IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1339/7/7/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday, 4th December 2024

Before:

Bridget Lucas KC
Carole Begent
Dr Maria Maher

(Sitting as a Tribunal in England and Wales)

Mark McLaren Class Representatives Limited

Class Representative

V

MOL (Europe Africa) Limited and Others

Defendants

A P P E A R AN C E S

Sarah Ford KC, Nicholas Gibson and Sarah O'Keeffe on behalf of the Class Representative (Instructed by Scott+ Scott)

Brendan McGurk KC, Michael Quayle and Natalie Nguyen on behalf of the First to Third and Fifth Defendants (Instructed by Arnold & Porter and Steptoe International (UK) LLP)

Wednesday, 4 December 2024

(10.30 am)

(Proceedings delayed)

(10.37 am)

THE CHAIR: Good morning. Before we start, I will give the usual warning. Some of you are joining us livestream on our website so I must start therefore with the customary warning. An official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of these proceedings and breach of that provision is punishable as contempt of court.

Yes, Ms Ford.

Format of Class Representative's expert evidence

Submissions by MS FORD

MS FORD: I appear with Mr Gibson and Ms O'Keeffe for the Class Representative and Mr McGurk KC appears with Mr Quayle and Ms Nguyen for MOL and NYKK.

THE CHAIR: Thank you.

MS FORD: We have an agenda which is in the bundle, PTR bundle, tab 3, page 1. This is, as the Tribunal is aware, the PTR for the trial that is due to start on 13 January and unless the Tribunal has any other preference I was planning to just work through the items

on the agenda.

THE CHAIR: That sounds sensible, thank you.

MS FORD: The first issue concerns the format of the Class Representative's industry expert evidence from Mr Goss and Mr Whitehorn. The Tribunal will have appreciated that there are two inter-related issues here. The first is whether despite having authored each of their reports jointly, Mr Goss and Mr Whitehorn should be cross-examined separately.

THE CHAIR: Yes.

MS FORD: Then the second issue is the suggestion that they should not even be permitted to watch the cross-examination of the other expert.

THE CHAIR: Yes.

MS FORD: Can we start by looking, please, at the first of the four reports that Mr Goss and Mr Whitehorn have authored jointly. It is in the CPO bundle {CPO-B/1/1}, and I start with this one simply because it is the first in time, but it is essentially illustrative of the broad approach that they have taken generally.

THE CHAIR: Yes.

MS FORD: If we look, please, within this to page 4 {CPO-B/1/4}, at paragraph 1.1 we can see that they confirm this expert report has been prepared jointly, Andrew Goss and Anthony Whitehorn:

"We have carried out all the work set out in this report on a joint basis, and we both take responsibility for the entire report."

THE CHAIR: Yes.

MS FORD: They then give a summary of their respective experience. 1.2 to 1.4 is Mr Goss' experience. He is chairman of the board of Vertu Motors, which is the fifth largest motor retailer in the United Kingdom. He explains he has over 40 years' experience working in the automotive industry. He was Sales Director at Toyota GB, Chief Executive Officer of Porsche Cars GB, President and Chief Executive Officer of Jaguar Land Rover North America and Global Sales Operations Director and board member for Jaguar Land Rover.

He explains what those roles entailed relevant to these proceeding, so he explains they are involved directly in the business planning process, including reviewing prices and margins, and he was the person to whom those responsible for setting delivery charges actually reported, and he says his role included assessing the overall delivery cost against delivery charges set.

We then have Mr Whitehorn's experience at paragraphs 1.6 to 1.8. He has over 30 years' experience of working in the automotive industry. He was Operations Director at Toyota GB, President and Chief Executive Officer of

Hyundai Motor UK Limited, Executive Advisor for Hyundai Motor Limited, and he also explains what his roles entailed:

"... full responsibility for and managed direct sales, marketing, after sales and distribution of vehicle parts."

Responsibility for:

"... the distribution of motor vehicles within the UK to the dealer network of the relevant franchises. He also oversaw the pricing to dealers of the delivery charges and, in conjunction with the marketing department, the customer pricing of delivery as it appeared in the public domain."

THE CHAIR: Yes.

MS FORD: Now, there are instances within their reports where the experts, quite properly, are careful to indicate the limits of their respective expertise. Just to show the Tribunal two examples of that, within this document, page 6, paragraph 1.14 {CPO-B/1/6}, the Tribunal will see that they explain there:

"We are not experts in the shipping industry..."

Then over on page 7, please, 1.19 {CPO-B/1/7}, they say:

"... our expertise is in the field of sales operations and associated distribution activities, and

we have never been directly involved in the procurement and negotiation of Vehicle Carrier services contracts. Accordingly, the information set out in this report is based on our knowledge of the industry as a whole, and discussions we have had with those who have been directly involved in the procurement and tender process."

So, they have been very careful to indicate the limits of their expertise.

If we go, please, within this document to page 27 {CPO-B/1/27}, they have given their experts' declaration. At paragraph 5.1, they confirm that they understand that their duty is to the Tribunal. They also say, if we can go, please, to 5.13, on the following page {CPO-B/1/28}, they say again:

"We understand our duty to the Tribunal as set out in ... the Guide to Proceedings ... and have complied with that duty."

Paragraph 5.13 is where they confirm the contents of their report are true.

THE CHAIR: Yes.

MS FORD: So, two points that we would draw out. The first, Mr Goss and Mr Whitehorn have expressly confirmed that they each take responsibility for their entire report, and as in my submission comes through amply from the

summaries of their respective experience, they each have sufficient knowledge and expertise to attest to the veracity of the entirety of that report and they have quite properly made clear the limits and the extent of their expertise.

So, in our submission it is not right for the Defendants to seek to suggest that there has been any relevant failure to identify which statements are made from the witnesses' own knowledge and which are not, which is a submission that was made at paragraph 5.1 of their PTR skeleton. The experts' position is that they have both indicated that they are both able to speak to the whole of the report, save where they have otherwise indicated.

Nor is it right in our submission for the Defendants to make the claim that they make at paragraph 12 of their PTR skeleton, where they say, and I read out exactly what they say:

"The MN Defendants have literally no idea what either Mr Goss or Mr Whitehorn will individually say about anything at all."

That is clearly, in my submission, not correct. The report contains their evidence on the matters relevant to the proceedings and they have each indicated that they take responsibility for all of it and so that is

what they are going to say.

Now, it is, of course, open to the Defendants to test that if they choose to do so. But we say that does not necessitate the two giving evidence entirely separately in order to do so.

Now, as to the remainder of the points that are made by the Defendants in their PTR skeleton, and these are points such as the fact that some of Mr Goss' or Mr Whitehorn's experience derives from excluded brands or the fact that they tend to use words like "generally" or "typically", those sorts of points, we say those are matters that they are perfectly entitled to challenge at trial if they see fit. But again, we say that does not necessitate these witnesses giving oral evidence separately when they have adduced their evidence jointly. That is the first point that we draw out.

The second point is, these are two witnesses with between them many years' commercial experience in the automotive sector, including many years of experience as company directors with all the responsibility that goes with those positions. They are cognisant of, and they have confirmed that they have complied with, their duties as independent experts to this Tribunal.

So the Defendants' suggestion that it would be inappropriate for them to either watch or even be

informed of the contents of each other's testimony because it might somehow affect their own evidence in our submission is an absolutely extraordinary position to take, particularly given the extent of their experience -- these witnesses' experience on the matters to which they speak, and their knowledge and compliance with their expert duties.

We say it is verging on an allegation of potential impropriety and any suggestion to that effect is completely baseless and frankly not a proper suggestion to have been made.

This first report, jointly authored report, was dated 18 February 2020 and it is right to draw to the Tribunal's attention that there was then some correspondence in respect of the approach that was taken in it. The first letter that raised any sort of point about the joint authorship of the report was 13 April 2021, so we are talking over a year after this report was first served. It is in the bundle {CPO-F/161/1}.

THE CHAIR: Yes.

MS FORD: This is a fairly lengthy letter. The Tribunal might want to just cast its eyes over the contents briefly but the Tribunal will see that the contents are relatively familiar.

THE CHAIR: Yes. Can you flip the page over. Thanks.

Yes, and again. Yes. (Pause). Again. Yes, thank you.

MS FORD: There was a follow-up letter for completeness on 22 April 2021. Scott+Scott on behalf of the Class Representative responded on 7 May 2021. That is in {CPO-F/169/1}. Again, if the Tribunal can very briefly cast an eye over it. What will be seen is that there was a thorough response in detail to all the criticisms that had been levelled.

THE CHAIR: Yes.

MS FORD: If we look, please, at paragraph 5.3 on page {CPO-F/169/5}, what we said as to timing at this juncture was:

"... even if there were any doubt as to the delineation of the Industry Experts' testimony, this would not be an issue for certification, but could be addressed in greater detail when our client files its expert evidence in the main proceedings following certification..."

We also made the point at paragraph 7.1, part way down:

"As noted in our letter of 20 April 2021, your clients have been in possession of the Industry Expert Report for well over a year. Had your clients raised

these challenges in advance of the CMC, there was ample time for the matter to be addressed and resolved at that hearing."

So, the Defendants had had the opportunity to raise this matter with the Tribunal at the CMC. They did not do so, so the position we suggested to them was okay, well, this is now a point for post-certification. It is fair to say that the Defendants did not agree with that so we got another letter from the Defendants on 10 June 2021. That is this bundle, tab 172, page 1 {CPO-F/172/1} and Scott+Scott replied to that on 18 June 2021 at {CPO-F/174/1}.

We then served a supplemental joint report for the purposes of certification on 1 October 2021 and despite the repeated letters, no formal objection was raised with the Tribunal at the certification stage. As the Tribunal is aware, since then we served two further reports from Mr Goss and Mr Whitehorn in the main proceedings, each of which was again served jointly. The one that accompanied our positive case was served on 22 March 2024 and then the one that accompanied our negative case was served on 26 July 2024.

THE CHAIR: Yes.

MS FORD: The Defendants did not raise their purported concerns with the approach that was taken either after

the positive case or after the negative case. The Tribunal will recall that there was a CMC listed for 17 April 2024, which was shortly after the positive cases were filed and we say any genuine concerns could and should have been raised then. Instead, the Defendants jointly applied with the Class Representative to vacate the CMC. That is the consent order of 10 April 2024. The Tribunal will recall that there was then also a CMC after the negative cases were filed.

THE CHAIR: Yes.

MS FORD: There was a fairly lengthy discussion at that CMC about the contents of the economic expert evidence. Again, we say that would have been an opportunity to raise any genuine concerns and none were raised.

So instead, the situation is that we heard nothing further after the last exchange of letters for over three years and then this point is resurrected in letters of 2 October 2024 and 11 November 2024. In our submission this is opportunistic conduct on the part of Defendants. Had there been any genuine objection to Mr Goss and Mr Whitehorn giving evidence jointly, we say it could and should have been raised and pursued much earlier.

THE CHAIR: Is there a distinction, though, between providing a joint report and then the cross-examination

on the basis of the contents?

MS FORD: Well, we say that really one should follow from another and we say there is no procedural obstacle to them being cross-examined jointly. But had the Defendants wished to take the point that there is a relevant distinction, then we say that really ought to have been raised at an earlier juncture.

In terms of the CAT's procedure, as the Tribunal is aware, the CAT has a flexible procedure and a broad discretion to admit evidence and we do not understand that to be in any way in dispute. As we had explained in our skeleton, and contrary to the suggestion that was made in the Defendants' skeleton, there is precedent for giving evidence jointly, even in the High Court, which it might be said has a slightly less flexible approach to evidence than this Tribunal, and the example we cited is the Charman v Charman case, which is in the PTR bundle, tab 39, beginning at page 1 {PTR/39/1}.

It is fair to say there is not a great deal of discussion of the proposition in this case. This was the then biggest ever divorce proceedings in this jurisdiction. The Tribunal will see paragraph 1, it is described as a "huge money case" with overall assets exceeding £100 million.

THE CHAIR: Yes.

MS FORD: If we go to paragraph 84 -- sorry, this is page 12 within this bundle {PTR/39/12}. What is simply recorded in that paragraph is the identity of the two experts who acted as valuers for the husband, Nicholas Andrews and Andrew Collard, from KPMG. Now, Mr Andrews is now a partner at BDO LLP and he is a colleague of Mr Robinson, who is the Class Representative's economic expert, so we understand from Mr Andrews that he and his colleague at KPMG gave their evidence jointly and were cross-examined on a joint basis.

Now, I obviously accept that there is no discussion about that as an approach within this judgment, but one might say that that really suggests that it was something of a non-issue.

The Defendants have cited two Australian authorities on this point and in their PTR skeleton they rely on those authorities for the proposition that jointly authored reports have been deprecated, that is the submission that is made.

THE CHAIR: Yes.

MS FORD: In our submission, neither of the authorities they have cited actually bears that out. The first one is a case called BrisConnections. It is PTR bundle, tab 43, starting at page 1 {PTR/43/1}. If we could go within this to page 7, please {PTR/43/7}. This

is a fairly lengthy report but what the Tribunal will see from paragraph 3 is that BrisConnections engaged a father and a son to provide an expert -- multiple expert opinions.

If we look to paragraph 6 on this page, an objection was taken to the admissibility of those opinions on the basis that:

"... as a 'joint' opinion, it was not apparent the opinions expressed were wholly or substantially based on the specialised knowledge of either Mr Veitch or his son and, as a consequence..."

The submission that was made was that it fell foul of a particular rule of Australian evidence.

We can see from paragraph 22 on page 11 {PTR/43/11} --

THE CHAIR: Yes.

MS FORD: -- that what actually happened was that BrisConnections then changed its position and indicated that rather than file a joint report they would rely on a revised version of the report which essentially had been revised to take out pronouns or to change the pronouns to make it an easier report --

THE CHAIR: Yes.

MS FORD: -- which is not a very promising start in the particular circumstances of that case.

But what we see in here is a discussion in general about joint expert opinions, in particular paragraphs 45 to 46 {PTR/43/19}. I am grateful to the operator.

What we see here recorded is that joint expert opinions are not uncommon in the United States.

THE CHAIR: Yes.

MS FORD: They say the US Court of Appeals, Tenth Circuit, has addressed the point. They cite what is said in the US:

"Co-authored expert reports are not exactly uncommon... Because they were both prepared to testify to all the opinions in the report, we see no reason why it would be inherently impermissible for them to file a joint expert report."

Then similarly the Tribunal appears to read what is said in paragraph 46, which is another US authority.

THE CHAIR: Yes, yes.

MS FORD: What the Australian court goes on to say in paragraph 47 is that it does not derive particular assistance from the US position because it is not grappling with the particular rule that exists in Australian law. There is a particular rule which they describe as the statement of reasoning.

Of course, this Tribunal has a discretion as to the admissibility of evidence, it is not bound by any

statement of reasoning rule. But we do note what is said right at the end of paragraph 47, where they say:

"It should be noted, however, that the Tenth Circuit did refer to the problem which arises if it is not pellucid from a report whether both experts adhere to all the opinions expressed and the report does not delineate which opinions belong to each expert - a problem said to exist in the present case."

THE CHAIR: Yes.

MS FORD: Now, the Tribunal will anticipate my submission, which is that is not a problem in this case. Both experts adhere to all the opinions expressed and that is the position they have set out in their report.

So that is the first authority that has been cited.

THE CHAIR: That authority is only relating to the admissibility of the report, though. As I understand it, Mr McGurk's clients are not taking issue with the admissibility of the report, so it really about we have the report before us, but how are we going to test it.

MS FORD: I think that is fair, but my submission is that the testing of the evidence essentially follows from the form of the report, so if the form of the report is admissible as a joint report and they have each adopted the entirety of the report, then they come into the witness box, they affirm the contents of their report as

being true and compliant with their expert duties and then that report is tested, and it would normally follow in my submission that they would be tested on their report in exactly the same fashion jointly because they have given it jointly.

THE CHAIR: But another way of doing it is, they are tested on the report separately so each of them is actually answerable for the entire contents and can be cross-examined uphill, down dale, for as long as we permit, on the entire contents. So that is an alternative. So why should we deviate from what, to be frank, is probably the norm, of witnesses being tested on their evidence separately?

MS FORD: In my submission, there is no particular reason to deviate in circumstances where there is no legitimate concern that these experts are not able to speak to the contents of their own report and it can be tested jointly equally as well as it can be tested individually.

We say, if anything, the Tribunal will be better assisted by hearing joint evidence in circumstances where they have produced a joint report. We say that that is more efficient. We say there will be less propensity for duplication as between the two experts, and we say in the event that there is an expert who is

better placed to assist the Tribunal in relation to a particular issue, then they are able to do so.

Now, this is the point that the Defendants describe as a "structural problem". This is their PTR skeleton, paragraph 13 {PTR/2/5}. We can see what they say about this, they say at 13.1:

"... the witness more able to 'deal' with that question is bound to respond~..."

Then they say:

"... (... the first expert's answer will tip off the second expert)..."

Now, that use of language really is quite telling and once again it is necessary to reiterate that these are expert witnesses who appreciate that their duty is to assist the Tribunal and there is no basis to assume they are doing anything other or will do anything other than to seek to assist the Tribunal as best they can in relation to the matters within their expertise.

What we say is not likely to assist the Tribunal in our submission is the Defendants' apparent desire to put their questions to whichever expert they judge is less well able to address them. In our submission, that is not going to be of assistance to the Tribunal in actually resolving the disputes before it.

So, we do ask the Tribunal to direct that they be

permitted to give their evidence jointly, as they have done in their four reports to date.

THE CHAIR: I think what I am sort of struggling with is why, if both of the experts are equally well equipped to answer everything on the reports, why there needed to be two signatories to the report as opposed to one signatory to the report or two separate reports, why it has to be joint. Because I can see that there is an argument that there is to be a joint report if there are two slightly mismatched areas of expertise, but to explain a coherent whole and make something digestible, those two contributions come together in one narrative; I can see there that there would be some justification for a joint report and you can see -- you could readily identify which bits probably were attributable to one expert and which bits to another.

But here, if I understand the situation correctly, and I am going to come on to this, the joint experts are equally well able to answer any question on the report; is that right?

MS FORD: That is certainly the case because they have each adopted the entirety of the report, the contents of the report have been adopted by each of them, so yes.

THE CHAIR: So, in one sense, and you do not have to answer this if you cannot, but it is sort of why you

need two people to say the same thing, in a way, I suppose I am saying.

MS FORD: We have been overcautious in adducing two rather than one. They are each able to speak to all of it and in that sense I suppose it could be said that we could put forward one. Sorry, my learned junior is trying to make a point to me. (Pause).

Yes, Mr Gibson is reminding me this is really a more economical way of approaching it when the alternative would have been to have essentially two largely duplicative reports with potentially differences of emphasis insofar as there may be matters where one has something marginally different to say as compared to the other.

As the chair puts to me, of course a further alternative would be just to adduce one. It seems slightly unfortunate that we should be criticised for adducing two persons who are able to speak to the entirety of the report as opposed to one. We do say that we have avoided the duplication of adducing two persons who are saying broadly the same thing in different words.

THE CHAIR: I think what I am getting at is: is there a difference in emphasis between their expertise? I was looking at paragraph 14 of your skeleton, I am afraid

I have not got a reference for that. I do not know if anyone can assist me. {PTR/1/6}, thank you.

It is really the second half of that paragraph about seven lines up from the bottom:

"While each of them has sufficient knowledge and expertise to attest to the veracity of the whole of each report, it is inevitable - given the differences in the emphasis of their expertise and experience - that one or other of them is likely to be better placed to be of greatest assistance to the Tribunal in answering a question on the points most relevant to their specific experience."

So, I am trying to get to grips with what that difference in emphasis is.

MS FORD: Yes, so they are essentially each approaching the same question from the different perspectives of their expertise. So Mr Goss is essentially looking at it from the perspective of the OEM, so essentially the car manufacturer, who is speaking to the NSC, the national sales company. His expertise, essentially, and the perspective he is offering about the delivery charge come from that direction.

THE CHAIR: Yes.

MS FORD: Then Mr Whitehorn is looking at it from essentially the other end, he is talking about the NSC

essentially speaking to the OEM, so he is slightly further down the chain of distribution in terms of his particular experience and expertise. But what they are both doing is expressing their expert opinion about the way in which the delivery charge is set and passed on and recovered, and so they are both expressing their expert opinion about the same subject matter and they both say that they are able to speak to that.

THE CHAIR: So, they corroborate each other, basically. They say you say that is what the OEM says to the NSC, and I can say that that is what the OEM says to me.

MS FORD: Yes, so they each are able to speak to the entirety of the report, but from their respective experience.

THE CHAIR: Right. Thank you. That is helpful. Thank you.

MS FORD: Of course, we are not preventing the Defendants from seeking to test that insofar as they wish. But what we do say is that it is not necessary to have these experts give evidence separately in order to explore that proposition and had they wished to suggest that it was, we do say that this is something which ought to have been raised and pursued earlier. It was initially raised a year after the first report and then everything went quiet for three years and now it is raised now and

we say, really as matter of procedural fairness, had they wanted to take a point of this nature it should have been taken at an earlier juncture.

THE CHAIR: But, as I understand your submissions, you are not saying it would be impossible for them to be cross-examined separately?

MS FORD: I do not go that far.

THE CHAIR: No.

MS FORD: It is unnecessary in order to enable the Defendants to test the evidence fairly and I say it would be -- it would not assist the Tribunal, in my submission, for that to occur, because it would be inefficient, it would be duplicative and would essentially raise the possibility that the Defendants do, whether deliberately or inadvertently, put questions to one expert which another expert would have been in a better position to assist the Tribunal on.

THE CHAIR: I slightly struggle with that, because both experts have signed up to the contents of the reports. So, I wanted to discuss with you where -- how you formulate the prejudice that -- I think you put it that way in your skeleton, the prejudice that would be suffered if we do not allow them to give evidence jointly because of this question could be directed to the weaker expert.

MS FORD: I do not think we would necessarily put it as the weaker expert.

THE CHAIR: No, I am sure you would not; but you know what I mean. How do you put it in your skeleton, actually? Because if there is this sense that one would be less well able to answer.

MS FORD: Better placed to assist really, because they are looking at it from different perspectives. What is difficult to anticipate is exactly in the abstract what question we are talking about and so one simply cannot say given that they do have different expertise, different perspectives on the same question, one cannot say there will definitely not be one expert who is not better placed to assist in relation to a question, we do not know what questions may be put, we do not know what questions the Tribunal may wish to know, as and when they are giving evidence.

In terms of the prejudice that we say has arisen, throughout these proceedings without objection, up until -- at least initially and then up until very recently, we have presented their evidence as a joint whole and we have done so not least because it provides a single and coherent statement of the underpinnings of this entire case and in our submission it does cause prejudice, for the basis on which we have proceeded, to

be put in issue so late in the day.

THE CHAIR: Thank you. Yes, Mr McGurk.

Submissions by MR McGURK

MR McGURK: The issue before the Tribunal is whether Mr Goss and Mr Whitehorn ought to be cross-examined separately in the usual way or should be permitted to be cross-examined jointly.

Now, given that the Class Representative is in effect asking you to do something that is entirely unprecedented in this Tribunal, we say it is important to approach this question in a principled way.

The fundamental purpose of written statements and written reports is to identify for the court or tribunal what the witness knows or believes about the relevant matter in issue and as a corollary, the purpose of cross-examination is to enable the other side to test whether the witness really does know what they say they know and there is nothing improper in seeking, as we do, to challenge a witness's evidence and on the contrary, cross-examination is at the heart of our adversarial process.

Now, because the purpose of evidence is to identify what the witness knows or believes, there are various principles and expectations as to the witness's evidence and the form in which it is given. For example, the

witness should speak in their own words. The involvement of lawyers should be kept light touch, to avoid diluting the witness's own words. The evidence must be from the witness's own direct knowledge, save that where the witness attests to things outside of their knowledge there is an obligation to make clear the source of that knowledge.

These principles are distilled one way or another in the CAT's Guide at 7.57, 7.58 and 7.68 in particular, and most of those principles are recognised, at least, in the instructions that were provided to Mr Goss and Mr Whitehorn.

However, the written reports that we have received do not adhere to those principles. Four reports have been produced, as you have seen, each on behalf of two people, but the reports 1 to 4 speak as of a single voice. Now, it is wholly unclear whose voice that is or to what extent that voice predominates on some or all of the topics that are covered across those four reports. That is because crucially they do not identify which parts were written by Mr Goss and which parts were written by Mr Whitehorn.

The reports do not identify any third-party sources of information which the witnesses rely upon either, and that is despite the fact, as their CVs make clear, that

in the relevant period that we are dealing with, only one of the two of them was employed by an included brand throughout that period. The Tribunal is fully aware of how many included brands we are dealing with in this claim and so our position is that they do not have direct knowledge of the pricing practices and the cost recovery practices of all of those other included brands, so where is the source of their knowledge on those matters?

Now, from the face of the Goss and Whitehorn reports neither the Tribunal nor we can tell first of all what Mr Goss -- and I will just refer to Mr Goss now, but the point applies to both.

THE CHAIR: Yes.

MR McGURK: What Mr Goss actually says about any aspect of the industry. We cannot tell what Mr Goss would have said if he had articulated it in his own words in a separate report. We cannot tell whether any statement purports to be based on Mr Goss' own actual knowledge and if so, how. We cannot tell whether the statement is said to be based on someone else's actual knowledge and if so, how that knowledge came to be imparted to Mr Goss. Fifth, take the world in which joint cross-examination is permitted and Mr Goss and Mr Whitehorn go into the box at the same time, in that

world we will not be able to tell what Mr Goss would have said had he not been seated next to Mr Whitehorn and had their evidence not been given in that amalgamated fashion.

So, all of this is antithetical, we say, to the purpose of witness evidence, which is simply to identify that which each witness knows so it can be properly tested by the other side in cross-examination.

Now, in opening, I am sure this was a slip, but my learned friend referred to their respective expertise and the fact that they had set out the limits to their respective expertise. I am sure the use of the word "respective" was a slip, because they do no such thing. They set out again collectively what their knowledge is and collectively what the limits of their knowledge are. But, and I am going to come back to the point you raised on paragraph 14, ma'am, that does not tell us anything about what each of them individually knows on a particular topic and who relied on whom to a greater extent, or to what extent therefore there is an amalgam on each topic covered in the reports.

Can I go back to Goss and Whitehorn 1 and just pick up a point my learned friend made on paragraph 1.19 {CPO-B/1/7}, please. We see at 1.19:

"As can be seen from our CVs ... our expertise is in

the field of sales operations and associated distribution activities, and we have never been directly involved in procurement and negotiation of Vehicle Carrier services contracts. Accordingly, the information set out in this report is based on our knowledge of the industry as a whole, and discussions we have had with those who have been directly involved in the procurement and tender process."

The words "based on" are important there, because in articulating what they do not have direct knowledge of, and referring to the fact that they have based what further they say on this matter on the discussions of others, they should be telling us who the others are, to what extent they have expertise and therefore to what extent it is permissible for Mr Goss and Mr Whitehorn to rely upon that expertise in an opinion piece that they are giving to this Tribunal.

I am going to come back to that later, because in effect solicitors for the Class Representative have recast what is said in this paragraph 119 but I will come on to that in a few minutes.

But given the complete lack of attribution across the reports, whether as between each other or as between themselves and third parties where neither have the direct knowledge, the Tribunal might wonder why is the

Class Representative so insistent that they give oral evidence jointly when that is plainly unprecedented in this jurisdiction?

One obvious reason why a party might want to do this would be to bolster gaps or hide weaknesses in each of the witness's proposed testimony without the other side being able to identify those gaps or weakness on a particular issue.

But in this case, we do not have to speculate further, in part for the reasons you have already started to probe with my learned friend. It is paragraphs 14 and 19 in their skeleton that I would like to take you to, please. So {PTR/1/6} again.

THE CHAIR: Yes.

MR McGURK: It is the point you made on the sentence nine lines down, which says:

"While each of them has sufficient knowledge and expertise to attest to the veracity of the whole of each report, it is inevitable - given the differences in the emphasis of their expertise and experience - that one or other of them is likely to be better placed to be of greatest assistance to the Tribunal in answering a question on the points most relevant to their specific experience."

In other words, this recognises that Mr Goss and

Mr Whitehorn not being the same person, not having the same history, not having the same identical expertise, not having the same mind or voice, will just know more about some things, topics, than others, such that had they been giving reports separately -- no doubt had they been expressed in their own words those points might have been expressed differently if signed off by one or the other rather than jointly.

That is of course absolutely to be expected, precisely because they are not the same person with the same mind. But it is all the more reason why, in circumstances where they have not given independent, separate reports, that they should have been clear in these joint reports who takes responsibility for which topic, or for which proposition, and who had the relevant knowledge in relation to that proposition.

So, we say the reports are problematic because they hide who actually knew what, such as would have enabled the Defendants to test that knowledge with the particular witness. In those circumstances we say it is all the more necessary for there to be independent cross-examination in the usual way, rather than the creation of some bespoke and wholly exceptional procedure which risks enabling "the better witness" to answer the question, allowing the weaker or potentially

inconsistent witness on that topic not to be identified or scrutinised.

As to the Chair's question, we see the same admission, and indeed the same fallacy, in paragraph 19 of the CR's skeleton, over the page at page 7 {PTR/1/7}. I want to just take this in stages. The first sentence says:

"The reality of the matter is likely to be that [the Defendants] seek to procure an unfair litigation advantage."

That is in respect of our desire to cross-examine them separately.

Now, that is, with respect, a nonsense. We are seeking simply that the expert evidence be given in the same way that it has been given in every other case in this Tribunal and we say it is the Class Representative who is seeking an extraordinary litigation advantage by trying to have two witnesses supporting each other because, in the words of paragraph 14, they would be more likely to give their best evidence and:

"... can better answer ... jointly."

What is being implied here is some notion of aggregate evidence. Best evidence seems to be more than the sum of the evidence of each individual part that would be given by Mr Goss and Mr Whitehorn separately.

Turning back to the second sentence of paragraph 19, the CR says:

"Not only would separate evidence risk impacting the coherence and unity of the industry experts' joint reports, but it would potentially allow the [Defendants] to target their cross-examination questions at one or other of the two, based on the [Defendants'] tactical assessment as to which of the two might offer the response most favourable to the [Defendants'] case."

Pausing there, we have not a clue who is the better witness on anything because we do not know individually what they would say on any particular topic. It is all first person plural.

Again, we have no idea what either would say individually on either of those topics, which is a deeply unusual position for us to find ourselves in on the eve of a trial and which could be highly prejudicial where the evidence of these two people is, as you know, central to the question of upstream pass-on and, therefore, the argument whether overall versus silo pricing is the correct way for damages to be assessed should we get there.

Finally, on paragraph 19, Class Representative goes on to say:

"This risks the Tribunal being less assisted by

their evidence because the [Defendants'] case may be put to the expert who is not best placed to speak to the point."

This picks up your point at paragraph 14, ma'am, to Ms Ford. We say that effectively lets the cat out of the bag. It is an explicit acknowledgement of the concern that on any given point, if cross-examined separately and in the usual way, Mr Goss or Mr Whitehorn might not in fact be able to stand over what is written in their joint name in these joint reports.

Again, we say in those circumstances there is an even greater imperative, given this context, for the Defendants to be entitled to scrutinise the knowledge and evidence of each of them separately as is the norm in this jurisdiction.

THE CHAIR: In light of the explanation that Ms Ford gave me, is that, -- I mean, is it really saying from the perspective of, -- is she saying from the perspective of an OEM this would be the case. If you put that to the wrong witness, I cannot now remember which way round it is, but if you put that to the wrong witness, they are going to say: I have no idea, whereas the other witness, being someone who can speak from the OEM's perspective, would be able to say: yes, of course that is what would happen.

MR McGURK: I take the point of the question but the answer you got was deeply inconsistent, in that you are being told at one and the same time that they are both able to speak to everything and take responsibility for everything and then there was a concession that some may be more able than others on particular points, which sounds almost reminiscent of what Orwell wrote in Animal Farm.

You cannot have it both ways. You cannot have your cake and eat it. If someone is more able than somebody else, and if on probing they would have said: do you know what, I think the answer might be X, but you may need to defer to Mr Whitehorn on that, that would show up a gap or a weakness that just does not appear from the face of this report.

Then, in circumstances where they have jointly signed on the basis they take responsibility for everything, if cross-examination revealed that weakness on a particular point or gap on a particular point, that obviously goes to the credibility of witnesses who have signed up to everything and say they take responsibility for everything and know everything, but that is more likely to be revealed on individual cross-examination, not joint cross-examination where I ask a question, I do not know who the more able witness will be, but they are

most likely to respond to the question.

What then happens practically in that scenario, Mr Whitehorn might answer a question I put to him and Mr Goss weighs in and says: yes, I agree, and then Mr Whitehorn amplifies his answer a bit more and Mr Goss says: yes, that is my understanding as well, and we may never have got to that position in the counterfactual world where we had cross-examined them separately.

So, in a sense the gap or the lack of knowledge on that point of Mr Goss where he just defers in the witness box to Mr Whitehorn will never be revealed and it is only by revealing it that we can then make submissions to you that Mr Goss is not to be relied upon and in fact this bit of the report is not to be relied upon because it ends up being an amalgam, a compromise position, where one witness has effectively agreed with another to reach a compromise position for the purposes of the report. That breaches the expectations and principles that the Guide imposes on experts giving evidence in this place.

Now, the Class Representative relies upon the ICI case. You will see that at {CPO-F/161/1} where they rely on paragraph 137 of Mr Justice Fraser's judgment, a case that we had set out at page 2, paragraph 10 of this letter, as something

that supported our position in raising these objections back in 2021.

ICI is at tab 40 of the PTR bundle {PTR/40/1}. If we could just turn paragraphs 136 and 137 up, please {PTR/40/39-40}. That case involved two witnesses. There was a trial on liability, a trial on quantum. The liability trial involved three witnesses, one giving a very long statement and two giving one-page statements saying we have read and agreed.

The claimant brought a strikeout application saying that was inappropriate. That was dismissed. Clearly chastened by that experience, the two witnesses in question at the quantum trial then put in identical 100-paragraph reports and that is what Mr Justice Fraser then addresses at paragraph 137 in ICI.

Can we bring up tab 40, please, in the PTR bundle {PTR/40/39}. Start on page 39. What I have just told you in relation to the background is set out in 136 and if we go over the page, please {PTR/40/40},

Mr Justice Fraser says:

"The peculiar approach to witness statements for the quantum trial may therefore have been adopted as a rather misguided attempt at avoiding what had occurred for the liability trial, but still failed to grasp the essential point that written witness evidence is

supposed to be in a witness's own words. ICI therefore issued an application to strike out large parts~... This was heard by me [in March]... Presenting the evidence in this way [four lines up from the bottom of the paragraph] also raised practical trial-management difficulties for ICI, as Mr Bowdery would not know which witness was the correct person to ask about particular points during cross-examination."

That is the point he picked up and which we relied upon when raising these objections in April 2021.

So Mr Justice Fraser says that evidence is supposed to be in the witness's own words and that applies with all the more force when we are dealing with experts because they profess to have specialised knowledge on the matters that are the subject of their opinion evidence. So, in circumstances where these reports are going to trial, the Defendants are simply saying that only by separate cross-examination can we, in the words of Mr Justice Fraser, know which witness was giving evidence about which events or topics.

Now, the Class Representative suggests that cross-examining Mr Goss and Mr Whitehorn individually would be tantamount to treating them as wrongdoers or criminals. With respect, that is nonsense. There is no pre-emptive complaint about the proprietary of approach

that will be taken by Mr Goss and Mr Whitehorn. All that we are proposing in this forum is the norm. My clients are simply seeking to exercise their right to test each witness's knowledge separately and so we do object to the criticism that we are somehow improperly raising this point when we are simply seeking to exercise our rights of defence and to test the evidence of each of them.

Now, we have raised the purdah point only in respect of Mr Goss and Mr Whitehorn. It is not pursued in respect of anybody else.

THE CHAIR: Before you start on the purdah point, can I just ask you, I mean, it does seem to me there may be something in the efficiency point. If you are going to put every issue in the case to each of Mr Goss and Mr Whitehorn, so that we do have duplication -- is that your intention or ...? I mean, obviously you will be formulating your own trial strategy, but I would be slightly alarmed if we had a rerun of the cross.

MR McGURK: It is a fair question. There are two points in relation to that. First of all, and this is the paragraph 20 point that is taken against us in the Class Representative's skeleton, we are very aware of our duty as advocates to conduct our cross-examination efficiently, proportionately and without duplication.

The problem here, however, is again the structural problem that arises from how these reports have been authored. Contrary to the submission of Ms Ford, we do not know who the witness better able on anything is because that is not revealed on the face of the report. So, imagine I ask Mr Goss a question to which he says again: well, I think the answer to that is X, but I am -- I will defer to Mr Whitehorn, you should come back to Mr Whitehorn on that. We do not know that answer is going to be given. We did not know from the outset that that should have been put to Mr Whitehorn, but we are going to have to go back and put it to Mr Whitehorn because we are told that he is the better witness and that will only emerge in the box.

So, we are not going to put our whole case and we have said in the skeleton insofar as part of the case is accepted by the first witness, as put, we will of course be proportionate in the extent to which, if at all, we need to go back to that second witness.

So, we are very aware of our duties, but the structural problem that arises here flows right out of the fact that (a) there is a joint report and (b) there is no internal attribution as to who speaks to what, or who is the predominant voice or has the predominant knowledge on that point.

THE CHAIR: Now, can that latter point be addressed by the Class Representative producing a further witness statement outlining who is best placed to answer particular areas of likely cross-examination?

MR McGURK: Ma'am, you were taken to the 13 April letter. I may come back to it in light of this question but the remedies section of the letter, section E, suggested back then the way to deal with this, absent which we will be going to tribunal final hearing and saying no weight should be put on this, the way to deal with this is the way it was dealt with in -- attempted to be dealt with in ^ BrisConnections, namely you unpack and you explain who, which witness is speaking to which topics and you effectively recast the report in that way so it is all clear. That would completely avoid the duplication problem you are now putting to me as well.

They did not do that. They said it is all for trial, this is a certification statement. Except they followed up with Goss and Whitehorn 2, took exactly the same approach. No attribution internally there. Even after certification, Goss and Whitehorn 3 and 4 do exactly the same.

So, we have said to them this is the solution, if you do that this would avoid the structural problem that we are arguing about today and they have ignored that.

So, we are left in a position that if this Tribunal were to order joint cross-examination on top of a report where there is no internal attribution as between Mr Goss and Mr Whitehorn and there is no attribution as between them collectively and a third party, we just do not know, contrary to the submission, who is the best person to put the point to.

THE CHAIR: But if the witness statement was prepared now which basically set out some general ground rules, would that address that problem or assist with that problem?

MR McGURK: You are saying in addition to us being entitled to cross-examine them separately?

THE CHAIR: Well, obviously, we have not determined that.

MR McGURK: Well, if this was in lieu of separate cross-examination, I would say that is insufficient and that would be prejudicial to us because we are entitled as of right to cross-examine each of them separately to understand the limits of their knowledge and to do otherwise would be unprecedented in this court.

If you are suggesting that as a potential solution to aid the passage at trial in addition to us separately cross-examining, I will obviously take instructions on that, but it seems to me a sensible aid to avoid the

duplication problem that you are raising, but not in lieu of separate cross-examination, ma'am.

THE CHAIR: Given this is becoming such a problem, is there any reason that it was not raised in the meantime? It has been a long --

MR McGURK: It was, ma'am.

THE CHAIR: Well, I mean, in the correspondence we have seen, it was raised before the CPO but we have had several case management conferences since and it does seem this has become a real sticking point. Is there any particular reason --

MR McGURK: Can I explain why we are where we are. So, we sent the three letters that my learned friend rightly raised in 2021. We proposed a solution that would avoid the structural problems that have arisen and they said: no, we do not accept the points and you get Goss 3 and 4, which are speaking in first person plural uniformly again.

We are, as practitioners in this jurisdiction, very, very aware of how the Tribunal approaches questions of admissibility and that the Tribunal is not bound by strict rules of evidence and has a wide discretion as to what to adduce and on what basis.

Now, we have put Agents Mutual in the bundle. Perhaps we should go there. It is tab 55 in

the PTR bundle.

If we move forward -- sorry, that is not the right reference. Sorry, it is 53. Forgive me. In moving forward to paragraphs 8 and 9 which I think is on page 3, maybe 4. {PTR/53/4}. Thank you:

"As has been made clear~..."

This was an admissibility ruling in the case:

"As has been made clear on a number of occasions~..."

Citing Argos, Claymore and Aberdeen Journals:

"... strict rules of evidence do not apply before the Tribunal. The Tribunal will be guided by circumstances of overall fairness, rather than technical rules of evidence.

"The consequences is that - certainly so far as disclosed documents are concerned, which is what the audio files and transcript files are~..."

Which was the issue in that case:

"... there is very rarely argument before the Tribunal as to whether a document is admissible as evidence: the argument by reason of the Tribunal's general approach, focuses instead on the weight to be attached to the document."

Now, my learned friend says there was no formal

objection. I am not sure what that means but it seems to be saying: why did you not strike us out? Yes, having asked them on 13 April to split out the Goss and Whitehorn evidence, and we received a refusal, and in very, very clear terms that they were going to proceed on this basis, and without waiving privilege as to how we have then approached this --

THE CHAIR: No, that is fine.

MR McGURK: -- our answer was to maintain the objection in the NPS. Can I just take you to that, which is at {A/25/38}, paragraph 154. Members of the Tribunal, if you would read 154 down to the end of 154, we make a number of points maintaining the objections that you have seen in the correspondence.

THE CHAIR: Yes. Over the page. (Pause). Yes.

MR McGURK: So, having originally asked them to split the Goss and Whitehorn evidence, having been refused, we did not drop the objection. We just made clear in that original correspondence that one of the things we reserved the right to do was there should be no weight at all placed on a set of expert reports where there is no attribution as to who knows what within the reports at all.

THE CHAIR: Thank you.

MR McGURK: So that is one objection. Yes. An important

point of context in all of this is that this proposal to jointly cross-examine has only been raised extremely recently, post the "K" Line settlement, or around the time of the "K" Line settlement. This was never proposed in conjunction with the service of any reports or in any other correspondence at any stage. It is a really very recent proposal indeed. They say we do not object, we had not objected to that. The reason we had not objected to that is because we did not foresee, because it has never been done in this Tribunal, that what would be proposed on the back of those reports is some joint cross-examination of Goss and Whitehorn. We did not envisage that ever being suggested. So, the idea that we have somehow implicitly acquiesced in that which we could not foresee is a bad point.

Yes, I think, to correct one thing I said, I think it emerged about 2 October. But we are here we are talking about an issue as to the format of evidence to be given at trial and the pre-trial review seems to us to be the sensible place at which to hammer these issues out. But, as I say, it is a very recent vintage that the proposal of joint cross-examination has been raised.

The other --

THE CHAIR: I was going to say I think you were coming on to purdah, were you? I do not want to interrupt you,

if you had something else to say on that point.

MR McGURK: I was, you are quite right.

On purdah, we have suggested that the second of the two witnesses needs to be in purdah during the first witness's evidence. That follows from the joint nature of the reports and the fact that, as you have seen from the skeleton, paragraphs 14 and 19, there is the beginnings of an acceptance that the witnesses will be weaker and not best placed to answer on certain topics.

So, that being so, the second witness will, if privy to the first witness's evidence, learn what is being investigated, the way in which points are being put, such that -- and there is no suggestion of impropriety at all here, but it is just as night follows day, if somebody is watching that, and they know the lines that will now be pursued with them, particularly in the world in which Mr Goss says, in my example: I am not the best person on that, you might need to ask Mr Whitehorn, they are primed for what is coming.

So, the skeleton says the request for purdah is frankly extraordinary, particularly extraordinary, draconian and extreme; members of the Tribunal, purdah is needed to enable the Defendants to disaggregate the evidence of two persons who have written statements that entirely melds, aggregates their evidence such that the

reports speak as though they have been written by one person.

It is targeted, it is only in respect of Mr Goss and Whitehorn, it is not sought in respect of any other witness, and as I say, there is no suggestion of pre-emptive impropriety being made against either of them, it is just the structural problem that needs to be dealt with.

I wanted then to just cover a few further objections that my learned friend made and points that she relies upon to say why the Tribunal should order this bespoke and unprecedented course.

She says if opposing experts can be allowed to hot tub, then a fortiori experts on the same side should be cross-examined together. That is a completely false analogy. As the Tribunal well knows, the purpose of the hot-tub, and in particular the inquisitorial questioning that is going to come from the panel to the experts, is to seek to generate further common ground between those acting on either side of the dispute. Of course, any concessions which an expert makes in the hot tub will made in a public forum, openly, in full view of both sides.

Allowing two experts, by contrast, on the same side, to engage behind the scenes in a process which results

in a form of compromise opinion being offered, again would only serve to hide differences of opinion they each hold about their own clients' case. So, the analogy with hot tubbing is completely inapposite, and indeed hot tubbing is provided for in paragraph 7.66 of the CAT Guide. There is no attempt to provide for anything similar for experts on the same side in that paragraph, or anywhere else, by analogy with hot tubbing or at all.

Yes, I think that takes us to BrisConnections. You have been taken to it briefly. I just wanted to say a couple more things about it.

THE CHAIR: Yes.

MR McGURK: But I need to address Charman first. So, this is the only authority that the class representative relies upon. It is clear that neither side is suggesting that cross-examination has ever happened jointly in this Tribunal. But when pressed, the Class Representative contends that the proposal is not completely unprecedented, pointing to this case from nearly 20 years ago in the Family Division, where it might have happened.

Now, the very fact that this is the only example that the CR's highly experienced legal team has been able to come up with rather proves our point that the

approach being suggested to this Tribunal is unusual in the extreme.

Now, when we read the judgment, we could not actually find any discussion of joint cross-examination and in fairness to Ms Ford she has conceded it is not there. She relies upon a letter that is at tab 58 of the PTR bundle {PTR/58/1}. Having asked the question on what basis do you say that there was joint cross-examination in this, we are told that Mr Andrews was a colleague of Mr Robinson's, Mr Andrews, paragraph 1.3, is now a partner:

"We understand from Mr Andrews that he and his colleague from KPMG gave their evidence jointly and were cross-examined on a joint basis."

First of all, it is a hearsay point. But let us assume the assertion is right and that Mr Andrews' partner was indeed jointly cross-examined in that case. The judgment and this letter together would tell us nothing, however, about how that joint cross-examination came about or was conducted.

I make just two points on this. You will, if you have, like I have, read through this report, have noted that there were two aspects of expert evidence, expert valuation evidence. One was in relation to the value of shareholdings and the other was in relation to discount

values. It is entirely conceivable that Mr Andrews and Mr Collard spoke to those two separate things.

THE CHAIR: It is entirely speculative, is it not, because we do not actually know what the contents of the report were and whether there was a clear delineation in the text of the report that would --

MR McGURK: No, we do not. But in circumstances where this letter is relying upon hearsay to say that it happened, we just need to tease out the extent to which that is helpful at all. So, this is one possibility as to what happened and it is a point the chair made this morning, that the different spheres of expertise might have gone into different parts of the joint report and they might have been cross-examined on it separately.

Plus, there is nothing whatsoever in the report or anywhere else to suggest that this was an arrangement imposed on Mr Charman, as opposed to something that the parties in that case, for whatever reasons that we are not privy to, simply agreed upon and it was conducted on that basis. We just do not know.

So, there is no sound foundation in Charman v Charman on which to invite this Tribunal to take such a radical step, with all the unfairness involved in denying us the entitlement to separately cross-examine the experts in the usual way.

That takes me to BrisConnections. You have the point as to what this was about. Tab 43 in the PTR bundle {PTR/43/1}. Importantly, my learned friend rightly said that when Arup, the defendant, had taken each with Mr Veitch senior not having attributed which bits in the report were his, that he recast it so that it was all in his voice. That was too little, too late because the point of principle had already arisen and there was a preliminary issue, which in the report was referred to as a voir dire, where Mr Veitch senior was cross-examined alone on the question of what was within his knowledge vis à vis the overall question of admissibility.

Just pausing there, it would have been completely absurd to have Mr Veitch senior and Mr Veitch junior in the box at the same time arguing about these points. It would have compounded the problem he was there to explain in the first place.

Then if with we move forward to page {PTR/43/19} within the report and start at 48 -- in fact I think we have to go on two more pages because there is a case citation box. {PTR/43/22}, please. Sorry, one more. There it is. I am so sorry. We have to go back one. There is a couple of lines at the bottom of the page on page 22, so that we have it:

"It is evident [the court says] that there is a need to work out where licit delegation, consultation and testing ends, and where inappropriate compromise of opinions begins. There is a danger in generalising and using labels, but I will use the term 'compromised opinions' to mean opinions reached as a result of decision to 'adopt' an opinion, which opinion is not the result of an application of the specialised knowledge of a proposed witness, but as a result of compromise between the proposed witness and another. This is to be contrasted with an opinion which is the result of an application of specialised knowledge of a proposed witness, but is reached following discussion and debate between the expert and another (even if the tentative or preliminary view of the expert is refined or changed by that discussion and debate, and involves, as a matter of fact, a consensus emerging, by reason of that process, between the initial view of the expert and the view of another). The former is an abdication of the expert's responsibility to form an opinion by reason of the application of the expert's specialised knowledge; the latter is a faithful discharge of the expert's responsibility to test and refine the expert's views and come to a considered opinion based on the expert's specialised knowledge, even though it may involve

embracing a final view which may not have been initially evident. Subject to how the opinion is expressed, the latter is admissible while the former is not."

That point of principle is true in this jurisdiction as well because if you do not attribute or if you do not refer to a third party and do not therefore explain the source of your specialised knowledge, there is a risk of inadmissibility.

Now we are not talking about inadmissibility. The point of separate cross-examination is to understand which side of the line these two experts fall in terms of that principled distinction between that which is permitted and that which is deprecated.

And then finishing on 52 {PTR/43/23}, the court refers to an American case:

"... contrary to the submission of BrisConnections, it cannot be correct that a report is admissibility under s 79 ..."

That is really just the provision in Australian law which permits expert opinion evidence as an exception to a prohibition on opinion evidence:

"... because 'the expert who signs the report takes all of the opinions as his own and can testify about them'."

That sounds rather reminiscent of Mr Goss and

Mr Whitehorn taking responsibility for everything.

THE CHAIR: Yes.

MR McGURK: "If the so-called 'taking of all the opinions' involves the 'adoption' of compromised opinions, or otherwise does not involve and make apparent the application of specialised knowledge by the 'adopter', it is not admissible. Put another way, the pervading vice of which Arup complains ..."

And the court is to this extent accepting Arup's submission:

"... (there is no real way to identify who did what, on the basis of what, and whose specialised knowledge was deployed) would exist."

That is the territory we are in. That is the persuading vice that has not been corrected.

THE CHAIR: Yes.

MR McGURK: Can I just pause a moment, ma'am. So just to finish on Bris, the submission that the court here accepts as to the pervading vice was articulated in paragraph 32, which I think is around page {PTR/43/16} of this document. Thank you. The Arup submission:

"... where it is evident that opinions said to be held by Tim Veitch were not based on his training, study or experience, but rather on the more extensive experience of Mr Veitch. The pervading vice is that

there is no way to identify who did what, on the basis of what, and whose specialised knowledge was deployed ... "

The solution in that case was to cross-examine Mr Veitch on his own to work out which side of the line we were on, plainly not joint cross-examination, which we say would compound the problem.

I will not take you to the Fitzpatrick case, but just to note that the same issue arose there. The pervading vice, the same point was discussed at paragraph 32. There was a report authored by four people. It was suggested a solution to that was to make them all available independently for cross-examination and the court said no, in circumstances where the persuading vice was clear and there had been no attribution on the face of the report making everyone available for independent separate cross-examination was insufficient.

So, before I wrap up, can I just check one point, ma'am.

THE CHAIR: Yes.

MR McGURK: Yes, there is a point about timing that is taken as well. My learned friend suggests that joint cross-examination might be more efficient, that there might be a time saving. I just do not accept that.

Again, I refer to the non-exhaustive list of practical problems in paragraph 13 that might arise. Again, taking the example where we have both of them in the witness box, a question is asked of one, another jumps in and answers, but I want to know the answer from the witness to whom I asked the question, then there is a debate between them.

How on earth does -- how on earth does the Tribunal work out which is the evidence of whom if there is a sort of aggregating debate that goes on between them in the context of that single question, and if I wanted to push a witness or both of them on the same point, whether it is on a point they started with, or it is a point they get to later in their own discussion in the box, that is going to take some significant time, in my submission. So, the idea that because they are there together it follows there is bound as a matter of fact to be a saving in time I do not accept at all.

But even if I am wrong, even if there was a minor time-saving to be had, everybody agrees we are going to finish well within time and that is not a reason to out-top our right to separately cross-examine the witnesses in the usual way in this Tribunal.

So, we say the Tribunal should rule that they must give their evidence separately. The pervading vice is

present across all four reports here in that we do not know which of Mr Goss or Mr Whitehorn speaks to anything or whether they are reliant upon unidentified third parties, and joint cross-examination would compound all of those problems that emerge on the face of the reports.

So, for those reasons we would invite the Tribunal to order them to give evidence separately in the usual way.

THE CHAIR: Yes. Before you take your seat again, I just want to press you a little bit about the suggestion that, if we were minded to order separate cross-examination, Mr Goss and Mr Whitehorn would have to be absent from the court for the cross-examination of the other.

MR McGURK: Yes.

THE CHAIR: So generally, if there is a -- in my experience, it would be if there is a difference in some disputed key fact, contemporaneous fact, contemporaneous factual witness, where you would be wanting to know exactly what each witness said about whether or not something happened at a particular day, time or in a certain way and you would therefore be more inclined to say yes, the witnesses must be absent so we absolutely do not get any contamination as to an account.

These are expert witnesses, and they are well aware of their duties to the court. Why is it you say that this should tip into purdah territory?

MR McGURK: Because at the moment it seems to us, shy of the cross-examination we want to undertake, that these reports may be, as was described by Mr Justice Lee, compromise opinions, and it may be on examination that one of the witnesses on a key point will accept that what was signed off in their joint name was not correct and should be pursued with the other witness, and so in those circumstances where we have no idea whose voice predominated on any issue in the report whatsoever, we will not know until we get there what points of dispute there may be between the two of them.

If there are points of dispute and because they are not a single person with a single mind and the same experience that comes to pass, it would be better that the answers of the first witness are not made known to the second witness because only then will the Tribunal have confidence that what comes out from the second witness reveals in fact the gaps and weaknesses that existed on the joint report that had been revealed by cross-examination, again, with no suggestion of impropriety in relation to the second witness.

If they are privy to the line of questioning, see

the gap and see the weakness, there is a potential to pick that up second time round, whereas if a completely different answer is given the second time round the Tribunal will know more clearly that what they had in the first place was a compromise opinion, the weight of which should be limited, and that will ultimately be the submission after the cross-examination.

So, we accept that it is not the norm, but neither is joint reports in this case and certainly not joint cross-examination. But we do say that purdah is justified in this case so that the evidence of each can come out as it would have done either had they given separate reports or if they had properly attributed as between themselves in the first place. We do not have either and so there is the risk of cross-contamination. So we say purdah is appropriate.

THE CHAIR: But in the example you gave if you get the answer which is contrary to what the report suggests or shows a lack of knowledge of it, if you get that answer and then the second witness comes in and gives a different answer, you have already got what you need, have you not?

MR McGURK: Well, it will be said -- what is almost certain to happen is that the second witness comes in, says something different, potentially less damaging to the

case, and it will be said, well, we foreshadowed that that in paragraph 14 and 19 of the skeleton, because invariably on one of the topics one will be better placed than another. But our submission will be: you have presented these two witnesses having co-extensive knowledge, taking responsibility for everything, signing off on everything, and therefore this is not a compromise opinion and that they had uniformly identical views.

So, we do say purdah is appropriate in the circumstances.

THE CHAIR: Thank you.

Submissions by MS FORD

MS FORD: It was suggested that, whilst Messrs Goss and Whitehorn indicated collectively, severally, what was the limits of their experience, just to give the Tribunal two examples where they do in fact (inaudible), that is in that the report we are looking at, {CPO-B/109/10}, paragraph 3.4(a), they are specifically referring to Mr Whitehorn's experience, because he (inaudible) with that particular aspect of what has been dealt with.

THE CHAIR: Yes.

MS FORD: Actually, we are now in the third report, so it is positive case. You see similar confirmation: I carried

out all the work set out (inaudible) current report save on specific point (inaudible) footnote 1. That is again on page 6.

(Counsel microphone not turned on)

It is actually the last sentence, subparagraph (e) where (inaudible). It is not right to suggest that very clear. We do say in that respect this is an important (inaudible). There, the Australian court said the problem we have is that we do not know who these experts the entirety (inaudible).

Mr McGurk also referred to the Ray Fitzpatrick case. I did not actually (inaudible). But the submission he made was that the problem there was essentially the same.

(Counsel microphone turned on)

That is not, in our submission, a correct reading of this judgment. The real problem in the Fitzpatrick case was the fact that the authors of the joint reports were not aware of their expert duties, and we can see that, for example, if we go to {PTR/42/13}.

At paragraph 27 on this page, the Australian court there is describing the extent of the disputed evidence, and then it comments:

"All of this work ..."

So, this is towards the bottom of this paragraph,

five lines from the bottom:

"All of this work, and the preparation of the two reports based it, was undertaken without any appreciation of the expert witness code of conduct or indeed appreciation of any greater obligation than giving the client (presumably Mr McKenzie for the purposes of the 2006 report) the benefit of honest opinions."

It goes on in paragraph 28 to:

"The honest reporting ... is but one aspect of it ..."

But it says:

"... the asserted potential significance of this evidence to the respondent's case made it more (not less) important for the evidence to be created by an expert or experts ..."

Just pausing there, no objection there to experts plural:

"... expert or experts mindful of their obligations under the code."

If we go over the page to 29 {PTR/42/14}, what the court is essentially saying here is that it is no answer for the proposed expert to now say he would not change anything had he been aware of the code. Then towards the end of this paragraph we see:

"The fact is that no one will ever really know what form the reports would have taken if prepared by people mindful of their obligations under the expert witness code of conduct."

Again, no objection to multiple authors provided they are aware of their duties. If we go to paragraph 32, please {PTR/42/16}. This is a passage that I understand Mr McGurk to have referred to because he says that the fact that the respondents are willing to make all the authors available for cross-examination does not answer, and indeed increases the problems. So this is of course grappling with a situation where one would have oral evidence, not just a question of admissibility.

In my submission, they say the report does not disclose who was responsible for its various parts in the circumstances set out above. In the circumstances set out above, what they are saying is, in circumstances where the authors were not cognisant of their duties as experts, this is a problem that the court should not be burdened by. The real core of the problem in this case was that they were not aware of their expert responsibilities.

In our case, Mr Goss and Mr Whitehorn have each taken responsibility for the entirety of the report, and

they have confirmed they are aware of the responsibilities and we say these objections simply do not arise.

I do submit in addition that it is important for this Tribunal to distinguish between matters for trial and matters which might be said to justify separate cross-examination. In my submission, the vast majority of the objections that Mr McGurk raises to the evidence of Mr Goss and Mr Whitehorn are points that he is perfectly entitled to take at trial but they do not go to the necessity for separate cross-examination.

That is particularly the case if one looks at paragraph 154 of the negative position statement which the Tribunal was taken to. These are, of course, points they are entitled to take, but they do not, in our submission, justify separate cross-examination.

Mr McGurk made the submission that he is not seeking to treat Messrs Goss and Whitehorn as wrongdoers or criminals, but we really do have to recall the extremity of the position that the Defendants are taking on this. It is not just cross-examined separately, it is that they should not be able to hear each other's evidence. That really is both, in our submission, unprecedented and unwarranted. It is simply that really only one normally sees in the context of criminal proceedings,

and we heard from Mr McGurk much emphasis on, "We are only seeking to do that which is normally done in this Tribunal". In this Tribunal one would not normally require one witness to go into purdah while hearing from the other witness. That really is quite extraordinary, and why have we not had a similar suggestion, for example, about the "K" Line industry expert witnesses, Finn, Chaisty and Good. Nobody was suggesting they should not hear each other's evidence.

So, in our submission it is important to recognise that what is being suggested here really is quite extreme.

The fourth point we would emphasise is that there is not a clear delineation between written evidence and oral testing of evidence in this jurisdiction. If one takes the classic example of a single witness, that witness sets out their evidence-in-chief in their witness statement and that is taken to be their evidence-in-chief, they affirm its correctness and then they are tested on it in the witness box. There is no delineation between what happens in their written evidence and what happens in their oral evidence.

In our submission, the same applies insofar as the written evidence is given jointly. That is the evidence-in-chief of the witnesses concerned, and one

would expect them to come and be tested on their evidence in the same way as they have presented it in written terms.

In my submission, that was fully appreciated by these Defendants. That is why they were raising their objections back in 2021. That is why they were taking detailed points on what they considered to be the adequacy of this evidence.

In our submission, had they wished to pursue the point that there should be separate cross-examination, it really should have been taken timeously rather than right now, when we are about to go to trial.

Just picking up on the Tribunal's concerns about efficiency, it is set out in the Defendants' skeleton, and I understand Mr McGurk to have confirmed orally that they do not intend to put the whole of their case to both witnesses and, in those circumstances, how is this Tribunal assisted by cross-examining these witnesses separately? How is this Tribunal assisted by entertaining the possibility that there might be one expert who is better able to assist than another?

In my submission, there is no inconsistency in me saying that that might be the position in circumstances where the experts have jointly adopted their report because they know what is in their report, they know

they are in the position that they are able to speak to it. What they do not know is what they might be asked about in cross-examination, and that could well traverse matters they have not dealt with directly in their report and it could well give rise to matters where one expert is better able to assist than the other, and the real question is how will be the Tribunal best assisted. Our submission is it is not by entertaining the possibility that the case does not get put to a relevant witness who is able to help with it.

Finally, just to address the suggestion that you, madam chair, raised about the possibility of producing a further witness statement indicating who is the best party to address certain matters, in my submission the real difficulty with that is that we do not know what the Defendants are going to ask these witnesses. So, it really does pose a problem to say, well, these matters should be addressed by expert X and these matters should be addressed by expert Y. We just do not know and are not in a position to predict the contents of the cross-examination, who will be best placed to deal with it.

We do make the submission that it is really unfair to be put in the position that we are put in now when this could and should have been raised and canvassed

back in 2021.

THE CHAIR: Thank you. Well, we will rise. I am very conscious the transcriber needs a break in any event. I am also conscious of time. So, we will rise. We will come back in 10 minutes.

(12.16 pm)

(A short break)

(12.26 pm)

Decision by THE TRIBUNAL

THE CHAIR: So, we will let you know our decision but we will provide reasons after this hearing. We are very conscious of the time. But we do need to reach a decision because the trial timetable and everything else depends on it. So, we have decided that Mr Goss and Mr Whitehorn will be separately cross-examined but neither will be excluded during the course of the evidence of the other.

MS FORD: The next item on the agenda concerns the fourth Defendant’s, "K" Lines', expert evidence and factual evidence.

The fourth defendant's expert and factual evidence

THE CHAIR: Yes.

Submissions by MS FORD

MS FORD: In order to address this point and also, when we come to them, various other new evidence that the

Defendants have sought to introduce at a very late stage, can we please look back, first of all, at how the Tribunal has directed these proceedings should be actively managed.

THE CHAIR: Yes.

MS FORD: The transcript of the February 2023 CMC is at {J/30/1}. Go within this, please, to page {J/30/6}. If the Tribunal looks down to line 24, we can see -- the Tribunal will recall the context of this was that we had had the remittal judgment from the Court of Appeal on the CPO.

THE CHAIR: Yes.

MS FORD: The Court of Appeal had indicated that this case needed to be actively case managed and so we see the Tribunal saying there:

"... the Court of Appeal was right. This case does require extremely active case management ..."

That is the context in which these directions were then set out. If we go over the page, then, please, to page {J/30/7}, what was proposed was there, which the Tribunal is now familiar with, positive case statements followed by negative case statements.

So, lines 8 to 11, we see the Tribunal saying:

"Each party grouping, we are going to say the Class Representative on the one hand and the Defendants on the

other, but if the Defendants want to fragment, no problem at all."

Just pausing there, what the Tribunal was contemplating at that stage was the possibility that the Defendants could, if they wished, to choose to act jointly and advance a joint position.

We then see the Tribunal defining what was meant by a positive case. This is lines 12 to 19 and it says:

"Each party grouping will produce their entire positive case on loss and damage ... By 'entire positive case' we mean this: we want all the factual expert and documentary evidence filed by each party grouping on this date. There will be no non-responsive cases. These filings will be done in parallel, and they will be accompanied by a position statement that draws together the threads of the primary material filed."

That is what was understood by a positive case and then that is to be contrasted by the negative case which is addressed on page {J/30/9} at lines 11 to 23:

"The parties will produce a negative responsive case, by which I mean something attacking the positive case produced by the other side or sides ...

"Those negative cases will comprise all material to be relied on at trial, factual, expert, documentary, plus again a position statement that draws the threads

together.

"No positive case can be advanced at this stage. It would entirely be carving chunks out of the positive cases that had been advanced."

Towards the bottom of this page, we see some fairly trenchant wording from the Tribunal, from line 24 onwards:

"All parties should be under no illusions as to how the trial of these matters will go."

If we go over the page, the general sentiment is there should be no surprises, and you see that in particular line 18 to 21:

"... there will be no rabbits from hats at trial. If you have not articulated your attack in your negative case, then things are going to go pretty badly for you at trial."

So insofar as the Defendants wished to advance a positive case, all evidence should have been advanced at the positive case stage. Insofar as they wished to attack the Class Representative's case, all evidence to do that should have been advanced at the negative case stage and it was made, in our submission, very clear that if a party wished to run a particular case it had to bring forward the evidence on which it relied to do that at the appropriate stage and not later.

We can see that those directions were then repeated in the Tribunal's ruling, which was 6 April 2023 {J/4/10}, please. This is paragraph 11 within that ruling. Subparagraphs (1) and (3) are the particularly relevant ones, (1) being the direction to produce the positive case and then (3) being the direction to produce negative case.

That was then encompassed in the Tribunal's order of 6 April 2023 {J/12/3} and the relevant directions are paragraphs 1 and 2, the heading "Remittal", (1) being concerned with the positive case and (2) being concerned with the negative case.

The desire, which we say was very rightly expressed in these directions, for a proper and procedurally orderly preparation for trial was one which the Tribunal has in our submission reiterated quite recently and most recently at the last CMC, which was in September. We can look, please, at the transcript from that. It is {J/33/3}. We are looking at lines 14 to 18.

The context of this is, the Tribunal was concerned with the extent to which various parties had or had not identified an alternative case in the event that their primary case was not upheld. In that context, the Tribunal said:

"... what we are anxious to avoid is a situation at

trial where we discover for the first time that if the factual assumptions on which a particular expert's report has been given are not upheld by this Tribunal, there is, in fact, an alternative methodology that that party wishes to put forward. We don't want to be discovering this for the first time at trial."

Obviously, that is a slightly different context, but, in my submission, it is essentially articulating the same broad sentiment, which is that the parties need to have set out the full extent of their case in an orderly fashion and not be seeking to supplement their case late in the day.

In our submission, what we have seen from these Defendants in the last few days is not a proper and orderly preparation for trial. It has been the antithesis of that. On 27 November, we had an application for Mr Finn's contact details. That was promptly withdrawn on 28 November when Mr Finn responded via contact details that had always been publicly available for him.

On 2 December, we received an application for Dr Bagci to produce a further report. On 2 December, at 18:43, we received for the first time an application to formally call the "K" Line witnesses. Then, on 3 December, around about lunchtime yesterday, prior to

the PTR, we received a further letter seeking to add Mr Dent to the list of witnesses to be formally called.

The reason I emphasise this is because, in our Submission, it is transparently not simply an exercise in regularising a case that has already been advanced by these Defendants. What is going on here is that these Defendants are casting around at the last minute to build up a case based on work which has been done by others and our overall submission in the context of this issue and in others is that it would be procedurally unfair to allow that to happen.

If we look at the nature of the cases the Defendants did advance, the Defendants did not take the Tribunal up on the possibility of producing a joint positive case or indeed a joint negative case. They each chose to adopt their own individual positions. Out of all the Defendants, only "K" Line adduced any expert evidence in response to the evidence of Mr Goss and Mr Whitehorn, and it was only "K" Line that adduced any industry factual witnesses.

So, as the Tribunal is aware, "K" Line adduced the evidence of Mr Chaisty, Mr Good and Mr Finn, and in each case their engagement letter was from Cleary Gottlieb, solicitors for "K" Line, and it was instructing the relevant individual to act as an expert witness for

their client, "K" Line.

Just to show the Tribunal one example, {C/6/20}. This is Mr Chaisty's original engagement letter sent from Cleary Gottlieb, paragraph 1:

"We are grateful for your agreement to act as an expert witness for our client ... "K" Line ... in relation to the above-referenced pleadings."

The same applies for the other industry witnesses as well -- industry experts, I should say. Then, as the Tribunal is aware, "K" Line was also the party that adduced factual witness evidence from Mr Cunningham and it continued to rely on its earlier factual witness evidence from both Mr Cunningham and Mr Dent that had been advanced at the CPO stage.

The MOL Defendants did not instruct any industry expert witnesses, either at the positive case stage or at the negative case stage. Mr McGurk's clients, NYKK, did not advance any positive case at all, and they did not adduce evidence from any witnesses at all at any stage.

Not only did these Defendants not jointly instruct the "K" Line witnesses, but it became clear they had not even had any direct contact with them, and that is why when "K" Line settled there was this sudden scramble to try and establish contact with them for the first time.

In our submission, it should have been entirely foreseeable that one or more Defendants to the proceedings might settle in the run-up to trial and had either MOL or NYKK wished to rely on the "K" Line witnesses' evidence they should, in our submission, have jointly instructed them at the relevant juncture, and they should have borne the costs and invested the time and effort in doing so.

Alternatively, they could have found their own witnesses willing and able to address the matters that are covered by those witnesses' evidence. Even now, there is no application before this Tribunal for permission to adduce the "K" Line witnesses' evidence as these parties' own evidence.

If we look, please, at the application that has been made. This is {PTR/47/1}. There is an application which is made one clear day before this hearing, and what we have is some slightly bizarre wording. If we look, please, in particular at paragraph 6 {PTR/47/2}, we see them saying:

"The MN Defendants recognise that the Industry Experts and Mr Cunningham would have been formally called to be sworn by the Fourth Defendant, having technically been instructed by the Fourth Defendant."

So, in those circumstances the application that is being made is to formally call these witnesses. But in our submission this is not just a formality or a technicality, this is about the fact that these Defendants did not adduce any evidence at the time they were directed to do so and these are not their witnesses, and they are still not seeking to seek permission from this Tribunal to advance these witnesses as their own evidence; in our submission, they are truly out of time to do so.

Just to underline really the oddity of the position, these parties have reserved the right to cross-examine "K" Line's witnesses. If we look at {I/200/1}, subparagraph (3) in this letter:

"... the MOL Defendants notify the Class Representative and the other Defendants that they anticipate wishing to cross-examine all of the witnesses who have given evidence in these proceedings on behalf of the Class Representative, save for Mr Londono. The MOL Defendants also reserve the right to cross-examine any of the witnesses who have given evidence on behalf of the other Defendants."

So, the present position is they are saying, "We reserve the right to cross-examine "K" Line's witnesses", and the same applies for NYKK. That is {I/198/1}. Last line:

"Subject to the foregoing, NYKK reserves the right to cross-examine ..."

So, in our submission this really isn't just a formality or a technicality or in any way a formalisation of any prior position. This is, these Defendants seeking at this juncture to adduce new evidence that they did not adduce before and, in our submission, that is flatly contrary to the way in which the Tribunal has directed that these proceedings should be case managed.

The Defendants were given a very clear warning by the Tribunal that they should bring forward the full extent of their case, and they did not instruct these witnesses at the relevant time.

We say that is the case for the MOL Defendants, is a fortiori, in our submission, in respect of NYKK, because it elected not to advance any positive case whatsoever and not to advance any evidence in respect of its negative case, and in our submission, both as a matter of the Tribunal's very clear directions and as a matter of basic procedural fairness, it cannot be

permitted to go back on that election and adopt for the first time what amounts to a positive case a few working weeks before trial.

We do say that this is a matter that causes significant and material prejudice to the Class Representative, both in terms of the procedural fairness of seeking to go behind the way in which the parties have proceeded since the remittal of this matter from the Court of Appeal, but also in the context in which the Class Representative has reached a settlement, subject to approval by the Tribunal, with "K" Line, which was the only party that actually went out and did the work and found industry witnesses and adduced them in evidence.

The Class Representative has concluded a settlement with that party and, in my submission, it would not be procedurally fair then for the work and effort that "K" Line did then to be transferred to parties who did not do it at the relevant time. So, we resist the application that has been made to formally call these witnesses and, to be clear, we would resist any application, if it were made, to adduce these witnesses as these parties' evidence.

THE CHAIR: So, on the assumption that there is an application to adduce the evidence, and obviously

Mr McGurk will correct me, whether I understood that correctly or not, I did not -- perhaps you could clarify that for me now. What is the nature of the application that is before us?

MR McGURK: The application is an application to be able to call the "K" Line industry experts to give their evidence at trial. For reasons I am going to come back to and amplify in oral submissions, we do not believe we need to make an application to rely in substance upon that evidence, and I will come back to that.

It is really a for-avoidance-of-doubt application in circumstances where "K" Line had instructed them, "K" Line have now settled out and where all of those industry experts are very happy to continue to come and give their evidence to this Tribunal and assist this Tribunal, there was the mechanical question of how are they to be called.

I will come back to how this is addressed in two cases that I cite, because both judges in Gurney and Shepherd Neame seemed to proceed on the basis that if evidence was in, evidence of an expert of a party who had settled out, if that was in and could continue to be relied upon, that witness could be called. There seemed to be no bar to calling that individual in circumstances where they had

been instructed by a party that had by then settled out.

That seemed to be the point that has been taken against us, which is why, for the avoidance of doubt, we made that rather narrower application to be able to physically call them to the witness box to have their evidence sworn in chief and so that they are formally within the process.

It goes no further than that, because we say we do not need an application to rely upon it because the law very cleverly says we can rely upon it, but I will amplify that.

THE CHAIR: But will you be seeking to cross-examine those witnesses?

MR McGURK: No.

THE CHAIR: No.

MR McGURK: Sorry, I articulated exasperation --

THE CHAIR: I was thinking it would be slightly odd if you were.

MR McGURK: Absolutely not.

THE CHAIR: Right, okay --

MR McGURK: Save, and I am sure my learned friend was going to come back to this slightly odd position --

THE CHAIR: With Mr Cunningham, yes.

MR McGURK: So, he is called 1 and 2 by the Defendants, called by the Class Representative for 3, so we will

both be very touchy-feely with Mr Cunningham. But, subject to his slightly odd position, the answer is absolutely no relation to the industry experts.

THE CHAIR: I think I read in the letter that you are now proposing, I think you say you have already instructed the witnesses that were formally "K" Line witnesses.

MR McGURK: They have all indicated that they are very happy to be instructed. I think some of them have -- all of them have been instructed.

THE CHAIR: Right, okay. So now I can go back to my question to Ms Ford.

So, they want to rely, they do apply to rely on the evidence and to adduce it as their own -- you are going to correct me.

MS FORD: As I understand it, the distinction that has been drawn, they are applying to formally call -- they maintain that they are not obliged to make an application to adduce it as their own, as I understand it.

MR McGURK: We will if we need to.

THE CHAIR: Yes.

MR McGURK: If you are against me that I cannot --

THE CHAIR: You do not need it.

MR McGURK: -- as a matter of law rely --

THE CHAIR: Right, okay.
MR McGURK: -- I will, on my feet, say can I have permission to call them for all the reasons that I am going to address you on.
THE CHAIR: Yes.
MR McGURK: My position is that the law says I do not need permission.
THE CHAIR: You do not need to, right.
MR McGURK: But we were just worried in case there was a mechanical concern that "K" Line having instructed them and "K" Line having gone, how do we actually physically get them into the box.
THE CHAIR: Right.
MR McGURK: But if you are against me on my substantive points and you say, "I think you do need an application to rely substantively on that evidence", I will make it. But my primary position is, I do not need to make that application.
THE CHAIR: Right, okay.
Let me put the point slightly differently. If we go back to some of the extracts from the transcript that we are looking at and, in particular, the one about there will be no rabbits out of hats, when we talked about prejudice, or when you made submissions about prejudice, there is not a rabbit out of a hat here, strictly

speaking, is there, in terms of the substance of the evidence?

MS FORD: It is true that we have been preparing for trial on the basis that "K" Line would be adducing these witnesses and it would be relying on the substance of its witness evidence, so in that respect that evidence is there, and I am going to come on to address Mr McGurk's point about the extent to which they are permitted to rely on it.

It is, in my submission, very much a rabbit out of a hat in procedural terms for a party that -- having been duly warned that they had to bring forward the entirety of their case at the appropriate juncture and did not, bring forward witnesses and did not instruct these witnesses, did not jointly instruct them, it is a rabbit out of a hat for that party at the PTR, essentially a month before trial to say, "Aha, now we do instruct them". That is, in my submission, a very significant procedural difficulty.

THE CHAIR: Thank you.

MS FORD: I wonder if I might address the point about the permissibility to rely on them. The cases that have been cited are Gurney and Shepherd Neame.

THE CHAIR: I wonder if the appropriate way to do this

is for Mr McGurk to -- because it is effectively his application, is it not --

MS FORD: Yes, I am very happy to --

THE CHAIR: So, if he makes his application and then you respond to what he says about those cases. So, if he makes his application and then you respond to what he says about those cases.

Application to adduce by MR McGURK

MR McGURK: Thank you, ma'am, I was wondering that. Before I take you through all the points I want to make, we are concerned that you have had Ms Ford saying we had no direct contact with "K" Line before evidence was served, we did not go and do the work, it was done by them. With the greatest respect, Ms Ford is in no position to make comments about what arrangements existed amongst the Defendants at the time of the service of evidence in support of PPSs and NPSs, and we are struggling with those positive assertions as to what went on when they were not privy to it.

My learned friend is on her feet.

MS FORD: I wonder if I might clarify the submission that I have made. The submission was that it is clear that they have had no direct contact with these witnesses and the basis of that submission is not seeking to infer anything about the nature of the interactions between

the Defendants and the settling Defendants, the basis of my submission is that that is why we ended up with an application at the last minute for contact details. One can infer from that that they did not have them previously. That was the basis of my submission.

THE CHAIR: Thank you.

MR McGURK: I will pick the points up as I go.

THE CHAIR: Yes.

MR McGURK: Members of the Tribunal, the stark proposition that the Class Representative is putting to the Tribunal is this, that notwithstanding that all of the Defendants adopted and relied upon the industry expert evidence and notwithstanding its centrality to both sides' cases on issues critical to these proceedings, and notwithstanding that the Class Representative has never before suggested that no other party was entitled to rely upon it, because those experts happened to be instructed by "K" Line and because "K" Line has now settled out, that evidence must be treated as excluded in toto for everybody else.

This is an entirely, in my submission, opportunistic attempt to generate a litigation windfall that is contrary to the premise on which all sides have proceeded in this case. It is contrary to clear legal principle and authority, which I will come back to, and

amounts to an attempt to require MOL and NYKK to fight this case at trial with one hand tied behind their back.

I am conscious of the time; I can make a start but I am in your hands as to when I should sit down.

I wanted also to say --

THE CHAIR: Please do not tempt me!

MR McGURK: Asking for it!

I should also say, and I should have made this at the start, I am jointly instructed by MOL and NYKK, as are my learned juniors today.

THE CHAIR: Yes.

MR McGURK: So, the Class Representative is seeking a ruling from this Tribunal which they consider would effectively determine this trial. To that extent, what they propose would not just produce irremediable unfairness to us, equally importantly it would deprive this Tribunal of critical evidence that will make its task of fairly determining the key issue of upstream pass-on, silo versus overall pricing nigh on possible.

If it is convenient, I was going to take the Tribunal through these submissions in four stages. I will let you tell me when to sit down, but I may set out just how I propose to attack this.

THE CHAIR: Yes.

MR McGURK: So, first of all, I am just going to show you the

extent to which all parties have relied upon the "K" Line evidence.

THE CHAIR: Yes.

MR McGURK: There are some inferences that can be drawn from that and the timings of what was filed and when.

Second, I will take you through the rules and authorities that demonstrate that "K" Line settling out has no impact at all on the remaining Defendants' substantive entitlement to rely on that evidence and to call those experts.

Third, I wanted to respond very briefly to the two short paragraphs in my learned friend's skeleton argument on this issue.

Fourth, I will address you very briefly on the practicalities in light of the fact that all industry expert and factual witnesses have indicated they are perfectly happy to continue to give their evidence and indeed, as we have just confirmed, have been instructed by the MN Defendants to do so.

So that is the framework for what I want to say. I can start after lunch, if that is convenient, or I can make a start now.

THE CHAIR: I think it would be convenient to start after lunch. I am slightly twitchy about the time today. We have still got quite a lot to get through,

1 although I do think the issue we dealt with earlier and
2 this issue, I think they are the most substantive, are
3 they not?
4 MR McGURK: Yes.
5 THE CHAIR: Then that will dictate timetable for trial
6 and the hot tub protocol should not take very long.
7 I think the other matters should be relatively
8 straightforward. So, there are the PSA witnesses, are
9 there not, and also the apportionment, what we are going
10 to do about contribution.
11 MR McGURK: Might it be an idea to come back -- this is
12 entirely in your hands, but come back at quarter to.
13 THE CHAIR: Slightly earlier, yes, quarter to. Thank
14 you.
15 (1.00 pm)
16 (The short adjournment)
17 (1.45 pm)
18 THE CHAIR: Yes, Mr McGurk.
19 MR McGURK: I set out the four stages I was going to take my
20 submissions in. I am going to start by showing you the
21 extent to which all the parties have relied on the
22 defendant expert industry evidence.
23 THE CHAIR: Yes.
24 MR McGURK: Can we go, please, to {A/14/3}. So, this is the
25 MOL positive position statement.

THE CHAIR: Yes.

MR McGURK: You will see at paragraph 3 it is stated:

"... the MOL Defendants adopt and rely upon the expert reports of Lawrence Good (dated 20 March~...), Darren Chaisty (dated 20 March~...) and Trevor Finn, (dated 21 March ...), filed and served by the Fourth Defendant (together, the Industry Experts)."

THE CHAIR: Yes.

MR McGURK: So, at the very start of the MOL PPS, clarifying the evidential basis on which its positive case would be put and so abundantly clear that these reports were part of MOL's case from the outset.

Before we move on, please can you note the dates of those reports: 20 and 21 March, relative to a PPS dated and served on 22 March, so one and two days before the date on which the PPS was filed and served.

THE CHAIR: Yes.

MR McGURK: I will come back to why that matters.

The MOL PPS and the expert report from Dr Bagci were replete with references to the evidence of Mr Chaisty, Mr Finn and Mr Good. Staying in the MOL PPS, can we go to {A/14/30}, please. So, you will see this is section E, the start of MOL's case on upstream pass-on. Paragraph 87 at the bottom of the page, here MOL identifies the evidence it relies upon for this part of

its case.

Going over the page to page {A/14/31}, please, you will see at 87.3, part of that case and evidence, it will be that:

"... from the Industry Experts adduced by the Fourth Defendant, i.e. Chaisty 1, Good 1 and Finn 1~..."... from the Industry Experts adduced by the Fourth Defendant, i.e. Chaisty 1, Good 1 and Finn 1~..."

THE CHAIR: Yes.

MR McGURK: Further down at paragraph 89, MOL summarises its case on upstream pass-on. The first point in that summary, paragraph 89.1, cites the Chaisty, Finn and Good evidence, in support of the critical point that the Defendants' overall pricing framework is to be preferred to the silo pricing framework advanced by the Class Representative.

Just pausing there, the Tribunal will of course recall that it was that dispute and the fact that the parties' cases were, as the Court of Appeal put it, passing like ships in the night, that led to the adoption of the positive and negative case procedure in the first place.

Over the page, page {A/14/32} in the PPS, MOL PPS, here we are getting into the detail of MOL's submissions. The first substantive point being at 92.1,

where MOL refers to a specific passage of Mr Good's first report where he says that customers negotiate a single overall price for a new vehicle.

92.2, MOL refers to a passage in Mr Finn's report, which makes a similar point. Then you will see MOL referring to Dr Bagci's evidence on this issue at 92.3.

If we turn over the page again {A/14/33}, paragraph 93, this is MOL's second point, about how vehicle pricing is advertised in the UK and the first evidential basis for this, again a passage from Mr Good's report.

MOL's next point is at paragraph 94. That is about how OEMs managed the case of RoRo, i.e. deep-sea shipping costs. Over the page at {A/14/34} you see its main evidential basis for this being paragraphs of Mr Chaisty's first report.

THE CHAIR: Yes.

MR McGURK: It continues much in the same vein for the next 10 pages over the upstream pass-on section, and I am not going to take you through all of that. MOL refers to what Finn, Good and Chaisty say in their reports in extensive detail, and indeed they rely on them just as much as they rely upon Dr Bagci, their own instructed economic expert.

So, it is absolutely clear from MOL's PPS that the

evidence from Mr Chaisty, Mr Good and Mr Finn is an integral part of MOL's case on upstream pass-on and their evidence was inextricably intertwined with both the rest of MOL's evidence and indeed the economic analysis that was put by -- put together by Dr Bagci, and I wanted to turn to that to make that good.

THE CHAIR: Yes.

MR McGURK: {D/43.1/31}, please. Thank you. At paragraph 57 there in Dr Bagci's report, she quotes extensively from Mr Chaisty's and Mr Good's reports in support of her view that national sales companies would likely have absorbed some of any overcharge.

Over the page, page {D/43.1/32}, please, you see paragraph 59, Dr Bagci does the same for Mr Finn, quoting from his evidence on negotiations with large fleet customers.

Now, suffice to note that the Class Representative raised no objection either to MOL in its PPS or to Dr Bagci in her report relying upon the industry expert evidence.

Now, the same point I can make in relation to WWL/Eukor, I will do it briefly, they are not here, they are in the attempt of trying to settle out. But for your note the WWL/EUKOR PPS is, at {A/18/1}, making clear that they rely upon the defendant industry evidence of Messrs Chaisty, Good

and Finn, at paragraph 3, footnotes 1 and 2 and page 15 and 16.

Similarly, WWL/EUKOR's expert, Dr De Coninck, {D/59/1}, again makes very -- makes repeated references to the reports of Messrs Chaisty, Good and Finn. I will not go through them, but for your note that reliance appears at pages 7, 8, 11, 38, 45, 49, 50, 51, 52, 53, 54, 64 and 65 of his first report. So very heavy reliance indeed.

Again, the CR raised no objection either to WWL/EUKOR via its PPS or Dr De Coninck's report, insofar as they made such heavy reliance on that evidence for the purposes of their case.

The Tribunal will note that the industry experts' reports only pre-date the date of the PPSs by a couple of days, a day or two. Frustratingly, privilege precludes me from going into the detail but the Tribunal will readily infer that the Defendants had involvement in those witness statement and did not merely see them for the first time fully formed on 22 March. How else could they be so heavily intertwined both with their own PPSs and have been taken into account and intertwined with the economic analysis of Dr Bagci and Dr DeConinck.

That was true of all of the Defendants, and it was clear that they were not therefore intended to be relied upon solely by "K" Line.

Given the centrality of that evidence, the PPSs and the adjoining expert reports, and indeed the Tribunal's expectations that the parties would cooperate -- the President envisaged this in a CMC which I am going to take you back to shortly, to avoid duplication -- this Tribunal can well draw its own conclusions as to the type of cooperation that was taking place between the Defendants before the filing of PPSs.

THE CHAIR: Just pausing there, you say it was true of all of the Defendants, but the Fifth Defendant is a bit of a standalone in that, are they not, because they did not put in a positive position statement at all?

MR McGURK: That is true, but my point is about what was seen before 22 March by all of the Defendants, and that I cannot go into more detail on.

THE CHAIR: Right.

MR McGURK: Now, turning, as you have raised NYKK, ma'am, to the Steptoe letter of 22 March, can we turn up, please, {I/143/1}. This has been partially quoted in the Class Representative's skeleton and I just want to take you through all of it because it is important.

Turning over to page {I/143/2}, please:

"Paragraph 1 of the Order permits the parties to file and serve, if so advised, a [PPS] and any evidence that they intend to rely upon~..."

"It is for the Class Representative to prove its case. The Fifth Defendant is not filing a positive position statement but reserves the right to serve a position statement and evidence in response to the [CR's] case in due course, pursuant to paragraph 2 of the Order.

"For the avoidance of doubt, the Fifth Defendant's position remains as pleaded in its Defence, and it reserves the right to rely (in its negative position statement and at trial) on any evidence filed and served at any time by any of the other parties in these proceedings."

Just as the Class Representative did not object on receipt of the PSSs and expert reports by MOL and WWL/EUKOR to their reliance upon the defendant industry expert evidence, nor did the Class Representative come back to us and say no, the proposed reliance that you set out in this letter is inappropriate. They said nothing at all. So, we all proceeded on the basis that we were all, to the varying extents we had set out either in our PPS or in this letter which I have just showed you, going to be relying upon the evidence file and in particular for these purposes the defendant industry expert evidence of Messrs Good, Chaisty and Finn.

One might have expected that at the very latest the

Class Representative would have raised an objection to this proposed reliance in its negative position statement, but it did not. On the contrary, the Class Representative's response was premised on an acceptance that the Defendants had relied upon that evidence and treated the industry expert evidence compendiously, calling it the Defendants' expert evidence.

Can I show you that, please, at {A/20/3}.

THE CHAIR: Yes.

MR McGURK: This is the Class Representative's negative position statement and paragraph 3 -- sorry, 4 at the bottom -- I am grateful:

"In the interests of efficiency and proportionality, the CR seeks where possible to respond to the defendant PPSs compendiously, insofar as the responses to their cases overlap. The CR therefore addresses the main matters in dispute thematically, before addressing any points specific to only one or other of the Defendants."

So, the CR was acknowledging there that there were issues that were compendious or general of which industry expert evidence was one. The defendant-specific objections they raised were raised in section 8 and in that section 8 no point was taken about reliance by anyone on the defendant industry evidence.

Can I make that good by starting with {A/20/30},

still in the CR's NPS. Here you will see the start of section 4 of the Class Representative's case on upstream pass-on. This is one of the sections responding, as paragraph 4 says, compendiously to the Defendants' positive statements and in this first paragraph, 38(1), you will see they refer to Mr Chaisty, Mr Finn and Mr Good, and they call them "the Defendants' industry experts". Not the "K" Line experts, but the Defendants' experts. They note that Mr Chaisty, Mr Good and Mr Finn:

"... provide support for the Defendants' 'overall pricing' approach~..."".. provide support for the Defendants' 'overall pricing' approach~..."

So that's how the Class Representative refers to their evidence throughout this section, a reference to the Defendants' industry expert evidence supporting the Defendants' positive cases. You will see that in 40 to 43 and the remainder of the section. I will not, given the time, take you through it all.

So at this stage the Class Representative clearly understands that the experts are an integral part of all of the positive cases that had been filed by the Defendants. There is no suggestion anywhere in this section that they are "K" Line's witnesses only, nor do they suggest that their evidence pertains only to

"K" Line's positive case. So, no objection by the Class Representative to the Defendants' reliance on the defendant industry expert evidence in its negative case either.

Then can we go, please, to {A/20/61}. This is section 8 in the Class Representative's negative position statement. This is where the defendant-specific issues were to be set out, and you would expect if the Class Representative had any objection, for example to MOL adopting and relying upon on Messrs Finn, Chaisty and Good on the basis, for example, that they were "K" Line's experts, this is where you might find it, but there is no such objection taken at all.

Turning then to the Defendants' negative position statements, all of the Defendants in turn continue to rely upon not just the first round of Good, Finn and Chaisty evidence, but the further expert industry evidence that they filed by way of their second reports.

Can I start then, please, with MOL's negative position statement. It is at {A/21/3}. You see at paragraph 3 the reliance being placed:

"... MOL adopts and relies upon the following evidence, filed and served by the Fourth Defendant. "...

"The second witness statement of Neil Cunningham dated 11 July ... and"

"The second expert reports of Lawrence Good ... and Darren Chaisty ... dated 23 July 2024~..."

That is three days before this statement was filed:

"... and the second expert of Trevor Finn, dated 25 July 2024~..."

That is just a day before this negative statement was filed.

Again, these were all replete with references to that further industry expert evidence. I am not going to take you through it, but for your note the MOL NPS relies upon all of that evidence, second round of evidence, at 9, 12, 13, 15, 18, 19 to 21, 34 and 67 to 69.

Similarly, Dr Bagci's second report also made reference to the second round of defendant industry expert evidence. I am not going to give you all the references, I fear I am veering into testing your patience.

WWL/EUKOR did likewise in its NPS, just for your note {A/27/4}, paragraph 6 and footnote 3 make plain their continued reliance on the existing and new evidence of the defendant industry experts, and De Coninck 2 {D/60/7}, paragraph 6 makes likewise clear.

Turning then to NYKK's NPS, that is at {A/25/1}, we made a very substantial reference to Chaisty 1 and 2, Finn 1 and 2 and Good 1 and 2, consistent with what NYKK indicated it would be doing in its letter of 22 March.

Again, I will not take you through all of them but for your note the references to that evidence were made at 7, 30, 31, 33, 42, 43, 44, 45, 46, 49, 55 and 56.

So, although I am again prevented from revealing communications that were subject to common interest privilege, the Tribunal will again readily infer that there must have been considerable cooperation between the Defendants before the filing of these negative statements given the dates of Good 2 Finn 2 and Chaisty 2 relative to the date of NPSs.

From the references to those reports throughout the Defendants' negative position statements it will be readily apparent, without the need to consider any privileged materials, that the statements were not expected to be relied upon by "K" Line and "K" Line alone.

Again, at this stage the Class Representative raised no objection whatsoever to any of the Defendants relying upon either the first round or the second round of the defendant industry expert evidence, and indeed having

raised no objections to the course that all of the Defendants took, both in March 2024 and in July 2024 in relying upon this evidence, the Class Representative cannot now, at this very late stage, effectively seek to resile from the clear, common understanding everyone had until a few weeks ago that these witnesses would be appearing at trial and where we have all been preparing on that basis.

The Class Representative has only in the last few weeks and further to settling out with "K" Line sought to suggest that a consequence of that settlement is that the expert evidence everyone else was substantively and openly relying upon is excluded from this case in its entirety. It is hard to think of a situation where a volte face by a party, if acquiesced in by the Tribunal, could have more prejudicial consequences for another party's ability to defend the case fairly at trial.

It is also crucial in my submission for the Tribunal to have the benefit of the industry evidence which has been relied upon and engaged with by the Class Representative and the Defendants in order to make a proper assessment of what the correct approach to upstream pass-on should be. That is critical to this claim, and the Tribunal, we submit, should have the

assistance of both sides' experts in order to be able to give an informed and balanced judgment on the question, having heard all of the evidence.

Now, there is no question as to the expertise or independence of any of Messrs Good, Finn or Chaisty, but the Class Representative's proposal is effectively trying to lock away the Defendants' witnesses, no doubt because it is very concerned about the assessment which the Tribunal is likely to make of their evidence if heard.

Turning then to my second set of submissions and the legal provisions.

THE CHAIR: Yes.

MR McGURK: First, I wanted to start with CPR 35.1.1. Of course we are in the Tribunal --

THE CHAIR: Yes.

MR McGURK: -- but the Tribunal's Guide to Proceedings at paragraph 7.65 states:

"As regards expert evidence, the Tribunal will take into account the principles and procedures envisaged by part 35 of the CPR."

CPR 35.11, part 35 I should say is at {PTR/46/4}. It is extremely short, unqualified in scope and very clear. It provides:

"Where a party has disclosed an expert's report, any party may use that expert's report as evidence at the

trial."

Now, before showing you how this provision has been applied and interpreted, I wanted to pick up on a point Ms Ford made this morning. She said there is no clear delineation between an expert's written and oral evidence and in those circumstances the Tribunal would expect them to come to the Tribunal and have that evidence tested. We agree.

Now, I want to show you two cases where a party wished to rely upon on the expert evidence of another party who at that stage had already settled out.

First of all, Gurney. It is at tab 51. If we could go there, please, in the PTR bundle. {PTR/51/1}. It is a judgment of His Honour Judge Coulson QC, as he then was. Turning over the page to {PTR/51/2}, you will see that the main claim is brought by a claimant called Pearson against Gurney, who was a defendant. But Gurney also brought Part 20 claims against a number of other parties including parties known as the Gleeds defendants. Pretty much everyone else at the Part 20 level settled out and Gleeds wished to rely upon the other expert reports of the Part 20 defendants who had at that stage gone.

Picking it up at paragraph 3, you will see that the claimant, Gurney, whose counsel was Mr Sutherland, four

lines up from the bottom, said the judge was:

"... naturally keen to ensure that Gleeds cannot rely on the reports served on behalf of those other parties who are no longer in the action."

Then, looking at how His Honour Judge Coulson addressed this, picking it up at paragraph 4, he sets out paragraph 35.1:

"Thus, he says, Gleeds do not need to make a formal application to use the reports of those engineering experts who will not now be giving oral evidence. However, Mr Reed accepted that it would be appropriate for the Gleeds companies to notify Gurney of the reports that they do seek to rely on in accordance with this rule. He also said that Gleeds could not 'cherry-pick' those parts of the reports on which they wished to rely and exclude those parts which may be unfavourable to them~..."

Just pausing there, we are obviously seeking to have everything in, in full, there is no cherry-picking.

Turning over to page {PTR/51/3} and paragraph 5, the judge went on:

"Mr Sutherland [for the claimant] disputes Gleeds' approach on two grounds."

First, he relied on CPR 35.11 he said it:

"... does not apply, because the reference there to

'a party [that] has disclosed an expert's report' must be a reference to a party in the ongoing proceedings~..."

Therefore, it could not be relied upon in relation to a party that has settled out. In paragraph 6 the judge deals with this. He says:

"... the answer to Mr Sutherland's points can be found in CPR 35.11 itself. It only applies where party A has already disclosed an expert's report and party B wants to rely on it as evidence at the trial. The disclosure of party's A report could only have occurred in accordance with CPR 35.4. In other words, it is a fundamental assumption within CPR 35.11 that there has already been compliance with CPR 35.4, and the report which party B now wishes to use is one for which the court has already given permission."

Which is true here.

"In such circumstances, it is not necessary for party B to seek permission all over again; party B merely wishes to use a report for which permission has already been given."

Finishing up with Judge Coulson's judgment:

"Similarly, because CPR 35.11 assumes that party A's report has been disclosed in accordance with CPR 35.4, it does not matter whether, sometime after disclosure of

that report, party A ceased to be a party to the proceedings. The reference to 'a party [that] has disclosed an expert's report' in CPR 35.11 cannot be limited to those who happen to be parties to the proceedings at the time that the report is sought to be used by another: there is nothing in the rule which could limit its scope in that way. The reference in r.35.11 is to any party who has disclosed a report in accordance with r.35.4, whether they subsequently remain a party to the proceedings or not."

This was then applied by Mr Justice Akenhead in the Shepherd Neame decision. That's at {PTR/52/1} if we could go there. Just to tee this up, it was a claim that arose out of a fire, claims were brought by middle properties, owners of which were referred to as the claimants, and the adjoining properties on either side, which claimants were known compendiously as the neighbouring claimants.

The second and third defendants settled out in this claim and, in this case, it was the claimants who wanted to use the second and third defendants' experts' reports at that stage and Mr Justice Akenhead agreed.

If we could pick it up at paragraph 9 at the bottom of that page, you will see:

"Mr Brown relies upon Gurney

Consulting ... as authority for the proposition that the claimants are entitled to rely upon the expert reports~... in circumstances where the second and third defendants have dropped out of the proceedings. He argues that in effect his clients are so entitled as of right given the wording of CPR r 35.11. In any event, he argues that it is fair that this can happen given these experts' involvement until past the twelfth hour."

Trial had already started, hence the reference to the 12th hour. All those points apply to us, even though we are not quite at the 12th hour, but not far off.

Paragraph 10 over the page, sorry, we will stay there, it goes over the page:

"Mr Jones argues otherwise. He refers to CPR r 35.1, which states: 'Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings'. He also relies upon CPR r 35.7 (under which the court can appoint a single joint expert) as supportive of his position that the court's approach should be sparing when it comes to allowing in expert evidence. He says that it is unnecessary for these two reports to be introduced as the claimants have adequate expert evidence~..."

Et cetera.

At paragraph 13 you will see there is extensive recitation of Judge Coulson's decision in Gurney and then if we go to paragraph 14 over the page again {PTR/52/3}, Mr Justice Akenhead says:

"I am of the view in the circumstances of this case the claimants are entitled to rely upon the reports ... pursuant to CPR r 35.11; my reasons are as follows."

I am going to track through (a) to (d) and (d) in particular is of importance. But the judge ruled:

"(a) CPR r 35.11 gives them an unqualified right to do so. (b) It is logical that, if the parties have complied with and relied upon court orders, as here, with regard to the service of expert reports and to the production of joint statements setting out what the experts agree or disagree about~..."

All of which has been done here:

"... any party remaining in the proceedings can rely, as evidence, upon the reports of experts whose clients were, but are no longer, active parties to the proceedings. They will have conducted themselves on the basis that all the experts will be giving evidence at trial."

As we have:

"(c) Even if CPR r 35.11 gave me a discretion, and

in any event pursuant to case management powers, I would allow the claimants to rely upon these other reports. The five experts undoubtedly spent a considerable time talking together and producing four joint statements (albeit Mr Bourdillon did not contribute to the fourth). Those statements are before me in any event and contain the views of [those experts]. To understand them in context, it is likely to be necessary to understand what their reports say. (d) It is not disproportionate to permit the claimants to rely upon these reports as evidence. If the case against the second and third defendants had proceeded, they would have been able to do so and EDF must have prepared for trial upon the basis that Mr Bourdillon and Mr Coates would have given evidence. There is no prejudice particularly to EDF [the defendant] who can either call the two experts~..."

I emphasise this:

"... who can either call the two experts or rely upon the factors set out in paragraph 11 of the Gurney judgment. I have made it clear in argument that I would permit EDF's counsel to cross-examine them if called pursuant to any witness summons issued by EDF. There remains time to issue such summonses."

So, in (d), the judge proceeded on the basis that

because the expert evidence was in the case, those experts could be called and cross-examined and that was notwithstanding that the parties who had settled out, the second and third defendants, were the parties who had formally instructed Mr Bourdillon or Mr Coates, and, therefore, could not physically call them to the witness box to swear their evidence-in-chief.

Mr Justice Akenhead did not seem to think there was any application to mechanically allow the other parties to call those experts, and he had no difficulty at all concluding that when 35.11 applied and the evidence was treated as in, those witnesses could be called and cross-examined. In that case, unlike ours, there was a prospect that witness summonses might have been needed. No such prospect here, because all the experts are entirely happy to come and give their evidence.

So, we say the legal position in light of that is crystal-clear. The defendant industry expert evidence is in the case, it has been relied upon in substance and at length by all parties and their experts. The MN Defendants can rely upon it even though "K" Line have settled out, and insofar as the evidence is in and the experts are content to be called to give their evidence, as we have put it in the letter of 2 December, the only

application potentially needed, it was not in Shepherd Neame, but the only application potentially needed would be a technical application to enable MOL and NYKK to be the entities who formally call Mr Good, Mr Finn and Mr Chaisty to the witness box.

That is why I call it a formal application, if it is needed at all. If it is needed, I make it.

The Class Representative's complaint that we needed an application to substantively rely on the evidence -- and this is the debate we had this morning at the start of this topic -- was of course in my submission wrong. Insofar as we make an application to be able to formally introduce the industry experts' evidence-in-chief at trial, that application essentially is responding to and catching up with the reality that "K" Line have now settled out and we do say this is merely a regularisation of the position, if it is needed at all.

Ultimately the Class Representative's objection now seems to be that the MN Defendants should suffer the most penal of consequences because we did not expressly say to the Tribunal in the past, but are saying now, when we rely on those witnesses it means that we will also call them if needs be.

We cannot be so staggeringly penalised by not being

able to rely upon that evidence because we did not use those words. There is no magic in the fact that "K" Line originally instructed these experts and you have seen from the positive and negative statements the extent of the cooperation and the extent of the reliance that was placed on it, so much so that the Class Representative was perfectly right in describing it compendiously as "the Defendants' industry expert evidence".

This Tribunal does not stand on form for form's sake and we invite the Tribunal to recognise the opportunistic argument for what it is and to permit us, if we need it, to call experts whose evidence we are entitled as a matter of law to rely upon and who have indicated their willingness to attend.

I am going to briefly, as my third set of submissions, look at the Class Representative's skeleton. Their points on this are set out at paragraphs 25 to 26 {PTR/1/9} and if we could go to paragraph 25. Thank you very much. This paragraph contains the contention that once "K" Line's settlement is approved the Defendants' experts, which only now and contrary to how they describe them in the NPS, are now again called "K" Line's experts, not the Defendants' experts:

"... will cease to be the evidence of any party in these proceedings~..."

Then the substance of the argument is over the page at paragraph 26 {PTR/1/10}. In the interests of time, I have made my points about reliance, but taking it in stages, the first two sentences, it is said:

"... the basis upon which these proceedings would be case managed and the extent to which any party should be permitted to adduce expert evidence either in support of a positive case or by way of a negative case was set out by the Tribunal in its CMC2~... The Tribunal made very clear that, to the extent that any party wished to rely on such evidence, it was to bring such evidence forward at the appropriate stage and not later."

There is a twofold problem with that. First, insofar as the Tribunal made clear that each party had to identify the evidence on which it would rely for its positive and negative cases, all of the Defendants, in March and again in July, made clear that they would rely on the evidence being filed and I have shown you the references above for where and how that evidence was relied upon both by the parties and their experts, economic experts, CR never objecting at any stage.

The second problem with this is that the President, when making those remarks, some of which my learned

friend took you to this morning, cited in paragraph 3 of the Class Representative's skeleton, would, if asked: in circumstances where certain Defendants have clearly cooperated in the production of expert evidence and have each expressly relied on that evidence in their positive and negative cases should expect themselves to be barred from relying upon that at trial because the party who was to formally call them had settled out.

I bet my bottom dollar that the President and the Tribunal at the time would have said: that is nonsense, do not be ridiculous.

But the point gets stronger when you see what was said in passages that are not cited by my learned friend. If we can go back to the transcript at {J/30/7}, this is page 5 of the transcript, I wanted to show you lines 8 to 19, which we looked at very briefly, but I want to emphasise the wording that the President used:

"Each party grouping, we are going to say the Class Representative on the one hand [one party grouping] and the Defendants on the other [another party grouping], but if the Defendants want to fragment, no problem at all. Each party grouping will produce their entire positive case on loss and damage by no later 4.00 pm on Friday 14 July~..."

So, note the words "each party grouping". The President was explicitly suggesting the Defendants could all advance evidence together, as a group. In other words, the President clearly expected the Defendants to work together on aspects of their evidential case and there is nothing here suggesting that there is a particular form that that group effort should take, in particular no suggestion that there could only be group cooperation and reliance upon the group evidence if there was a joint instruction.

It now becomes clearer when you go forward in the transcript to 7/30/8 [sic], this is page 6, starting at paragraph 23. Let me give you the reference again 7/30/8 [sic] I hope that brings up page 6 of the transcript.

THE CHAIR: I think it must be {J/30/8}.

MR McGURK: Oh, I said 7, did I not?

THE CHAIR: Yes.

MR McGURK: So sorry, my fault. {J/30/8}. Thank you, ma'am. Picking it up at line 23:

"The details of this, and indeed anything else, can be worked out in a formal order. We are just articulating a broad-brush provisional approach."

In light of that it is clearly inappropriate for the Class Representative to rely on these preliminary

remarks at the beginning of the CMC as hard and fast rules for the positive and negative cases. If it is not in the ultimate order, it does not matter and there is nothing in the order about a need for joint instructions or anything which would prevent the Defendants proceeding as they did.

So again, no suggestion that we could only, if somebody settled out, rely upon expert evidence where it had originally been produced pursuant to a joint instruction.

Then just finally on the transcript, {J/30/9}, over the page, picking it up at line 24 at the bottom, the President said:

"All parties should be under no illusions as to how the trial of these matters will go. Each party will be [going over the page] entitled to identify well in advance of trial exactly who it needs to cross-examine in order to make good its negative case. The party advancing a positive case is going to be required to produce the relevant witnesses for cross-examination, so that the attack intended by the responding party can be made good. This is not going to be a process where it is for the party making positive case to choose who they call and when. That will be in the control of the Tribunal and the process will be negative

respondent-led, not the advancing party-led process that is usual.

"So, in short, this is not a case where the party advancing a case can choose who to call. That ship will have sailed with the adduction of a positive case. You will be obliged to present those persons who the opposing party thinks need to be called in order to test that positive case."

So, what the President is saying is you need to have identified who you are proposing to call in your positive cases, so the other side can see who it needs to cross-examine, and that is exactly what has happened. MOL and the other Defendants identified Mr Chaisty, Mr Finn, Mr Good as central to their positive case and the Class Representative made clear in its negative case that they wanted to challenge their evidence. In "K" Line's absence, MOL and NYKK have instructed them so they can produce them for trial as the President suggested.

Moreover, and finally on this, it is common ground that there is no property in an expert and the question of which party formally instructed or called the expert just is not terribly important. Because actually their role is to be an independent voice assisting the Tribunal and therefore, for those reasons, who happens

to call an expert is in that sense mere happenstance.

Back to my learned friend's skeleton, {PTR/1/10} and sorry, going across to paragraph 26. So, picking it up at the third to sixth sentences, you can see what is said:

"K Line duly filed and served the K Line reports. The other [Defendants] elected not to instruct those witnesses jointly."

The President made clear that is irrelevant:

"Nor did they instruct any equivalent of their own."

No, we did not, that would be utterly duplicative and there was no point given the cooperation, and the expectation that we would all cooperate:

"Any attempt on the part of the other [Defendants] to purport to rely at trial on the K Line Reports in circumstances where K Line is no longer a party and the [Defendants] did not themselves instruct those witnesses would be inconsistent with the basis upon which the Tribunal has directed these proceedings should proceed to trial."

Absolutely not. It is clear from the CMC, and it is clear from how in fact everyone proceeded in the building of their positive and negative cases and the filing of expert reports accompanying them.

Again, it troubles us that in this statement you

have the line that other Defendants -- this skeleton -- that other Defendants elected not to instruct those witnesses jointly. The Class Representative is in no position to say that.

Paragraph 26 goes on to say that the MN Defendants need to make an application. I have explained why we do not and therefore why what we have done is for the avoidance of doubt and in the event that the mechanism to call them needs to be addressed, we have made our application on that narrow basis. If I am wrong that I do not need to make an application, I do for all the reasons I have given you.

The real point in this skeleton is the very last sentence in paragraph 26 when my learned friends say:

"Insofar as the CR has succeeded in negotiating a settlement with K-Line which has the benefit that K-Line's witnesses in support of its case will no longer form part of the case the Class Representative faces at trial, that is a legitimate settlement strategy."

So, there's the truth of it. The Class Representative has thought, wrongly as it turns out, that if they successfully pick off "K" Line, the remaining Defendants will have to fall like dominoes because they and the Tribunal will be deprived of all the evidence that was formally called by "K" Line but

which in substance everybody was relying upon at each stage.

To the victor go the spoils of apparently preventing MOL and NYKK from being able to rely on any of the evidence that up to now they thought they were going to be relying upon at trial.

Now, the Class Representative complains about rabbits being pulled from hats. I cannot think of a bigger one that could be pulled on the eve of trial.

This reveal about the settlement strategy and the picking off of "K" Line gets slightly worse. You will have picked up in the correspondence, and my learned friend has alluded to this morning, and I have to address it, she mentioned the Finn application.

THE CHAIR: Yes.

MR McGURK: Yes, of course, there were public details as to how we might contact Mr Finn. But crucially, not his phone number and plainly Cleary would have had Mr Finn's phone number. We asked Cleary to provide it to us they initially refused and on probing they told us they couldn't because a non-cooperation clause had been imposed which they thought would be violated if they even handed over a number for Mr Finn.

THE CHAIR: Yes.

MR McGURK: So, when you put these things together, the

attempts to call Mr Goss and Mr Whitehorn jointly, the attempts to exclude en masse the defendant expert evidence and this attempt to prevent us from even contacting Mr Finn to facilitate the passage of the experts from "K" Line to the remaining Defendants, it all adds up to a rather unattractive strategy at this stage of the trial where had it been successful, as I say, the Class Representative clearly thought it would have had the effect of essentially determining the outcome of this trial. Not on the merits, but on these technical points now opportunistically taken.

A very last, almost rhetorical point: what would be the status of all the references to Mr Good, Mr Finn and Mr Chaisty across the PPSs, NPSs and all the expert evidence that relies upon it and refers to it?

THE CHAIR: I had wondered that.

MR McGURK: Exactly. So, you have seen how much reference there is to it. The CR's own negative position statement, where it directly addresses these reports, for example, paragraph 3. What about the large swathes of actually the Class Representative's own witnesses who respond to Mr Good, Mr Finn and Mr Chaisty? You have seen the raft of industry evidence that they have served which directly addresses those points. What do we do; do we put a big red line through chunks of it? How do

you disaggregate it in circumstances where Dr Bagci has relied upon it such that it has become integral to the methodology and analysis as to how upstream pass-on should be understood?

You cannot disaggregate that. You cannot unwind it. So, I say I raise these points rhetorically because we see no sensible basis on which you could strike this out and have all the evidence and submission in the case remain in its current form. It would be incredibly complicated to try and manage this in its current form. But happily, we do not need to because the evidence is -- the title is in and we are entitled to rely upon it.

Very finally, practicalities. I have told you that the experts have been instructed. They are all willing and able. We also seek to call Mr Cunningham on Cunningham 1 and 2, and Mr Dent. Cunningham is in a slightly unusual position which we canvassed this morning. He is going to be cross-examined anyway. It would be crazy to have him here to be cross-examined on 3 and not 1 and 2.

Mr Dent, we, NYKK, relied upon in our negative position statement. No point was taken that we could not. He has indicated his availability and willingness to continue to assist the Tribunal and speak to that evidence and so again we would like to call Mr Dent and

apply for any permission to do so, if it is needed.

So, for those reasons I do urge you to reject the attempt to exclude all of the defendant industry expert evidence in total.

THE CHAIR: Thank you.

Ms Ford.

Submissions by MS FORD

MS FORD: Mr McGurk has spent some time taking through this all the cross-references in the various cases to this evidence and no one disputes that these Defendants have cross-referred to "K" Line's evidence. They have done so at their own risk. The reason I say that is because it was self-evident and they must have appreciated that "K" Line might settle and in the event that "K" Line settles, they do not then have a witness that is their witness to cross-refer to, because it was always "K" Line's witness.

The point is taken that we -- it was suggested that we did not object to this assumption that they appear to have been making throughout, that if they cross-refer to it, then it is their witness. We did expressly object in the context of NYKK and in the context of circumstances that they had not even put in a positive case. I can show the Tribunal that.

THE CHAIR: Yes.

MS FORD: The correspondence begins at {I/144/1}. This is a letter that was sent on behalf of the Class Representative following the -- in fact the Tribunal looked at 2.1:

"... we note that the Fifth Defendant elected not to file a Positive Position Statement."

We say while this is surprising, we accept they are fully entitled to take that approach:

"That being said, one of the motivations~..."

For the case management proceedings:

"... in particular the remittal of the case management issues regarding the competing methodologies~...

"For the avoidance of doubt, our client's position is that - as the Fifth Defendant has elected not to lead any evidence or position statement in support of the 'overall pricing theory (as defined at paragraph 11 of the Court of Appeal's judgment), which it previously argued was the correct approach - the Fifth Defendant is now precluded from arguing that an 'overall pricing' methodology is the correct approach and/or that it would produce a different result from the application of the Class Representative's 'silo pricing' approach."

We go on to address what we say are the consequences for the negative position statement:

"... attempts to raise issues as part of its Negative Position Statement which ought properly to have been addressed as part of a Positive Position Statement~..."

Please go over the page {I/144/2}:

"... (including but not limited to any suggestion or reliance on an overall pricing theory being more appropriate than the approach taken by the Class Representative and/or leading to a more favourable result for any or all of the Defendants) our client will forcefully object to this as an abuse of process. The Class Representative also reserves its position to apply to put in further evidence and submissions in response to such evidence, should the Fifth Defendant be permitted to adduce it."

So, we said at the outset you have made your bed, essentially, by not putting in your positive case. There was a reply to that which is at {I/146/1}.

THE CHAIR: Do they have to lead evidence, or can they rely on the evidence of others parties? What do you say about that?

MS FORD: I think there are two points to make about that. The first is that, as you have been shown by both sides now, the President did contemplate the possibility that they would take a joint approach. In our submission

that is not what they did. A joint approach would entail a joint position statement saying we are jointly adducing the following evidence. They chose not to do that, so we are not in that territory.

The second point is nothing is precluding them from cross referring but, as I submitted a few minutes ago, if that is the choice they make, they do so at their own risk because if the evidence that they have not themselves adduced, to which they choose to cross-refer, the party who is adducing that evidence settles, then that witness is not their witness.

THE CHAIR: But is there any property in a witness?

MS FORD: There is no property in a witness, and we have never sought to suggest anything to the contrary, and the Tribunal may have seen, we have strongly resisted any suggestion that the steps that we have taken are in any way seeking to suggest that there is a property in a witness.

Of course, if this debate had been happening back at the time of the positive or even perhaps the negative position statements, we would say, well, you can now make an application to be permitted to adduce this as your evidence. Insofar as that application is being made now, it is, we would say, vastly too late.

I am going to come on to the submissions that were

made on the legal position, because it is not the case that this evidence is self-evidently in as these parties' evidence. So, we say that nothing precludes them from cross-referring, clearly, they have done so, but they do so at their own risk in the event that the party that actually brought this evidence then drops out.

So, we were dealing with the submission that no objection was taken.

THE CHAIR: Yes.

MS FORD: The point I am making is an objection was very clearly taken in the case of NYKK. The response to our letter is the one I think which is now on the screen. {I/146/1}.

THE CHAIR: Yes.

MS FORD: They are reserving the right to serve a negative position statement and evidence in due course. We know, of course, that they did not serve evidence in due course. Then:

"NYKK considers that it is not precluded from arguing at trial, consistent with its Defence and by reference to any evidence served by any party in the proceedings, that the 'overall pricing' methodology is the correct approach and/or that it would produce a different result from the application of the 'silo pricing' approach. Indeed, the proposition that the

Class Representative's approach is flawed as a matter of law and incapable of establishing loss is, fundamentally, a negative or responsive position rather than a positive case."

So that is what they said in response to our fundamental objection to the position they appeared to be taking at the time.

Then we responded, tab 152 {PTR/152/1}, and the headline statement is 1.3:

"... our client's position is that the Fifth Defendant is now precluded from arguing that an 'overall pricing' methodology is the correct approach and/or that is would produce a different result~..."

If we can go over the page, please, to look at 1.7 {PTR/152/2}, we say at 1.7:

"... it is not open to NYKK, particularly in the light of the orders made in these proceedings, to argue as a matter of pure assertion without any factual or expert evidence whatsoever, that had the Class Representative taken a particular alternative approach to seeking to prove its case, that alternative method would have shown that there was no loss to the class."

This is in the context of pointing out -- responding to NYKK's attempt to conflate a positive and a negative case. We say it is not open to you to make these

assertions without any evidence, clearly the premise of that is that we do not accept that they are entitled to cross-refer to other people's evidence in that way and treat it as their evidence.

Then just -- there is a fairly detailed argument about this in the course of the letter but just to go to 4.4, please {I/152/4}:

"As is clear from the Supreme Court's judgment in Merricks, the Tribunal must do its best to quantify damages based on the evidence available. As your client has led no factual or expert evidence, there is nothing for the Tribunal to consider as regards NYKK's position. It is no longer open to your client to argue that the proper approach is the 'overall pricing' approach and that using that approach the outcome is or would be different from the damages found using Mr Robinson's methodology."

So, insofar as the submission is made that we never took issue with the notion that everybody was referring to the same evidence, we very clearly did in relation to NYKK.

THE CHAIR: Yes.

MS FORD: As to MOL, it is right that we did not object to MOL cross-referring to other parties' evidence in circumstances where that other party was still a party

to the proceedings, because the reality of the matter is, of course, that those matters would be traversed anyway in dealing with "K" Line's case. We do say that now the Class Representative has settled with "K" Line, the position is relevantly and materially different.

The submission was made that there had been some common understanding throughout that permitted continual reliance on "K" Line's evidence. In my submission, that is clearly not the case. There was a common understanding that there was no point in objecting while "K" Line was still in the proceedings. There is no basis whatsoever to suggest that there could have been any common understanding that once "K" Line and its evidence ceased to be party to the proceedings, everyone else could proceed on the basis that their witnesses were in fact common witnesses advanced on behalf of all the Defendants, when clearly they were not.

Moving on to address the legal provisions which were relied upon, and these are the cases of Gurney and Shepherd Neame, starting, please, with Gurney, {PTR/51/1}, and can we go, please, over to page {PTR/51/2}. If we look at paragraph 4, can we remind ourselves of what this case about. This is about CPR 35.11:

"Where a party has disclosed an expert's report

[physical document], any party may use that expert's report as evidence at the trial."

So, we are here talking about them cross-referring to an existing report produced by another party.

Now, you have been shown the majority of the reasoning in this judgment but you have not been shown paragraph 11, perhaps we could go to that on page 4 {PTR/51/4}.

THE CHAIR: Yes.

MS FORD: This is the judge's essential parting shot:

"... in general terms it would be artificial for me to ignore entirely the views of the other engineering experts, it should not be thought that any great weight can be attached to the views of any expert who will not give oral evidence at the trial. Moreover, the fact that the majority of the engineering reports reach broadly similar conclusions on causation is also, of itself, of little account: cases of this kind are decided by reference to the quality of the expert evidence adduced at trial, and in particular the oral evidence. They are not determined by weight of numbers."

This in my submission is directly relevant to the question the Tribunal asked about what is status of this material. The report remains in the bundle. The

cross-references which were made at risk obviously remain in the position statement, but what weight does the Tribunal place on the evidence of the witness whose -- who was invited to come and give evidence on behalf of a party who has now settled? As the judge says, when they are not attending to give evidence, then the answer would be very limited weight.

What this doesn't do in my submission is entitle the non-settling party to treat that witness as essentially their own and assume their right to adduce oral evidence from that witness as their own at trial. It is clearly not saying that that is what you do. What you do is you can refer to the report, but it is necessarily given limited weight.

That is the caveat that was then expressly cross-referred to in the second judgment that Mr McGurk took you to, that is Shepherd Neame, if we go, please, to {PTR/52/3}. We were shown the judge's reasoning in 14. The particular pertinent part is just above F.

THE CHAIR: Yes.

MS FORD: Where he says:

"There is no prejudice particularly to EDF who can either call the two experts or rely upon the factors set out in para 11 of the Gurney judgment."

That is the paragraph we have just looked at. The factors there are essentially you can make the submission, but the report should be given limited weight because the witness in question is not attending trial.

So, there you have the court again saying that the effect of this rule is yes, the report is in the bundle, yes, you can refer to it, but it is given limited weight. Insofar as these Defendants have proceeded on the basis that this is a rule that means they can treat that as their evidence and presumptively bring that witness along to trial when they haven't chosen to do so when directed, in our submission, that is wrong as a matter of law.

THE CHAIR: So, what do you say about when it carries on:

"I have made it clear in argument that I would permit EDF's counsel to cross-examine them if called pursuant to any witness summons..."

MS FORD: Yes, EDF is the party who is essentially trying to resist any reliance on the report, so this is not a non-settling defendant who is saying I now want to rely on the report and the court is saying yes, you are perfectly permitted to treat this as your evidence and bring them along. This is saying essentially in an extreme situation the party is objecting to ongoing

reliance on the report when the person who adduced it has settled, the party who adduced it has settled --

THE CHAIR: Will be allowed to cross-examine them.

MS FORD: Could, if they saw fit, summon the witnesses. No one is suggesting we are going to be summoning the "K" Line witnesses.

Of course, what the judge was saying here is that the alternative is to rely on the paragraph 11 factors that the judge in the previous case identified, which is to say they are not here, they get given limited weight.

THE CHAIR: So, do you say this authority is in support of the proposition that the Defendants in those -- in that case, the people who wanted to rely on it, were not entitled to apply to call the witness? Do you say that is authority for that proposition?

MS FORD: I am saying that was never the suggestion that was being made. If we go back to the rule that Mr McGurk took you to, which was in issue in Gurney, we are talking about {PTR/51/2}, paragraph 4.

THE CHAIR: Yes.

MS FORD: The rule is:

"Where a party has disclosed an expert's report, any party may use that expert's report as evidence at trial."

So, they may refer to the document and the judge then

goes on at 11 to say if you do so, it may be given limited weight. It is not in my submission any authority for the proposition that because somebody has adduced this witness, then that witness can automatically be adduced by any other non-settling defendant.

THE CHAIR: Could you just go over the page of the report, please.

MS FORD: The Tribunal will see paragraph 6:

"It only applies where party A has already disclosed an expert's report and party B wants to rely on it as evidence at the trial."

THE CHAIR: Yes, thank you.

MS FORD: So, in my submission, this is the answer to the Tribunal's question: what is the status of that evidence? The status is the report has been disclosed by "K" Line. "K" Line has now settled. They are entitled to refer to it but our submission will be it should be given very limited weight, particularly in circumstances where the Tribunal will have the benefit of other oral evidence.

What it doesn't do, in my submission, is provide any legal basis to assume that because there has been some cross-reference in the statements of case, automatically these Defendants are then entitled to treat this as

their witness.

In fact, I go further, there can be no assumption but equally the directions the Tribunal gave, in my submission, it would be completely contrary to those directions to proceed on that basis.

THE CHAIR: But it sort of still brings me back to where the real prejudice is in the case, because your client is well aware of the contents of these reports.

MS FORD: That is certainly true. That would not in, my submission, mean that it is permissible or legitimate for these Defendants to proceed on the basis that it is their witness in circumstances where they were very clearly directed that they had to bring forward their case at the relevant time.

This was in response to the Court of Appeal's indication that there should be active case management in this case and this was the Tribunal's response, to say the way we are going to approach this is to say you must adduce the entirety of your case at the relevant time. Now, yes, they purported to cross-refer, but the Tribunal has my submission, that is very much at your own risk in circumstances where it is quite evident that the party whose witness that is might well settle out. You do not have an automatic entitlement to treat that as your witness when you did not instruct them jointly.

THE CHAIR: But is there not something about efficient and cost-effective case management that means that you can avoid duplication? I mean, your submissions appear to proceed on the basis that once you have elected to put in a position statement, then you are narrowly within those tramlines of that position statement and insofar as you draw on work done by other of the Defendants, you cannot then look to that later if they disappear from the proceedings. You are saying it is very much everything has to be in it and if it is not, you cannot refer to it at all. Is that right?

MS FORD: I did make that submission. The Tribunal recognised from the outset that the alternative possibility, which might well have been sensible and efficient, would have been to take a joint approach. But it is very clear that is not what these did Defendants did. They did not produce the Defendants' positive position statement accompanied by the evidence instructed essentially on behalf of all of the Defendants. They each chose to produce their own positive position statement setting out their position, with the very obvious exception of NYKK, which did not produce a positive position statement at all. So, they have clearly elected not to take that efficient method, they have chosen to plough their own furrow and to run

their own case.

In those circumstances they have not adduced evidence in support of their case and merely cross-referring to another party's evidence comes with what really ought to have been an obvious risk, that if that other party settles you do not have any evidence.

THE CHAIR: You could plough your own furrow on certain things and pool resources on others, could you not?

MS FORD: Entirely possible, theoretically. Did they do it? In my submission no, clearly not. They took their own path. They did not jointly instruct these witnesses. These were "K" Line's witnesses and there is no legal proposition which says we are entitled once "K" Line settles to treat these as our witnesses.

There were a number of submissions on our skeleton, paragraphs 25 to 26, but I have essentially addressed the Tribunal on those already because that was the essence of the positive position that I put forward.

I should just address the submissions that were made in relation to Mr Finn's situation. The submission was made crucially what they did not have was his phone number. If we look, please, at {PTR/31/3}. This is the evidence which was made -- adduced in support of the Finn application and we can see set out exactly what they did have. It is essentially the publicly available

information. So, the website -- this is subparagraph 9(b):

"The website does not show any telephone number, but referred to a team email address."

We have got LinkedIn mentioned at (d) and we have (e), a mention of leaving a voicemail on the mutual connection on LinkedIn, asking for Mr Finn's contact details. (f), we have an email address, (g) we have directory enquiries for Mr Finn's telephone number, which was called several times and was engaged each time.

Going over the page.

THE CHAIR: Yes.

MS FORD: There is another reference at (i):

"... I tried again multiple times to reach Mr Finn on the telephone number which had been supplied by directory enquiries, but the line was still engaged."

Now, we know that Mr Finn did eventually get back in contact. I am afraid I don't know whether or not the relevant information as to how exactly he had received the message was given, but one of these methods ultimately yielded a response from Mr Finn.

So, I do strongly refute the suggestion that we, the Class Representative, have taken any steps to prevent these parties from contacting Mr Finn. What we have in

my submission entirely legitimately done is contracted with "K" Line that it shall not facilitate efforts to contact Mr Finn. We have not actively obstructed these efforts and, ultimately, they yielded a response from Mr Finn.

THE CHAIR: Yes.

MS FORD: Now, it will be a matter before the Settlement Tribunal to respond to the submissions that these Defendants have put in that we should not have negotiated a non-cooperation clause and that is for the Settlement Tribunal to adjudicate upon. But my very strong submission is that we have not in any way positively obstructed these Defendants from seeking to contact Mr Finn and they have in fact succeeded in doing so.

So, we resist any suggestion that there has been any improper conduct on the part of the Class Representative in relation to the rule that there is no property in the witness.

THE CHAIR: Yes.

MS FORD: Mr Gibson reminds me that of course the way that was ultimately successful in contacting Mr Finn would have been the way in which "K" Line originally sought contact with him. They were no worse off than "K" Line, who originally adduced this evidence.

Unless I can assist further, those are the reasons why we continue to resist the application that the Defendants should be permitted to adduce these witnesses as their own witnesses, extremely late in the day.

THE CHAIR: Thank you. I think strictly, Mr McGurk, I will give you a right of reply because I do consider this to be your application. I do not know if you have anything you wanted to add?

MR McGURK: Do you need to hear me on anything?

THE CHAIR: It is only if you wanted to say anything.

Looks like a no.

Reply submissions by MR McGURK

MR McGURK: Well, there is more I can say. It is an extraordinary set of propositions. Two weeks ago, everyone thought we were going to trial with all of these witnesses and my learned friend's response to my suggestion that there was a common understanding to that effect (a) I did not understand, (b) to the extent that I can discern where she was going with it, it is just not correct. This is an almighty rabbit from the hat.

If she is right about this, it creates the perverse incentive that everyone would feel compelled to put in their own evidence if they are forced to stay within their guard rails and take the risk of what might happen if someone settles out. She might say well, joint

instruction is the alternative. Well, the President at the CMC said you do not need joint instructions and left it loose as to how group cooperation, the party grouping cooperation could proceed.

The letter she showed you was really about whether NYKK could even pursue what it had pleaded in its defence. That is a legal point. We were saying all along if you are wrong about silo pricing then, as a matter of law, your claim fails and the idea that because, as we were entitled to, we did not put in a PPS, we were not able to run our pleaded case that this is wrong in law to trial is nonsense.

Finally, she says yes, we are entitled to rely, but, again, all of that is just subject to the risk we all take that somebody may settle out, and again the magic turns on whether there was a joint instruction or not, and if not, you take the risk and even if you are proceeding to trial on the basis that all of this is in, two weeks before trial somebody goes: on your head be it, it is deeply unattractive and it is obviously wrong.

THE CHAIR: Thank you. Clearly this is something we are going to have to take a few moments to discuss. I think shall we take 10 minutes. Thank you.

(3.01 pm)

(A short break)

(3.11 pm)

(Proceedings delayed)

(3.29 pm)

Decision by THE TRIBUNAL

THE CHAIR: Right, again we will give you our decision and reasons will follow. We are not going to decide now whether or not a formal application is required to rely on the evidence but, if a formal application is required, it is granted.

That is in relation to, I should be clear about this, the First to Third Defendants. We also grant permission to the First to Third Defendants to call the industry expert witnesses.

We find the position in relation to NYKK more complicated, in particular, in the absence of the positive position statement and the relatively few references across to the evidence in issue. So, we want to consider that further. So, you will have a reasoned decision in due course and that will include a decision for NYKK. So, the decision in relation to NYKK is reserved.

So, I think that means that we can proceed with further issues relating to the timetable.

Submissions by MR QUAYLE

MR QUAYLE: I am going to be addressing the trial timetable.

Given the decision that you have just made, there is only one proposal presently before the Tribunal which takes into account the witnesses, so Chaisty, Finn, Good, Dent and Cunningham, so I propose perhaps that I address you on that first and take you to that first, given that is the only proposal currently before the Tribunal where there is a concrete proposal.

THE CHAIR: We have sort of a prior issue, really, which is the hot tub and how that is going to be run, because we have read both sides' submissions as to the trial timetable and how the hot tub should be run and the Tribunal has views of its own.

We consider that all factual and industry expert evidence should be heard before the economic expert hot tubs and we also consider that the hot tub should be split into three sessions overcharge and umbrella effects, upstream pass-on and value of commerce, for the second one, and the third one would cover downstream pass-on and interest. That is our preferred structure. I am not going to shut out the parties if they want to try and persuade us that that is inappropriate.

MR QUAYLE: If I may --

THE CHAIR: Tell me it is inappropriate?

MR QUAYLE: -- make three submissions on why we say that it would not be appropriate for all of the factual experts

and industry evidence to be heard before the hot tubs and essentially the position of the Defendants is that the two areas of evidence are fundamentally distinct and what we are proposing to do and the proposal which is already before the Tribunal does, ensures that the Tribunal has the benefit of the factual evidence that pertains to that particular area of expert economic evidence and that is grouped together in the first segment of the trial whereby you have the evidence from Mr Kosugi, MOL's witness, followed by the overcharge hot tub. Then the second segment of the trial groups together the factual and industry experts' evidence on the -- on what happens essentially further down the supply chain.

The reason this is important, the reason what the Class Representative has proposed creates various issues and, indeed, it would seem what the Tribunal, its current preference creates some issues -- is that it creates a very significant distance between some of the critical evidence on, for example, upstream pass-on, from Mr Goss and Mr Whitehorn, and the point at which that will actually be addressed by the -- by Mr Robinson, first in the hot tub and then under cross-examination.

So, I think the most helpful way to illustrate this would be to actually go through their proposal for the

hot tub which is at {PTR/7/1}.

THE CHAIR: Yes.

MR QUAYLE: So, on this proposal they have Mr Goss and Mr Whitehorn giving their evidence beginning on 16 January, the first week.

THE CHAIR: Yes.

MR QUAYLE: But then Mr Robinson does not give his evidence on upstream pass-on for another three weeks, so until week four. So, if we go over to the next page, we have Mr Robinson giving the upstream pass-on hot tub on 4 February and then on Thursday you have the cross-examination of Mr Robinson.

Now, that matters because Mr Robinson's approach to upstream pass-on is explicitly almost entirely predicated on how Goss and Whitehorn say the market works. So, my learned friend said this morning that Mr Goss and Mr Whitehorn's evidence was the underpinnings of the Class Representative's entire case and that's correct, and they have made that clear, both in the joint experts' statement where Mr Robinson says that his pass-on framework is unique to this case and is reflective of the evidence provided by the Class Representative’s industry experts. For your reference that is proposition 30 in tab D -- bundle D, tab 61, page 40 {D/61/40}.

Then in Mr Robinson's fifth report, this is at paragraph 230, perhaps we could bring it up, it is {D/20/25}.

THE CHAIR: Yes.

MR QUAYLE: Perhaps if we go back a page and back a page again. {D/20/23}. This is described as:

"Factual basis underpinning the assumptions upon which my methodology is reliant."

So, Mr Robinson sets out a series of propositions about how the market works. He does that for several pages, so if we skip forward then to page {D/20/25}, he says:

"As the above shows, the assumptions I rely upon are almost entirely based upon the evidence of the industry experts regarding how the automotive industry operates in practice."

THE CHAIR: Yes.

MR QUAYLE: So, the point is, if we go back to what the CR is proposing on the timetable, {PTR/7/1}, splitting it up in this way is going to mean there is a very long time between Mr Goss giving the evidence on which Mr Robinson explicitly and exclusively relies on upstream pass-on, and in between Mr Goss and Mr Whitehorn giving their evidence, you have Mr Kosugi giving evidence on overcharge, you have all the factual witnesses speaking

to various different parts of the supply chain, including, and in addition to the ones in the CR's proposal, Mr Good, Mr Finn, Mr Chaisty and Mr Cunningham and Mr Dent, and so -- and then you have all of the expert economists on overcharge. So, you see that starts on 30 January.

So, on this proposal you have a gap of almost three weeks with all of that in between. That is going to be at least a week longer now that all of the Defendants' evidence, the Defendants' industry expert evidence is going to be factored back in.

The other major problem with what the CR is proposing is that the single hot tub they are proposing puts a lot of distance between the hot tub and the cross of the experts, but I think the Tribunal's current preference is to split the hot tubs up, probably with hot tub --

THE CHAIR: Yes.

MR QUAYLE: -- followed by cross, which would alleviate that concern. So that would address with that.

THE CHAIR: Yes.

MR QUAYLE: So, ultimately, there are two parts to this case. This is an indirect claim. First of all, the Tribunal needs to come to a view, test the evidence, and what happened -- what the immediate effects of the cartel

were, what happened in the car carrier market, to what extent OEMs were overcharged for car carrier services.

Then it has to answer the logically antecedent question to that, which is how much of that overcharge flowed down the supply chain? Those are fundamentally two distinct issues and there are two different parts of the evidence which go to the issues and, in my submission, it is more efficient, more logical for the Tribunal to proceed along those lines.

It also better reflects the way that all of the parties have approached these issues in the case to date. Everyone has consistently delineated between overcharge and umbrella on the one hand and pass-on and the other issues on the other side.

I am not going to labour this point, but it is in our skeleton at paragraph 36, we have given you a string of references to parties' positive statements, negative statements, expert reports, joint expert statements, that all demonstrate how that -- how the parties have split those.

Now, the Class Representative has objected to what we have proposed on several bases. The primary one appears to be that they consider there to be overlap between the areas of evidence and the first -- they give -- they give several examples. So, the first one in

their skeleton is that some of their factual witnesses speak to demand (inaudible) shipping, negotiations between OEM and shippers and they say that is an overcharge issue.

But, in fact, it is two single -- all they have referred to is two single passage, two witness statements, which are peripheral points on the overcharge analysis and haven't formed a material part of any parties' case on overcharge to date.

The second part of their (inaudible) objection is that Mr Robinson considers that overcharge and pass-on are interconnected somehow in this loss calculation methodology. But that is actually not correct because that interconnection only happens at the upstream pass-on stage.

I can illustrate this briefly. If we can go to bundle {D/20/26}. This is Mr Robinson's fifth report and this is where he summarises his methodology of how the loss is calculated.

THE CHAIR: Yes.

MR QUAYLE: Paragraph 3.2:

"I set out below a high level summary of my methodology to calculate the overcharge and the resulting loss to the end customer."

And you will see point (a), this is essentially

a summary of how he arrives at his overcharge estimate and you can see that he then refers, at the bottom of that bullet point, he says:

"This step is discussed in detail in Section 4~..."

So, this, we say, is the matter he would be addressing in the first expert evidence session that we are proposing, the overcharge session.

Now, if you go down each of the further steps, so (b) and then over the page {D/20/27}, (c), (d), (e), all of these steps refer to section 6. Now, section 6 is entitled:

"Pass-on of shipping cost overcharge through the OEM MSE supply chain to the end consumer."

So, it is pass-on. The interconnection between overcharge and pass-on is dealt with -- that they have said constitutes an overlap is at paragraph 3.2(e), it is the overcharge per vehicle figure, and again if we go over the page {D/20/28}, you will see this includes another cross-reference to section 6, halfway down there, which again is pass-on.

So, on Mr Robinson's own approach, this is not -- this particular point is not an overcharge issue, it is an upstream pass-on issue.

THE CHAIR: Yes.

MR QUAYLE: Now, in their skeleton the Class Representative

made a couple of other points which they say demonstrate overlap. One they say that VOC, volume of commerce, feeds into the parties' case at a different stage. I think they misunderstood what we mean by VOC and I think, as the Tribunal has correctly identified, VOC arises in the context of upstream pass-on and we mean it in the way the joint experts mean it in the joint experts' statement.

So, it is not an overcharge issue at all, it is to do with the volume of commerce, i.e. the number of vehicles that were subject to the alleged overcharge once it had flowed down the supply chain.

Finally, the Class Representative says that certain economic factors arise in relation to overcharge and upstream pass-on, like market competitiveness. I am not sure I understand that, but even if it is true, it makes no difference. It would happen in both a single expert session or a split session. The second time the issue comes up, the expert can simply refer back to their earlier comments.

So ultimately what we are proposing and the segmentation that we are proposing, we consider makes the issues more digestible for the Tribunal. You will hear -- you will have the benefit of the factual evidence, followed immediately by the relevant economic

evidence, that will -- it will be more logical. You will be able to form a preliminary view on overcharge and umbrella before you move on to the next logical step in the process of considering to what extent that overcharge has flowed down the supply chain.

It means that the evidence will be tested together in a way that is proximate so that you hear from Mr Goss and Mr Whitehorn and all the other factual witnesses that the Class Representative has put forward and all of the Defendants' industry experts, side by side, followed by testing the economists, precisely on those issues.

That we say will make it more digestible and give the Tribunal and the parties a better opportunity to properly test all of the evidence without having to scramble back through transcripts and without bouncing around different evidence on different issues almost at random.

We say that our structure embodies the principles of active case management and fact finding and the trial structure which are -- which arise under the Tribunal's general principles in rule 4 and we say it also reflects the Court of Appeal's firm steer on the case management of this claim, in its decision in the certification appeal.

The Court of Appeal said the CAT needed, as part of

its gatekeeper role, to set out how it expected the trial to proceed. That was true of the -- that guidance rings as true for the trial structure and how this is approached and how the Tribunal deals with the ships passing in the night, just as much to the trial as it did to the positive and negative case structure.

So, on that basis, we respectfully submit the Tribunal adopt our proposed structure, the two segments.

THE CHAIR: Thank you.

MS FORD: Madam Chair, we took the liberty of preparing an alternative proposal, in the event that the Tribunal directed that the industry evidence was in.

THE CHAIR: Yes.

MS FORD: This essentially -- on the assumption that the industry evidence was in and then essentially adopting the position that the Tribunal indicated provisionally that it would wish in terms of the hot tub structure, and happens to have anticipated that, so I wonder if I might hand that up.

THE CHAIR: Yes, that would be helpful.

Have you not seen it? (Handed). Thank you.

MS FORD: So, to address head on the point that has been made that there might be too long between industry expert evidence and Mr Robinson being cross-examined that he might not be able to hold it all in his head,

notwithstanding the availability of transcripts. On this alternative timetable that we have just handed up, the difference between the period of time when Goss and Whitehorn are done with their evidence and the upstream hot tub is 22 days. On the Defendants' timetable, the difference between Goss and Whitehorn finishing their evidence and finishing the hot tub is 20 days, so it is really vanishingly small in terms of distinction and in our submission there is really no great concern that Mr Robinson will be materially prejudiced by the delay, he can review the transcripts and consider appropriately.

I do have some submissions to make about the distinction between upstream and downstream -- sorry, between overcharge and upstream pass-on in the context of Mr Robinson's methodology but I am very mindful of the time, I wonder if it might be better to just focus on the practicalities of how we have laid this out.

THE CHAIR: Yes, I think so.

You will have seen a certain amount of activity delivering bits of paper to the panel as well. We took the opportunity whilst we were out in the last break of seeing what the impact would be on a timetable and so we have also prepared a timetable. Is it best that we all rise for 10 minutes and look at your proposal, review

your proposal and look at what the panel thought was do-able and see if there is any overlap on that?

So, you do not object to the hot tub being split, so the fact that our timetable reflects that is fine. You did, but I am not sure -- are you maintaining that objection?

MS FORD: Well, we had understood that you were indicating separate sessions but what I understood to be between us is whether or not those sessions are themselves split around other evidence. We are fully with the Tribunal in terms of the indication that the evidence, factual and expert, should come first and then the hot tub, for the economic experts, that is very much the position we have taken, within that --

THE CHAIR: So, it looks --

DR MAHER: (Inaudible) if we split up the hot tubs, the cross-examination would come after each relevant hot tub subject.

MS FORD: In principle we have no objection to that.

THE CHAIR: Fine. So why do we not rise for 10 minutes -- I think we have sufficient copies -- and everybody has a look at the timetables and sees where as a matter of practicality we are now at with it. So, 10 minutes.

(3.49 pm)

(A short break)

(4.01 pm)

THE CHAIR: Right. Ms Ford.

MS FORD: (Inaudible) practicality largely relating to the witnesses' availability and such like and timing.

The first is the Tribunal's timetable envisages the industry experts for the Class Rep being on 27 and 28 January. The slight difficulty we have there is that Mr Whitehorn is only available from 29 January. One solution would be to just switch Defendants and Claimants, subject to their availability.

THE CHAIR: Flip them, yes.

MS FORD: There is then for the Defendants' industry experts, there are obviously three of them and we had originally provided for three days to cross-examine them. Obviously, we can do our utmost to try and keep it proportionate and try to get it into two, but we do know that at the moment the 31st is a non-sitting day so query whether it could be pencilled in as a possible overspill and we would do our best not to run over but in the event that we do.

THE CHAIR: Yes, we had thought about that, yes.

MS FORD: And then the third point is just concerning Mr Cunningham, who is on 10 February.

THE CHAIR: Yes. You are going to tell me he cannot not

do that day.

MS FORD: No, I think he is fine. We had originally pencilled him in for half a day on the basis that he would only be coming to give evidence on behalf of the Class Representative. --

THE CHAIR: Right.

MS FORD: --as part of the evidence he gives for this side. Insofar as he is now appearing in a dual capacity, we anticipate he may need longer than half a day.

THE CHAIR: Right. This is a sort of a rough outline. What we are trying to avoid is splitting cross-examination over a weekend unless it logically falls. We are not particularly keen on that, because (a) we do not want people unnecessarily sitting through a weekend under purdah and (b) the sort of -- there is a slight perception that someone has had longer to prepare their cross-examination perhaps than other advocated, so we are trying to avoid that.

MS FORD: Yes.

THE CHAIR: So, these are -- this is how we broadly see it. We would be perfectly happy if the parties went away and fiddled with it, if you were broadly happy with it, so that you could come back and say, we can accommodate this by moving this and sitting on this

Friday but not the Monday or re-jigging it. If you are happy with the principle, but I suspect the Defendants may not be.

MR QUAYLE: We are happy, we take the Tribunal's steer on that. The major issue we see, which is similar to the one my learned friend has raised with respect of the Defendants' industry experts is that there is not a great deal of time in this timetable for all of their factual witnesses.

THE CHAIR: Right.

MR QUAYLE: So, there are nine in total and those are being allocated essentially four days.

THE CHAIR: Right.

MR QUAYLE: So, you have Tozer, Griffin, Palmer, Minta, Slater, Price, Duffy, Hollway and Mr Cunningham and four days is not very much. So, there are obviously non-sitting days on Friday 17th, on 24 January as well, but even allowing for that, it gets a bit tight and I obviously do not want to presume that the Tribunal is necessarily willing or available to sit on those Fridays.

So, I suppose the question now, to allow us to go away and discuss with the other side is to what extent are you amenable to that or to the timetable being extended out slightly if that is necessary, to give

proper time.

THE CHAIR: Well, I do not think we would have any issue if you said you wanted the factual witnesses to extend out by few days. But you have heard the steer about cross-examination, in particular relating to certain witnesses not spanning over the weekend. We are not so keen on that.

MR QUAYLE: That is understood.

THE CHAIR: And yes, I think that should work. It is basically following that order. This has the benefit from your client's perspective of the industry evidence being heard closer to the hot tub, which, as I understood it, was a concern.

MR QUAYLE: That is appreciated, I am grateful.

THE CHAIR: Yes.

I will signal now that 14 February, sitting on the Friday actually is not possible, and it would have to be a hard finish on Thursday 13th. But other than that, you can assume a certain degree of flexibility, as long as there is the time for us to prepare the hot tubs.

So can we leave you to bash out the timetable or there is any other fundamental point?

MS FORD: Certainly no fundamental points from our perspective. Given the Tribunal's helpful indication that you might be amenable to sitting on a Friday, one

possibility in relation to Monday 10 February, which is the sort of overhang of cross-examination of the economic experts, would be to move that back to the Friday, which also has the benefit that the cross-examination does not run over the weekend, that would then leave a day for Mr Cunningham rather than half a day.

THE CHAIR: Yes, that is also an option, although if more time is factored in for the factual witnesses it may all shunt forwards anyway, so yes. But yes, feel free to think along those lines.

MR QUAYLE: One point I would just make, it might just be typographic, on 19 February we have economic experts cross-examination and on 20 February and that was (inaudible), I expect that was intended there was hot tub on those issues on 19th and 20th.

THE CHAIR: Yes, you are completely right. One day of a hot tub on that, thank you. You will work out that some of the colour coding has gone wrong, but I think you can work out where we are going with it.

So that would be the -- is there anything else on the timetable?

MS FORD: No, I do not think so. I am hoping that that largely disposes of the hot tub protocol as well. There was a very small question of the extent to which the

Tribunal wanted to have the headings and the agenda in the form that they are.

The only very limited point that we made about the Defendants' more detailed approach is that they have taken the headings from the joint experts' statement and in some cases that is not necessarily useful guide to where actually the disputes are. So, for example, some of the headings are the experts defining the concept of the Class Representative's pricing theory and that does not seem to necessarily be a subject for hot tub discussion so much as the way in which they proceeded to then express themselves in the remainder of report.

Also, there are various headings where there is no present dispute between Mr Robinson and MOL's expert, Dr Bagci, and so those are the ones that concern the views of the settling Defendants' experts, and again it would seem that a hot tub involving the Class Representative's expert and Dr Bagci would not necessarily need to traverse that ground. That is subject to the point we are going to come on to discuss, which is the extent to which Dr Bagci should then be permitted to scan over the settling Defendants' work and adopt, which just to flag up our position we say would not be appropriate.

THE CHAIR: Yes. Shall we put the hot tub protocol to

one side then for now and deal with the point of substance, which is the one you have raised.

Raised.

MS FORD: Yes.

THE CHAIR: I wasn't sure, is there a current application in relation to that?

MR QUAYLE: No, we trailed (inaudible) in our skeleton (inaudible). At present we do not intend Dr Bagci to put in any evidence formally adopting any aspect of the other experts' evidence, so Dr (inaudible) and Dr (inaudible). Obviously, there is already a joint expert statement in which she has commented on their approaches, we are not intending to put in anything supplementary to that at this stage.

There is a separate point which is Dr Bagci -- an application we have made in respect of Dr Bagci's supplemental report on the attribution (inaudible) between Defendants, but that's --

THE CHAIR: That's a separate point, is it not? Yes.

MS FORD: May I make two very brief points in response to what we just heard. The first is when it is said we are not doing it at this stage, in my submission, if it is not done at this stage, it really will be too late, it cannot be entertained at any later stage.

The second point is that insofar as Dr Bagci has in

the context of the joint statement insofar as there are propositions that identify disputes between Mr Robinson and the settling Defendants' experts, which Dr Bagci has not addressed in her reports, in our submission, that does not come into the body of her evidence because she has purported to comment on that (inaudible) in the joint experts' statement. In our submission, Dr Bagci's evidence should be confined within the four corners of the report she has lodged and is not expanded because she has passed comment on a dispute that occurred as between Mr Robinson and another expert.

THE CHAIR: I think the starting assumption must be that Dr Bagci's report is Dr Bagci's evidence, that is her expert evidence and if she wishes to adopt another point I would expect that to be expressed more formally.

Application by MR QUAYLE

MR QUAYLE: Just one -- if we are ready to move on to the Bagci application point. We trailed this application in our skeleton, as I say, it was filed very shortly after the settlements became live, as it were. We have since made a formal application to file on Monday, it is in the PTR bundle at {PTR/48/1}.

The Class Representative has not responded to that application. We do not know what its position is. I can take this perhaps more briefly if they were to

indicate whether or not they propose to oppose it.

MS FORD: We do oppose it, the reason we have not responded is because it has only been put in extremely late.

MR QUAYLE: We are making this application because both "K" Line and the WWL settlements have been made on the basis that they include a barring provision, essentially the same form as that adopted in the previous --

THE CHAIR: Can I just stop you there. It is very late and the Class Representative has not had time to consider it properly and it is all very well saying you have had a day or whatever but there is all sorts of other preparation that goes on around these hearings and your skeleton I think is due tomorrow, is it not?

MS FORD: Yes, plus there is a settlement hearing tomorrow.

THE CHAIR: Yes, so there is plenty on the agenda. Just as a matter of principle, is there any reason why we have to deal with the effect of the barring provisions during the trial itself? Is it something that can be left to a phase 2?

MR QUAYLE: No, in a word, because it directly impacts upon the damages award that the Tribunal may ultimately award. So, for example -- so the barring provisions make express that the trial Tribunal may determine that WWL and "K" Line's proportionate liability is higher than that which forms the basis of their settlement.

THE CHAIR: Yes.

MR QUAYLE: So, if, for example, the trial Tribunal was to decide that "K" Line's share is not 17%, it is actually 20%, then that means the amount that the Class Representative is able to recover from the Defendants is reduced accordingly. So, this is something the Tribunal is going to have to grapple with at the trial, at this trial, and that is the case because the barring provisions have essentially, for the first time in any material sense, directly put in issue the attribution of liability between the Defendants.

The point has been made against us that this is late but this point simply did not arise in any material sense before now, the CR's claim was brought directly against all of the Defendants, alleging liability on a joint and several basis, and there are no contribution proceedings presently on foot. So there is not presently list between the Defendants but the reason it has now come to light is because they are proposing in their settlement proposals to carve out from the claim a proportion of the total liability attributable to the rest of the Defendants and at present there is not any evidence before the Tribunal which directly addresses that point and that is why we are making this application, and --

THE CHAIR: I think if you are going to tell me this needs to be determined at some point, I think I would want to see a draft of the expert report that was going to go to the point, so we could see how much work was going to be involved for the Class Representative because we have only got four weeks now before trial.

MS FORD: May I make an attempt to explain why we say it does not need to be --

THE CHAIR: Right.

MS FORD: The assumption seems to be that because there is a provision on the face of the CSAV settlement order, which, of course, dates back to 2023, but also provisionally in relation to these most recent settlements which says in the event that the Tribunal may find that there is a greater share of the damages caused to the class than the percentage market share which has been carved out, then we will reduce our claim further. The assumption seems to be that that has effect to put this in issue in these proceedings. In my submission, it absolutely does not at all. What it is doing is making provision, a protective provision for the benefit of non-settling Defendants who have provisionally agreed that they will not bring contribution proceedings consistent with the barring order, that in the event that it turns out that the

market share is greater, then a greater amount will be carved out.

But it is saying "may" and what it is not doing is saying: this is something that the Tribunal must decide. It is saying if this were to be in issue in these proceedings, if for example any party had brought contribution proceedings or if for example in traversing matters that the Tribunal does deal with it happens to make a determination as to market shares, then the consequences would follow. But our submission, and I would ask for the opportunity to elaborate on it a bit more, if it would assist the Tribunal, our submission is this is not something which is presently on the face of this dispute and these proceedings merely by virtue of the form of the settlement order.

THE CHAIR: I thought it all sounded very complicated, and I think I have just been persuaded that it is, and that you need further time to pull together how the CR would approach this, so I am not going to make an order today allowing you to adduce this evidence.

MR QUAYLE: One point, if I may, there is a practical issue with that which is, as my learned friend has said, the settlement approval hearing for the "K" Line and WWL/EUKOR is tomorrow, obviously what we see in the barring provision is part of that, their proposed

settlement, and we have permission to address the settlement tribunal tomorrow.

If this is opposed and the Class Representative is attempting to essentially remove the benefit of the substantive rights that are carved out in the barring provision, which is what it seems they are trying to do then we may need to reserve our position to challenge whether the settlement tribunal is actually able to make the bargain provision.

So, this is something that needs to be addressed now and it is not -- to pull the Class Representative, my learned friend, up on a point, this is something that arises directly in this claim and that is because as part of the barring provision they are also undertaking to amend their claim in this case to say that they will -- the carve-out from the amounts that is pursued against the MN Defendants, the settlement proportion, 17%, 20%, whatever it is, or such higher amount that is attributed to those settling Defendants that the Tribunal may determine.

So, it is something which then has become live in these proceedings because they have amended their claim, they have very recently amended their claim in respect of the CSAV settlement in that regard, that was only six weeks ago that they actually filed that, their amended claim

form, but they are also undertaking to do that in respect of their claim to make further amendments for the purposes of WWL and "K" Line.

So, this is something that is going to be live at the trial because it goes to, as I explained before, the amount of damages the Tribunal is going to award, because it is only going to award it on the basis of the liability that is attributable to the MN Defendants.

I can elaborate on this further, I can actually take you through what the barring provision does and what this undertaking says, if that would assist.

THE CHAIR: I just fear that Ms Ford is being slightly taken by surprise by some of these submissions. This application did come in very late. Are these not matters more appropriately raised at the settlement hearing tomorrow?

MS FORD: Well, it certainly -- what has in particular taken us by surprise is the suggestion that we would somehow be resiling from the protection that we have agreed an undertaking to give the non-settling Defendants, that is absolutely not the case. What our submission is, is that the -- this arose first in 2023 so the suggestion that it has somehow suddenly become in issue now and not previously is wrong, it has been in issue for a year. We have duly amended our pleadings in order to make that

undertaking and nobody has objected to that amendment and no one has responded to that amendment. In particular, no one has responded to say: actually the amount that you have carved out in respect of the CSAV settlement is somehow wrong.

The presumption which continues to be made by my learned friend is that because there is this protection that in the event that the Tribunal were or may determine that there was a different market share actually that puts this matter in issue in these proceedings, that is in our submission, the error that they are proceeding on, because it does not. It requires them separately to have said for some reason, whether it is contribution proceedings or otherwise, it requires them to actually put this in issue.

Quite to the contrary, Mr Robinson's market share analysis has been in his report since 2020. Not only has it not been opposed, Dr Bagci has actually relied on it on two occasions at least in her reports in dealing with the situation on umbrella damages, so, in our submission, there is no basis presently to say that this is positively in issue in these proceedings.

THE CHAIR: Well, I do not think we are in a position to give permission for it or to accept that it is necessarily part of the trial that is going to start on

13 January. We could -- I do not know how you want to proceed from here. I think you need to more formally make the application, supported by the skeleton argument that is going to set out your argument. Ms Ford, your client obviously has to have the chance to prepare the arguments as well.

Now, that all presents more work for everybody on both sides, and I am very conscious of that.

MS FORD: That is in circumstances where our trial skeleton is due on Friday.

THE CHAIR: Yes.

MR QUAYLE: If I may address you on this point, very briefly. So, to reiterate, we can put this before you in draft form, very, very quickly. It is not a long, complicated report. It can be done swiftly. We propose in our application that we have it in on 9 December, and we are happy to do that.

But I think -- I do not want to retread old ground here, but I think it is really important that the Tribunal appreciates that these barring provisions, what this carve-out actually means for this trial. In this trial, the Tribunal is going to form a view on the overall damages award.

THE CHAIR: Yes.

MR QUAYLE: Which is going to reflect all of the Defendants.

It is going to come up with a number if it agrees that there are any damages that are payable. Once it has come up with that number, what the amendments to the pleadings that the Class Representative has made mean is that it then needs to reduce that number to take out the bit that has already been carved up into a settlement.

THE CHAIR: But that is kind of my problem. Why cannot that carve-out -- if we are coming up with a global sum, why can't there be a pause in proceedings for you either to agree the relevant proportion or to put in evidence relating to the relevant proportion? Why can it not be done at that stage?

MR QUAYLE: Procedurally, there could be a second trial, a consequential hearing, another event after the end of the trial which dealt with that. If that would be the Tribunal's preference, then perhaps this issue could simply be parked until that point.

THE CHAIR: I am just very conscious that there is quite a lot going on just to get this trial up and running.

MR QUAYLE: That is -- we completely appreciate and understand that. The reason this has come around in a fairly madcap, last-minute way is simply because these settlements are still breaking news. We only received any indication of what this carve-out would be on -- in respect of "K" Line -- 25 November. It is not very long

ago. Only when we saw the actual settlement applications themselves did we understand on what basis they had proposed to -- the basis for the carve-out market share figure.

So, we simply -- we have not had time to do this before and we reject the suggestion that this is simply always an issue since 2023. Formally, as I have said, they only amended their pleading on CSAV six weeks ago, so that is actually only when formally it became an issue in these proceedings. And the reality is that this wasn't a big issue in these proceedings because CSAV was small fry, CSAV was 1.7% of the overall claim. On any reasonable view of attribution, that was only going to change by a few fractions of a per cent either way, which would have a very marginal impact on any damages award.

So, putting in evidence at this stage, for example immediately after the amendment back in October, would have been disproportionate and unnecessary. It is very conceivable at that point that the Defendants would have taken a different view on each other's liability and that would have generated a side dispute at a point in the claim which is unnecessary because all of the material Defendants were still in the litigation and proceeding on the basis that they would remain in the

case all the way to trial. So, it is only now with these proposed settlements that this substantial issue has been arisen, which is why we are making this application now.

Now, I understand that does create some natural difficulties, if the Tribunal would like to see a draft of the report, then of course we will provide that as soon as we can, and we will do that. It may be that this issue can be dealt with in subsequent proceedings after the trial, but as I say, it does have an impact, potentially, on the settlement tomorrow and that is why in an ideal world we would have permission, we could put this in, we can have that fight later on.

But if the CR is going to persist with obstructing us from putting in evidence which responds to a point they have essentially only put in issue right now, then we may need to -- we will need to bring that to the attention of the Settlement Tribunal tomorrow and we will put that SettlementTtribunal in a very difficult position. So that is why we are saying this now. We appreciate it is late, but we are left with no choice.

THE CHAIR: So, the way I see this, I mean, it sounds like -- I would like you to go away with your clients and decide whether or not it really does need to be part of the trial. Now, if the issue of proportions becomes

relevant, then obviously there is going to have to be evidence about market -- there is going to have to be evidence about it. So, I do not know that the Class Representative is saying if that argument has to happen, you would not be entitled to put in evidence on it. It is just when the argument happens. It can be -- as I see it, it can be a consequential argument after the final decision at trial or it can be -- I do not know the ins and outs but it could be separate proceedings, that is what Ms Ford said previously. But it sounds to me like logically it would follow on from after any decision has been made. Is that enough for your purposes?

So, the way I see this, I mean, it sounds like -- I would like you to go away with your clients and decide whether or not it really does need to be part of the trial.

Now, if the issue of proportions becomes relevant, then obviously there is going to have to be evidence about market -- there is going to have to be evidence about it. So, I do not know that the Class Representative is saying if that argument has to happen you would not be entitled to put in evidence on it. It is just when the argument happens and it can be -- as I see it, it can be a consequential argument after the

final decision at trial or it can be -- I do not know the ins or outs, but it could be separate proceedings. That is what Ms Ford said previously. But it sounds to me like logically it would follow on from after any decision had been made. Is that enough for your purposes?

MR QUAYLE: The only timing issue is the Settlement Tribunal. If they were to undertake that we would be allowed to put in further evidence that speaks to this point they have just put in issue, then that would solve the immediate problem for tomorrow.

Now, of course, if we were to be given permission to put in evidence, whether that is next week, whether that is further down the line after the trial at some future point in the proceedings, then we of course would not object to them having permission to put in responsive evidence. Perhaps this could take place all after the trial: we put in more evidence, they put in evidence, we have that fight at that stage, in a less mad-cap way, but for the moment what we need reassurance on is the point that we can -- we are going to be allowed to put that evidence in, in these proceedings, and they are not going to object to it.

If I may, one final point on that, they are going to be standing up in a settlement hearing tomorrow and they

are going to point to the barring provision, and they are going to be telling the Settlement Tribunal that this protects our rights. The point we are making is this only protects our rights if we are able to put in the evidence we need to actually exercise our rights.

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But for the moment, what we need reassurance on is the point that we are going to be allowed to put that evidence in in these proceedings and they are not going to object to it.

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1 going to be telling the Settlement Tribunal that this
2 protects our rights. The point we are making is this
3 only protects our rights if we are able to put in the
4 evidence we need to actually exercise --
5 THE CHAIR: To argue the point.
6 MR QUAYLE: Exactly.
7 MS FORD: Madam Chair, we would be content with the
8 Tribunal's proposal that the Tribunal, at the
9 forthcoming trial, determines what is presently in
10 issue, which is the aggregate damages sum. Then, in the
11 event that the parties, post trial, are not able to
12 resolve amongst themselves the question of what is the
13 relative apportionment as between them, then in that
14 circumstance we would not object to the Defendants
15 putting in evidence in order to address the extent to
16 which it cannot be resolved.
17 But we do say that it is much more practical to deal
18 with it in that way, post-trial, than to try and
19 shoehorn something else into the trial that is due to
20 start in January.
21 THE CHAIR: Is that sufficient for your purposes?
22 MR QUAYLE: Yes.
23 THE CHAIR: Thank you. Where does that leave us?
24 (Pause). So where does that leave us on the agenda?
25 MR QUAYLE: The only outstanding point is a very short point

to do with corrective evidence that was adduced by MOL in respect of Mr Kosugi.

THE CHAIR: That was agreed, wasn't it?

MR QUAYLE: We don't have to address that. The final point is the evidence from the PSA litigation.

THE CHAIR: Yes.

MR QUAYLE: So, a bit of background. The PSA litigation is a damages claim concerning the occupant safety systems cartel. It was brought by the OEM PSA which owns several of the included brands in this claim, Peugeot, Citroën, Citroën Vauxhall and Fiat Chrysler. The PSA case was very recently tried in the CAT, in October of this year, and some of the issues in raised in that litigation are essentially the same as the issues that arise in this case and in particular one point was exactly how OEM set the prices of new vehicles and the relationship between costs and that price.

In that litigation, three witnesses gave evidence on precisely those issues, on 7 and 8 October this year, that is Benoit Couturier of Opel, which is Vauxhall in the UK, Jerome Gautier of Peugeot and Citroën, and Francesca Biancheri of Fiat Chrysler. After they gave their evidence we wrote to the claimants in the PSA litigation and asked for the witness statements of these three individuals. You will appreciate we could not

have asked for them before that point because the rule under the CPR, by analogy in this Tribunal, is that only once a witness statement has been put in evidence at a public hearing can it be used in proceedings other than those in which it was served. So -- that is CPR 32.12(2)(c).

The PSA claimants' solicitors wrote back a few weeks later and provided non-confidential versions of the statements of those three witnesses. There are five. Three of them come from the safety system litigation itself and the other two are earlier statements made by Mr Gautier and Ms Biancheri in separate litigation concerning another car part, which is automotive bearings. The bearings statements were initially given in that litigation but then refiled in the OSS litigation with new statements addressing their ongoing relevance. So, these are all in the PTR bundle, on a de bene esse basis for now, at tabs 22 to 26.

Once we had these statements we wrote to the Class Representative enclosing the statements and asking that they be added to the trial bundle because they are relevant to the McLaren proceedings.

Now if I could go to PTR bundle 2, tab 20 {PTR/2/20}. So, we have summarised here, this is our skeleton argument, paragraph 61, summarised the aspects

of their contents which are relevant to this litigation, and it is essentially because, as I say, PSA statements address vehicle price setting and the relationship between costs and price at several included brands. So, you see at 61.1 Mr Couturier addresses how Opel/Vauxhall benchmark their new vehicle retail prices against their competitors, how they manage costs and how they set prices.

Then 61.2, similarly Mr Gautier addresses new vehicle pricing, profitability, margins and retail sales in the period and he does that for Peugeot and Citroën. And over the page, go to 61.3, this is summary of Ms Biancheri's evidence, which is for Fiat Chrysler automobiles. Again, she addresses new vehicle pricing and how costs factor into that and the relationship between margin and sales.

Now, this evidence is squarely relevant to these proceedings. It has always been the Defendants' case that many included brand OEMs manage the cost of deep sea shipping as a cost like any other, alongside costs --

THE CHAIR: Does the evidence address deep-sea shipping costs?

MR QUAYLE: It doesn't address it specifically, but our case has always been on the basis that this -- the prices

should be considered in an overall sense, and not in the silo sense, that the Class Representative suggests. We have always said that OEM pricing decisions are not cost plus related to overall car pricing or specifically any delivery charge. They are very complex processes involving benchmarking against competitors and that is the case whether there is an OEM published delivery charge or not.

I am not going to trawl through all of the various submissions in which that debate has been played out but this evidence does play directly into this debate, even without specifically referring to deep sea shipping because it is clear from the way they are talking about the relationship between costs and price that it is the more holistic process that our industry experts, and our case has always said that it is.

I think it would probably be helpful --

THE CHAIR: You have sort of made one of the points I was going to ask you about, I mean, you have evidence on this issue anyway, have you not? Well, you have now, you have your industry expert evidence. Why do you need these?

MR QUAYLE: We do have evidence, and we are not proposing to call any of these witnesses. These are simply witness statements which we say are relevant to the proceedings

because they deal with a point which is incredibly important in these proceedings and they are -- so they have value in that sense. They also -- their primary value is likely to be in testing the evidence of the other side, so we have here witnesses speaking, giving -- providing first-hand evidence of how their OEMs dealt with costs and prices, that would not otherwise be before the Tribunal and they are talking about brands to which no expert presently -- either no expert is presently addressing, or --

THE CHAIR: Are they included brands?

MR QUAYLE: The ones I have listed, so Vauxhall, Chrysler, Peugeot, Citroën, they are all included brands. And at least in one -- for one of those examples, Mr Couturier speaks to Opel/Vauxhall. Now, the Class Representative has adduced evidence from Mr Tozer, who also purports to speak to the pricing and costs recovery processes employed by Vauxhall. We say this evidence will be useful to the parties and useful to the Tribunal in testing Mr Tozer's evidence and also testing --

THE CHAIR: Is that not a slightly one-sided process, though, because if you are not proposing to call the PSA witnesses, then they are not going to be able to interrogate his evidence?

MR QUAYLE: We completely accept that and the Class

Representative will be entirely free to make whatever submissions they would like about the weight that can be attached to this evidence, given those witnesses (inaudible). We are not seeking to in any way stop them from doing so and they have already prefaced the kinds of arguments they are going to be raising in that regard in their skeleton argument. They can do that. That does not mean that they are -- so that will go to their weight and we accept that.

It does not necessarily go to their admissibility, particularly in this Tribunal, which does not apply the rules of admissibility in quite the same level -- way that the High Court does, in quite the same strictness, it takes a more flexible approach, which focuses on weight rather than strict admissibility. It is proportionate for these witness statements to be added to the trial bundle and used in that way with every party free to make submissions about to what extent the weight can be attached to them.

So that's the extent of our reliance on them.

One further point on that, which is if we were to use them, as I propose to use them, for example, putting them to Mr Tozer, Mr Goss or Mr Whitehorn, to test their evidence, then whatever the Class Representative says about the value of these statements themselves, whatever

that witness says in response to the points put in the PSA statements, that will be primary evidence in this case and that is something from which this Tribunal will derive great benefit, in my submission.

Would it be helpful for me to actually briefly take you to one of the statements so I can demonstrate what exactly whether talking about?

THE CHAIR: Yes, I think it would, thank you.

MR QUAYLE: So, if we can go to ... I have lost my reference. It is the (inaudible) statement which is at {PTR/22/4}. So top of page 4:

"Pricing of new vehicles."

It starts with "Competitor benchmarking". In the first few lines of paragraph 12, immediately underneath, you see he explains the different sort of prices that Opel and Vauxhall benchmarked against, so -- can I invite you just to read that section. Talking about benchmarking:

"To do that, we have three levels of comparison: (i) list price, (ii) at list price comparably equipped ... and ... transaction price comparatively equipped."

So, he is talking about how vehicle -- companies set -- OEM set their prices, and the way in which they looked to their competitors to do so. If I could go down a few pages to page {PTR/22/6}, paragraph 21 here,

headed "Costs". You will see the first sentence:

"Each vehicle program has KPIs (Key Performance Indicators) such as the positioning/pricing target, a profit target and a cost target."

Now, part of the Class Representative's case is that at least in respect of deep-sea shipping costs they were recovered on -- not only on a cost plus basis but a cost plus a fixed margin basis. So, this is relevant to that, in that it is saying that we had costs targets, but it was not the sort of immutable relationship on which their case fundamentally depends.

Finally, if we go over a page to page {PTR/22/7}, you will see the heading "Profitability targets", above paragraph 26, and if we look at the last few lines of paragraph 26:

"Pricing was a question of balance between the overall benchmarking strategy, what the customer is willing to pay, our profitability targets, and then costs."

Then paragraph 27:

"Indeed, there was no direct relation between component costs increases and what the customer actually paid for the vehicle -- if costs increased we looked at how we could use different levers to offset the cost increase and reach the probability level. These levers

existed on the cost side (as explained earlier in paragraph 23) but also on the revenue side."

So, what it is saying there is the relationship between cost and price for new vehicles was not simply cost plus. It is saying it was a complicated process which involved considering whether the market could tolerate a particular price increase to reflect a cost increase, or whether there would be something on the revenue side where they would have to accept an absorption of a cost increase in order to continue to price competitively.

Now, all of this is very pertinent because it answers directly to the point that the Class Representative makes in terms of how vehicle prices are set. Now, they will say that, well, the delivery charge is in a separate silo, that it is dealt with differently to the costs components that are in this litigation. But the problem with that is we do not accept their case and we certainly do not accept that that is the case for all of the included brands and in all circumstances over the entire period of the claim period, of the claim.

In those circumstances, this does play directly into the debate. They cannot shut this out on the basis that they have a different view of how the market works. This is how we say the market works and it is relevant

to that and it will enable the testing of their witnesses on the case that they are -- the much more rigid costs plus fixed margin case that they are proposing.

One final point on this. In their skeleton, the Class Representative says that this is somehow procedurally unfair. They also said this in correspondence. They say this is late in the proceedings and it had to be advanced at the positive case stage, back in March 2024. But, ultimately, this does not actually make any sense.

As I have said, these documents only became available following the start of the PSA trial in October. I do not have a time machine. I cannot simply go back in time, get them and then put them in in our positive case.

There is nothing in the order for the positive or negative cases or the Chair's comments in the preceding CMC that suggest the process is so rigid that documentary evidence that becomes available only later is automatically inadmissible. It simply cannot have intended to bind the Tribunal's discretion to documents into evidence in that way.

To the contrary, we are not making this request late in the day. We acted swiftly, as soon as these

documents became available, and we have given them to the Class Representative two months out from trial. Parties sometimes agree in trials that they will identify documents that are going to be put to witnesses in cross-examination a couple of days in advance, but we have gone well above and beyond that in that we have identified these documents two months out. We have, in our skeleton, even identified the passages that we consider relevant to these proceedings and so there is no prejudice to the Class Representative. They and their witnesses will have ample time to consider these documents ahead of the trial.

So, ultimately, the Tribunal is assisted, in our submission, by having evidence on how OEMs manage costs and set prices. It will be better for everyone involved to have the benefit of detailed, direct evidence on these points. This is non-partisan, first-hand evidence, albeit hearsay, from the OEMs who are not here to give evidence themselves.

The evidence, as I said, goes directly to the dispute between silo and overall pricing which was considered by the Court of Appeal to be, and remains, one of the central issues in the case. So, in our submission it will enable the just and effective trial of these proceedings and we respectfully request that

you provide -- make a direction for these documents to be permitted to be added to the Tribunal.

THE CHAIR: Is there a problem in that these witness statement were subject to cross-examination in a different context in the PSA proceedings and we do not even know what the Tribunal found as a result of that cross-examination, as to whether this was actually accurate or not, and I do not even begin to understand what the issues were in PSA, but --

MR QUAYLE: Two points. The first is that we have suggested in our application and in our skeleton that we would seek to also add the transcript of the cross-examination of these witnesses to the trial bundle when it becomes available.

We have contacted the Tribunal, asked them when that is going to happen. We are told it will be in the next couple of weeks. So, the Class Representative will have the benefit of being able to look at those transcripts and if it is obvious from that that the evidence was shredded in the box then they will be able to use that as part of their submissions on the weight that should be attached to these statements. So, that is the first point.

The second point, about you do not know what the Tribunal says about this at this stage, we --

ultimately, that is hypothetical at this stage. If that were to occur during our trial, i.e. the Tribunal in PSA was to hand down judgment, then, of course, and it was going to say something about these witnesses in particular and the credibility of their evidence, of course, as I say, the Class Representative would be able to make submissions on the weight that should be attached to that evidence then. But we say the mere possibility that this might happen is not a reason to exclude this evidence now.

THE CHAIR: When you say you have produced it as soon as you possibly could have done, I mean, you could have gone to these people yourselves and asked for a statement, could you not?

MR QUAYLE: Well, we -- we have approached this matter on the basis we only are seeking to rely on these witness statements as documents. It -- I cannot trespass on the privilege and give you insight into our trial strategy, but that is the way we have proposed to put our case and we already obviously -- as you pointed out, we do have evidence which goes to these points.

We are not seeking to use this as direct evidence in the proceedings, and also need to be mindful of the realities of the situation here. These are parties who have been involved in litigation, in relation to

these -- these proceedings, and is not always as straightforward as we can simply go to an OEM and ask them for them -- for their senior executives to turn up in a tribunal in London and give evidence for three days on how costs and prices are set. There are natural difficulties there which mean it is difficult for us to -- but that does not mean that where there is a document which is relevant and helpful to these proceedings we should be excluded from bringing that into proceedings to assist the Tribunal and parties in testing relevant points in this case.

THE CHAIR: Thank you.

Yes, Ms Ford.

Submissions by MS FORD

MS FORD: Madam Chair, we have very genuine concerns about the prospect one would be putting in statements from completely unrelated proceedings, from witnesses who will not attend this trial to be cross-examined, and we say it is no answer to say that they have been cross-examined in the PSA proceedings, because they were not cross-examined about the particular matters that are in issue in these proceedings.

Can I show the Tribunal an example of why we say this raises a very genuine concern. If we look at Ms Biancheri's evidence. It is {PTR/25/1}. Her first

statement is dated 17 May 2021, and it was not given in the PSA occupant safety proceedings system at all, it was given in the context of a claim for damages in relation to automated bearings. You can see that from paragraph 9, {PTR/25/3}:

"This statement is my first witness statement in these proceedings. I make this statement in support of FCA's claim for damages for losses it suffered because of higher prices paid for automotive bearings, and for components containing automotive bearings ..."

So, that is a prior set of litigation even before occupant safety systems, which was the subject of the trial that happened most recently.

She then produced another statement {PTR/26/1}. This is dated 1 February 2024 and if we look, please, at paragraph 5 {PTR/26/2}, yes, she explains that she previously provided a witness statement in Bearings litigation. Then at paragraph 9 on page {PTR/26/3} what she does is she confirms the extent to which what she said in relation to automated bearings was equally relevant to the situation of occupant safety systems.

So -- and she does in fact carve out bits which she says she is no longer confident about:

"Apart from my earlier statements about the pricing of spare parts ... I am no longer confident about

because of the passage of time and the fact it was managed as a separate business within FCA in which I was not involved ... there is no other factor in my Bearings Witness Statement that I think would not apply equally in context of this claim relating to safety components."

The Tribunal has no evidence from Ms Biancheri or indeed from either of the other two witnesses confirming whether the evidence that they gave in relation to occupant safety systems does or does not apply to delivery charges. We say it is an absolutely crucial omission because the core of the disputes between these parties, as the Tribunal aware, is whether delivery charges are treated the same way or are treated differently.

Mr Quayle's submission was that it does not matter, the Tribunal can let this in, and it all goes to weight. But how is the Tribunal to reach an informed assessment as to the weight to place on these witnesses' evidence when they are not here to confirm whether what they say applies to delivery charges or not. In our submission, that is an absolutely fundamental problem.

Mr Quayle has made a submission that this is all very relevant and very helpful and the Tribunal will be assisted by putting it in. In our submission, not only would the Tribunal not be assisted, for the reasons

I have traversed, but if that were indeed the case then these Defendants had their opportunity to put in relevant and helpful and assistive evidence at the usual time in support of their positive case, or in support of their negative case, and so this is becoming something of a refrain, but they chose not to do so at the time and we do say it is too late to do so now, so we would invite the Tribunal to refuse this application.

Reply submissions by MR QUAYLE

MR QUAYLE: Very briefly, ma'am. On weight, I have already addressed you on that. They are free to say whatever they wish on the weight to be attached to these statements. But I will repeat the point I made earlier: that does not apply if we are using these documents in order to test evidence and putting them to witnesses who can then respond to them. That point, they will be making primary evidence in response to what is written in these documents which is direct evidence in this case. In that sense, the weight that is attached to these documents is irrelevant.

THE CHAIR: I think that is what causes me some concern, because you can put your documents to -- and say this is what the evidence is of Ms Biancheri, for example, what do you say about it, and then you get primary evidence extracted as a result which -- whereas there is not an

opportunity to do it the other way round, so the Class Representative doesn't have any opportunity to put anything back.

MR QUAYLE: But the witness will have the opportunity to respond to the points that are put to them and to the extent they are simply addressing points of business and commercial common sense, what we are essentially doing is supporting the basic premise that surely when you set prices you do not do it in this rigid way: look, here is some (inaudible) what do you say to that.

They can then respond. If they say, "I totally disagree with everything they say, that is totally wrong, that is totally irrelevant", then of course that is their evidence and that is in the case. So, they have already responded to it. There is no prejudice to them from the simple fact that there is this evidence.

In some respects, given the way we are intending to rely on this, the fact they are witness statements does sort of give them a particular aura, but they are documents like any other. If we were to take an article from Automotive Weekly and put that to them and say this describes how prices -- then they would respond that. Of course, the same the objection you are raising applies there: you do not know if you spoke to the author of Automotive Weekly in that particular article

what they would say. But that is irrelevant, because we are simply using the document to demonstrate this is someone talking about relevant process and it is quite different to what you have said, how do you respond to that.

If I can make one final point, the approach of this Tribunal, historically and in multiple cases, has been to approach these matters, the matters of documents for the Tribunal with respect to weight over strict considerations of (inaudible). I can take you to {PTR/53/1}. I am interested in paragraphs 8 and 9 {PTR/53/4}. So, this is making the simple point, which is well understood before this Tribunal, that:

"As made clear on a number of occasions ..."

A series of cases:

"... strict rules of evidence to do not apply to the Tribunal. The Tribunal will be guided by circumstances of overall fairness, rather than technical rules of evidence.

"The consequence is that -- certainly as far as disclosed documents are concerned, which is what the audio files and transcripts are -- there is very rarely argument before the Tribunal as to whether a document is admissible as evidence: the argument, by reason of the Tribunal's general approach, focusses instead on the

weight to be attached to the document."

As I have said, they are free to say whatever they would like (inaudible), but the primary purpose for using (inaudible) -- that is for them to do. We are not going to constrain them. All we are simply doing is proposing to add these documents to the Tribunal so they can be used to test the evidence and to assist the Tribunal deciding what is important.

Further submissions by MS FORD

MS FORD: May I offer a very brief response to the question you posed to my learned friend?

THE CHAIR: Yes.

MS FORD: Which concerns what would happen if this evidence is being used in the cross-examination of a witness. In our submission, the risk of prejudice arises because the premise on which it is being put to the witness is potentially a false premise --

THE CHAIR: It is that is true --

MS FORD: -- and potentially a misleading premise, that it is true and that it applies to delivery charges. That is the proposition that is being put to them and that, in my submission, is problematic.

Further reply submissions by MR QUAYLE

MR QUAYLE: Sorry, one final point. There is an irony in what my learned friend is saying here in that earlier

today she was telling the Tribunal to make an assessment of the weight to be attached to the industry expert evidence, their reports, without them being there, so it is rich for her to take this point now.

THE CHAIR: We are very conscious of the hour, so I was just suggesting to my fellow panel members that we would take a decision on this and let you have reasons for it in the ruling that you are going to get in relation to the other outstanding reasons and decision relating to NYKK. So that is what we will propose to do. I do not know if there is anything else on the agenda.

MR McGURK: Just in relation to that point, ma'am. I rise, take my NYKK and MOL hat off and just put my NYKK hat on, and just wanted to ask a clarificatory question.

As you know, we have prepared our approach to this whole claim and in particular preparation to the trial on the basis that the evidence is in. Whether it is or not will have a very significant bearing on our approach to trial preparation going forward. We might have to do it on an alternative basis if this decision gets held over. It may affect the basis upon which we speak to witness who we are already speaking to and, of course, the instructions of the experts have been done on a joint basis and that might need to be revisited. So, I am conscious of the Tribunal's workload and I know the

Tribunal want to give us a quick decision. I just wanted to ask when we might expect that, because all of these things are contingencies in those circumstances.

THE CHAIR: Yes. So, I will certainly endeavour to get it to you in the next -- beginning of next week.

MR McGURK: Thank you, ma'am.

THE CHAIR: I appreciate that you all need to know where you stand, especially with the trial coming up. But I do think the position in relation to NYKK is a little bit different, which we as a panel need to get properly to grips with, because there was no positive case, no evidence put in the first place, and the position in relation to reliance is very different to MOL's, which was quite upfront.

MR McGURK: You have all my submissions, references to PPS and I am grateful for the indication on timing. Thank you.

THE CHAIR: I think that we may be finished for the day so we will rise and we will let you have our reasons and ruling as soon as possible.

(4.58 pm)

(The hearing concluded)