IN THE COMPETITION APPEAL TRIBUNAL

Case No:1537/5/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Thursday 23rd January 2025

Before:

Andrew Lenon KC

(Sitting as a Tribunal in England and Wales)

BETWEEN:

OT Computers Limited (in liquidation)

Part 20 Claimant

V

Samsung Semiconductor Europe Limited

Part 20 Defendant

A P P E A R AN C E S

Andrew Bartlett On behalf of the Part 20 Claimant (Instructed by Osborne Clarke LLP)

Kristina Lukacova On behalf of the Part 20 Defendant (Instructed by Covington & Burling LLP)

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Thursday, 23 January 2025

(10.30 am)

THE CHAIR: Good morning. Some of are you joiningour live stream 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 the proceedings. Breach of that provision is punishable as contempt of court.

Yes, Mr Bartlett.

MR BARTLETT: Good morning, sir. I'm solicitor advocate for the claimant, OT Computers, referred to as OTC, and Ms Lukacova is counsel for the Part 20 defendant, Samsung, referred to as SSEL or Samsung.

Can I check you've received skeleton arguments from both parties and a hearing bundle which is a single pdf, and an authorities bundle, which is also a single pdf.

THE CHAIR: Yes, I have, thank you very much.

MR BARTLETT: And the parties also circulated a suggested agenda which was agreed between them.

THE CHAIR: Yes.

MR BARTLETT: As per the agenda, various issues have been agreed and/or narrowed, but there are issues to determine today relating to pleadings, experts, disclosure, costs and general directions to the trial.

It would be my suggestion, I think, that we deal with each of the general issues that I just mentioned separately rather than hearing submissions on everything at once, but I'm in your hands as to that.

THE CHAIR: It occurred to me that that was the best way forward.

MR BARTLETT: Turning to the first issue, then, of pleadings in general. As Ms Lukacova has mentioned, there is no dispute between us, I think, as to SSEL's

application to amend the defence, subject only to a costs point which I will deal with second. I propose first to deal with OTC's pleadings application and then the costs issue.

Before going into detail of the application, if I could just make a general point about SSEL's position that the main claim was not a follow-on claim. It's a point that has some relevance to the way the arguments are made. I would just like to say that that isn't quite right. The main claim was a claim for loss caused by the infringement that was identified and determined in the decision of the Commission. Like any other follow-on claim, the precise effects of the infringement were disputed, but that doesn't change the point that it was following on from the liability that had been determined by the decision. So the position of OTC in its claims was similar to that of an umbrella damages claim, where the product that was purchased was not itself the subject of the price fixing, but it was sold in the same market, and the argument was that the effects reached OTC.

That's just a general point that's relevant to the way some of the arguments are put.

Then, obviously, today we're dealing with the contribution claim, the Part 20 claim. If I could just very quickly take you to the relevant parts of the Act that are mentioned. Those are in the authorities bundle at tab 1.

THE CHAIR: Let me just find it.

MR BARTLETT: It's tab 1, page 3.

THE CHAIR: Yes.

MR BARTLETT: First we have section 1.1. This is the general section that provides that:

"Subject to ...(Reading to the words)... any person liable in respect of any damage suffered by another person can recover contribution."

That is from any other person liable in respect of the same damage, and those last

words are ones which cause some issue. We say Samsung is liable in respect of the same damage, and that's damage in the general sense of harm and loss rather than specific damages.

Then section 1.4, which is on the next page, and this is the section that has the statutory presumption that the defendant who has settled was actually liable without having to prove that liability.

The requirement there, this is where you see the bona fide wording in the first line, and then the proviso at the end, which is provided that "the defendant would have been liable, assuming that the factual basis of the claim against him could be established."

So that's back to the facts as pleaded in the claim.

Then we have section 2.1 further down, and this is the section relating to the just and equitable share, and the words I point to there are in the penultimate line:

"What is just and equitable, having regard to the extent of that person's responsibility for the damage in question."

It's "responsibility" there rather than "liability", and that's a point that's worth noting.

Turning then, back to the pleadings application --

THE CHAIR: Sorry, Mr Bartlett, before you move away from that. I've never come across a case before where there's been an assignment of a contribution claim to the primary claimant. Are you aware of any case where such an assignment has been recognised? It clearly does raise quite novel issues, does it not?

MR BARTLETT: On that point, the assignment point really wasn't something we thought was -- well it has been raised in issue. An application was made previously to put OTC in place of Micron. That was agreed by the Part 20 defendant and so was embodied in the order. So no issue was taken as to that. I think as to whether we've seen other cases before the assignment was carried out, we did look into the case

law. There are some situations where I think it wasn't permitted because of issues over whether it was a genuine settlement, but in this situation, we say there is no problem. The question really goes back to whether it was a bona fide settlement. If it's a bona fide settlement, we say that there was a legitimate interest in assigning the claim to OTC, and so no issues really arise, and as I say, no issues have been taken.

THE CHAIR: Let's just suppose, I know this isn't necessarily this case, but let's take a case where the claimant was fully compensated by the original defendant. How does it work then? As I say, the premise is the claimant has been fully compensated. There is then an assignment of a contribution claim. Is the claimant entitled to recover over and above full compensation? Because on the face of it, the original defendant would have had a claim for contribution, notwithstanding that the claimant had been fully compensated. How does it work then?

MR BARTLETT: Sir, I think the important point here is that yes, there shouldn't be any double recovery, and so one has to look at what was the basis on which the assignment was made. In this case, there was a settlement payment of 4.2 million in respect of the damages claim. So that was simply settled for cash. But there was also -- OTC also had a costs claim against Micron, and in settlement of the costs element -- in consideration for settling the costs claim, they assigned the contribution claim. So that was a genuine commercial transaction on the basis of the perceived value of settling the costs claim and the perceived value of the contribution claim. So Micron, in a sense -- OTC are standing in the position of Micron. Samsung is no worse off. Samsung would have faced a contribution claim either brought by Micron or OTC standing in its shoes, and there is no double recovery, because OTC was compensated for its damages claim in the settlement payment. And then in respect of costs, rather than a cash payment, it received this assignment of the contribution claim. So it received a claim in lieu of cash. But OTC doesn't therefore -- there's no

circularity. OTC doesn't seek to recover in respect of Micron's claim that it might have had, relating to the assignment of the contribution claim. So there's no circularity there. The contribution is in respect of the 4.2 million it claimed, and certain other -- contribution towards its costs, it's paid out.

So I think yes, there could be situations where something is done which looked inappropriate, or was circular, or undermined the bona fide nature of the settlement, but that isn't the case here, which is presumably why it has progressed as it has, and no issue was taken.

Going back to the pleadings point, the simple point of OTC, really, is that SSEL has failed to properly particularise its case, and OTC needs to know the case it has to address, and that needs to be understood from the perspective of setting directions. We can't have points raised later which give rise to disclosure issues where we never had disclosure. So the pleadings application is at tab 62. The key complaints regarding the draft defence are at paragraphs 5.16 and 5.17 of the pleadings application. If I could take you to that. It's page 717.

THE CHAIR: Yes.

MR BARTLETT: Perhaps I could just ask you to remind yourself of 5.16 and 5.17. (Pause).

THE CHAIR: Yes.

MR BARTLETT: Of course this correspondence followed, and the amended defence, had followed a request for further information, where OTC had first been asking for clarity on these various points. Samsung provided this amended defence but didn't address all the points in the request for further information, and as noted at 5.18 in that same letter in front of you, they had said in the covering letter that various other matters would be matters for submission. OTC's position is that really isn't adequate in terms of fairly preparing the case.

The relevant sections of the defence are at pages 94 to 96 of the bundle. This is paragraph 8(a)(i). The wording which we point out is really this without prejudice wording, which is in purple. So this is the defence by Samsung that there was no reasonable cause of action against Micron, but we say they need to particularise the grounds on which they say there is no reasonable cause of action, and instead, what they've done is they make their point about major OEMs, and they say the major OEM point was no damage to OTC. But they make that without limiting their ability to raise other points, and that's the without prejudice wording at the beginning.

So there's that in 8(a)(i), and then in 8(a)(3) further down the page, they repeat 8(a)(i), and then as you go over the page, again more without prejudice to the generality wording.

THE CHAIR: Isn't that just sort of boilerplate drafting? Frankly, SSEL would have difficulty relying on those words as a way in for as yet unpleaded allegations.

MR BARTLETT: The concern that OTC has is, first, we accept that if they were to amend their pleadings, they would have to seek permission and go through the normal process. So there would be control over that. But what SSEL said, of course, is that based on the rules that apply, they don't need to plead these points, and that they can refer to them in submission or evidence.

Now, given that that's the position they've said, it's possible that we might, in the future, be able to bar them from making points, or if they then put something in evidence, saying "This is a new point, you can't raise it", or "make it in submissions", but from our perspective, that puts the tribunal and the parties in an unsatisfactory position later down the line, when they don't know whether they really have to deal with an issue or not, and they don't know whether they need to put evidence in. What we say is that it's much better to identify the issue now and have clarity, rather than leave what could be an awkward dispute, with arguments both ways as to whether someone's

prejudiced, if we leave it further down the line. Because the issue has been raised by them now, that they don't intend to plead these points, they intend to leave them until later. But we say we can't properly prepare the case and that isn't the appropriate way to do it.

So this point arises in respect of the reasonable case against Micron, the liability of Samsung, and that's in (iii), and then, in 9(a) and (b) slightly further down, we're dealing with the just and equitable share point. So here it's worth saying what OTC's case is. OTC's case is very straightforward on the just and equitable share. It says you determine the relative responsibilities of the parties by looking at their market shares. We have market data saying that the relative market share is 60 per cent Samsung, 40 per cent Micron, therefore we seek a contribution for 60 per cent of the settlement payment. Faced with that straightforward approach, Samsung's response is to deny that it should be calculated by reference to the settlement payment, deny that it should be calculated by reference to market shares. They also deny that the market share information is necessarily representative of market shares but they don't then say what we should be looking at to determine this just and equitable share point. So we're left with not knowing what range of evidence they could say is relevant, and this could plainly lead to evidence being put into witness statements.

The one point they do make is that -- they make one point below, where they say Samsung itself did not supply Micron -- did not supply OTC. Which may or may not be a relevant factor, but they've identified one point. They don't go beyond that, but again, they just seek to keep it very broad.

So, again, we suggest that is wholly unsatisfactory, in circumstances where they are plainly arguing that this is a very broad test and they can put whatever they want into the mix.

So OTC's position is not that -- we're not trying to impose sanctions which have some

adverse impact on Samsung now, we're just trying to -- we've given them numerous opportunities to plead their case, to explain their position, and we want to say from now on, if it's not pleaded, either they can apply to amend in the future, and they would have to have permission, or otherwise, it can't be argued. We just don't want to have the gap where they say "We don't need to plead these points", and leaving it open to some argument under the rules as to whether, strictly, they do or don't. We want direction and clarity here to avoid those sort of arguments and satellite litigation which can be very wasteful in the future and make the preparation of witness statements, for example, difficult.

So that's the key point. There are two forms of relief that we seek. One is the deemed admission, and one is the prohibition on raising new unpleaded points. Those are the two forms of directions.

The principal points raised by Samsung are, first, that they don't need to respond to the points which are in the main claim particulars of claim, because they're not a party to the main claim. The second, they say that the onus is on claimant to prove the claim, based on the rules in CPR 16.5(3) and (4), and they say there's no deemed admission of points of law. Fourth, they say there's no real need for specific directions, because we have the general rules and principles.

Quickly turning to those points, as regards the no need to plead to matters in the main claim, the point here is, of course they're not a party to the main claim, but of course, in order to establish that there was a reasonable case against Micron, of course OTC is relying on the particulars of claim in the main claim, and of course, that is the case that we all understand, and that's the approach, obviously, we have to take.

It follows Samsung disputes that there was a reasonable case against Micron. It must say why, and we can't be left in a situation where we don't know what these alleged defects are. As I say, they've made the major OEM point, but no other.

So the points in the main claim must be relevant to the question of whether there was a reasonable case against Micron. They're also relevant to the dispute about whether Samsung is liable for some harm. We've made it clear in the reply that, to the extent that -- well, why we say Samsung is liable, and we say it follows automatically in the circumstances of this sort of case, but in the alternative anyway, we rely on the main claim, the claim set out in the main claim. Samsung disputes this liability, so again, plainly we need to understand its position in respect of that main claim, because that is completely integrated into this Part 20 claim.

There is the second point about the onus being on OTC to prove its claim, and focussing on the CPR rules. Now, it's worth saying the reason they say the CPR rules apply is when there was a transfer of the case to the CAT from the High Court, it was agreed that the High Court rules would continue to apply to pleadings. What CPR 16.5(3) says -- and that's at page 251 of the authorities bundle if you want to turn it up.

THE CHAIR: Yes.

MR BARTLETT: Sorry, I think that page number may be wrong. Let me just check. (Pause).

Sorry, 241, it should be.

THE CHAIR: Yes.

MR BARTLETT: So you have 16.5(3):

"If a defendant fails to deal with an allegation but sets out in the defence the nature of their case in relation to the issue to which the allegation is relevant, then the claimant is required to prove the allegation."

They say this applies. Our point here is simply that Samsung has not said with sufficient particularity what its case is, so this provision doesn't apply, it's only if they set out a contrary case which you can answer. But here, the point is they haven't set out with any particularity what their point is. So we say this really doesn't take us any

further, 16.5(3). Then 16.5(4), if one goes down a little bit further, this is the provision which relates to money claims. Samsung rely on this to say "Well, where the claim includes a money claim, the claimant must prove any allegation relating to the amount of money claimed." So they say the onus is on the claimant to prove this, unless there's an admission. So this is why there shouldn't be any deemed admission.

The response of OTC to that is, "Well, you have to look at the situation of this claim." OTC does not need to prove a money claim against Micron or Samsung in that sense. The issues we're talking about, it only needs to show a reasonable case -- it had a reasonable case on the basis of the pleadings against Micron. On those issues it's not required to prove a money claim now, in respect of that general question of the liability of Micron. Equally, as regards Samsung, it only needs to show some liability. It's not proving the liability in respect of that underlying damages claim. The only question of the amounts here is the just and equitable test.

So what we say is this provision which would have made sense if one was talking about the main claim, isn't actually applicable here.

Thirdly, Samsung's point is they shouldn't have to plead issues of law, or shouldn't be deemed to admit issues of law. Our point here is although there is no specific obligation to plead issues of law, there is an obligation, a requirement, to clarify one's case, and that does extend to issues of law when one is responding to a case. So one can't properly particularise one's defence at times, without addressing the legal issues as well as the factual issues. That is, we say, actually clear from notes in the White Book to 16.4, but in fact, I'm afraid we don't have it in front of us. But what the notes to 16.4 say is:

"The distinction between the obligation to plead material facts and mere permission to plead points of law may be academic if the amendment is in answer to questions already pleaded and is necessary to give the other party fair notice of the arguments

to be advanced."

And with reference to the Scipion case. What we say is it is necessary to make these points of law, in order to give us their notice of the case. Of course, the CAT rules require points both of law and fact to be properly pleaded.

The final, fourth point they make is no directions are necessary because we have the rules, which I think is the point we discussed earlier. We say yes, there are rules about permission to amend, but what we don't want to do is move forward several months, not know what evidence to put in in factual witness statements, and then have an argument about whether or not they can run an argument which wasn't properly pleaded and then have uncertainty for both sides. And in my submission that's much worse for both sides and indeed the tribunal, than simply trying to clarify the position now.

So, sir, those are the points we wanted to make in response to Samsung's position on that. Unless I can assist any further on that -- the issue of the defence amendment costs might be best to be dealt with separately, but I can address those now, if that would be helpful.

THE CHAIR: Why don't you deal with it now, Mr Bartlett.

MR BARTLETT: Okay. This relates to the application to amend the defence. OTC's position is that Samsung should pay the costs of those amendments that relate to foreign law, but the remainder should just be costs in the case. It's worth just explaining how this amendment arose. OTC --

MS LUKACOVA: I'm so sorry to interrupt, it's just that there's been a development, and I can now confirm that we do not oppose paragraph 28 of my learned friend's draft order. That's the provision in relation to costs occasioned by the foreign law amendments. I mention that because it might allow us to get through it more quickly.

MR BARTLETT: Okay. Just to clarify, does that mean as regards the remaining costs

of the application, is it Samsung's position that those should be costs in the case, or are they pursuing those costs?

MS LUKACOVA: We are still seeking costs of the application.

MR BARTLETT: Okay. So going back to how this arose, OTC made a request for further information and suggested in that that the further information might be best provided by way of an amended defence. Samsung responded with its proposed amended defence. In that amended defence, there were some amendments relating to foreign law, which was a new point they were running which had nothing to do with the request for further information, and that's what Ms Lukacova has just confirmed, they accept that those costs should be paid by Samsung. But then the other amendment related to the request for further information. We say the costs relating to those other amendments should just be costs in the case. We say OTC has acted entirely reasonably in terms of the application that was made -- well, before the application that was made, and after. The approach of OTC has simply been to first raise questions about the foreign law aspects of the amendment. We said there was no realistic prospect of success, we wanted to check whether they really wanted to pursue this. We pointed out the cases why we said it had no realistic prospect of success, but once they did say they were going to pursue it, we didn't take issue with that. We then made the points that really relate to this application we're making now, the pleadings application, as to why we said their amendments weren't sufficient, and we asked them to make further amendments to deal with these issues. What happened was they chose not to do that and then they made the application for an amendment, and we made the pleadings application, and we then said, you know, "Subject to the pleadings application, we will consent to the amendment application." So that's how it arose. The correspondence -- I can take you to the letter that we sent on 17 December, which is at page 119. This is before the applications were issued.

Sorry, that's the tab number. It's page 1061. This was after OTC had received the draft defence, and it's our response. You can see, first, there's a section on governing law, where we explain why the governing law points really had no prospect of success. Very similar issues but in a slightly stronger case were addressed in a recent trial of the LCD judgment in OTC's claim. But anyway, that was the first point.

The second point is under number 2. It sets out the pleadings point. It wasn't a case of us being obstructive, we were just trying to explain why we thought further clarity was required, and this foreshadows the pleadings application. That was 17 December, obviously shortly before Christmas, and the 3 January deadline for the applications of course, in practice, arose very shortly afterwards, because most people were off from around 20 December to early January. So we say OTC's position on this has been entirely reasonable, we haven't been trying to prevent amendment, we've just been trying to ensure that it's dealt with in a practical -- well, that it was as appropriate as possible. So we made our application, they made their application, and then in our response on 13 January, we again clarified our position in response to their application, and that's at 946.

Sorry, no, that's Covington's response, sorry. We responded at 828.

So we say, yes, that the practical way forward for this, and there will be very minor costs anyway, is to make costs in the case of the application.

That is all OTC has to say, then, on the pleadings point.

THE CHAIR: Very good. Thank you, Mr Bartlett. Ms Lukacova.

MS LUKACOVA: Thank you. Yes, sir.

SSEL's position is that this application is procedurally unsound and should be dismissed. I will first give a brief overview of the context in terms of framing, including in respect of the structure of the proceedings and some of the key issues that arise in the Part 20 claim, and then I'll look at the relief sought by OTC and explain why we

say that is not the right way forward.

In terms of the high level structure, that is, of course, common ground. So we have the main claim by OTC against Micron, and then we have the Part 20 claim by Micron against SSEL, now pursued by OTC following the assignment. Of course, each of these claims has its own set of pleadings, and that we can see from a snapshot just on page number 2 of the bundle in the index. There we can see that section A lists the statements of case in the main claim. As usual, the particulars, the defence and then the reply, and then section B lists the various statements of case in the Part 20 claim. So we have now OTC's re-amended particulars of additional claim, SSEL's re-amended defence, soon to be, following OTC's consent to the amendments, the re-re-amended defence, and then OTC's reply following that.

Having a brief look at the main claim, there are a number of key features that then feed into the Part 20 claim and make sense of our pleadings. As I say, we do not accept any criticism of OTC of our pleadings, we say our pleadings are entirely adequate, and in any event the relief sought isn't justified.

So the re-re-amended particulars of claim in the main claim are at tab 2, starting at page 13 of the bundle. I just want to flag a couple of key features that distinguish this claim from what OTC might describe as a typical follow-on claim.

Critically, as we know, the decision by the European Commission that OTC relies on only makes findings in respect of conduct as regards major original equipment manufacturers, so major OEMs. It is OTC's own case that it isn't one, and we can see that in paragraph 32, page 19 of the bundle, which says:

"For the avoidance of doubt, it is accepted that OTC is not a major OEM, nor was THK [THK being one of OTC's pleaded suppliers], a major OEM."

So OTC, and one of its pleaded suppliers, expressly pleaded not to be major OEMs.

There is no other pleading in the main claim statements of case, in our statements of

case, pleading that any of the suppliers were major OEMs.

So what we have here, in distinction to the usual follow-on claim, is that there is a gap, because the findings of the Commission do not relate to the sorts of entities that OTC has pleaded it had been procuring DRAMs from.

Additionally, there is no pleaded factual basis for the effects that OTC is asserting. If we can briefly look at a couple of paragraphs. If we go to page 22.

On page 22, if we look at paragraph 47, this is where OTC says in the main claim that the effects of the DRAM cartel on prices charged by participant undertakings to non-major OEMs will be particularised in expert evidence, following disclosure. So this is where one might sometimes see a pleaded factual basis for the assertion of effects. What we have here instead is a cross-reference to future expert evidence and no pleaded factual basis.

We do, to be fair to OTC, in paragraph 48 just below that, followed -- well it's preceded by the wording that we are criticised for using in our pleadings, which is:

"Without prejudice to the generality of the claims arising from the aforesaid expert evidence."

It goes on to say:

"OTC avers that it follows naturally from the findings of the Commission."

And that is the basis upon which they've put their claim so far, and that is also the only basis upon which they will have put their claim, the main claim having now been settled.

I should make one point in respect of this. In my learned friend's skeleton appears a sentence in his paragraph 41(c)(i) that it seems undisputed that there is a close correlation between prices charged to major OEMs versus prices charged to non-major OEMs. That is very much disputed and it is pleaded in our draft re-re-amended defence. I'll also take the opportunity to say there are a number of

assertions in my learned friend's skeleton that are very much in dispute, some of them made for the first time now. I do not propose to give a full list of them, I'm simply flagging at this point that I will get to them as and when they arise, but if I don't, especially given the time, I'm not making any concessions in respect of anything stated in my learned friend's skeleton, by virtue of not having dealt with it expressly.

The absence of a pleaded factual basis in respect of loss then carries over into quantum. We can see, if we turn to page 24, in the middle of the page, paragraph 60(c), where OTC is applying a percentage of 26 per cent by way of overcharge. It says 26 per cent represents the assumed overcharge percentage. There's more information about where this came from in paragraph 57. So if we turn back to page 23 and we look at the bottom, OTC pleads:

"In the absence of evidence in the non-confidential version of this decision to which OTC presently has access or otherwise of the actual extent of the overcharge, OTC's losses are for present purposes calculated on the basis of an overcharge of 26 per cent. This is based on the conclusions of the study prepared by economic consultant Oxera for the European Commission in December 2009 in respect of the mean overcharge resulting from the wide range of international cartels."

So this is the reference to the 2009 Oxera study for the European Commission which cross-referred to a sample of, I believe, about 50 international cartels, nothing to do with DRAMs. So when OTC says that this is an assumed overcharge, that is very much an assumed overcharge without any reference whatsoever to the facts of this case or to DRAMs.

That leads to the question of why does this matter for the purposes of this claim, and also, how does this manifest itself in our response in our defence to the Part 20 claim? There are essentially four reasons. The first one has to do with foreign law. I think I can deal with this quite briefly. We say this gives rise to a foreign law issue, because

in circumstances where the decision concerns conduct in respect of major OEMs, and when the vast majority of them were based in the US, and that is also where they were conducting their procurement from, the main claim and in fact the Part 20 claim, are governed by US federal law, and we've pleaded this in our draft pleading that is now going in, following our application to amend.

OTC have reserved the right to strike out that part of the draft pleading, but they haven't made any application yet. So for now, this remains an issue in the proceedings. However, even if English law applies, this is still highly relevant and it feeds into our draft re-re-amended defence.

In terms of the Part 20 claim, the parties agree as to the high level structure of the issues to this extent: question 1 is whether in this case, Micron was liable to OTC. Question 2, whether SSEL would have been liable to OTC in respect of the same damage. Then, those being preconditions, if both of those threshold requirements are met, then questions of attribution arise in terms of quantification, so what is a just and equitable share.

In terms of the first of those issues, that relates to the question of Micron's liability to OTC. We do agree that section 1 of the 1978 Act applies, and that that means that as long as the settlement is bona fide, the test is whether the claimant, OTC, had a reasonable cause of action against the defendant, assuming that the factual basis of the claimant's claim, as set out in its statement of case, is correct. That's a direct quote from how OTC themselves have summarised it in correspondence, and we agree. We do need to look at the claimant's claim as set out in its statements of case. We assume facts, and then we'll look at whether they disclose a reasonable cause of action.

So this is the reason why SSEL has not been responding to OTC's particulars in the main claim on an allegation by allegation basis, because that is simply not the

exercise.

THE CHAIR: Sorry to interrupt. Samsung's case on the main claim is basically the points that you've just highlighted, in other words the point about the major OEMs, that you say the absence of facts supporting the allegation of effects, and you've also said that there's an issue about the application of foreign law. Those are basically your points; is that right?

MS LUKACOVA: In respect of Micron's liability to OTC, yes, those are the points, and they are pleaded in the draft re-re-amended defence. That is correct.

THE CHAIR: You're not going to produce something out of a hat at the last minute in relation to the main claim, that's basically your case?

MS LUKACOVA: That is certainly our case at the moment. That is not to say that we are intending to issue an application to amend any time soon, or ever. At the same time, of course, I'm not in a position to confirm that that will never be the case, but that is as things stand, our case, and what I will say, once I get to the relief sought by my learned friend, is that there are rules in place to address amendments and applications to amend and what can and can't be pleaded, what has to be pleaded, and what the implications of running an unpleaded case are. And in my submission, those are entirely adequate and there is no reason to depart from them.

THE CHAIR: Yes, and a rule about not leaving amendments to the last minute and the risk to a party if an application to amend is left to the 11th hour. All that's taken as read; yes?

MS LUKACOVA: Of course.

Then this also goes to the question of reasonableness of the settlement. It may be that I don't need to get into that in any detail right now. I simply flag that the absence of a pleaded case in respectof OTC's alleged loss does also go to that, and in my skeleton I've cited authority that says that reasonableness of the settlement is an issue

in Part 20 claims. We are entitled to put the claimant to proof as to that. While it is the case that the tribunal will not be analysing this and assessing it as if this were being litigated in the main claim, the tribunal does need to be satisfied that the settlement was in the right ballpark. It is for the claimant to establish this. It is for the claimant to put forward their case in the pleadings and by way of evidence, and then it is for us to challenge that as we wish. There's also authority, again cited in my skeleton, to the effect that this is an objective test, and the fact that a party has had legal advice in settling their claim is irrelevant.

This is of slightly less relevance, perhaps, to the pleadings applications, so I simply leave it there for now, but I wanted to mention it, because it is related to the other points that I am currently looking at, and it explains, again, the broader structure of our re-re-amended defence.

THE CHAIR: Sorry to interrupt again. What do you say to the point that it's all very well for Samsung to deny that the settlement was not just and equitable, but it doesn't put forward any positive case as to what a just and equitable settlement would have been? Do you accept there's any force in that?

MS LUKACOVA: In terms of the reasonableness of the settlement, no. We can go to the authority that says that it is for the Part 20 claimant to put forward their case and to put forward a prima facie case in terms of the settlement being a proper one, essentially, and that it is for the Part 20 defendants to then shake the cage. There was an expression, it's in the Sainsbury's case that we can look at, but the short answer is that I don't accept that the burden is on us to challenge it, and if we don't, then it's assumed that it is reasonable. It is for the Part 20 claimant to put forward a prima facie case of reasonableness as to the settlement.

Then the other aspect of the Part 20 claim that the absence of a pleaded factual basis for loss in the main claim goes to is the question of whether SSEL is liable to OTC.

OTC say that this is assumed under section 1.4. We do not accept that. We say that section 1.4 has to do with Micron's liability to OTC rather than SSEL's liability to OTC. But in any event, even if we were wrong on that, and that is a trial issue, even if we were wrong on that, we would still run into the same issues as I've just explained in respect of Micron's liability to OTC, and so it doesn't add much in this regard, certainly not in respect of OTC's pleadings application.

In terms of the implications of all of that, this is the structure that underlies, certainly, large parts of our re-re-amended defence. If it is slightly unusual, that is because the claim in the main claim is unusual in terms of the gap that I've identified as between the decision and the claimed loss in respect of alleged overcharges to non-major OEMs.

Just to address the specific criticisms that my learned friend makes of the draft re-re-amended defence. If we can turn to that, it's at tab 9. The first section that my learned friend has criticised is paragraph 8(a)(i). That's on page 94. Paragraph 8 deals with the contribution claim under English law, and 8(a)(i) deals specifically with the question of Micron's liability to OTC. This is where we therefore say we do not accept that the re-re-amended particulars of claim in the main claim disclose a reasonable cause of action against Micron. So that is the point that I've referred to. That is followed by the words "without prejudice to the generality of the foregoing", but that is, we would say, standard wording. If we were to seek to introduce something by reference to that wording later on that OTC consider unjustified, then they can make that point, but we've had the discussion about the fact that we are not currently -- we're not holding anything back, it is simply standard wording, and I would note that in the wording of OTC's particulars of claim in the main claim, we've just seen virtually identical wording there as well.

So in summary, my submission on this would be that there's nothing out of ordinary

about this that would justify any departure from the usual procedural rules.

Then criticism is also levelled at paragraph 8(a)(iii) which deals with the question of SSEL's liability to OTC. I would submit that this doesn't raise any unique issues relevant to what I've just discussed in respect of issue 8(a)(i).

Again, the pleading is standard, I would submit.

Just for completeness, if we look at page 95, the second paragraph, in the middle, which says:

"It is averred that there is no interrelationship between prices charged to major OEMs and prices charged to non-major OEMs."

That is the point I mentioned earlier, about the fact that it is very much not common ground between the parties that there is a correlation between the two. Again, there is nothing unusual about any of this, nor is there anything inappropriate about any of this.

Then paragraph 9(a) is the next one that my learned friend queries. That deals with the question of attribution. 9(a) starts with the question of the reasonableness of the settlement. Some of the points that I discussed earlier feed into that. There's a cross-reference to paragraph 8, paragraph 8 being, again, the paragraph about loss and inadequate pleading of loss and the gap between the decision and OTC's claim in the main claim.

That goes to the reasonableness of the settlement.

And then 9(b) deals with the further question of what the just and equitable share might be. This only arises, of course, if the threshold conditions have been met, but if we get there, we've pleaded our case as to what factors we say are relevant to a just and equitable share. Its not right that we've only pleaded one factor. We've pleaded two.

So 9(b) about five lines into the paragraph, we've pleaded that SSEL did not supply any DRAM to the claimant or to any entities in the claimant's supply chain pleaded in

the main claim. This was referred to by my learned friend just now, but then the paragraph goes on to say:

"It is further averred that SSEL continued to compete actively during the cartel period, as defined in the re-re-amended particulars of claim and refused to abide by the cartel discussions from time to time."

One of the cases cited by my learned friend in his skeleton argument says that culpability and causation are two of the factors that courts and tribunals look at in respect of attribution. That is correct, and this is what it goes to. This hasn't been mentioned in my learned friend's submissions, so I simply flag it. There are two specific points pleaded here. There is the wording "without prejudice to the generality of the foregoing", which I simply say is standard.

That takes me to the relief sought by my learned friend, and we can see what relief is being sought in paragraphs 3 to 5 of my learned friend's draft order. There are three directions that are being sought, and they fall into two categories. Paragraph 3 is in a category of its own.

THE CHAIR: Sorry, which page is this?

MS LUKACOVA: That is loose leaf, but they haven't changed, and therefore, if you don't have it to hand, then I can give you a reference to their application. That's at tab 62, "Application for directions regarding SSEL's pleadings." Yes, it's on page 714, where paragraph 4.1 says:

"OTC seeks the following directions."

Underneath are the directions, and that is maintained. So it is exactly the same wording as appears in my learned friend's draft order filed yesterday.

In this version, paragraph 4.2 is what I've referred to as the deeming direction in my skeleton.

What this says is this:

"To the extent SSEL has elected not to plead to OTC's pleas in its statement of case in the main claim and OTC has not explicitly either denied or not admitted such pleas, SSEL shall be deemed to have admitted those pleas, insofar as they comprise a positive averment of fact and law."

For context, as mentioned by my learned friend, and I understand this to be common ground, because it hasn't been queried, or hasn't been challenged, all of these pleadings are governed by the CPR because the transfer order from the High Court to the CAT included a paragraph that says that "all pleadings in these proceedings will be subject to the CPR." So that is the relevant regime here.

We can briefly look at it, so we're clear on the position that is in place in the absence of any additional directions --

THE CHAIR: I don't think we need to look at the CPR, I think we can take that as read.

MS LUKACOVA: Very well. There are three points here. Rule 16.5(1), as we know, it says that in the defence, the defendant must deal with every allegation in the particulars of claim. But, of course, that is a reference to the particulars of claim that the defendant is responding to, it isn't a reference to any other particulars of claim in a different claim. There were a number of procedural safeguards briefly mentioned by my learned friend. While the CPR already includes a deeming provision which says that if a defendant doesn't respond to an allegation at all, then they're deemed to have admitted it, that isn't as black and white, because we have rule 16.5(3), which deals with --

THE CHAIR: All this is set out in your skeleton argument, Ms Lukacova, I don't think we need to go through it. I'm also conscious of the time. We're still on point 1 in the agenda and we've had nearly an hour on this already.

MS LUKACOVA: Absolutely, I'll move on. I rely on my skeleton argument for that, and there is no reason, I would say, to depart from these provisions in this case,

certainly not across -- pleadings across different claims, and certainly not in respect of any pleadings to do with the law, which the parties are not required to plead in these proceedings in these statements of claim.

Then in relation to the following two directions that are being sought, they are equivalent, in that they relate to different topics, but ultimately, the relief sought is that we are prohibited from advancing unpleaded matters. I can deal with this quite simply as per my skeleton, which is that there are rules on this, there's case law on this. It's well tested, there's useful guidance. That makes any dispute more predictable. Nor is there any criticism being made of those rules or of that guidance. So I say that is perfectly adequate, and there is no good reason to have a bespoke regime in this case, because my learned friend has not justified why any change would be required, and there's a real risk that if we do start creating bespoke regimes, that if anything, will in itself be liable to generate uncertainty.

Those are my submissions on the rest of the application.

THE CHAIR: Thank you.

Just before I go back to Mr Bartlett, do you accept, Ms Lukacova, that it is open to a defendant to assign a Part 20 claim, or a contribution claim, to the main claimant?

MS LUKACOVA: We have not challenged it. We have not taken any points on this to date.

THE CHAIR: Okay, thank you. Mr Bartlett, do you want to come back on anything? You set out your case pretty thoroughly in opening.

MS LUKACOVA: I'm so sorry, I'm reminded that I haven't dealt with costs. I can do that very briefly, if this is a convenient time.

THE CHAIR: Yes, go on then.

MS LUKACOVA: As I mentioned, costs occasioned by the foreign law amendments are now agreed. That simply leaves the costs of our application to amend. I think my

learned friend, on a couple of occasions, referred to the costs of the amendment. Just to be clear, all we're seeking are the costs of the application to amend, not the cost of the amendments themselves.

THE CHAIR: Sorry, if I could just boil it down. What I understood Mr Bartlett's position was, originally the application to amend was opposed because of these points about what is said to be inadequacies in the pleadings, but later, OTC's position was that the application to amend wouldn't be opposed, but they would make their own separate allegation requiring more details. That's really what it comes to, isn't it?

MS LUKACOVA: Yes. So what I say to that is that ultimately, OTC consented to this application, and they simply should have consented to it straight away, because there was pre-application correspondence. I won't take you to it in the interests of time, but I will refer you to paragraph 14 of my skeleton, where I've included all the references to the correspondence. So there was pre-application correspondence, where we sought OTC's consent. They came back to us and said "Please prepare further pleadings." They didn't say "We consent to these amendments". We therefore issued an application on 3 January. In their response to the application, OTC still didn't say "Yes, we consent to the application". They didn't flag any amendments that they were opposing, but that is a part of the problem. If they were going to consent to it, they simply should have consented to it straight away, and then the costs of the application could have been avoided.

THE CHAIR: What are the costs of the application?

MS LUKACOVA: We are not seeking an assessment today. All that we would be seeking, and that is equivalent to similar orders made in these proceedings in the past, is a direction that would say "to be assessed if not agreed." So we're not seeking any further process for the purposes of assessment.

THE CHAIR: Okay. Mr Bartlett.

MR BARTLETT: Thank you. I'll be very brief then. Only a very few short points I'd make in reply.

As to the general point that we have the rules and they give sufficient protection to OTC, and Ms Lukacova focussed on the requirement of permission to amend -- the court's given permission to amend. But the concern from our perspective is that they have expressly stated that they don't think these are things that need to be pleaded, and so they can just put them in evidence or submissions. That is in their covering letter which came with the amended defence, which is at page 142. They say:

"Otherwise it is our client's position that the RFI raises issues for evidence and submissions and/or issues as to which our client reserves its position pending the provision of disclosure."

So we are saying they are leaving open this ability to bring up new arguments whenever they feel it appropriate, which would therefore circumvent the normal process of disclosure, witness evidence, and then determination of an issue. If you add in a new issue later on, you've missed out relevant disclosure, and we've potentially missed the opportunity to put in evidence. So you might have witness statements. They address one point, we haven't addressed that at all. So that's the concern, and we say they've specifically raised that point.

I would then say, as to the point that this without prejudice wording is very generic, and it's for example, used by the claimant in the main claim particulars of claim, there is a clear distinction, I would say. In the main claim particulars of claim, OTC put in that without prejudice wording expressly because of the need for expert evidence, because a claimant in a cartel claim is unable to prove -- you know, a lot of the detail of causation and loss will come from expert evidence and also, it doesn't have any of the documents, they're all in the hands of the defendants. So there is a need to reserve that right to provide more particularity later on in that sort of claim, where

there's a complete asymmetry of information and experts are fundamental to it. That's very different from the Part 20 claim, where if anyone has the information, they have all the information. We all know what the issues are, but they don't want to plead them. Now they say "We'll think if we have some more." I think what they have said today is "We've pleaded the things we're thinking of at the moment, but we're not saying we won't make further arguments."

So that's our concern, it's just a very practical point.

Then I'd just make one very short point, just to clarify. As to section 2.1, where we talk about just and equitable under section 2.1 of the Contribution Act, just to be clear, it isn't a question of whether the settlement was just and equitable, it's a question --

THE CHAIR: No, I muddled the two, you're quite right.

MR BARTLETT: That's understood. Those are the only points I think I needed to go back to on the pleadings application. I don't think there's anything further that needs to be said on costs. It is, ultimately, a very inconsequential point. We think it should be costs in the case. I don't think I need to go back on that.

THE CHAIR: Okay. I will issue a written ruling in due course, but I can now say what my decision is on these directions, and that is I am not going to order further directions in relation to SSEL's statement of case. It doesn't seem to me that the directions sought are necessary. I consider that OTC is sufficiently protected by the CPR which applies to the pleadings in this case. As I indicated to Ms Lukacova, it's not open to Samsung to introduce fresh factual allegations further down the line which have not been appropriately pleaded, and if SSEL left it to the last moment to introduce new allegations by way of an amended statement of case, they might well find that such a course was resisted by the tribunal.

As to the costs of the application, this is a relatively minor point, the costs are not substantial. But bearing in mind my conclusion on the proposed directions, it does

seem to me that OTC should have consented to the application to amend, and therefore, they should pay the costs of SSEL's application.

MR BARTLETT: Thank you, sir. Shall we then move on to experts?

THE CHAIR: Yes.

MR BARTLETT: There are three areas of expert evidence that have been mooted. There's first foreign law, and as explained, OTC have agreed, consented to Samsung's application for permission to adduce foreign law evidence, despite their reservations about the whole merits of the arguments on foreign law.

As to economics experts, the position is disputed, and that's the issue I'll be addressing. There is a third minor point as to the expert evidence to the nature of the DRAM market. This isn't a point in dispute, just to be clear. OTC's position was that in the event that the tribunal did consider it appropriate to grant expert economics evidence, OTC would seek a direction to allow expert evidence on the nature and operation of the DRAM market. That is something which isn't disputed by Samsung.

Turning to the need for expert evidence, this has been addressed in detail in section 34 of OTC's skeleton. The general considerations and principles for the tribunal to take into account will be well known, they're set out in section 37 of the skeleton. I would just emphasise there's a need to "control expert evidence so as to ensure that it's reasonably required to resolve the proceedings." That quote comes from the Arla v Stellantis case which is at authorities 9, page 226. There's a requirement that the evidence be reasonably required, and the tribunal needs to be satisfied it's going to be helpful to the tribunal in reaching a decision on the relevant issues. The tribunal also have in mind the general principlesin rule 4 of the CAT rules, that "The tribunal shall seek to ensure that each case is dealt with justly and at proportionate cost." That's very much what goes to the heart of this dispute now about experts.

So Samsung's application is based on its assertion that evidence as to whether the

DRAM market had an effect on the prices paid by non-major OEMs would be relevant to the determination of three issues. They say it's relevant to Micron's liability, issue 1, it's relevant to Samsung's liability, issue 2, and it's relevant, they say, to the reasonableness of the settlement, which is part of this just and equitable test, they say, which is issue 3.

What we say is we have to look carefully at those three issues, really, to see whether expert evidence is going to be helpful on these issues, and whether it is relevant, because the broader context, of course, is that expert economic evidence will change the nature of this claim hugely. It will make it very expensive, very complicated, much more time consuming. And that will affect all aspects once we've had expert evidence, all the preparations for trial, et cetera.

So it's a very significant point, which is why we're addressing it.

These points are addressed at sections 40 to 44 of our skeleton. What I'd like to take you to is just address each of those three issues and break it down a little bit, to explain why we say expert economic evidence isn't going to be helpful. The first question that they say is relevant is that of Micron's liability. As we know, and as Samsung accepts, the question here is whether there was a reasonable cause of action against Micron. We're not trying to determine anything absolutely, we're just trying to determine whether there's a reasonable cause of action. What we say here is that a reasonable cause of action, when determining that, it's not something where one wants to have expert evidence trying to address, you know, the whole issue in the underlying claim, because it was, of course, settled before there was any expert evidence. So the idea of relitigating the reasonableness of that settlement by reference to expert evidence that might have been produced in that claim, seems artificial and not helpful, and it goes against the authorities. That's just not what is meant to be happening here, when one considers whether there was a reasonable cause of action.

So we say that first point is a fairly high level test, it's not one which involves proving on the balance of probabilities, all the specific points that would have gone to Micron's liability.

The second general point they say that the expert economic evidence will be relevant to is Samsung's liability. The question here then is whether Samsung is liable for the same loss for the purposes of engaging section 1.1 of the Contribution Act. It's not a matter of proving the quantum of damages against Samsung. What we say here, first this is a matter, as I said, of proving some sort of general loss or harm rather than liability for a specific amount of damages. Now, that distinction that this isn't about proving damages, is in the authorities bundle, the final entry, at page 244. It's section 4.27 of the Law of Contribution and Reimbursement textbook. Perhaps I could just ask you to read that quickly. It's particularly the final few lines.

It says:

"When considering the scope of the 1978 Act, it does not matter whether one speaks of damage or loss or harm, provided it is borne in mind that damage does not mean damages."

As we said in the skeleton, the previous cases, we say, are absolutely clear here, that in this sort of special situation involving a follow-on claim and a decision of an authority which is binding, that the liability of D2, and that's Samsung, follows, as the cases say, ineluctably from the liability of D1, Micron. One doesn't have to go further than the specific situation of this case to reach that conclusion of liability.

That's set out in a few cases, but I quoted from Wolseley in the skeleton. That's section 47 of Wolseley, which is at page 129 of the authorities bundle. (Pause).

Here they're talking about the previous Newson case, where this point had been made, or assumed, and they're confirming here that in this situation, where you have a settlement, and both defendants being joint and severally liable because of

a decision which is binding, then it follows ineluctably, D2's liability. So there isn't some need to prove it separately.

The relevant section of Newson they had been referring back to is at page 108 of the bundle. Then I'll take you to Percy v Merriman, which is another case which comments on the same point of Newson. That's at page 188, at section 89. The point that they make in the first part of this paragraph is that whilst it's not -- normally, proving a liability of D2, Samsung, is a step that has to be undertaken, but that in Newson, which they're referring back to, this was automatic because of the situation in that case, and we are in that same situation, we say.

So these are both cases which just refer back to Newson in saying that in these situations, one doesn't need to prove liability separately.

We say on the law, in reality, expert evidence is not reasonably going to be required and it's not going to be of any assistance. Obviously, Samsung has raised the point. It doesn't accept that, and it says that OTC is required to establish liability for some harm or loss against OTC. As I said, if Samsung are right, and we're assuming they're right, all we would need to establish would be some loss in a general sense, some harm in a general sense, to Samsung. Not going through complicated economic evidence to work out the precise level of an overcharge which is the sort of escapade that happens in the follow-on damages claims. We say that's a much more general and simpler point that in reality, can be determined on the balance of probabilities without complex economic evidence. So even if this is really required at all, which we say it's not, it is not a point which requires extensive and very costly economic evidence, and that's not something that will really assist the court in resolving this point. It's something which can be addressed by much more general factual evidence to an adequate level. Because we're not trying to show there was an overcharge of 10 per cent, there was an overcharge of 20 per cent. We're just saying there is some

degree of harm. And in a competition context, once you have an interference with free competition in the market, and they are buying DRAMs in the market, you can see how the general evidence as to things like the correlation between prices charged to all different customers, that sort of evidence will be, hopefully, sufficient to address these sorts of issues at this general level of was there some harm for the purposes of showing the same loss requirement of the Contribution Act.

So we say this isn't the sort of issue which should open up a need for expert evidence. We say it's not needed because it should follow automatically as per Wolseley, but even if there is some factual assessment of the causation of harm to OTC, it is something which wouldn't warrant highly complex and expensive expert evidence.

So that's the second question which they say expert evidence is relevant to. Is Samsung liable to the same loss?

The third question for which they say expert evidence is liable, the third main question, is the reasonableness of the settlement. As we discussed earlier, that forms part of this just and equitable assessment, section 2.1 of the Act. We don't accept that reasonableness is necessarily the right question, but putting that aside, the key point here is the nature of this test. What is the court being asked to do? They're being asked to determine what is just and equitable by way of contribution. That is a broad test which is mentioned at section 19 of our skeleton, but the key point is it's a broad brush assessment. It is not an assessment which requires very detailed evidence on particular points. This point was in fact confirmed specifically by the Court of Appeal in a case which Samsung itself was involved in and where it itself was pursuing a contribution claim on a very similar basis to which OTC is now pursuing a contribution claim. If I can take to you that at 207 of the authorities bundle. Paragraph 18. The second half of that paragraph, the final sentence, you will see:

"In general, what is just and equitable will be assessed with a fairly broad brush, as ex

hypothesi, both the parties are wrongdoers and an unduly granular approach would be disproportionate use of the court's resources to the prejudice of other litigants."

So we stress that whilst Samsung is entitled to argue about reasonableness, whether or not that's the right question, this is all part of the just and equitable test, and this is a broad brush approach. The Contribution Act is not meant to be about -- or this assessment under the Act is not meant to be a highly granular sort of exercise involving numerous economic experts.

They also say as part of this just and equitable test that expert evidence may be required on questions of attribution, and by this, we assume that they're really talking about the relative responsibilities of Micron and Samsung. We don't understand this.

They also say that OTC seeks disclosure on the issue of market shares, and this somehow supports their position. We don't quite understand this. On the issue of attribution, we have pleaded that the percentages should be done by reference to market share, and we've pleaded specific data from industry sources which says what the market shares are. The only reason why there's disclosure on this is because it's not accepted by Samsung, and so if it is not accepted, we obviously have to have disclosure on the issue. But our position is very straightforward there.

But we're saying relative responsibilities of the two parties is not something which requires expert economic evidence. You have the Commission decision which deals with culpability and what they did, and then you have market shares information which is industry information, it's not information that will be calculated by an expert.

So we say that point they raise about attribution at section 19.3 of their skeleton, we say doesn't take them any further.

Finally on the issue, Samsung say that OTC is seeking disclosure relating to supply and demand factors, and they say because this is one of the points in the disclosure issues list, this supports their point that there should be economic evidence, because

usually, this sort of documentation relating to supply and demand would feed into the expert evidence. I think that's their point. It is correct that those disclosure issues do include supply and demand factors, but the only reason that was put there was because it was to protect the position, because we knew that Samsung would be seeking expert evidence, and we didn't want to be caught without the sufficient information if that were granted. But we accept that information relating to supply and demand factors wouldn't be necessary to be disclosed if expert evidence is not permitted.

So that is why we say on the three big issues that have to be decided in contribution claims, expert economic evidence isn't really reasonably necessary and isn't going to help the tribunal in coming to a decision when you actually look at the nature of the tests they're deciding.

The other point we keep in mind is proportionality and what we say is that proportionality is very important here. This is accepted by all parties to be the tail end of litigation that's been running for many years. The Part 20 claim needs to be determined efficiently and cost effectively. Expert economic evidence will hugely increase the costs. It's not only the cost of the experts, which could be very high themselves, we have some of the figures in the skeleton, but it will increase counsel's costs in preparation for the trial hugely, it will increase the trial length, it will increase the need for disclosure, it will increase solicitors' costs. So the whole nature of this contribution claim will be changed from something which should be relatively efficient, it's not a very high value claim, but it will turn it into something which is very expensive and very time consuming to resolve. Our view is that that is not the right way to go, and also, it's not the right way for the tribunal to go, because it will very much discourage defendants in these sorts of claims from settling in the future, if they know they're going to have to relitigate everything, all the same issues in effect, with experts

in a contribution claim. And that goes against the whole point of the Act, one of the points, which was to allow settlements and then contribution claims that follow.

So those are my submissions on the need for expert evidence on economics.

THE CHAIR: Thank you. Mr Bartlett, do you accept that the causation issue, if you like, the issue of whether the DRAM cartel had an effect on OTC as not being a major OEM, is that an issue that can legitimately be raised, either in relation to the reasonableness of the settlement or in relation to the just and equitable share? And if it can be raised, how is the tribunal going to deal with it? Also, it's right to say that if it is raised, the onus will be on OTC to establish the relevant causative connection.

MR BARTLETT: We say when the court is considering the just and equitable contribution, so the third part of the test -- the general authorities in the background suggest this is to do with culpability and causative effect, but it's the relative culpability and causative effects of the two defendants that one's looking at. In the Act it talks about the relative responsibility of the parties.

So what we say is this exercise is much more about how do you divide up the liability. All right, if reasonableness comes in, it's only at a high level. Was it reasonable for Micron to settle at this sort of level? But that is a fairly broad brush approach, and from a policy perspective, of course, in a situation where Micron is advised by lawyers, was involved in proceedings for several years, you can see that the court would be very reluctant from a policy perspective to start second guessing the reasonableness of a settlement, where inevitably it was prior to expert evidence. Because if you say "Well, oh no, you could never reasonably settle before you've had expert evidence", that would again undermine the whole Act. So we would say there isn't an onus on us to prove causation of a large amount of loss. There may be, in the second question as to Samsung's liability, although we dispute it, there may be a requirement just to show some harm, but really under the Act, once you get beyond there being a liability

for some harm, some liability of Samsung, one's talking about is it a bona fide settlement? And it's plainly a bona fide settlement at that stage, and then just and equitable is not about trying to unpick the settlement, we would say. So we don't say there's any positive obligation on OTC standing in Micron's shoes, to show that its settlement was reasonable. But even if one is addressing reasonableness, we say the court would not be trying to address reasonableness by litigating the issue that was settled. That just can't be the right way to go, and we say it's not supported on the authorities either, which talk about -- when they say if one is looking at reasonableness, it's a high level approach, it's not trying to conduct a mini trial on the issues.

THE CHAIR: All right, thank you. Ms Lukacova.

MS LUKACOVA: Can I check, do we need a break for the transcribers at some point?

THE SHORTHAND WRITER: I'm fine to carry on, thank you.

THE CHAIR: Thank you for raising it.

MS LUKACOVA: The first point to raise here is that my learned friend says repeatedly this isn't about the precise figure, this isn't about the precise amount of loss, and it doesn't matter whether it's figure X or figure Y, as long as there is some loss. But the problem with that is here, we do not accept that there was any loss at all, because of the gap that I have discussed, and also, critically, because of the absence of a factual pleaded basis in OTC's own particulars in the main claim. So that is what takes this out of the norm, so to speak.

Again, I won't go through it in detail again, but I will work through the implications for the purposes of this application. There is the question of causation and whether any loss has been caused. I go to those three issues. One is Micron's liability to OTC. I've dealt with that adequately in the context of the pleading application. The only thing I would reiterate is that we do not accept that any unpleaded facts are to be assumed

against us. So where there is no pleaded basis for an assertion, we do not accept that that is to be assumed in the Part 20 claim.

Then there is the question of the reasonableness of the settlement, and there I would quickly, if I may, take you to the relevant passage. It's just a couple of paragraphs in the authorities bundle. That is at page 61. It's tab 3. The Sainsbury's case starts at page 26. So this was a contribution case at this point. Sainsbury's brought a main claim against architects, Broadway Malyan, that's the main defendant. That main claim then settled, and then Broadway Malyan became the Part 20 claimant and sued construction engineers under the 1978 Act. So that is the context. The court here was looking at the question of what is to be assumed and the question of reasonableness of settlement.

If we can turn to -- so it's internal page 321E, or if it's easier, it's page 61 of the bundle.

THE CHAIR: Yes.

MS LUKACOVA: So starting just below E, there's the point that my learned friend emphasises, which is that -- three lines under E, he rightly emphasised that:

"Biggin v Permanite established that the court is not required to decide what should have been the proper amount of the settlement as if the matter were being tried."

That is correct, but then the passage underneath that sets out what the test is and what the tribunal does need to be satisfied of. If we could have a look at that. Starting at the end of line 3 under F, it says:

"If, upon the evidence, the judge is satisfied that the damages would be somewhere around the figure at which the plaintiff has settled, he would be justified in awarding the settlement figure. I do not consider that it is part of his duty to examine every item in these circumstances [that is correct]. The plaintiffs put forward their claim and call evidence to establish it."

This is what I mentioned earlier, it is for the Part 20 claimant to prove their case on

this. It goes on to say:

"The defendants have an opportunity of cross-examining the plaintiffs' witnesses and of calling evidence themselves. The plaintiffs must establish a prima facie case that the settlement was a reasonable one. If the defendants fail to shake that case, the amount of the settlement can properly be awarded as damages."

So that is the framework for this. And then just two sentences after that:

"The test is an objective one. [As I mentioned before.] So the fact that settlement was reached following legal advice is irrelevant."

Those were the propositions that I rely on, and in circumstances where there is no pleaded factual basis for any loss suffered by OTC in the main claim, this is, I say, highly relevant.

That's the question of the reasonableness of the settlement. The third question in this category is the question of SSEL's liability to OTC, which is the question that my learned friend tends to focus on. That's where he relies on Newson and Wolseley. What I say is we do not accept that SSEL's liability to OTC is assumed under section 1.4. But even if we are wrong on that, the same issues arise as regards SSEL's liability to OTC as they do as regards Micron to OTC. There is simply no pleaded factual basis in support of any loss, and therefore, this does need to be grappled with by the tribunal.

Now we of course accept that expert evidence must be relevant, plainly. We say that it is. We also accept that it must be reasonably necessary. Again, we say that it is. I do note that OTC itself is seeking disclosure on this issue. I've referred to it in the skeleton. I don't propose to take you to it, but that is issue 1 about the interrelationship of the pricing as between prices charged to major OEMs and non-major OEMs. OTC is seeking, as part of that, documents that go to supply and demand factors, impacting upon the pricing of DRAMs. That is typically the sort of documentary evidence that

expert economists look at.

OTC suggests that this can all be determined on the facts in its skeleton and in my learned friend's submissions today. We do not accept that. This is where my learned friend, in his skeleton, raised the issue that it seems to be common ground that there's a correlation between these two price channels. As I've explained, that is very much not accepted, but in any event, causation does need to be addressed at some point and it isn't clear to us how pure factual evidence is going to get us there at all, and causation does need to be grappled with.

These aren't the only issues that we say expert evidence goes to. There will be broader issues of reasonableness of settlement. I've covered that adequately, in my submission, and then there are also the questions of attribution. As I've mentioned, it is part of SSEL's pleaded case that it continued to compete actively. I've taken you to the relevant part of the draft re-re-amended defence. The tribunal will need to assess the impact of that somehow and to consider the relative responsibility for any loss, and we submit that expert evidence will also be needed for that, but even if it wasn't, there's a number of different issues to which this goes.

Then finally in relation to market share, again OTC is itself seeking disclosure of, they say, best available data in respect of the market share of DRAM manufacturers. It is not for us to tell OTC what to do with this data, but it isn't currently clear to us how they intend to use it, without the benefit of any expert input from an expert economist.

Just briefly, OTC relies on a number of authorities. My learned friend relies on Trucks. There might be one paragraph that I would briefly like to take you to. The question being dealt with here in Trucks is whether the overcharges in France and Germany should be calculated separately or whether the UK overcharge being determined by the tribunal should be applied to France and Germany. If we could turn to tab 9 --

THE CHAIR: Why is this going to help me?

MS LUKACOVA: My learned friend takes the point in his skeleton that there are authorities such as Trucks, where the tribunal has been prepared to, for example, here apply the UK overcharge to France and Germany and decided that French and German overcharge didn't have to be calculated separately. I'm rebutting that by saying that, firstly, there was going to be determination of the overcharge in the UK, so already that's a very different situation, and then secondly, there's a paragraph that I was potentially going to take you to, but we don't have to go there, where the tribunal explains that, actually, there isn't sufficient evidence to suggest that there would be any material differences between these overcharges across the three countries anyway.

So I'm simply neutralising my learned friend's submissions in reliance on Trucks. If that isn't necessary, then I don't need to go there.

He also relies on Autoliv but that's purely for the proposition that expert evidence must be reasonably required, which we of course accept.

So in summary, SSEL's position is that expert evidence from an economist here is relevant and it is reasonably necessary to resolve the issues for trial.

THE CHAIR: Thank you. Anything else, Mr Bartlett?

MR BARTLETT: Could I just come back very briefly on a couple of points just relating to this question of the reasonableness of the settlement and the approach to resolving that. My learned friend referred to the Sainsbury case at page 61 of the bundle, which referred back to the Biggin case. If I could just make a couple of very short points. The first is that the reference back to be the Biggin case, so at the bottom of page 61, the point that was being made by counsel is the point before the quote, which is just that it wasn't a matter of determining these issues as if they were being tried. The Biggin case itself was 1951, it was 20 plus years before the 1978 Act came in, and that means that the way you read what was said there, you have to read it with caution,

because the whole provision of section 1.4, which is the presumption of liability in terms of settlements, did not exist at the time of this. So it's something that should be read with care, and with the understanding that it's before the Act came into place.

But also, if you just go down to page 62, 322 of the case reference numbering, just below B, what you see at the end of that paragraph is talking about the test:

"Settlements are to be encouraged as a matter of policy, so it would be a discouragement if a party had to justify them in detail."

That's the point I was trying to make, and I think that's the point that is made in that case.

That also comes through, I think, in paragraph 29 of Wolseley, which is at page 123 at the bottom. You will see the last two lines:

"The court is not required to decide what should have been the proper amount of the settlement as if it were being tried."

And then it quotes again from Biggin. So I'm just emphasising that point, this is not a matter of going into great detail, and of course, I took you to the broad brush point which is in a very recent Court of Appeal judgment in a contribution claim relating to a cartel, where they point out this is a matter of a broad brush valuation.

So I think those are the points that would support our view that you should not be having expert economic evidence, which would be very expensive and costly, in the context of determining that just and equitable test.

THE CHAIR: Thank you. Again, I will issue a written ruling. I am not going to order any expert evidence. It seems to me that the onus is on OTC to establish the reasonableness of the settlement that it made with Micron and also to establish that the contribution it seeks from Samsung is just and equitable Mr Bartlett's position is that expert evidence is not necessary. In that context, the tribunal should approach these issues at a high level. Without getting into too much detail, I am not deciding

whether he is right or wrong on that point, but it seems to me that the onus is, as I say, on OTC, and in circumstances where Mr Bartlett resists the admission of expert evidence, I am not going to direct it. I also consider that it would be not proportionate, bearing in mind the anticipated costs of expert evidence and the relatively small amount at stake in these proceedings.

MR BARTLETT: Thank you, sir. If we can now turn to disclosure. As to Samsung's application for disclosure from OTC, that has been agreed, so we're only needing to deal with the question of OTC's application for disclosure from Samsung. There are two principal issues in dispute relating to OTC's application for disclosure. What has been agreed are the issues for disclosure, so the types of relevant documents have been agreed. The two issues in dispute are, first, the scope of the searches that should be carried out by Samsung and secondly, whether Samsung, SSEL, should be required to provide disclosure of relevant data that relates to the Samsung DRAM business which is held by other Samsung addressees named in the decision.

Samsung's skeleton focuses on its attempt to delay the determination of the disclosure issue on the basis of the revision to the application that OTC made, and OTC's position is that's really not a very constructive approach, because obviously, we need to get as much done now as we can at this hearing. I'll explain why we think this issue should be dealt with today and can be dealt with today in a way which doesn't cause any prejudice to anyone. So I propose to address the issues in the following order: first, as there's no dispute, I think, as to this issue being determined now, it wasn't amended in any way, the merits of the issue relating to whether they should search for data held by other Samsung addressees. So that point, I can deal with the merits of that first. Then I'll deal with the procedural points that Samsung make relating to the amendment to the application, and then I'll very briefly say something about the merits of that application regarding the scope, but that's already been addressed in skeletons and

I think there won't be much to say there, given that it hasn't been responded to.

So on the Samsung addressees point. The point here, really, is whether Samsung should be able to avoid disclosing data that relates to the DRAM business that was the subject of this cartel because it's held by other Samsung addressees, they say. They want to avoid that on the grounds of separate legal corporate entities, the separate legal personalities of the different companies. This is addressed in OTC's skeleton at section 59. Samsung's skeleton doesn't really address this point, but it is addressed in their response letter briefly, which is at page 949 of the bundle. The main argument made by Samsung is that it has no control over the data. They refer to the witness statement of Dr Helmer and the evidence at page 653 of the bundle. What he asserts there is that they don't have any control because they're different companies.

If I could start quickly by taking you to the law --

THE CHAIR: I've read what you said in your skeleton. There has to be some sort of arrangement or understanding, I think, between the two.

MR BARTLETT: Yes, we say the corporate relationship is irrelevant. There needs to be some sort of understanding or arrangement providing for control. That arrangement can be inferred from the circumstances, and evidence of past access to documents in the same proceedings is highly relevant.

OTC's position is that the tribunal can reasonably infer that there is a sufficient arrangement or understanding regarding access to documents -- regarding control over the documents. The grounds upon which we say that are set out in the skeleton at section 64. In essence, you'll have seen the first point is this clear joint economic interest in defending the claim. The point here is that all the Samsung addressees, they were all found liable and fined by the decision, so Micron could have sued any of them in contribution, and if Micron sues one of them, they can claim in contribution

against the others, between them. So they have, in practice, a joint economic responsibility for this claim, so they have a joint economic interest, and that is obviously relevant to inferences as to how this claim is being managed and who is likely to assist whom in dealing with this claim.

That's the first point. The second point is that there is actually clear evidence here of a large amount of sharing of documents to date. This is at point 64(b) in the skeleton. We know that Covington & Burling and maybe their predecessors, acted for all of the companies and produced a single submission to the Commission in relation to the investigation. So they must have pooled all their documents, sent a pack off to the Commission and so, as clients, they all have rights to the documents held by their solicitors. That is why Samsung, now does not dispute that it has access to all the documents held by Covington & Burling and those documents, of course, will have come from different Samsung entities, because they were all putting one single submission into the Commission. So this is a case where, plainly, there has been pooling of documents and shared access to documents, and there continues to be that shared access, because Samsung continued to have access to all the Covington documents, which are said to amount to many gigabytes of data. But what they're saying is "We don't have access to the management systems to where the sales data, et cetera, is kept."

That's the second point. The third point is that in practice, it can be inferred that Samsung's defence of this claim is being managed by SSEG, which is another of the addressees. So we're in a situation where SSEL is pending liquidation, it's waiting to resolve this claim before it goes into a voluntary liquidation, I think, it's transferred all its assets to SSEG, that is said in Helmer's statement, paragraph 8, and at the moment, the general counsel is the one who's been giving evidence. Dr Helmer is SSEG's general counsel. He's the one who's given evidence here. Point 4 at (d) is

Samsung has agreed -- so Dr Helmer has confirmed that Samsung has agreed to give assistance. The other addressees, or SSEG has agreed to give assistance to SSEL as needed, and that's in Helmer 1 at sections 1 to 3 at page 648. In one part of his statement he says there's no control, but he is agreeing they will give assistance as needed. That's page 648 of the bundle, if you want to go to that. It's at the end of paragraph 3. He talks about the other companies being called on to give administrative support on an as needed basis.

The fifth point at (e) is that Dr Helmer has, in practice, given witness evidence, so they have been assisting with these proceedings, and as general counsel, one can assume has been directing these proceedings. He is the general counsel of SSEG. One can only assume that the witnesses whom SSEL intend to call -- and they've said they propose to call two witnesses, given that SSEL has no employees, according to its accounts, they're presumably going to be calling more witnesses from other group companies, most likely SSEG, who now controls the business.

So we say that in all these circumstances, this is precisely the sort of situation where it is reasonable to infer that control. These are very closely related companies. They're all part of the same economic undertaking, which is why they were all fined together. They all have a common interest, and they are all actually sharing documents.

So we say this is exactly the sort of situation envisaged by Berkeley Square, in that case, where it is reasonable to infer access --

THE CHAIR: Isn't the problem -- if I've understood Ms Lukacova's skeleton argument correctly, the objection is that the expansion of OTC's application to cover subsidiaries was only made very late in the day, in your statement earlier this week?

MR BARTLETT: No, that isn't the point that's being made. This argument about other addressees was made in the original application, there isn't a dispute about that. The

only change was the second argument that I haven't addressed yet, which was this point as to should the documents that SSEL does have, which are held by Covington, should it just search the leniency file, which we thought was much bigger or all of those documents? That's the issue that she takes objection to, the amendment on that. So we don't understand there can be any procedural objection to this issue being addressed, and in fact of course, a similar point was raised more than a year ago, but it was never -- for various reasons, disclosure wasn't given by Samsung in the main claim. But Dr Helmer's evidence about control was given more than a year ago. So this issue has been live for a while.

So those are the points that we make there, and we say, thinking practically, the alternative to that is that OTC could seek to join SSEG into the proceedings as a defendant, which we say it could do. That would add procedural complexity, time and cost. We say it's wholly unnecessary. And also, as I mentioned in the skeleton, Samsung say because of the drafting of the assignment, you can't do that. We've mentioned in the skeleton, we say that's not right, but they're obviously going to raise an argument about the assignment, which would complicate and make it more unattractive, again, to join in another party just for the purposes of this.

We would also say the fact that they could be joined in as a party, again is something that the court should bear in mind. We're trying to think what is the most efficient means of operating here, and conducting this claim, and no-one is being prejudiced here, we're just trying to find a practical way forward. We also say that it is a way that accords with the legal principles.

THE CHAIR: All right, Mr Bartlett. Shall I hear what Ms Lukacova has to say about the subsidiaries.

MS LUKACOVA: Yes, sir. First of all, SSEL does object to this element of it being heard today as well. There has been an issue. The extent of the shift has only really

become clear at the point of the exchange of skeleton arguments, and I can make that good. There's little disagreement about the law, Berkeley Square says what it says, but the chronology is a real issue here.

Before I do anything else, if I can just show you the paragraph in Helmer, because that comes first chronologically as well. That was filed in advance of the last CMC held in November 2023. That's tab 57, page 653, and it's paragraph 11. This is where Mr Helmer says:

"However, SSEL does not have in its possession or control, nor does it have a right to possession, inspection, or to take copies of documents or data held by Samsung Electronics Co Ltd or any of its subsidiaries."

This was filed in November 2023. Then OTC filed its application on 3 January this year. If we can have a look at the basis on which this was put then. If we can look at tab 64. The application itself starts on page 737 and the part in respect of disclosure starts on page 741. That's section 7. The scope of documents to be searched, that doesn't go to this, but then across the page, page 742, starting at 7.8, is where OTC set out the basis upon which it is seeking disclosure as regards other companies. I would invite you simply to read this while bearing in mind the test which is whether there's an arrangement or an understanding, and then I will comment on it once you've had a chance to read through (a) to (g). (Pause).

THE CHAIR: Okay.

MS LUKACOVA: None of this goes to the test. For example, in (f), the closest that OTC gets to that is where it says:

"The court may therefore reasonably infer that there is substantive benefit ...(Reading to the words)... the litigation, have the power to give access to the data sources to SSEL."

None of this goes to whether or not SSEL has control over the documents of other

companies within the group, SSEL being a subsidiary. The precise corporate structure doesn't matter, but there is still an additional point to note here, which is that we are looking at a subsidiary, not a parent company as well. Not that I would accept that parent companies necessarily have control over subsidiaries' documents either, but I simply note the structure.

So this was how it was put in the application. If we then look at my learned friend's skeleton, paragraph 64, which is what he was referring to just now. What we will see -- again, the tribunal is now being invited to infer matters from various factual assertions, many of which are contested, but importantly, many of which had not been put in the original application. We can have a look. For example, in 64(b), my learned friend is referring to the fact that the Samsung companies acted jointly in their response to the Commission's investigation, instructing a single law firm to make the leniency application, and so on. This wasn't previously raised or discussed, and we do not accept that SSEL has in its possession or control any documents provided by any other subsidiaries to those solicitors, by way of example.

Similarly, then, from (c) onwards, there are some detailed factual allegations being made about management, about SSEG, about the absence of employees --

THE CHAIR: Is any of this disputed? It doesn't look to me to be terribly contentious.

MS LUKACOVA: It is. Just by way of example, it is accepted that the same law firm was representing a number of companies in respect of the investigation, but it is not common ground that SSEL therefore has access to the entire pool of those documents. That is not accepted. If this has now become an issue, then that's exactly the sort of point on which we would now need an opportunity to put in further evidence, because there was no reason to deal with this before, the issue not having been raised.

Then similarly, the various assumptions being made about what witnesses we might or might not call. First of all, I would ask the tribunal not to hear this today, but

secondly, that, at this point, ought to be disregarded entirely. All we have said is that we will be calling no more than two witnesses. Anything else is an assumption.

Similarly, these assertions about the role of SSEG and providing support as needed. My learned friend himself referred to what Dr Helmer says about this being administrative support. That doesn't mean that SSEL has a right to possession or control of documents of any other subsidiary. We have a clear statement to that effect in Dr Helmer's witness statement, and that is the only evidence that we have on that today. So if the tribunal were to go behind that, it would be finding that Dr Helmer's clear statement on this is inaccurate, in circumstances where, in fact, if these are now live issues, we do need an opportunity to address them further.

There might also be a practical point, if I may. If we are sticking to the two and a half hour time limit for this hearing, then we have 15 minutes left, so it seems unlikely that we could get through the rest of it anyway, even if the tribunal were minded to hear it, so it may be that the practical way forward is simply to adjourn, we would say, both of these applications -- OTC would say their revised application -- regardless of labels, to adjourn the disclosure related applications, with directions for evidence in response, and if OTC wishes, evidence in reply.

THE CHAIR: What do you say to that, Mr Bartlett? If I do adjourn it, it's not going to be for very long. I don't see that these matters require much evidence in response, but we are running out of time.

MR BARTLETT: I accept we're running out of time. I would suggest that this issue that we are dealing with can be resolved now. The evidence that we've relied on specifically is Helmer 1, which is the evidence that was relied on by Samsung in response to the application. So we are simply relying on that evidence. That's one point that apparently is said to be unfair, but we don't go further than that.

Secondly, the point about the sharing of documents is indisputable. It is Samsung's

own evidence that they put together the largest file of documents they could, and that's what Helmer says, to give to the Commission, on everything that could have been relevant. It is not feasible to suggest that hasn't been shared. We know they have said that they have access to all the Covington documents -- well, to 35 gigabytes of data held by Covington. There may be possibly some detail behind that, but the general point is very straightforward, and all we're saying in this application, all the court needs to be satisfied of is that it can draw some inference. So we say it can be addressed here, and this really shouldn't need extensive further evidence. We say there's no harm, and there isn't anything new. The only point, there's been, obviously, a clarification of the legal position as set out in Berkeley Square, but we made the application, and it was responded to with Helmer 1, and we are simply making points that come out of that evidence, and the evidence that was clearly before the tribunal as to the documents. What the disclosure report itself said about the documents.

THE CHAIR: The trouble is Samsung has not addressed the question of whether there is some understanding or arrangement that it would be able to access documents held by other subsidiaries. That wasn't the way it was put in the application, and there is no evidence from Samsung dealing with that particular point. I appreciate that Mr Helmer says what he says, but it's addressing a slightly different point.

MR BARTLETT: Yes, I take that point, but I think where there is indisputable evidence is what they have said about their giving documents to the Commission, and the fact that they have pooled their documents for those purposes.

I don't see any way around what they've said there, and it's plain that one firm was acting for everybody. In fact, if a solicitor is acting, they can't really withhold documents between their clients. So we would say that there is sufficient material there, based on the whole approach to the investigation, the use of Covington and

a submission of a single file of documents to the Commission. But whether Samsung wishes to put in evidence as to -- you know, it's unlikely they're going to want to put in specific evidence on the terms on which Covington are instructed, because it would all be privileged anyway, but I don't know whether -- well it seems that we're unlikely to benefit much from an adjournment but we are ultimately in your hands.

THE CHAIR: What occurs to me is I could direct that there is more evidence, and I can then deal with it on the papers rather than having to convene a further hearing. What I would have in mind is that Samsung has seven days to deal with points made in paragraph 64 of your skeleton argument -- and how long do you want after that?

MR BARTLETT: If we could just have seven days to respond to that, if there are any submissions needed, if it's going to be dealt with on paper.

THE CHAIR: All right.

MS LUKACOVA: If I might, the only thing I would say is that if the rest of it is getting adjourned anyway, it might make sense for the -- partially overlapping, in fact, bits of the application to be heard and determined together, because part of the – what we would call 'new application' is that a review should be carried out of all documents held by Covington, so they bleed into each other, and so it may be best for the two to be handled together, in circumstances where the proceedings can't exactly move forward anyway until both issues have been determined.

THE CHAIR: We could deal with the Covington issue today, couldn't we? Why can't we deal with that?

MS LUKACOVA: I'm sorry?

THE CHAIR: The issues are separate. Why can't we deal with the Covington documents now?

MS LUKACOVA: Now, in the sense of at this hearing right now, or now, in the sense of on the papers, dealing with all remaining --

THE CHAIR: At this hearing.

MS LUKACOVA: Well, because that is the element that's new that I've raised in the skeleton, in respect of which we say we need a fair opportunity to address it as well, and also, we only have ten minutes.

THE CHAIR: Mr Bartlett, what do you say? Sorry to interrupt. There is a difference -- I'm not sure, does the OTC application raise any fresh factual issues upon which more evidence would be needed?

MS LUKACOVA: Yes. Are we now talking about the new request that all documents held by --

THE CHAIR: Yes.

MS LUKACOVA: Yes, it does, because the evidence that we've prepared was focussing on the question of the alleged delta between the documents that are held, that were disclosed to the Commission, versus the accessible Commission file that has already been disclosed. So in our evidence, when Ms Grelier was dealing with the question of purpose, so what is this for, she was focussing on the question of, well, it's all within the accessible file that has been disclosed in these proceedings anyway. She wasn't dealing with the broader question of is there a purpose to looking through all these other undisclosed documents, because that wasn't in issue. She also wasn't looking at proportionality in respect of that, because that also wasn't in issue, and searches of those undisclosed documents were not being sought.

So we're not suggesting -- I apologise.

THE CHAIR: No, I'm satisfied that we are going to have to adjourn that aspect of it, hearing what you have just said.

So I will direct that Samsung files and serves evidence in response to the expanded application, if you like, and the points raised in Mr Bartlett's skeleton argument within seven days, and that OTC can respond seven days thereafter, and if I can, I will deal

with it on the papers, without having to convene another hearing.

MS LUKACOVA: Is there any chance we might be able to have a bit longer? We would seek 14 days, but 12 might work.

THE CHAIR: What do you say, Mr Bartlett? I'm conscious that the trial isn't that far ahead. I don't know how time critical it is.

MR BARTLETT: I don't think we have a trial date, unless the trial date from the original action has been left and that was to be used for the Part 20 claim. At the moment, one of the things we're keen to set is directions for trial, and that's one of the reasons we want things to move on quickly, but it was my understanding, I have to say, I think -- it seems to be Ms Lukacova's understanding that we don't have a trial date in the Part 20 claim.

MS LUKACOVA: My understanding -- I'm sorry -- is that it was never listed. To the extent there was a window, that was essentially now, so that wouldn't in any event be viable, and I would imagine there would be no opportunity to list anyway, so there is no trial date, and there are no directions ahead that we would need to keep up with at all. So on that basis, we would seek 14 days, or as close to 14 days as is possible, with the same amount of time for OTC to make --

THE CHAIR: That's fine. It was still listed in my diary, which is why I assumed there was still a hearing, but if there's no trial date fixed, then by all means have 14 days and OTC have 14 days thereafter.

MS LUKACOVA: Thank you.

THE CHAIR: Probably we should now have a break.

MS LUKACOVA: Yes. So that leaves, if I may, our security for costs application, which at this point needs to be adjourned, and my learned friend's cost related application as well.

MR BARTLETT: Yes, I don't know, sir, whether -- from our perspective, the two

remaining costs issues could be dealt with very simply by -- ordering costs budgets was what we proposed, and then adjourning the security for costs application, pending the court cost budgets, and that process taking place. That's what we had envisaged would be the most practical way forwards, and given where we are in time, we would say that would be a simple way of dealing with things, given that there isn't time to do much else right now.

THE CHAIR: Yes. Ms Lukacova, I recollect, was concerned as to what the position would be if the security for costs application was put off in terms of ring fencing funds available for meeting Samsung's costs.

MS LUKACOVA: That is correct. May I just quickly take instructions on whether we would wish for this to be determined on paper, or whether we're content for this to be adjourned, to be heard alongside the other applications? We're content for it to be adjourned alongside these other application, on an understanding -- I'm assuming it is envisaged it would be listed in the near future. As long as that's the case, I think we're content with that.

THE CHAIR: All right. What about the provision of costs budgets?

MS LUKACOVA: Yes, so that is opposed.

Simply on the basis that we appreciate that the value of the claim is relatively low within the context of the CAT, but things do tend to evolve. We've now had three CMCs. The landscape changes very considerably with each one. It may look like the process ahead of us might now be more linear than it has been so far, but there are certain indications that that will not necessarily be the case. OTC are reserving their right to make a strike-out application, for example. There's uncertainty in respect of disclosure, and so on. OTC also occasionally threatens to join other parties. So our concern would be that we end up putting together a costs budget on one basis and then everything keeps shifting in the future, potentially, and that itself can end up

generating costs. That we can see in part from the directions being sought by OTC, who are seeking several weeks for the parties to discuss assumptions for the purposes of costs budgets, and then for there to be cost budgets filed and then subsequently, the budget discussion reports. Had that been done at any point in these proceedings in the Part 20 claim, it would have changed -- it tends to change going forward.

So on that basis, we certainly oppose a costs management order, detailed directions in respect of costs budgets.

THE CHAIR: I'm not sure the directions would be very detailed, simply a direction that both parties provided budgets of what their estimated future costs are.

MS LUKACOVA: Yes, if that is where this is headed, what we would still suggest is that is ordered now, as a provision for costs budgets to be filed, with liberty to apply for OTC, if it wishes to, for a costs management order in due course, once we see where we are with the costs budgets.

THE CHAIR: Yes.

MR BARTLETT: Yes, sir, we would agree the order can be straightforward for the filing of costs budgets, and with liberty to apply, we accept that. We also note, just in terms of comments like "there may be other applications", of course those would fall outside -- any new application would fall outside a costs budget anyway, so that wouldn't prevent it. The only thing I would say is it probably makes sense to delay the costs budgets, obviously, until a period of time after we've finalised issues about disclosure, so until after the determination on the remaining issues for directions. So once we have directions on disclosure, then I think the parties will be in the right position to file their budgets, but I can see it wouldn't make sense to do those before we have had the directions on disclosure.

THE CHAIR: Do you agree with that, Ms Lukacova? The only other way of doing it would be to do it on a sort of alternative basis. I don't have a strong view about that.

MS LUKACOVA: That's what we would rather avoid. Where there is some urgency, for example, in respect of our security for costs application, the concern you've identified, so with that, we wish to press on, but when it comes to costs budgets, where other directions might have an impact, we would very much prefer for this simply to be adjourned and looked at again in the context of the next hearing.

THE CHAIR: Where it's said that the costs budgets are obviously relevant to the security for costs application?

MS LUKACOVA: Yes, and we acknowledge that what we've prepared isn't necessarily perfect, but we'll do the best we can on the information that we have, and that, we would submit, makes sense, in the context of a security for costs application that we regard as urgent from a certain angle, but in the context of costs budgets, that ought to then be the basis upon which everyone proceeds going forward. In the absence of further applications, we would suggest that there is no great urgency there and that can wait.

THE CHAIR: What do you say, Mr Bartlett?

MR BARTLETT: We very much agree with the point that the two are linked and it doesn't make sense to determine security until one has the costs budgets. The second point, we would say, in terms of the alleged urgency, we say there's no urgency. We are currently holding £500,000. Actually, in the Part 20 claim to date, very little has happened, very little has been done by SSEL, and we say that £500,000, in terms of recoverable costs, is perfectly adequate at this stage, at the stage of a CMC, when the pleadings are pretty short, very little has been done. So we don't see there's any risk. Of course, OTC is not going to be dissipating assets in advance, it's managed by responsible liquidators, so there shouldn't be any concern there either way.

MS LUKACOVA: May I respond briefly?

THE CHAIR: Yes.

MS LUKACOVA: The issue with that is, one, our incurred costs already exceed that amount, and I could show you that based on the October 2023 costs budget, in combination with what we know has happened since. It's quite clear that that is the case, but I don't think we need to go there. I simply mention that.

But secondly, the concern is more that OTC's assets tend to fluctuate, and we know that because OTC is a company that has been in liquidation for the past 20 years. When Micron applied for security for costs, OTC's response was that it was unable to raise the funds and its claim would be stifled in the main claim if it were to be ordered to provide that security. So clearly, its asset position does fluctuate. Currently, we have made this application and we are not hearing OTC saying "We couldn't pay this", so right now appears to be a time when they do have -- on their own account, have the funds that they're able to raise, and so that is why we say that, actually, there does seem to be an element of urgency to it, especially in circumstances where we have proposed, we have said that we would be open to an adjournment, on the basis that OTC offers to ring fence the amount sought in the interim, pending the application. The fact that this hasn't been offered suggests that there's a reluctance to commit to it, which is of concern to us. That is why we regard this as fairly urgent. Now if OTC were to now say, actually, they're content to ring fence the funds that we are seeking pending the hearing of the application, then we are, of course, content for the adjournment to be as long as is sensible in respect of any other factors that are in play.

THE CHAIR: There seems to be some common ground that security for costs and the costs budgeting cannot be done until I have ruled on the adjourned disclosure items, so it seems to me that there should be two further stages. Stage one will be the stage of evidence on the disclosure items. I will then rule on that. After that, there will be a further adjournment, if you like, a short period, we're talking about a stage of weeks rather than a long period, during which costs budgets can be produced on the basis

of my disclosure directions. After that, I will rule on the security for costs, and, if it's pursued, on costs management.

MS LUKACOVA: Thank you.

THE CHAIR: At the moment I have an open mind as to whether those remaining issues can be dealt with on paper or whether a hearing would be useful. Perhaps we can leave that open for now.

MR BARTLETT: Thank you.

THE CHAIR: Is there anything else?

MS LUKACOVA: No, sir.

MR BARTLETT: The only point, I suppose, just for the record. In terms of the issues that are being adjourned, I think also the directions following disclosure, the directions to trial. It may be that now we have clarity on experts, it may be that they can be agreed between the parties, but if we can say that on the understanding that the parties seek to progress directions and any issues can be determined, along with the disclosure issues.

THE CHAIR: Thank you. Can I ask you both to draw up an order reflecting what we've achieved today at least.

MS LUKACOVA: Of course.

THE CHAIR: Thank you very much for your help.

MR BARTLETT: Thank you.

(1.05 pm)

(The hearing concluded)