand the Tribunal is urging on us in this case, so we would hope for some of that here also.

So that repleading exercise shouldn't delay us to the extent that Mr Hoskins, my learned friend, describes.

MR HOSKINS: (Audio distortion) you need six months to do it because that's your own correspondence, that's your own timetable. It would be helpful if that is clarified.

MR KENNELLY: We are having to adjust, in view of the clear steer that we're getting from the Tribunal and our feet will be held to the fire, I think that was said a few times, so we have that well in mind.

PRESIDENT: Yes, but I think Mr Hoskins and, indeed, my question, is just what date would you propose that is just short of inflicting third degree burns but close

enough to keep your feet uncomfortably hot? Because we don't want your clients to be in a position where they put in something that they regret or want to amend again.

MR KENNELLY: The problem we have is that the last -- we're pleading on the basis of documents we get from the Defendants and the last of the documents they're providing to us arrive in May of this year. End of May of this year. So that, I'm afraid, that does affect how quickly we can replead.

PRESIDENT: The end of May date and you may not be able to assist on this but I will ask anyway, is that a date that can itself be accelerated or is that a hard date that is not capable of being telescoped further?

MR HOSKINS: I think that's for me --

PRESIDENT: Well, it is indeed.

MR HOSKINS: It's pursuant to an Order of the Court that was made by Mrs Justice Cockerill. We recently put in a letter to the Tribunal, as required, with an update of progress and we're confident we will meet the May date but if it was to be brought forward now, we would not be confident in doing it. We have been working towards the May date but you have chapter and verse in the letter we have provided.

PRESIDENT: Yes.

Yes, thank you.

MS BLACKWOOD: (Audio distortion) to mention that they do have K-Line's foreign regulatory documents already.

MR KENNELLY: While I am on my feet, my colleagues will reflect on what we can do in the meantime, if anything, and if we can move more quickly because I move on now, if I may, to --

PRESIDENT: If we were to say -- Mr Hoskins has said end of May for the disclosure on this, is end June 2023 unreasonable or doable?

MR KENNELLY: The problem is --

PRESIDENT: You don't know what you're going to receive.

MR KENNELLY: We don't know what we're going to receive and unlike the Defendants, they're not our documents. We have to decipher them and understand them before we can plead to them and four weeks for the non-K-Line documents is just -- I cannot commit to that in the absence of knowing what we're going to get.

You've seen from the Annex that I have shown you the very extensive nature of the admissions that they have made for a cartel running from 1997 until 2012 and on one view, the volume of documentation we're likely to get could be enormous. We have already received very substantial numbers of documents in respect of these foreign investigations.

I think I am told over 100,000 documents have already been provided and if we get something like that again, then it would be difficult to understand them and plead to them in time. That is why we put that lengthy period in our timetable in order to plead to these because we may be receiving hundreds of thousands of documents.

PRESIDENT: Yes.

MR KENNELLY: I probably said all I can about how quickly we can plead back but in our respectful submission, the process doesn't need to wait for the pleading itself.

I now move on to my third and final point which is our own proposal and what we can do in order to realise the proposal from the Tribunal. And it would involve adopting in rough terms the same stages that you have for *McLaren*, the same idea of having a positive case and a negative case.

The first stage is the provision by us of overcharge disclosure. We have shown you the difficulties we have in producing pass-on disclosure. We have tried to see what we can give earlier and if we split our overcharge disclosure and our pass-on disclosure, it is possible to give the overcharge disclosure earlier. That is separate

data which can be provided more quickly.

And that, of course, is very important for the regression analysis on overcharge that the Defendants need to do as part of their positive case on an overcharge against us and that we can provide by July 2023.

The next stage is the pass-on disclosure and for the reasons I have explained by reference to Dr Hemler's evidence, that really cannot be produced, that data cannot be produced, earlier than September 2023. But if it is produced then, it will allow the positive cases of the Claimants and the Defendants to be produced in April 2024. That's six months after the provision of the pass-on data by us and that positive case would include our expert evidence and a revised pleading and this is where we're trying to anticipate a little what the Tribunal has in mind, in terms of what document is needed at this stage.

The Tribunal envisages, I think, in the positive case, something more than just a pleading and something more than just expert evidence, some form of statement or submission which sets out in detail the positive case both on overcharge --

PRESIDENT: Just to be absolutely clear, what we understand by the filing under positive and negative case is this: it will be all of the evidence that will be relied upon at trial, witness, expert and to the extent not identified in those documents, any other documentary material that is relevant, drawn together by what we have called a position statement which essentially pulls the threads together but is a luxury which one can probably do without, provided one has the material that is to be relied upon, and then the negative statement has its definition by reference to the positive statement but, obviously, is attacking it and, again, containing the evidential material of that attack.

The frills to that process are that there is time both before the positives case and the negative case for the parties, by way of request and, if necessary, order of

the Tribunal, to seek material that they need in order to properly articulate the case that they want to produce and, come trial, it is they who will be able to articulate who turns up for cross-examination on what points.

So it's all of a part, but the positive and negative cases are a very significant part of that process and are intended to be not quite the last word but pretty much the last word on what will be considered substantively at trial.

So I wouldn't want to understate the importance of and the amount of work that goes into these documents.

MR KENNELLY: Included within that list of pleading, obviously our pleading in the traditional sense should be done earlier.

PRESIDENT: Yes.

MR KENNELLY: If the pleading is superseded in some way by this process, that may be something we need to revisit with the Tribunal. We are rather feeling our way here because -- but we can come back to that but the key thing I understand the Tribunal to be saying is if the date is April 2024, by then you would need from us factual evidence, expert evidence and a position statement drawing it together.

On a positive case that we make on liability, overcharge and pass-on and similarly from the Defendants, their positive case, as the Tribunal has described it.

We would then propose by June of 2024, the queries that the Tribunal mentions and expert engagement. That's not to say there couldn't be expert engagement throughout the process but just to make sure it's addressed here, and the negative cases by September 2024.

Following that, expert engagement and a joint expert statement which I think would assist. At that stage, perhaps in October 2024, your decision, most likely at a CMC, on whether there should be Ubiquitous Matters because then you will have fully crystallised the true areas of overlap which we would hope to show by then to be

much more limited than you're currently told.

When then will the trial be? Although I think Mr Hoskins is, with respect, wrong to focus on the pleadings, what we're hearing and, indeed, from looking at our own timetable, Q2 of 2025 may well be more realistic than Q1. And that reflects our difficulties but also those of other parties and if I have to urge upon you the evidence that we have produced from Dr Hemler and the difficulties we have, I can't then, I suppose by the same token, ask you to dismiss the difficulties my learned friends raise.

But that still would allow a trial in Q2 of 2025 and I appreciate that is later than *McLaren* would like, it's later than the Tribunal would like but if that's the price, in our submission it's a reasonable price to pay to secure the goals that you have outlined.

Unless I can be of any further assistance, I think that's probably all I can say at this stage on those points and I'm obviously happy to address any points from you.

PRESIDENT: Mr Kennelly, we're very grateful. Thank you very much. What we will do is we will rise for, I hope, no more than ten minutes and we will come back with not a full judgment but with a clear statement of where these proceedings are going. So ten minutes, I hope. Thank you very much.

(2.54 pm)

(A short break)

(3.12 pm)

RULING

PRESIDENT: Thank you for your time. We will set out our detailed thinking in a judgment, so this is a statement of where we want these proceedings to go but you can expect a fuller judgment and a draft order articulating what we want to have happen to be released in the short and near future. But where we are going: there

will be a trial of the *McLaren* proceedings in Q1 of 2025. We will mark the whole term out for that trial. Obviously we do not expect the whole term to be occupied by that trial but we need the time, for reasons that I will come to.

The panel for the *McLaren* proceedings will be chaired by Ms Lucas KC. For the present, the other members will be Cockerill J and Mr Bishop. The panel in the *VW* proceedings will be Cockerill J in the Chair, Ms Lucas KC and Mr Bishop. There will be mutual disclosure and mutual exchange of all other documents, so we would like everyone to be copied in on everything, so far as it is sensible, between the *VW* and *McLaren* proceedings. That will include not merely disclosure and correspondence, but the positive and negative cases to which I will be coming in a moment.

Before I come to those, the *VW* stand-alone pleadings, by which I mean liability, the amendments from VW will be filed by no later than 31 July 2023 but with a liberty to apply if the disclosure that is received by end May is so large that that date cannot be complied with and, subject to the same *proviso*, a Defence by 30 September 2023.

The *McLaren* positive case -- not the *VW* positive case but the *McLaren* positive case -- will be filed by 15 December 2023. We have thought long and hard about that date. We think it is doable. We recognise it is tight. We think it is doable, given what Mr Kennelly has said about overcharge data being provided by July and September for the pass-on data, and we would expect work on the positive cases to be commenced, really, as soon as practically possible, with disclosure requests informing that work.

Exempted from the *McLaren* positive case obligation is CSAV. We do not think that CSAV should be obliged to file anything. The preliminary issue that Ms Abram has addressed us on will be dealt with at some point in time between 15 December 2023 and 15 May 2024, which we hope achieves the savings that preliminary issues are

intended to achieve.

McLaren and negative cases, 15 May 2024.

VW positive cases, 31 May 2024.

There will then be a three-day case management conference intended to frame any potential Ubiquitous Matters in July 2024. That will be presided over by myself, with the two Chairs around, so that any orders regarding Umbrella Proceedings and Ubiquitous Matters can be made. We will make any other declarations or decisions for the trial organisation at that time also.

Then, lagging that, *VW* negative cases, 15 September 2024. We do not think we need the *VW* negative cases before seeking to frame the Ubiquitous Matters.

We will obviously flesh that out in greater detail in our judgment, but if there is anything that is unclear then we would be very grateful if anyone would raise those, so that we can try to clarify any issues now.

Ms Lucas reminds me and this is quite clear, I hope, from what we have said earlier, that if the preliminary issue goes against CSAV then we will slot in any positive case that CSAV wants to make in the timeframe, but we are not going to make any order about that now because that will be to anticipate the preliminary issue. But, Ms Abram, you should not worry; we won't leave you out in the cold if, contrary to your best efforts, you are still in.

MS ABRAM: I'm grateful.

PRESIDENT: Ms Ford --

Ms Blackwood.

MS BLACKWOOD: I have just been asked when the *VW* trial is going to be set down.

PRESIDENT: That is going to be a matter that we will be debating. Certainly no later than the July hearing. The question will be how much we can shoehorn into

Ubiquitous Matters but we are quite deliberately not, at this stage, setting down anything for *VW* because we want the parties to think what use can be made of the term beginning 2025, in terms of trying not only *McLaren*, not only Ubiquitous Matters, but also *VW*. We are not making an order to that effect. We don't want *VW* to be under any undue pressure about a trial date but that time will be available and we have configured the timetable so that that time can, if it is fair to all concerned, be used in that way.

To be clear, we do not regard the cumulative nature of these two proceedings as a 20-week trial. We think it can be done in less and the parties should obviously work towards that but we are not at this stage making any further direction regarding the rump end, as we hope it will be, of the *VW* matters. But the *VW* Claimants should obviously feel free to raise the question of listing, in light of further developments, so that if, contrary to our hope and expectation, they aren't large Ubiquitous Matters to be heard and the *VW* trial in bulk needs to be later than Q1, 2025, it is listed as soon as practicably possible in 2025 or 2026, but we are not saying anything more than that.

Ms Ford.

MS FORD: Sir, there is a separate item on the agenda for confidentiality in the context of the UPO proceedings and the Tribunal has obviously indicated that there will be neutral cost disclosure which just raises the question of the mechanism by which the Tribunal envisages that's going to take place. We have indicated that we don't particularly have a preference as to whether or not one set of proceedings enter into the other proceedings confidentiality ring or vice versa. We have simply indicated that, ideally, one wouldn't end up with different rings, with different and potentially contradictory requirements. It may be that the parties can sort that out amongst themselves.

PRESIDENT: I was going to come to any other matters that arise out of the agenda. That, it seems to us, is something where your indication is entirely apposite, if I may say so, Ms Ford. We would not want a proliferation of confidentiality rings. We would want a system of confidentiality that works, treating effectively, the two proceedings as one but, obviously, bearing in mind that we need to be particularly careful about admission of lay clients into any ring. That's not to say we won't do it, we obviously will because there is questions of fairness in that but we do want that process to be fairly rigorously controlled.

On the other hand, we are quite relaxed about external experts and external lawyers being admitted to a ring because entirely rightly, we trust in the professionalism of external people and it is really the temptation, inevitable in client members, to unwittingly deploy confidential information on collateral matters that we must guard against. Professionals are not subject to that.

We can hear from other parties on that as needed but on the broad outline of the tectonic plates, are there any further points of clarification that we can assist the parties on?

MR KENNELLY: Just one point of practicality and that is in the event that it will be necessary to list a more lengthy *VW* only trial than the Tribunal hopes, if we wait until July 2024, there may be difficulty in listing such a trial, especially a three member Tribunal with my Lady in Q2, 2025 and so we would ask for some mechanism that would allow us, if it becomes necessary after the work is done that you envisage being done this year, to list such a trial, otherwise we could end up stuck in late 2024, with no prospect of a trial until late 2026 which is not what the Tribunal wants.

PRESIDENT: No, well, Mr Kennelly, can I leave it like this: your point is well made. You know that it is the practice of this Tribunal to get matters on as quickly as

practically possible. We will, when framing our judgment, give some thought as to the worst case scenario which is what to do with *VW* if large parts of it cannot be resolved in the way we are suggesting and we will endeavour to ensure that in that case, your trial comes on as soon as possible but I think we need to apply our brains to ensuring that we have got all our ducks in a row on that point, which I think involves articulating fairly clearly the process that we hope will resolve the bulk of the issues which is the one I have just articulated. But your point is well made and we're grateful for you raising it and we will deal with it.

I am taking silence not as consent but as no questions about the process we have outlined.

Is there anything more we need to deal with in terms of directions that would assist the parties in either action to take matters forward? We're very conscious that there will be dates in the order that we circulated in *McLaren* regarding disclosure times and things like that which we will flesh out, but those are points which we think should be left to the good sense of the parties' reaction to what will be a draft order from the Tribunal rather than a final order.

MS BLACKWOOD: Sir, just in relation to -- is that the *McLaren* draft order?

The parties have been liaising in *McLaren* about the draft order setting down times. I think there is a large amount of agreement. There's just a couple of issues on dates, on timings of responses in the order but I'm sure those can be resolved and if not, covered or addressed in a short letter.

PRESIDENT: Ms Blackwood, we don't want to waste any agreement that has broken out between the parties, so if you could send us what has been agreed, we will obviously factor that into the order which we will circulate again in draft.

It's obvious we will have to revisit all of the dates in light of the timetable that we have now set out because we have put some meat on the *McLaren* bones and we

have really created the *VW* skeleton and then put some meat on that as well, so we do need to think things through, but Mr Kennelly, you're on your feet.

MR KENNELLY: Just Ms Blackwood's point that rather than send you what we've agreed, there is scope for us to agree everything very quickly.

MS BLACKWOOD: Sorry, there is a draft order in *McLaren* which the Tribunal originally drafted and then there is a separate issue of disclosure in the *VW* case and the parties have been liaising over the last week and, indeed, a letter came in from VW this morning, suggesting further shifting in the appropriate disclosure order.

As the parties are still in discussion, we thought the most sensible approach might be for us to continue to liaise and if there are a few outstanding issues, perhaps those could be addressed on the papers.

PRESIDENT: Yes, that would be very helpful and to be clear, we will try to produce either one or two orders that deal with all outstanding matters in both *McLaren* and *VW*, so that the parties know where they stand but clearly, in those orders where there has been an agreed course between the parties, that is something that we would naturally place considerable weight on because the parties know rather more about the proceedings than we do, so we will take our steer from you on that regard.

Well, can I thank all of the parties for their very considerable -- oh, Mr Kennelly, I'm so sorry, I spoke too soon.

MR KENNELLY: Sorry, you're moving so quickly.

The first is the WWL settlement agreement, is that still on the agenda? I wasn't sure if you still wanted that.

MS BLACKWOOD: No, we're not pursuing that at this time.

MR KENNELLY: I'm grateful to hear that. That's one thing off the list.

PRESIDENT: I am working on the list as set out in Slaughters' agenda but I have clearly missed a few things, so do let's go through the points that you --

MR KENNELLY: That was the last thing on my list.

Mr Woolfe --

PRESIDENT: Mr Woolfe.

MR WOOLFE: The other matter which is on the agenda is the application made in respect of costs. VW is applying for its costs of preparing written submissions on custodian disclosure last autumn and that was reserved to this CMC. We have applied, made an application for them. I don't think it will take very long, certainly get it done before the end of today, easily. It's an application specifically against MOL, so I don't think it concerns necessarily, everybody else in the room.

PRESIDENT: First of all then, anyone who doesn't want to stay for what may be a very thrilling application, should feel free to go. But before you do that, let's make sure we've got everything identified that needs to be done.

Ms Ford, I see you're on your feet.

MS FORD: Sir, it was only I was unclear whether the Tribunal wanted to return to the question of confidentiality and see if there was any further submissions to be heard or whether that was resolved.

PRESIDENT: A timely reminder. I wasn't getting the sense that there was any pushback on what was said but now is the time. I am seeing a lot of shaking heads.

MR HOSKINS: Sorry, I was busy discussing something with Mr Kennelly, so I completely missed that, I'm very sorry.

PRESIDENT: No, not at all, this is the question of whether a single confidentiality ring embracing both actions resolves all issues of confidentiality rings or whether we need to have specific rings for specific purposes.

MR HOSKINS: We got as far as one ring to rule them all but I'm sure it just leaves us to see if that works.

PRESIDENT: We will leave that to the parties' good sense. If you need further

guidance, then it can be dealt with, I hope, on the papers.

MS FORD: Grateful.

PRESIDENT: I'm very grateful to you, Ms Ford.

In that case, anyone interested in Mr Woolfe's application should remain but we won't treat it as a discourtesy if the rest of you run for the door.

(Pause)

Application by MR WOOLFE

MR WOOLFE: They are missing out.

Now, the materials for this are mostly in volume 2 of the CMC Bundle. The letter of application, we start behind tab 75 and there you have the letter of application written by Slaughter and May and immediately behind it you also have the Fifth Witness Statement of Camilla Sanger, the partner at Slaughters dealing with it. That starts at page 840 and also behind that you have the statement of relevant costs that starts at page 850.

And it's dealt with in our skeleton argument at paragraph 68 to 71 of our skeleton argument for this hearing.

As I say, it's an application for the cost of preparing written submissions on custodian disclosure. The amount of the order is small in the context of this case. But we do say it's important because it sets expectations on the parties going forward, as to what appropriate behaviour in relation to disclosure is and, in particular, in the context where the timetable the Tribunal has set down is one that does require quite a lot of cooperation and goodwill between the parties and taking it sensibly, we do consider it important for the Tribunal to set expectations on this.

The context of this, if I may start, was the custodian disclosure exercise was ordered by Mr Justice Picken in July of last year. His order, we needn't go to it but I can tell

you where it is, it's volume 1, tab 28, and at paragraph 14 of that order a deadline was set for filing written submissions as to custodians, et cetera. It was originally for 30 September and it shifted to October.

But if I may, Sir, what I am going to do is set in context why we were doing this at all, then briefly what happened in October and then turn to why the costs order should be made.

Now, as regards why this disclosure exercise was being undertaken, you've already seen today, Sir, Volkswagen's pleaded case which is that the cartel was much broader in geographical and temporal scope than found in the Commission decision. We say it's global and my learned friend, my leader, showed you those references in the pleading earlier.

And we say it ran from 1997 through to 2012. That's 1997 to 2006 is stand-alone and all the stuff outside the EEA is stand-alone, as well. In support of that claim, at annex 2 you saw the foreign regulatory decisions that set out some of the material. Now, the Defendants do have legal objections to this case, this part of the case. They say both that there can be no damages claim prior to 2006 because before then, regulation 1, 2003 did not extend to cover this and the preceding regulation and we also say that shipments between ports entirely outside the EEA, so America to Japan, fall outside the scope for Article 101 entirely. So they have these legal objections but no strike-out has been brought on that basis and the facts are therefore a matter for trial.

The Defendants' pleaded response to the facts, if I may, is striking not for what it says but for what it does not say. As you will have seen from the foreign regulatory material, it is abundantly clear in this case -- often in competition cases we have follow-on and stand-alone. I know there is a certain scepticism about the stand-alone. Wouldn't the regulator have really found the conduct was wider if there

was good evidence?

In this case, it's apparent the Commission saw a jurisdictional reason not to go earlier or wider and there's a lot of material from foreign regulators, indicating that on the facts, we have a good case.

Now, the Defendants must know the truth of the matter, that they were involved in the cartel and know what was going on and, therefore, in ordinary principles, they would either admit or deny the allegations we have made regarding further groups and time periods. But if you take up the MOL Defence which is in volume 1 of the CMC Bundle, I think it's tab 8 and if you go to page 106 of the Bundle, you get MOL's entire response in paragraph 26, where they simply admit the fact of foreign regulatory action, say that the investigatory steps have no probative value, deny that findings of foreign regulators are admissible as evidence and that's it.

What they don't do is plead any positive case, any positive denial with reasons or any admission of the conduct.

The effect of that is that we do have to plead this all from scratch and hence why we want all these documents that we've been --

MR KENNEDY: Sorry to interrupt my learned friend but in paragraph 26F, it's been suggested there's no positive denial but in fact, 26F which is at 107, Sir, says it's aware that the First Defendant, that's MOLEA, not MOL, which is the parent company, has not been subject to any of the investigations by criminal and competition authorities referred to in annex 2 and annex 2 is the annex which Mr Kennelly took you to earlier. So there is a denial there as to which particular entity was involved, so it's wrong to say that there is no such denial.

MR WOOLFE: Thank you. For what it is worth now, (inaudible) to the application but the now parent companies are part of these proceedings and we also do allege in our Particulars that they are part of the relevant undertaking which is broader, than

the parent company.

Now, MOL, as my learned friend said -- my leader rather, said several times today at paragraph 8 of its skeleton -- says: oh well, if this is a stand-alone claim, it will be much broader. It is a stand-alone claim, we have made that very clear.

Now, what happened -- that's why we want disclosure. The reason why custodian disclosure was at issue is that immediately before the CMC before Mr Justice Picken, we were seeking for several months disclosure of -- documents from the Commission file, documents that the Commission was given but did not end up on the file and foreign regulatory documents.

And that was resisted by MOL on grounds of proportionality and relevance. So you see that, for example, in Bundle 1, tab 51. That's a disclosure report. If we go behind that to page 551, what you will see there is a letter from Arnold & Porter dated 19 April and if you turn over the page, this is correspondence leading up to the last CMC. Turn over the page to paragraph 7 on page 552, they were refusing what they called our "overbroad and indiscriminate request for provision of all Other Regulator Documents."

And what they say is basically it's saying it's all disproportionate. They do say that's in that paragraph, at the moment I have not located it, that enquiries are ongoing as to these documents. 7(a), I am told. That is right. So 7(a):

"your request is based on the assumption that the Other Regulator Documents will be "readily available". That is not correct. While the Defendants' enquiries as to the availability of Other Regulator Documents are ongoing, we expect ..."

And they go on to say how big it will be, so at that stage, 29 April 2022, we're told that enquiries are ongoing. Then what we actually get thereafter is the filing of the disclosure reports which is the first document in this tab. So it's still in tab 51. If you turn back to page 549 and the date of this disclosure report, it was filed on

29 June 2022. You see that on page 550, signed by Ms Wessel of Arnold & Porter. So this is now about two and a half months after they said enquiries were ongoing and they describe in response to question 1 on page 549, all documents which exist or may exist which may be relevant and item 4 they said was:

"Copies of documents submitted by the First Defendant to regulators other than the European Commission in the context of antitrust investigations into the provision of RoRo services". "Where it may be found" [second column] - "In the First Defendant's possession."

So we're being told at that stage, just before the CMC in mid-July, that they have other regulatory documents in their possession.

What then happens, if you turn to the next tab, page 569 and 570, on 12 July, so just a couple of days before the CMC, they file a revised disclosure report in which they suddenly say at point 4 of question 1, in respect of the same category of documents, "The First Defendant does not have control of any of these documents." And they refer to a witness statement and what that witness statement essentially said was: all these documents are in the control of our parent company. So this was unsatisfactory behaviour before the last CMC which my clients were quite put out about, to put it colloquially. By having been told enquiries were ongoing and having had a signed disclosure report saying the First Defendant has control of these documents, suddenly being told days before the CMC. No, we don't.

Mr Justice Picken therefore ordered a process of custodian disclosure in which the parties would seek to agree the names but in any event, MOL would have to do custodian disclosure to try and find documents relevant to the broader cartel investigation.

That is why disclosure was being given and why custodian disclosure was being given and also giving you a flavour of some of what it is that my client is unhappy

about.

What then happened next, in October 2022, is on 2 September, we can go to the letter, MOL proposed a list of 17 custodians who they were willing to search. On 4 October 2022, Volkswagen proposed ten additional custodians. Later on, one of those was changed, the identity of one was changed, it remained at 10. Then those were put together and suggested on the basis of a review of the other documents that we had already received at that point. There were names of people who you could see in the documents, were associated in some sense with the wrongdoing, who weren't in the list of custodians that MOL was putting forward and, therefore, who we thought may hold relevant documents.

The first letter I'm going to take you to is on 10 October. This is MOL, volume 2, tab 118 and that is on page 1080. Sorry, it starts on 1078. The relevant bit is on 1080 and that's a response to Volkswagen's proposal.

At paragraph 10, which is on page 1080:

"You have provided a list of ten additional custodians who you have asked our client to include in the disclosure. Our client's proposal was specifically to disclose all documents that were collected in the context of proceedings before the Commission subject to the exclusions listed in paragraph 7 of that letter. This data set comprises in excess of 2 million documents. It would therefore be wholly disproportionate to expand the scope of this disclosure further at this stage not least because increasing the data set by potentially many thousands of documents would significantly increase costs."

So what they are saying in response is: no, we're not going to search more people, it would be disproportionate.

Slaughter and May respond, it's in the next tab, on 13 October, so three days later and this, since we're on live stream I'm not going to read out, but at paragraph 9,

what they do is set out why the documents are relevant, broadly speaking, by giving examples from the documents of "his name we found in the document. They seem to be mixed up in things. We think you should search that." And you can see the highlighted material in paragraph 9.

And that's essentially where the debate about the disputed custodians ends or at least pauses momentarily. What then happens is MOL, on 18 October -- the deadline for written submissions was 21 October, that's a key date. At tab 120, what they do is put forward at paragraph 6 of a letter, a series of key word searches which they are proposing to apply to what are called the agreed custodians. So of all the documents harvested from the custodians, here are some key words but they maintain at paragraphs 9 through to 11 at pages 1091 to 92, that it would be disproportionate to carry out the searches on further custodians. They are just refusing at that point.

On 20 October, Volkswagen -- it's the next letter but you don't need to read in detail -- agrees in principle to key word searches. That's a sort of detail about -- but is not the names that have been disputed and come back with some more materials, explaining why they still think additional custodians are necessary. That's the highlighted material on pages 1095 and 1096 in the letter of 20 October.

So this takes us up to the time written submissions are going to be filed on the 21st. What we're hearing from the other side is: we are not going to do further custodian searches, it's disproportionate. We, therefore, are preparing written submissions, with a witness statement in support, as to why this is necessary.

What Arnold & Porter do is shortly before, the day before the deadline for written submissions at tab 122, they write an email to Slaughter and May and they -- perhaps you could read that email as a whole -- refer to Slaughter and May's letter:

"… not yet had an opportunity to consider the content of your letter in detail ... remain

aspects of our client's pragmatic proposals which you reject and you make new proposals (including adding an entirely new name to the list of your proposed Additional Custodians ..."

What happened was, I think, one of the ten was dropped and a new one was suggested:

"You demand our agreement to your new proposals by 10 am tomorrow, failing which you say that your clients intend to file submissions with the Tribunal."

They say it's "unfortunate", "disorderly" and not "a helpful way of proceeding". They say can't take instructions until MOL reopens. And they say in the circumstances, they want a further short extension.

So this is saying: you've rejected our proposal for -- there is some dispute with us about key word searching and you've proposed one more custodian. We want some more time to think about it. But there is no suggestion in this letter either that they're accepting that the further custodian searches would be proportionate, nor (inaudible) point of complete absence, nor are they saying: by the way, we are investigating whether or not we actually hold the documents relating to these custodians or: we have doubts about that. Nothing like that is mentioned at all at this stage.

That suggestion is rejected and Arnold & Porter subsequently seek an extension from the Tribunal and Slaughter and May (inaudible) find -- the extension request I think is actually sent in at 3.55 on the day on which this is due to be filed. I will momentarily locate it.

But then what happens is Volkswagen consider over the weekend what to do and ultimately choose to file their submissions on the Monday.

In terms of what Volkswagen were putting in, you can see that, that is at Bundle 2, tab 79, and what you can see behind that is a witness statement prepared by

Ms Sanger. The main meat of which and what took the work to prepare is all the stuff that's highlighted in yellow and is confidential. That's all the material about why these additional custodians should be searched.

And there were some written submissions that went with it as well. I think those are at tab 77. Some fairly brief written submissions that are by counsel at pages 879 through to 889, explaining why the custodians were necessary.

The request for an extension went in to the Tribunal behind tab 82 from Arnold & Porter and you can see an email to the Tribunal timed at 15.35, so 20 minutes before the deadline and what they told the Tribunal at that stage which is behind the pink slips at page 908, paragraph 4:

"Yesterday the Claimants' solicitors wrote to the First Defendant and put forward a further set of proposals in relation to key search terms and additional custodians. Our client is actively considering these proposals."

And they ask for a short extension of time.

Now, again, there is nothing said to the Tribunal of: actually, we are investigating, we're not sure if we hold these documents or not. And then after that, I think it was on 24 October, so after the deadline for submissions was when my clients were told that: actually, MOL doesn't have control of these custodians, they just work for MOL and, therefore, they can't give disclosure on that basis.

Now, tab 124, if I may. Yes, you can see there is an email dated 24 October 2022, timed at 16.12 and the letter behind it says at paragraph 3:

"we have investigated the names which you have proposed as Additional Custodians to determine whether their documents are in MOL (Europe)'s control. Our conclusion is that they are not."

So that's after the deadline.

Now, essentially, Sir, I would say this: at the time when Arnold & Porter were writing

to us to seek an extension of time, there were three possibilities. One is they hadn't yet done any work at all to investigate whether these documents were in their control and that would not be an acceptable way to proceed because our clients were understandably incurring costs to respond to MOL's argument that such disclosure would be disproportionate. So if that's the case, it's not good.

The other possibility is they were investigating it, had already found these people didn't work for them and didn't have control, in which case they should have told us and we could have downed tools the moment we found out. The other possibility is they were investigating but didn't yet know, in which case wouldn't the responsible thing to have done, bearing in mind we had a deadline and we were preparing submissions, would be to tell us: we are investigating. Whatever we may have said previously about proportionality, there may be an entirely different reason. We suggest you down tools and stop work.

None of those three things happened. So whatever the situation is about, when they started investigating or when they found out they didn't have these documents, in any of those scenarios MOL did not act well in respect of the filing of those written submissions.

That was a deadline imposed by the Tribunal, imposed by the court, rather. It had been extended but it couldn't be extended forever and we were facing that against the background of a clear position we were being told it was disproportionate.

Sir, it's in those circumstances we do say we should have our costs of preparing that witness statement and those written submissions. We were put to the costs of preparing them, when it was entirely unnecessary. Had MOL acted in a timely manner, we would not have incurred those costs and they should bear them rather than us.

Now, unfortunately, we are not in a position to tell you exactly what it is MOL did

wrong because they have never given us any account of when they started looking into this issue and how long it took them. All that's said in MOL's skeleton argument for this hearing -- I think it's paragraph 6 of their skeleton argument -- paragraph 8, I think. Sorry, it's not, it's paragraphs 29 and following. They say, paragraph 30(a) on page 101, in the middle of that paragraph, they did not mislead us as to whether it had control. It investigated the identity and informed us of the outcome as soon as they had been completed. The fact this investigation took approximately three weeks does not come close to constituting improper conduct on MOL's part. The fact that it takes three weeks to find out, does not, if that is the case from start to finish, we don't know their internal arrangements, but if this was a serious risk, what they shouldn't have done was write letters insisting it was disproportionate, without also saying: by the way, we're looking into this other issue which may constitute a complete bar to this kind of disclosure because they knew that the deadline was looming, so their answer is no answer at all.

So, Sir, we do say we should have our costs of this. I don't know whether you want to hear me on the amount now, hear everything at once, or decide principle and then come back.

MRS JUSTICE COCKERILL: We will hear the other side on principle first and we will see where we go.

MR WOOLFE: Thank you, Madam.

Submissions by MR KENNEDY

MR KENNEDY: Sir, I'm afraid I'm going to try your patience a little and ask you to turn up some of the correspondence but before I do that, I would like to step back from the detail a little bit. in the terms in Ms Sanger's Fifth Witness Statement, it's suggested and I quote that MOLEA acted "improperly", "uncooperatively" and

unreasonably and that that conduct caused VW to waste costs.

In light of the terms of the application, one might expect to see some pretty egregious behaviour from MOLEA but you search in vain for that level of egregious behaviour and what we in fact see, Sir, is a back and forth regarding disclosure that you see in the run up to every CMC for this Tribunal and the Commercial Court. The parties engage in correspondence, they make some progress, but not complete agreement. A deadline is extended by agreement to allow them to try and agree and eventually, at the last minute, matters are agreed and the parties don't trouble the court or the Tribunal.

Parties have almost inevitably wasted some costs. Some part of a skeleton argument is deleted at the last minute, some part of a solicitor's supporting statement is deleted at the last minute. In those circumstances, Sir, it would be very surprising if one party or the other said that they were entitled to the costs of that part of the skeleton argument or that part of the witness statement.

On the contrary, ordinarily, the parties recognise that this is simply the cost of doing business when it comes to litigation on this scale and so, Sir, we say that the fact of this application is pretty surprising and we say that the level of costs is incredibly surprising, almost in fact over £50,000 in relation to what, as I will come on to show you if necessary, are two very short witness statements and one short set of submissions.

So with that introduction, Sir, I propose to take my submissions in three stages. Reluctantly, I do propose to go back to the pre-history of the dispute which takes us back to the first CMC. As I pointed out during my learned friend's submissions, there was an omission of a reference to our pleaded case which made clear that the First Defendant, MOLEA, was not party to the foreign regulatory proceedings. We accept that the first disclosure report which my learned friend took you to, misstated the

position. It indicated the First Defendant had control. A document that my learned friend didn't take you to and I will ask you to turn up very briefly, is the electronic disclosure questionnaire that was filed at the same time. That's in the CMC Bundle, the Core Bundle, volume 2, tab 61 and you see in box 2, second sentence says:

"MOL -- "

Which in this instance is MOLEA. I apologise for the confusion arising out of the various acronyms but at this time the only MOL entity that's involved is MOLEA. So the First Defendant "is investigating the existence and location of any documents submitted to foreign regulators", which was the case. So in light of our pleaded case and what was said in the EDQ, we submit that any scope for confusion was fairly minimal and in any event, the position was corrected promptly in the follow-up disclosure report which my learned friend took you to which came two weeks later and we also filed a witness statement from Mr Luttmann, explaining the position.

So that's the first storm in the first teacup. An error was corrected and the scope for mischief was very limited.

The second point which I just need to correct very quickly was there was a suggestion that the custodian disclosure was ordered by Mr Justice Picken. In fact, it was done by consent. We agreed to it and it was recorded in the order of Mr Justice Picken on 14 July. So, Sir, that's the pre-history and so we say not much to see there.

Turning back to the present circumstances, I will address you first on the question of control and then I will come on to show why, in our submission, it is in fact VW's overly aggressive approach to this litigation that caused them to incur the cost of these written submissions and no improper, unreasonable or uncooperative conduct on our part.

Sir, the control issue boils down to this: was it improper, uncooperative or

unreasonable for MOLEA to take just under three weeks to complete its investigations into the additional custodians, and we say clearly.

The time that it takes to make these enquiries we say has to be viewed in the context of proceedings of this kind and of this size. My learned friend took you to his solicitors' letter of 4 October which first introduced the Additional Custodians, ten named individuals who VW had identified from documents that MOLEA had provided from the documents it had sent to the Commission.

MOLEA provided over a thousand documents and VW identified ten additional custodians that it said it would like further documents from. Prior to this, we didn't have any notice who these people were.

Now, MOLEA forms, as I don't think will be controversial, part of a large, multi-national group. Three different entities within the MOLEA group were addressees of the Settlement Decision. The *VW* claim spans 15 years and the start of the claim period is 25 years ago.

So the suggestion that was made in my learned friend's skeleton argument that identifying the Additional Custodians was simply a question of carrying out basic searches, we suggest is fanciful.

Moreover, the suggestion is entirely at odds with the position that VW has taken at this CMC. Mr Kennelly very fairly said that he couldn't pray in aid of his own volition, the difficulties identified in Dr Hemler's statement and that he had to accept that the Defendants would be under similar difficulties and we say that the same is entirely true in these circumstances.

I don't think we need to turn up Dr Hemler's statement but she points out that VW is a large, complex organisation and getting approval for documents and finding out where documents are can take a large amount of time. Things are held in different systems and different databases.

The same is true of MOLEA and we say that if you view three weeks in that context, it's not a particularly long period of time at all.

Sir, if I could ask you just briefly --

MRS JUSTICE COCKERILL: Can I just ask you this. The deadline for the submissions under Mr Justice Picken's order was originally 30 September.

MR KENNEDY: It was, Madam, yes.

MRS JUSTICE COCKERILL: So presumably, at the time you agreed to that order, you anticipated being able to bottom out the position as to custodians within that period of time.

MR KENNEDY: We thought that would be a sufficient period of time for the parties to try and reach agreement. The proposals were to be made by 16 September and it gave the parties two weeks to reach or not reach agreement in those circumstances. The 30 September deadline, Madam, was extended at VW's proposal. I'm sure you have seen that in the skeleton argument in the papers.

MRS JUSTICE COCKERILL: It's just to the extent you're saying: well it's terribly difficult to work out what's under the control and what's not, doesn't one have to look at that against the background of the order to which you signed up?

Shouldn't you have been able to come up with an answer to that within the period you agreed to deal with submissions in relation to custodians?

MR KENNEDY: Madam, it's necessarily going to depend on the circumstances. The Additional Custodians are not custodians from whom we had gathered documents in the first instance. The Agreed Custodians that have been called are those whose documents we gathered during the Commission proceedings and that's explained in the correspondence and certainly I would imagine we would be able to answer questions about those custodians more quickly because we had already gathered their documents and we had been working with their documents previously.

But these were individuals, as I said, Madam, who were identified -- just people who were perhaps copied on an email in documents that had gone to the Commission but were not people who had been identified in the process leading up to and during the Commission proceedings, who were, if I can put it this way, involved in the conduct at issue. They're necessarily more peripheral and that may account for the increased amount of time that it took.

MRS JUSTICE COCKERILL: Thank you.

MR KENNEDY: So as I said, alleged to have been not only acting improperly but also uncooperatively and having not provided sufficient information as to the Additional Custodians. And we say that the correspondence shows that that's not actually correct. If I could just ask you to turn up a letter. It's in the second volume of the CMC bundle, tab 117. It's a letter from my solicitors. In fact, I am mistaken. It's not the letter from my solicitors, it's a letter from VW's solicitors.

Sorry, Sir. Two tabs forward, tab 119. This is the letter of 13 October from Slaughter and May to Arnold & Porter and their solicitors. If you go forward to page 1085, paragraph 10, you will see there this is Slaughter and May engaging with the question of proportionality. Subparagraph (a), they say "it seems likely" to them "that the Additional Custodians", the additional ten, their "Documents will also be held in those databases" that we have identified in respect of the agreed custodians.

If we turn to the next tab, this is the response from my solicitors, 18 October. Forward to page 1092, paragraph 11. This is paragraph 10(a) which is the paragraph we just looked at:

"of your letter is incorrect to the extent it assumes that documents held by the Additional Custodians listed in your letter are included in the existing databases. The Additional Custodians and documents held by them are, in fact, not included in any of these databases."

So where we had specific information that was relevant to the additional requests to provide, we provided it. We didn't simply, as was suggested by my learned friend, stonewall under the cover of proportionality.

And, Sir, we submit that this kind of cooperative approach is characteristic of the approach we tried to take in the light of Mr Justice Picken's order. I won't ask you to turn them up but twice, Slaughter and May raise details, queries about the Agreed Custodians and the process that had led to the gathering of those documents and twice, Arnold & Porter replied in detail.

When an initial extension was proposed on 28 September to move back the 1 September deadline by three weeks, Arnold & Porter agreed with that demur.

MOLEA suggested search terms as a way of trying to reduce the burden on both parties and to make the disclosure exercise less time-consuming, less burdensome and finally, MOLEA agreed a compromise on timing. They had originally proposed a deadline of 17 February 2023. There was much back and forth about how unsatisfactory that was for Slaughter and May and what was eventually agreed was that they would use their best efforts to comply with the deadline proposed by Slaughter and May.

So we say that we cooperated as best we could during the period in which this was being negotiated. And we say that, in fact, if we go back through the correspondence, and I won't take you through all of it, I'm just going to focus on two or three letters, you see that in fact it's VW's unreasonable conduct that led to them incurring these costs.

I think we can start with Arnold & Porter's letter of 18 October and what you see is a response at paragraph 9 of that letter, page 1091, a response to Slaughter and May's assertion as to why the Additional Custodians' documents were likely to be relevant. My learned friend took you to a confidential passage in which

Slaughter and May had identified documents within the existing disclosure which they said showed that the Additional Custodians had participated in the unlawful conduct.

At paragraph 9, what you see is Arnold & Porter pointing out that the two documents identified in the letter of the 13th would actually include the Agreed Custodians as recipients and, therefore, would be caught by the existing proposal.

And so that's the 18th, this is the Tuesday. Deadline for submissions is on the Friday. What we don't see in response to that letter is a suggestion from VW that they think the correspondence has run its course and there is nothing more to be said and they're going to put their written submissions in. In fact, what we see if we turn to the next tab is Slaughter and May's letter of two days later, 20 October. Turn to page 1095, paragraph 9. Again, it's highlighted because it's confidential but what we have here are two further documents which Slaughter and May have found in the existing disclosure which were not sent to Agreed Custodians but they say were sent only to Additional Custodians. And so this is continuing the fight about not the question of proportionality but the question about whether or not the additional searches are likely to produce additional relevant documents.

So the debate continues. Obviously, in the gap between the 18th and 20th, Slaughter and May have been searching around in the disclosure they already have to try and find documents to press home their point on relevance. And over the page and this is the point that my learned friend glossed over initially and came back to, paragraph 11:

"Please note that, given Mr [name is confidential] appears to have been engaged in/or have been aware of the Unlawful Arrangements, our clients consider that he should be included on the list of Additional Custodians. However, our clients are content to remove [another named person]."

And so there is a substitution proposed to the list of additional custodians. This is the day before written submissions are due to go in.

Can I just ask you to turn over the tab, page 1098, you will see that that letter was actually received at 5.30. This is an email from my solicitors at 6.45 on the evening of the 20th and they say -- it's addressed to Mr Lawrence of Slaughter and May:

"Dear Sirs and Madams We refer to your letter [it's the letter I have just taken to you] today at 17:30."

If we just flip back one page, 1096, what you will see there, say:

"Please confirm your client's agreement to" – paragraph 14. "Please confirm your client's agreement to the proposals set out in this letter as soon as possible and, in any event, by 10 am on Friday, 21 October."

That's the following morning, so this is 5.30 on the Thursday night and my clients are being given an hour and a half to respond to the suggestion that there is going to be a further custodian.

And unsurprisingly, if I could ask you to flip back, my clients, my solicitors say: that's not going to be possible and we think that a short extension would be in order, in order to allow us to look into this new person and to come back to you on that.

And, sorry to flick back and forth, Sir, but read on. So not only is there an impossible deadline of 10 am the next day suggested, it says:

"In the event that such agreement is not forthcoming, our clients intend to file submissions with the Tribunal."

And that's the first mention we have seen of any written submissions being filed. It's been suggested latterly that on receipt of the 18 October Arnold & Porter letter, that VW threw up their hands and said: there is nothing more to be done here, let's just go ahead and put our submissions together and we will let the Tribunal decide it. But in fact, what we see is a further substantive letter seeking to drive forward the

debate on whether or not the additional custodians disclosure should be given and in parallel, £40,000 in costs racked up in preparing the written submissions.

And then a deadline imposed, an hour and a half deadline imposed on the threat of then the submissions being filed if agreement is not forthcoming.

Curiously, what happens next is that VW file their written submissions with the Tribunal, a control issue comes to light. The issues then fall away. The only outstanding issue at that point, Sir, is the question of the search terms which falls outside the scope of Picken's order so there's nothing left to be determined. My solicitors, and I won't actually turn it up, therefore propose a consent order reflecting a proposal made by Slaughter and May as to how the search terms could be agreed on a separate timetable.

VW then purport to not have enough time to consider their own proposal as to the search terms and proceed to serve the filed submissions on my clients but write to the Tribunal at the same time and suggest that no directions be made, which seems slightly curious, to serve submissions where you're asking the Tribunal not to make any order.

And so in my submission, what we see from the passage at play from the 18th through to the 28th is an attempt by VW to manufacture a source of pressure on my clients. They knew they were preparing the letter of 20 October. They knew that we would have to ask for more time to do it and they knew that if they had written their submissions and racked up what we see to be considerable costs, that they hoped to have us over a barrel and we would have to agree. And we say that the making of this application is of a piece with that aggressive approach. The making of the foreign regulatory materials application which was determined by my Lady is of a piece with that approach and we say that that approach is entirely inconsistent with the governing principles which require, A, cooperation and B, proceedings to be

dealt with at proportionate cost.

Sir, those are my submissions on the question of principle. Unless I can be of any further assistance.

Reply submissions by MR WOOLFE

MR WOOLFE: I will be very brief. First of all, my learned friend started his submission saying the question is whether it was improper for them to take three weeks to investigate who controlled these documents. For the absolute avoidance of doubt, our application is not based on any suggestion that taking three weeks to investigate whether or not you control certain documents is improper.

Our complaint is about a lack of transparency on the part of MOL and also not taking deadlines seriously.

There is a second point which my learned friend, in his last submission, said that this reference to filing submissions in our letter of 20 October was the first time they had seen a reference to us filing submissions. This was not a spontaneous application made by my clients. We weren't saying on the 20th: we're fed up with this, we're going to make an application tomorrow if you don't give in. We were working towards a deadline that had been set down by a court order that had been extended once but we were working to that and preparing for that. Therefore, there's no surprise and we weren't doing anything improper by being ready to file the submissions that the Tribunal would have been expecting from us.

The third point is a suggestion was made that somehow these people were tangential, sort of difficult. Because they were more tangential, they were difficult to find or somehow these weren't so important, these documents. That's not the case. These names could be identified in some cases. Obvious from what we saw, the documents we had, these people were centrally involved in the unlawful conduct

and, therefore, there was a real possibility that a search of their materials would turn up more documents. You see that most clearly in Ms Sanger's Fourth Witness Statement which I think is behind tab 79 of the Bundle. I was going to refer you to one paragraph of that. It's paragraph 14B on page 897, on to 898.

What you will see is what we had found, a description of the documents we had found on a certain date in 2000. A certain individual sent an email to somebody else at another undertaking. And two people copied in.

In the middle of that, three names we say are all Additional Custodians. They were people who weren't proposed in our list and those were the names of the person who sent the email and the two people who were copied in. I'd ask you to read the words that are underlined in capital letters and then "The email then goes on to state:

"1. The above request is not based on MOL's seniority ...""

Sir, on its face, it appears to be fairly clear evidence, given who this email was sent to, a different firm and the subject matter of it involved actual involvement in the anti-competitive practices. So you can see why we would think, fairly naturally, we would like to see more emails from this person, not somehow, peripheral material at all.

Another point made was that this material was -- somehow, MOL were being reasonable by pointing out that the emails we had found were already caught in the existing searches. That is not a good point. It is inevitably the case we could only look at the material we had been given to try and identify pointers to who may have other materials. So inevitably, anything we put forward would be something that had already been disclosed. That goes nowhere.

Finally, my learned friend did say at the start that over £50,000 of cost have been incurred on these submissions. That's not the case. He's added together both, in a sense, the costs we're seeking and the costs of this application. This costs

application now. The actual amount is set out behind Ms Sanger's Fifth Witness Statement in the schedule.

MRS JUSTICE COCKERILL: 37,000-odd.

MR WOOLFE: That is right, and you take a view on the correct amount of that, if you decide the interest issue of principle in my favour. I think that's everything. All the questions.

PRESIDENT: Mrs Justice Cockerill, as the Chair of the *VW* Panel, will give a ruling on this matter.

RULING

MRS JUSTICE COCKERILL: This is an application for costs brought by the VW Group Claimants in relation to their costs of filing written submissions in relation to MOL's custodian disclosure in relation to Foreign Regulatory Documents.

The matter has something of a history. There was to be a CMC which ultimately took place in front of Picken J. There was definitely some confusion and inaccuracy in the run up to that CMC, in that originally an indication was given in the DRD that certain foreign regulatory documents would be within the possession of MOL and originally it was stated by MOL, or MOLEA, that objections were based on, if anything, relevance and proportionality.

Quite shortly before the CMC, it became clear that that position (that the documents were within MOLEA's control and that it was a question of relevance and proportionality) was changed and the position was stated that the caches of documents in question were, in fact, held by the parent company, Mitsui and were not within the litigant's control.

What happened then was there was an order made by consent in Picken J's CMC order. It was ordered that there would be custodian disclosure. Because of the late

change of position and emergence of the custodian route there was not time to agree custodians and the parties were to file written submissions if the custodians could not be agreed. The deadline for the submissions was initially 30 September, later extended to 21 October 2022.

In the period which succeeded that, some agreed custodians were identified and then the Claimant solicitors identified some additional custodians where the materials which had thus far been seen, indicated a direct contact with the unlawful conduct. Those custodians were identified and what then happened was that MOL suggested that searches would be disproportionate.

All of this occurs against a background where there was a deadline. The parties were aware of the deadline. They had both agreed to a deadline of 30 September 2022, but they then appear to have taken a somewhat relaxed approach to it, being prepared to agree an extension of time to 21 October.

Then in the run up to that 21 October date, there was considerable toing and froing in the correspondence. There were queries. There were answers to queries. MOLEA was resisting disclosure of the additional custodians on the basis that such disclosure would be disproportionate. What has been said in relation to this by Mr Kennedy for MOL is that what one sees is the usual toing and froing that one would expect in relation to disclosure matters. But there is focus on the fact that while MOLEA is saying first of all, that the disclosure in relation to the extra custodians would be disproportionate, they were at the same time not sure that the custodians were within their own control. Correspondence continued right up against the deadline. No indication was given by MOLEA of the control issue. At the same time very shortly before the deadline the Claimants were asking for a change in relation to custodians, developing their position in relation to the documents and seeking to substitute a new custodian for one of the existing custodians.

Ultimately, what happens is that the Claimants, in the face of a continuing answer that the additional custodian disclosure would be disproportionate, but without regard for the likely knock on effect of the revised position they had taken, prepared submissions in accordance with the deadline. They filed those submissions. These are the main costs in debate. Shortly after the submissions were filed it transpired that, in fact, the custodians in question were not within the control of MOL at all and so that there would be no response in relation to custodian disclosure, if those custodians were identified. The whole debate is a dead letter.

This forms the background to the Claimants' submissions that this was improper behaviour on the part of MOL. The basis on which this is put by Mr Woolfe is that effectively this is not transparent behaviour and it ought to be marked by disapproval on the part of this Court. The way that he puts this is that either at this point MOL had done nothing to ascertain the position on control, or they had investigated and had found that there was no control and they had nonetheless not told the Claimants, or they had been investigating and they did not yet know and, in those circumstances, bearing in mind the deadline, there should have been transparency and the Claimants should have been told to down tools and not prepare the submissions. Ultimately, he says whatever was done MOL did not act well and the Claimants should recover their costs – and the costs of the application which has been contested.

This is an application which I am not prepared to grant; but I am also not prepared to go down the line indicated by Mr Kennedy of costs in the case. The reason is this: this is exactly the sort of point where there should not be an application for costs brought to this Tribunal at all.

I wish to mark the disapproval of the Tribunal both in the way that disclosure was being handled and in the fact that this spat has been the subject of argument before

us. Looked at overall, neither side emerges from this story with any credit whatsoever.

On the part of the Claimants there is suggestion that there was a lack of transparency; but that is a criticism which goes both ways. The Claimants had prepared their witness statement, or started to prepare their witness statement rather before they indicated they had done so. They did not give MOL much opportunity to tell them to hold off. In addition, all of this was being left very much to the last minute with a deadline impending and changes were being made to custodians. These changes were being sought by the Claimants in circumstances where it must have been obvious that would be likely to result in a need for an extension of time. And yet matters were being prepared as if the deadline was realistically going to be met. That is not attractive.

On the other side, on the part of MOL, there had plainly been, in the course of this particular exchange going back prior to the CMC, a lack of grasp in relation to the position on custodians. There was the initial confusion which led to the matter not being effective at the CMC, when it should have been debated. There was then really quite an excessive period of time apparently needed to bottom out custodians and who had control of custodians. A deadline had been agreed which should have been complied with, but even with an extension that extended deadline was upon the parties before MOL produced an answer which would have saved considerable debate.

There was, on both parties' parts, a failure to engage constructively with the questions of whether they could realistically get these custodians sorted out within the time and, if not, did they need to extend. Deadlines appear to have been taken lightly and co-operation is not as apparent as it should be in the correspondence.

My overall impression is that all of these things should have been capable of being

dealt with with rather more cooperation and rather more transparency on both sides. Certainly, this is not a matter which should have resulted in an application for costs and the costs of the costs dispute being brought or heard in front of this Tribunal. Accordingly, what I am going to order is that neither party shall recover the costs in relation to this particular custodian exercise and this dispute, whatever the outcome of this trial.

Thank you.

I am nonetheless grateful for the excellent submissions on both sides. You both had a highly unattractive position to fight and you fought it very well.

MR WOOLFE: Thank you, Madam. Can I ask a point of clarification of the order: you said not in relation to the costs of the custodian disclosure exercise. You mean in relation to arguing about it or the actual exercise of undertaking it? I would assume --

MRS JUSTICE COCKERILL: The underlying exercise and the application.

MR WOOLFE: Thank you, Madam.

MR KENNEDY: That covers my question as well.

MR HOSKINS: I think business is done.

Perhaps not?

MR WOOLFE: I was going to say thank you, Madam, for your (inaudible).

MR HOSKINS: I think that concludes all the matters before you.

PRESIDENT: It does indeed. Thank you all very much. We will conclude the proceedings. Thank you all.

MR WOOLFE: Thank you very much.

(4.29 pm)

(The hearing concluded)