IN THE COMPETITION APPEAL TRIBUNAL

Case No.: 1632/5/7/24

Tuesday 4 February – Wednesday 5 February 2025

Before:

Justin Turner KC
Lesley Farrell
Tony Woodgate

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Claimants

ASDA Stores Limited & Others

v

Respondent

Bremnes Seashore AS & Others

A P P E A R AN C E S

Anneli Howard KC, Julian Gregory, Alastair Holder Ross on behalf of ASDA Stores Limited & Others

Emma Mockford on behalf of Bremnes/Grieg Seafood

Tim Johnston on behalf of Cermaq

Paul Luckhurst and Rayan Fakhoury on behalf of Leroy Defendants

Charlotte Thomas on behalf of Salmar ASA
Daniel Jowell KC and Gerard Rothschild on behalf of Mowi Defendants

Conor McCarthy on behalf of SSF Defendants

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Wednesday, 5 February 2025

(10.00 am)

Submissions by MS MOCKFORD (continued)

MS MOCKFORD: Members of the tribunal, good morning. We finished yesterday with the CMA 2021 decision.

THE CHAIR: Yes.

MS MOCKFORD: Just to wrap up that point, the claimants at footnote 57 of their skeleton refer to a number of other regulatory decisions, one from 2005, one from 2006. I say that, they are very old cases, and we saw the OFT expressly reversing its previous view in the 2021 decision.

I am going to move on to deal with the second basis on which liability is put against the UK defendants, which is implementation.

We had a brief discussion about that, Mr Chairman, yesterday, and you anticipated my point that whilst the claimants put a lot of weight on what they call the Nokia implementation line of case law in their skeleton, I say it has now effectively been subsumed by Sumal and the two lines of case law have converged.

Three points in support of that proposition, I am going to try to deal with them quickly and be sitting down again by 10.15.

First, it was always part of the implementation case law, in my submission the domestic implementation case law, that the subsidiary had to be part of the same undertaking as the parent, and the two bases for attributing liability, therefore Sumal and the domestic implementation line of case law, I say come together.

We can go back to one of the first cases in this line to see this point, Cooper Tire, which you will find in authorities file B in your hard copies, tab 27, and I am after page 1141.

THE CHAIR: Yes. Tab again?

MS MOCKFORD: Tab 27, page 1141, paragraphs 55 and 56.

You can see here that the court is discussing -- it's Mr Justice Teare -- the prevening line of case law. He makes the point in the middle of paragraph 55 that counsel to the defendants -- number of the defendants:

"... submitted that the absurd consequence of the claimant's argument was that a parent company ...(Reading to the words)... rather than BR or ESBR."

Those are the car tyre products in this case, which are forms of rubber.

The judge responds at paragraph 56 by saying:

"However, I did not understand ...(Reading to the words)... the sellers of shoe polish."

I say that was always present in the assigned case law, precisely the point Mr Justice Teare was anticipating, precisely the Sumal point about ten years earlier.

Likewise, if you look at the paragraph in Nokia on which the claimants place such reliance, you can see that in paragraph 32 of their skeleton argument, core bundle tab 47, page 536.

THE CHAIR: Sorry, you are giving a references to the case or the skeleton?

MS MOCKFORD: To the skeleton - the skeleton which has extracts from the case on which the claimants rely. I think it's the quickest way of seeing it.

THE CHAIR: Which paragraph of the skeleton?

MS MOCKFORD: Paragraph 32. The bundle numbering, if you have that, is page 536. You can see the two paragraphs from Nokia which they rely on there, if I could just invite you to remind yourselves of those.

THE CHAIR: Yes.

MS MOCKFORD: As you see here too, that Mr Justice Sales as he then was here is referring to the fact that the subsidiary needs to be part of an undertaking which has participated in an unlawful cartel. So I say that just brings you back round to Sumal

as well.

THE CHAIR: So it is just a single undertaking test --

MS MOCKFORD: Yes -- well, it didn't used to be --

THE CHAIR: -- which confused me a little bit --

MS MOCKFORD: I am sorry, my Lord.

THE CHAIR: You carry on, sorry, you are about to answer --

MS MOCKFORD: It didn't use to be. So the knowing implementation case law used to say: if you are part of an undertaking who has infringed, then you may be liable; also if you have implemented the cartel -- and all these cases typically about what does implementation require -- but my point is Sumal has now addressed decisively the question of what, when, a subsidiary would be liable for its parent's anti-competitive conduct.

My point is Sumal now comes to occupy the whole space because it says: you are liable if you part of the same undertaking. So the additional requirement that knowing implementation case law was --

THE CHAIR: What about the cases where you are not part of the same undertaking, but you have knowingly implemented?

MS MOCKFORD: I am not sure there are any of those cases. In these cases it has always been a precondition, that's my point, that you were part of the same undertaking --

THE CHAIR: I understand the claimant is putting it two different ways: you are either part of the same undertaking or you are knowingly implementing it --

MS MOCKFORD: They are --

THE CHAIR: -- those are distinct cases. So it is easy to say: if you are part of the undertaking, you don't have to worry about the implementation. I understand that. But just dealing with the other possibility, is that I am with you on the fact that you are not

part of the same undertaking, so we then have to go on to consider knowing implementation. You say --

MS MOCKFORD: I say "no", because it has always been a requirement of these cases that you were part of the participating undertaking, and what they were then doing is imposing an additional requirement.

THE CHAIR: And that additional thing has gone, yes, understood.

MS MOCKFORD: Yes. And you see that from two more cases. One is the -- well, you see it from one more case, and that one place doesn't help the claimants. AG's opinion in Sumal, which I think we should go to next, is at authorities bundle, tab 105, page 4475.

THE CHAIR: Sorry, what is the reference again?

MS MOCKFORD: Authorities bundle, tab 105. I think that will be your file H.

THE CHAIR: Yes. Yes, it is.

MS MOCKFORD: I am after page 4475 -- that's the start of the AG's opinion, I am actually after 4489.

THE CHAIR: The AG starts at 4369 --

MS MOCKFORD: Sorry, I am after paragraphs 54 to 59 of the AG's opinion, 4383.

THE CHAIR: I have it.

MS MOCKFORD: Here we see that the AG is addressing the issue that the CJEU obviously looked at, and we looked at yesterday, which is the conditions for the recognition of joint and several liability of the subsidiary for the anti-competitive conduct of the parent. I pointed out to you yesterday that we saw explicit endorsement of this section of the AG's opinion in the CJEU's judgment.

If I can ask you to look at paragraph 56 where he's dealing with this issue, and read that.

THE CHAIR: Yes.

MS MOCKFORD: So what he's doing is drawing a distinction between the attribution of liability from the parent to the subsidiary and from the subsidiary to the parent.

Then at paragraph 57 he goes on and says that liability in the Top-Down case -- I am in the middle of the paragraph:

"... results from the fact that the subsidiary's business is in some way necessary to give effect to the anti-competitive conduct, for example, because the subsidiary sells the business that is the subject of the cartel."

The footnote there, footnote 69, takes you to a reference to the English case law on knowing implementation. What he says is that a similar solution has been reached by several English courts. He refers to Provimi, Cooper Tire -- which we just looked at -- Vattenfall and Media Saturn.

The final sentence of that footnote which I ask you to note is:

"Moreover, the court drew those judgments to the attention of the parties ...(Reading to the words)... and the interested parties who had the opportunity to submit their observations during the proceedings before the court."

So the point I make is that the court was obviously apprised of the English law position and the AG saw themselves getting to a similar outcome.

THE CHAIR: What is the test of knowing implementation? I understand your point that it is now subsumed within the common undertaking case law, but prior to that, what was the test.

MS MOCKFORD: It was getting ever broader. It started with you have to sell the cartelised product, then you had to sell a product that incorporated a cartelised product. And then in some of the cases, for example, Vattenfall and Media Saturn, we saw something wider than that, including something relating to the cartelised product, like providing marketing activities.

THE CHAIR: Yes, but none of that -- what is -- it's the knowing bit I am struggling

with, what's the knowing?

MS MOCKFORD: That comes from it being part of the same undertaking. So the point was being made in these cases that we assume that the subsidiary was knowing because they were basically tarred with the knowledge of the participating parent.

THE CHAIR: I see, I see. So it doesn't require knowledge -- the subsidiary may be completely unaware, and taking an English individual company's perspective, no one on the board -- no corporate knowledge of the cartel -- but that's assumed which is why the knowing gets in.

MS MOCKFORD: Yes, by virtue of it being part of the same undertaking --

THE CHAIR: Yes, I understand.

MS MOCKFORD: -- which is why being part of the undertaking was always part of the test.

THE CHAIR: I see, thank you.

MS MOCKFORD: My third and final point -- then I am going to sit down and let someone else speak for a while -- is that the Biogaran case, that the claimants refer to at paragraph 33 of their skeleton, page 537, core bundle, tab 47.

THE CHAIR: Yes.

MS MOCKFORD: It doesn't help them. The point I think they are making is that the approach being taken to knowing implementation in domestic case law is consistent with what they describe at the CJEU's judgment in Biogaran, but actually they are quoting from the general court's judgment, you see that from the footnote -- T677/14 is the reference -- and they make the point.

My point is that there is in fact a CJEU judgment in Biogaran. There is no English language official version of that at the moment, but my solicitors have helped to prepare an unofficial translation of the French. It was filed, I think, with the tribunal yesterday. We have copies if you would like them. It is a very short point. My point

is essentially the CJEU -- this is a judgment which postdates Sumal and the approach they take is the Sumal approach.

THE CHAIR: Where in the bundles is --

MS MOCKFORD: It has gone into an additional bundle that was filed with the tribunal yesterday. I don't know if you have seen that.

THE CHAIR: It is called "the supplemental"; is that right? Just give me a reference.

MS MOCKFORD: I will do that.

Would you like hard copies?

THE CHAIR: No, I think it is fine if you just tell me where it is. Now, don't worry about it now.

MS MOCKFORD: In that case, that is the conclusion of my submissions on implementation, unless there is anything else I can assist on.

THE CHAIR: No, thank you very much.

MS MOCKFORD: I will pass to Mr McCarthy.

Submissions by MR MCCARTHY

THE CHAIR: You are SFF, aren't you?

MR McCARTHY: Yes, sir, I act for the SSF, and those are defendants 11, 12 and 13. Ms Mockford has very helpfully addressed you on Sumal and the strike-out principles, so my hope is I can be a great deal briefer than I would otherwise be because of that. I don't propose to say a great deal about those matters she has covered, and instead simply to address you in relation to how those principles -- adopting her position on those principles and how they apply to our clients.

I propose to structure my submissions as follows.

First, just to very briefly set out some essential background in relation to the SSF defendants -- as background to my application; then I need to deal with the position of

D12 and D13; and then separately to deal with the position of D11. So that's SSF Limited, the parent company within the SSF Group.

Just by way of brief factual background. Sirs, you are aware that the core business of the SSF defendants is to farm and primary process Scottish farmed Atlantic salmon.

As I noted yesterday, one of the SSF defendants, D11, has some, but very limited involvement in the sale of Norwegian farmed Atlantic salmon. That is not the case in relation to either D12 or D13. They all operate from sites in Scotland. None of the SSF defendants have any presence in Norway.

In relation to the corporate structure, if I just explain this briefly. So the 11th defendant, SSF Limited, is the parent company within the SSF Group, as I mentioned. It is in turn owned by a Norwegian holding company, which is Norskott Havbruk AS. That's a 50/50 joint venture between the Leroy Group, which is D5, and SalMar ASA, which is D7.

Now SSF Limited has two subsidiaries, D12 and D13. These were acquired by SSF on 15 December 2021. Prior to that, they were within the Grieg Group.

THE CHAIR: Is this corporate structure set out in your skeleton?

MR McCARTHY: It is, yes. I don't need to say much more for present purposes other than to just indicate that.

Just to deal with acquisition, sir, it is important just to note that SSF Limited acquired D12 and D13 quite some time after the relevant period pleaded by the claimants, which is 2011 to 20 February 2019, which is pleaded in the statement of claim, paragraph 6. So that back-stop date of February 2019 relates to the Commission unannounced inspection.

We say just as a note for present purposes -- I will come back to the significance of this -- but we say there is no factual basis pleaded for any alleged infringement after the Commission's unannounced inspection, and such a suggestion is inherently

unrealistic.

I just note that for present purposes.

We addressed you on the commercial activities within the SSF, I won't do that again. I just note that the position in relation to the SSF defendants in respect of the Commission investigation is different from other defendants. So although the SSF defendants were subject to an unannounced inspection in February 2019, and a small amount of documentation was taken by the Commission, we were not subject to any further steps in that investigation, other than responding to an RFI from the Commission. No statement of objection was issued to SSF and we were effectively excluded from the investigation.

So that's the essential factual background.

Just before coming on to the substance of my strike-out, can I just take you briefly to the particular paragraphs of the particulars of claim to which we take objection. This just takes you to the core bundle. I don't think I need to go beyond the core bundle for the purposes of my submissions, but it is paragraph 85, which is at 33 of the core bundle.

You will see the three ways -- you have covered this already with Ms Mockford, but you will see the three ways in which the liability allegation is put. So we have the allegation at 84 of direct participation in the cartel; then at 85 we see mere implementation as an alleged form of liability. And we say, just as Ms Mockford does, that that is an insufficient allegation in and of itself, because the ground is now occupied by Sumal.

Then at 87, effectively we see the Sumal quoting -- 87G deals with the position of the SSF defendants. So the allegation is that further or alternatively, each defendant is liable by virtue of its role within the respective corporate group since it forms part of the same undertaking for the purposes of competition law.

Then dealing with SSF specifically, the allegation is that 11 together with D12 and D13 are liable for the separation of statutory duties as a result of their legal, economic and organisational links, and essentially saying that they sold relevant products. And that allegation is put both in respect of both the Grieg Group and in relation to the Leroy SalMar as part of the joint venture.

So those are the different ways in which liability is put and those are the balance of particulars I attack in my strike-out application.

We just note, sir, the allegations of liability. Beyond the bare assertion of liability and the bare assertion of collusion, no facts are pleaded whatever in relation to SSF to evidence or to plead facts and particulars in support of the claim that collusion has occurred or that SSF had any knowledge of infringement. That is entirely absent from the particulars of claim.

We say that is a particularly glaring omission in circumstances where SSF has already been investigated by the Commission, but excluded from the Commission's investigation.

In that regard, sir, we don't need to look at the authority, but I just remind you of what the tribunal said in Evans v Barclays Bank in relation to this. Of course we accepted, as one does, that in a competition case and a cartel case a more generous approach is adopted in relation to pleading, but the tribunal went on to say this:

"It is not enough for a claimant to commence proceedings unable properly to ...(Reading to the words)... of pleadings."

In this case, there were no factual averments set out -- relevant factual averments against SSF, and we say that is a fatal to an allegation of direct participation in an infringement.

Even if one could say, "Well, something might turn up later", we say that is an improper approach to a strike-out on the part of the claimant for the reasons set out in Evans

and also in King and Stiefel line of case law -- that point, the something might turn up approach, is not an acceptable approach.

So turning then to the substance of the application -- just to encapsulate the point on that, the upshot of that is that ultimately there is no possibility, we say, of the claimants succeeding in relation to an allegation of direct participation, no realistic prospect has been shown and that can't be made out in the pleadings. So the only possibility of success against SSF is via, essentially, Sumal. That's the only way in which they can succeed.

That brings me then to the rest of the application. Sir, I need to deal with the position at D12 and D13 separately. So there is really just quite a short point here in relation to the issues. The short point is that D12 and D13 have no involvement in the sale of Norwegian salmon.

So in relation to D12, the factual position is that D12 is a holding company. We say that there is no possibility of the second limb of Sumal being satisfied in relation to D12.

You will recall -- again we don't need to go to the authorities -- that in paragraph 52 of Sumal, the court held that:

"The victim should in principle establish an anti-competitive agreement concluded by the parent company ...(Reading to the words)... concerned the same products as those marketed by the subsidiary."

Well, in the case of a holding company, that simply cannot be satisfied, because the holding company is simply to hold the investment for whatever purposes -- tax or whatever purposes -- that there is no proper case under Sumal --

THE CHAIR: But it owns all the shares in D12 and D13.

MR McCARTHY: They do hold the shares, precisely, in D12 and D13 -- but applying the approach in Sumal we see that even if you were to conclude against me in relation

to D -- sorry, just to be clear, we are talking here about D12.

THE CHAIR: Yes.

MR McCARTHY: But even if you conclude against me in relation to D13, we still say that D12 is entitled to a strike-out.

THE CHAIR: Sumal doesn't really assist us on what happens when you have a holding company which exists for the whole purpose of holding the shares of the subsidiary which is engaged in the relevant economic activity.

MR McCARTHY: Sir, we would say it does because applying the test in Sumal, the holding company is not had engaged in providing any products in the market, and it certainly is not engaged in providing or selling --

THE CHAIR: The argument -- no doubt I will hear from Ms Howard -- will no doubt be that its sole existence is to facilitate economic activity which is carried out by its subsidiary.

MR McCARTHY: That may be so, sir, but we would say that is not -- consistent with Sumal, that is not --

THE CHAIR: Sumal just doesn't grapple with that particular --

MR McCARTHY: The essential concern in Sumal, if I can put it this way, was to deal with a situation where there are conglomerate businesses in which different entities carry out different functions. And that's our concern in relation to it, the function carried out in relation to D12 does not relate to either selling the same products or the same economic activity.

That's our point in relation to that.

Sir --

THE CHAIR: It would be a bit odd if you have as an undertaking a corporate structure, A and B are part of the undertaking, C is a holding company for D and E, so you end up with a sort of undertaking with a hole in it, where the holding companies sort of fall

through, but all the other active companies are part of the same undertaking. It just seems a slightly odd position.

MR McCARTHY: I do see the point, but the focus of the concept of undertaking is on the underlying economic activity --

THE CHAIR: So what is the economic activity of the holding company?

MR McCARTHY: It is simply to act, essentially, as an investment vehicle. That is it. One can imagine in a conglomerate context, you have other forms of entity more sophisticated that are engaged in investment, but they are not engaged in the same sort of economic activity as another subsidiary, another entity, which is selling salmon or whatever the particular product happens to be on the market.

THE CHAIR: Okay.

MR McCARTHY: Sir, you have that point.

In relation to the position -- the position in relation to D13 -- I need to take you just to some of the evidence on it -- but our point in relation to D13 is simply that it hasn't at any stage sold Norwegian salmon, and so we rely on the same point that the Grieg defendants relied on in relation to that.

THE CHAIR: So it is not de minimis?

MR McCARTHY: It has not sold any, so there is no de minimis point in relation to D13.

THE CHAIR: Can you give me the reference, it may not be necessary to go to the document --

MR McCARTHY: I can take you by reference -- refer to evidence on this.

THE CHAIR: Just give us the reference.

MR McCARTHY: Sir, this is dealt with by Mr Frey in his first statement. You will see the relevant paragraphs, so paragraphs 12, 13, 15 and 44.

THE CHAIR: Yes.

MR McCARTHY: Just -- the evidence is slightly complicated, but I just need to make good on the evidence why we say it is clear that D13 has not sold any Norwegian salmon.

So you will see at paragraph 12 there is an explanation that in 2010 Grieg established a joint venture with Bremnes which was -- the establishment of Ocean Quality, and it was Ocean Quality, then one sees at 13, which was responsible for all the sales and distribution activities of fresh, whole and gutted Norwegian salmon. And it emphasises that all of the Norwegian salmon, so within the Grieg Group, was sold by Ocean Quality. That was established in 2010, prior to the start of the relevant period.

Separately, you also see that in -- I just mention this for completeness -- you see that in paragraph 15 Grieg UK was established in 2014 and was responsible then from that date for selling Scottish salmon.

Prior to that, it is quite possible that D13 sold Scottish salmon, but the evidence is clear that they didn't sell Norwegian salmon because the sales activity was undertaken by a different entity. So D13's activity was simply essentially to farm salmon, but it wasn't involved in any sales activity in respect of Norwegian salmon.

So on that basis, we say there is no de minimis point in relation to D13, it is simply a straight forward question as to whether it is engaged for the purposes of the second limb in Sumal being an identity of economic activity on the basis that it had no sales of Norwegian salmon, and for the reasons that Ms Mockford has explained, we say that that test is not made out.

Sir, just in summary then, in relation to D12 and D13, our position is really twofold. First, we rely on the fact that there is no evidence of any knowing implementation or no evidence of direct participation. You have my submissions on that.

The second point is a point in relation to the second limb of Sumal.

Sir, I just turn then, as briefly as I can, to the position of SSF Limited. So this is D11.

We make two points, both related to Sumal in relation to D11. The first point concerns decisive influence. We say that the claimants haven't pleaded or made out a case in respect of decisive influence; and the second point is the same point in relation to the second limb of Sumal about relevant product markets.

Sir, just dealing with the first of the propositions, the legal principles are broadly common ground. I can make this element by reference to three principles which are set out in the claimant's skeleton at paragraph 29, and with which we agree.

So the first proposition.

THE CHAIR: Just a moment.

MR McCARTHY: Yes.

THE CHAIR: 29 of the claimant's skeleton, yes, I have that.

MR McCARTHY: Sir, the first proposition is that in the context of the joint venture there is no presumption of decisive influence, so it is a point that has to be pleaded and proven by a claimant. And that's common ground.

The second point is that in order to establish decisive influence, it must be shown that the subsidiary does not decide independently on its own conduct in the market but that its conduct is determined by the parent companies. The authorities are cited in the skeleton and that's an agreed proposition.

So in Fujikura v the Commission:

"The general court explains the decisive factor is whether the parent company exercises an influence, but the position to ...(Reading to the words)... the two must be regarded as a single economic unit."

So those are agreed propositions.

Then a third point is that the claimant must show that the parent company actually exercised decisive influence on the subsidiary's conduct on the market, rather than merely that it had capacity to do so.

Those are the three propositions.

Mr Gallagher's evidence on this is set out in his first witness statement in the core bundle at page 366.

Sir, I think the quickest approach might simply be to ask you to read, if I may, just the relevant paragraphs, which essentially is subparagraph 29 and the adjoining subparagraphs.

THE CHAIR: Where do I find it?

MR McCARTHY: Core bundle, tab 32, sir. Mr Gallagher, managing director of SSF. From paragraph 29, sir, and the various subparagraphs.

THE CHAIR: Okay, I have read that.

MR McCARTHY: Sir, I am also asked to ask you to read 18 to 22 as well.

Sir, so just to draw the propositions that we take from that material, we see that Leroy and SalMar have the ability to appoint two of the six directors during the relevant period to the board, and the remaining two were internal company appointees. Neither parent exercised control over the commercial decision-making of SSF via the board.

No parent had a veto from the board, nor had any parent ever exercised any veto over the commercial operational decision-making of SSF.

Neither joint parent is responsible for the day-to-day management operations at SSF.

The parents appear to have potentially some say in the pricing, but neither parent determines SSF's pricing policy, which is a matter for the board and Mr Gallagher himself.

SSF was financed largely independently, as Mr Gallagher explains, and SSF operates a stand-alone corporate function, including finance, human resources and IT systems.

So across the various indicia of control, that is the evidence. We say the claimants simply -- this has been in issue since at least June of last year, the pleadings hadn't been modified. It is simply a bare assertion of decisive influence, and yet against

Mr Gallagher's evidence we say that is simply not made out. On that basis --

THE CHAIR: So what's the test of decisive influence? If you have people on the board, the board is directing the company --

MR McCARTHY: Sir, the test was the agreed test that I took you to, which is set out in the claimant's skeleton and we agreed. It says:

"To establish decisive influence, it must be shown that the subsidiary does not decide independently on its own conduct in the market, but its conduct in the market must be determined by its parent companies."

So --

THE CHAIR: It depends a little bit on how much you are standing back and looking at the overall commercial picture of the day-to-day decisions; is there anything in the authorities that helps on that?

MR McCARTHY: Sir, we accept that one has to look at a range of indicia in order to determine whether a subsidiary's conduct is determined on the market, but we say the evidence on this is clear, and it is clearly set out by Mr Gallagher across the range of corporate decision-making in relation to either commercial policy, operational matters or the rest.

SSF is operating as an independent business and that --

THE CHAIR: But it is not entirely independent because it has members on the board.

MR McCARTHY: Exactly. It is a question of whether its conduct in the market is being determined or dictated by the parent companies. That's the threshold, and that threshold, I say, isn't made out.

THE CHAIR: Right. Okay. It is very easy to say these things and very difficult to know how to apply these tests in practice sometimes.

MR McCARTHY: I appreciate that, sir. I suppose our core point is that ultimately there is no complaint -- this matter has to be determined on the pleadings and the

evidence before the tribunal. The evidence, we say, is clear that we have adduced. Beyond that, there is no further pleading on this other than bare assertion. And on that basis we say that the first limb, that Sumal had a decisive influence in the context of a joint venture, is not made out.

We say that the absence of pleading is particularly significant in circumstances where there is no presumption. It is not one of those cases where, as is often the case in decisive influence, a claimant can simply rely on a strong presumption. That doesn't exist in the context of a joint venture. So it is particularly important that the matter be pleaded out properly and it hasn't been.

Sir, the final point in relation to D13 simply concerns the product to- market point. We accept, as you heard yesterday, that D-11 - but only D-11 - has engaged in what we say are very small -numbers - de- minimis sales effectively in relation to Norwegian salmon.

Sir, in relation to this, I will just alert you to the evidence in relation to this. So in relation to -- Mr Gallagher sets out the position in his second statement --

THE CHAIR: Where is that?

MR McCARTHY: It is in the core bundle, tab 33. You will see there, page 379, paragraphs 20 to 22, he sets out the position.

THE CHAIR: Yes. Okay, this is not confidential, if it is 20,000 tonnes -- more than 20,000 tonnes -- of Norwegian salmon. Again, why is that de minimis -- I understand if you said it was a crate and a half, you would say: it is de minimis, don't --

MR McCARTHY: Yes, we have also given the figures in relation to value. We were asked to provide these figures by RFI and we have provided them. If one looks at the figures by value, the position is that by value the resales represented 0.06 per cent of SSF Limited's Scottish production of farmed Atlantic salmon.

THE CHAIR: It is the same point. Insofar as there is a test of de minimis -- and no one

has shown me an authority which says there is -- insofar as there is a test of de minimis, is it absolute or is it relative?

MR McCARTHY: The way we would put the point, sir, is this. We say the exercise that is required by the second limb of Sumal is inherently comparative because one is looking at the identity of economic activity comparing two entities, the parent and the subsidiary. Looked at in that comparative light --

THE CHAIR: But Sumal doesn't address this. It's all very well saying you can extrapolate Sumal and this makes sense in the light of Sumal and all that, but Sumal just doesn't address that.

MR McCARTHY: I quite accept that, and my submissions are essentially drawn from principles established from Sumal. But in my submission, sir, it is clear in Sumal that it does require, effectively, a comparative analysis, in the sense that one's looking at the parent company and the subsidiary. So in that context, actually, we say the relative approach is an important one and is particularly significant because ultimately --

THE CHAIR: So then it comes down to saying de minimis has nothing to do with it. More of its business was involved in a different product. It is already -- it wouldn't matter if it was actually a very, very large amount, if it was a minority --

MR McCARTHY: Yes. I certainly wouldn't want my submission to hang on the chop of the term de minimis. It is ultimately a functional approach that is applied -- a comparative approach as I have indicated -- and one has to compare the global position of the parent with the subsidiary. So in that context, we say that the value is significant (inaudible due to audio distortion) activity is.

The other point is this, the value indicates that the position is very much incidental and marginal to the SSF's business, so it is incidental and marginal rather than being the focus of the business.

THE CHAIR: You said the values had been produced --

MR McCARTHY: Yes, it is in the additional bundle, and it is tab 7, page --

THE CHAIR: The additional bundle?

MR McCARTHY: The additional bundle, yes.

THE CHAIR: So really can we just have some -- I know I am repeating myself -- but some better labelling system for the next hearing -- additional bundle -- supplemental bundle -- yes, okay, I don't have an additional bundle that I can see.

MR WOODGATE: Could I just ask, what is the value in pounds of the 20,000 tonnes?

MR McCARTHY: Yes, I will give you the absolute figure in pounds. So the total turnover from 2011 to 2019 was 1.2 billion; resales of NFAS was 6.9 million; and then the commission was £735,000. There are some decimal points, but those essentially are the figures.

MR WOODGATE: Did I catch 6.9 --

MR McCARTHY: 6.9 million in relation to resales of Norwegian farmed Atlantic salmon. Then Commission sales, those were £735,000 during the period of 2011 to 2019.

MR WOODGATE: Thank you. And they can be added? The Commission is a different --

MR McCARTHY: Yes, just to explain in relation to the Commission so there is no misunderstanding in relation to this. The Commission sales were essentially where SSF Limited was acting as an agent. Clearly, they are comparatively small in number. The Commission is essentially -- the fee paid from the Commission, of course, to SSF, doesn't reflect the value of the underlying salmon.

MR WOODGATE: And do you have the value of the underlying salmon?

MR McCARTHY: We don't. It's not straightforward, we have not gone into that. Certainly in the time available, when we were asked for this information last week it was not possible for us to produce that information in time.

MR WOODGATE: Thank you very much.

THE CHAIR: Thank you.

MR McCARTHY: I am grateful, sir, those are my submissions.

Submissions by MR JOWELL

MR JOWELL: I think I can be very brief indeed.

We gratefully adopt Ms Mockford's elucidation of the law, and we agree that the principle is that which is in paragraph 52 of Sumal, namely that the claimant has established that in this case the UK subsidiaries marketed the same products as those with which the anti-competitive conduct by the parent was concerned.

THE CHAIR: That doesn't say "same products", does it? Does that paragraph say "same products"?

MR JOWELL: Yes, it says the same products.

THE CHAIR: Just remind me.

MR JOWELL: You will see it cited in our supplemental argument which you will find at tab 52, paragraph --

THE CHAIR: Where do I find Sumal?

MS MOCKFORD: Authorities tab 105. I think it is your final authorities bundle, sir, page 4399. We looked at this yesterday.

MR JOWELL: It is the last sentence of paragraph 52, which says:

"Thus in circumstances such as those at issue, the victim should in principle establish that the anti-competitive agreement concluded by the parent company for which it has been punished concerns the same product as those marketed by the subsidiary."

THE CHAIR: Right.

MR JOWELL: That we say is the basic legal test. In our case, our evidence is, first of all, in relation to D10, Mowi Scotland, it did not farm or sell Norwegian farmed

Atlantic salmon at all; it farmed and sold Scottish farmed Atlantic salmon.

D9, did not sell on the spot market at all. So whilst it sold very small amount -- very small proportionate amounts of Norwegian farmed salmon on a contract basis, it didn't sell on the spot market.

The infringement that is alleged by the European Commission and invoked by the claimant in their particulars of claim, of course concerns spot sales of Norwegian farmed Atlantic salmon.

So that is our case, and our evidence.

You will see that we have put in evidence from Mr Nolan which you will see in the core bundle at tab 29, explaining the many differences between Scottish salmon and Norwegian salmon.

I make just one further point, which is if you turn up our skeleton argument at paragraph 52 -- forgive me, tab 52 -- I would just cite one further principle, which is that which we refer to in paragraph 11, where we quote from Lord Justice Moore-Bick in the Korea National Insurance Corporation case, in which he said this:

"It is incumbent on a party responding to an application for summary judgment to put forward sufficient evidence to satisfy the court that it has a real prospect of succeeding at trial. If it wishes to rely on the likelihood that further evidence will be available at that stage, it must substantiate that assertion by describing, at least in general terms, the nature of the evidence, its source and its relevance to the issues before the court. The court may then be able to see that there is some substance in the point and that the party in question is not simply playing for time, in the hope that something will turn up."

So we say us having put in evidence on this important distinction between the two types of salmon, and the fact that an infringement only concerned Norwegian salmon and expressly excluding other types of salmon, it was then on the claimants to come up with something convincing to say to the contrary, and we say they have not

discharged that burden.

Those are the only additional points I wish to make.

THE CHAIR: Thank you.

Submissions in reply by MR GREGORY

MR GREGORY: Sir, members of the tribunal, as you have just heard, the defendants have all made strike-out summary judgment applications in respect of the remaining six UK subsidiaries that claim against Leroy UK (inaudible). I am proposing to proceed as follows: I should say I am conscious of the hard stop at 4.00 pm. I am hoping to be finished by lunchtime --

THE CHAIR: I should certainly hope so, yes. I think this is a fairly short point.

MR GREGORY: I am going to begin by showing you those parts of our pleading that are relevant to the strike-out and summary judgment applications, to the extent you've not already been shown them. I will then discuss the correct approach to strike-out applications on the one hand and applications for summary judgment on the other. Those types of applications are often brought together and they can overlap, and they have a slightly different focus and they are governed by different sets of principles.

To speed things up, we sent in a speaking note which refers to some of the authorities; I don't know if you have copies of that?

THE CHAIR: Yes, we have copies, thank you very much.

MR GREGORY: Okay. Then I'll address you on the three different bases on which we pleaded the UK subsidiaries, the jointly and severally liable, the infringement. The first basis is the undertaking basis. The main point there concerned Sumal. Mr McCarthy has also made some points relating to SSF, which I will briefly address you on.

The second basis is that all the UK subsidiaries have implemented the cartel and fit

within the broad meaning of that term that has been adopted by the EU and UK courts, which includes selling products, the price of which has been inflated by the infringements.

A number of courts have held that it is well arguable that subsidiaries can be liable on that basis. And the extent to which the prices of the products sold by the UK subsidiaries was affected by the cartel will be the subject of factual and expert evidence at trial.

So those issues will need to be addressed in any event.

The third basis of liability is the possibility that the evidence at trial will show that the UK subsidiaries participated in, or at least have knowledge of the cartel. I will show you what we have and have not pleaded in relation to that, and how other courts have determined equivalent applications in a similar context.

That context is, of course, that the cartel was secret. And there are huge information asymmetries between the parties at this stage, and it can be expected that the substantial evidence shedding light on the role and knowledge of the UK subsidiaries will come to light during proceedings, in particular through disclosure.

The UK subsidiaries will be liable at trial if we can establish that one or more of those three bases are satisfied.

Accordingly, in order to succeed in their present applications, the defendants have to satisfy you that we have no realistic prospect of making good any of those bases.

By way of high level comment, strike-out and summary judgment powers are designed to deal with clear-cut cases where it is obvious that it is not worth the issue going to trial --

THE CHAIR: I think we are very familiar with the principles of strike-out. I think we can probably --

MR GREGORY: The volume of legal argument and materials that you have before

you gives the impression that the issues on which the applications are based are not completely straightforward. Of course, there is going to be a huge amount of additional evidence put forward during proceedings.

Finally, by way of introduction, sir, you asked yesterday why did it matter whether the UK subsidiary is part of the litigation or not. It was suggested by Ms Mockford that striking out the UK subsidiary claims would materially save cost by reducing the number of parties. It is true --

THE CHAIR: I think her better point was that they were entitled. If there is no claim, she is entitled. She doesn't have to give a reason, she's just entitled to have it struck out.

MR GREGORY: There is a usefulness in having them in, because actually, she said it was beneficial that they won't have to lead evidence but actually, we will want evidence from the UK subsidiaries in relation to how they set their prices for the products which are referred to -- from them by the claimants, whether directly or indirectly.

THE CHAIR: The fact that they are parties doesn't mean that they are going to give evidence -- I mean, you will have to see.

MR GREGORY: It doesn't necessarily mean that they will provide evidence, but you would expect that there is evidence in their possession which would be relevant to the issues on which you will have to decide at trial.

Turning to the parts of our pleaded case relevant to the summary judgment and strike-out applications --

THE CHAIR: Yes.

MR GREGORY: It is in core bundle tab 1, page 4. The main thing we had to go on, given the secret nature of the infringement, was the Commission's press release, accompanying the statement of objections which you have been shown and which is

brief. We do not know what evidence will come out from the Commission file or from disclosure from the defendants.

As a result, we have pleaded in the particulars of claim those matters which are covered in the stated objections in more detail, but what I will show you is that they are also higher level more general pleadings of infringement that cover all the defendants, including the UK subsidiaries.

So on paragraph 1, second line:

"The unlawful cartel arrangements were entered into and/or implemented by at least the defendants."

It is obviously possible that there were other groups involved as well.

Over the page to page 5 and paragraph 2:

"The claimants do not have direct knowledge of the cartel arrangements."

Page 6, paragraph 5:

"The claimants have reserved their right to amend in the light of disclosure, including evidence from the DC investigation file."

Paragraph 6A -- sorry, still on page 6, it is a long process:

"In summary: the claimants can tell that the infringement comprises unlawful agreements and/or concerted practices in relation to the coordination of sales prices for farmed Atlantic salmon in the EEA and the United Kingdom, including in particular the exchange of commercially sensitive information and the manipulation of prices on the Norwegian spot market, which provided the international benchmark price for the pricing of farmed Atlantic salmon globally."

So the pleaded case is not limited to the manipulation of the Norwegian spot price, it can include the exchange of commercially sensitive information in relation to sales prices in the UK.

THE CHAIR: What is your evidence in support of that?

MR GREGORY: Well, I am going to come to that later on, if I may.

THE CHAIR: Just tell me what it is, give me a target.

MR GREGORY: There is specific evidence, which Ms Howard showed you yesterday, relating to SSF, which appeared to be sharing its future pricing intentions, in particular saying it will make sure that its sales of Scottish salmon were above --

THE CHAIR: Is that in the US pleading?

MR GREGORY: Yes.

THE CHAIR: Okay, you have not pleaded that?

MR GREGORY: We have not pleaded that. I will come on to why. I am going to take you a little later to the Nokia judgment of Mr Justice Sales as he then was. One of the things he points out is that the claimant's lawyers in this situation are in a slightly difficult position. We are subject to professional obligations which prevent us from making serious allegations without having any evidence; at the same time, where you're bringing a claim based on a secret cartel, you have very little evidence on which you can provide detailed particulars.

THE CHAIR: Right. But you just said there's something in the US documents I need to pay attention to and I'm just saying you haven't pleaded those documents.

MR GREGORY: Yes. I think if there is a narrow pleading point, then I think the response to that would be that we'd apply to amend it, to put in a reference to the SSF documents. I don't think there would be any good reason for refusing the --

THE CHAIR: Let's press on anyway.

MR GREGORY: Paragraph 6D, each of the defendants and/or the economic undertakings of which the form part participated in and/or implemented the cartel.

Page 9, paragraph 12, final sentence, farmed Atlantic salmon includes salmon produced in Scotland as well as in Norway and elsewhere in Europe.

Page 13, paragraph 32, the claimants do not know which defendants may eventually

be addressees of the Commission infringement decision.

Page 20, paragraph 62, claimants do not know the full details of the cartel arrangements, it is secret.

Over the page, halfway down, the claimant's case is not confined to the examples pleaded below:

"The claimants reserve the right to plead further matters and facts outside the scope of any such decision and further heads of loss or on disclosure, including materials disclosed in other legal proceedings and any other relevant materials or explanations from the defendants or third parties."

So we can't plead detailed particulars at this stage, but we emphasise that our pleaded case may well ultimately, in the light of disclosure, go beyond the scope of the Commission decision, assuming there is one.

Paragraph 63, just to highlight the first few words:

"Without prejudice to the foregoing ..."

So at this point we don't plead more details, particularly of those matters which were referred to in the Commission SO.

Paragraph 65, again we note that the scope of the claim is not limited to the final decision of the Commission.

Paragraph 67, I think you were shown this yesterday, but if you just cast your eyes over it again.

THE CHAIR: Yes, I was shown it then.

MR GREGORY: 67 on 24, it's relevant to implementation.

Paragraph 69, the first few words say "collusion took place in Norway"; the defendants have made quite a bit of that.

The two points I make is, one, this is the bit of the pleading that is pleading the Commission SO press release in more detail and we have already said it is without

prejudice to our wider case; secondly, if it was a real problem, we could apply to amend and just insert the words "in particular" in that sentence.

THE CHAIR: Right. I am not so worried about the implied permission, I am more concerned that -- which you will come to, I know -- at the moment I don't see a positive case pleaded that the UK defendants were involved in the collusion. I may be wrong about that, but if there is anything -- and what the basis for it is.

MR GREGORY: Yes, that is covered in 67.

THE CHAIR: Yes, but that is all in the alternative, isn't it? "Implemented and gave effect to", I understand. I know you are going to come to it, but if you want "implemented and gave effect to", we will deal with and that may be sufficient for your purposes, but if you want to press that the UK companies participated in the cartel, you will need to get to that --

MR GREGORY: I will take you to the monopoly judgement where Mr Justice Sales addresses that point.

THE CHAIR: Not Mr Justice Sales, the evidence in this case. Nothing to do with Mr Justice Sales. I understand the principle that pleading in cartel cases is difficult and due allowance needs to be made, and all those things. That is a given. But we will get to that. I think you have the US document you were going to come to on that.

MR GREGORY: Yes.

THE CHAIR: As I understand, that's the only thing you have, is that US document --

MR GREGORY: In terms of a specific action by a UK subsidiary.

THE CHAIR: Yes.

MR GREGORY: Page 30, paragraph 79, we say the definition of the relevant market will be a matter for expert evidence in due course.

Subparagraph A, the relevant product market is for farmed Atlantic salmon which has been defined above as including Scottish as well as Norwegian salmon.

Over the page, page 31, paragraph 80, subparagraph B:

"The arrangements [couple of lines down] increase the spot prices ...(Reading to the words)... and/or wholesalers in the UK."

Then subparagraph D says that will be the subject of expert evidence.

Now we get to the paragraphs which plead the different bases on which we say the UK subsidiaries were jointly and severally be reliable. I think you have already been shown paragraphs 83 to 87.

THE CHAIR: Yes.

MR GREGORY: If I just have a look at paragraph 87A, this relates to D1 and Ocean Quality:

"... are part of the same economic undertaking as a result of their legal, economic and organisational links. During the relevant period they had formed part of the group and carried out related economic activities in connection with selling relevant products in the EEA and UK which are linked to the subject matter of the cartel."

So the point there is if the test is the Sumal test, then we have pleaded it.

THE CHAIR: Right, but there are two bits. I think the point being made is there was no direct influence of the parent over the subsidiary -- or the partnership over the subsidiary -- I understand there is a point floating around of whether Scottish and Norwegian salmon are different, and everyone is taking a rather odd approach to that, in my view. But there is a separate point on the partnership.

MR GREGORY: Yes.

Turning to the legal principles, the underlying provisions are well known. It is common ground that the tribunal applies the same approach as the CPR. I said the two types of application can overlap, in particular if you conclude on summary judgment grounds there is no realistic prospect of one of the parties making good on an issue at trial, then that bit of the pleading can obviously be struck out.

Other than that, they had a different focus.

We would be grateful if you have the legal principles' note to hand. If you look at paragraph 4, the Supreme Court has indicated the challenge such as this, the challenge to service out on the grounds there is no arguable case against (inaudible) defendant should ordinarily be assessed on a strike-out basis rather than a summary judgment basis, and that is precisely to avoid the court getting drawn into exercising judgment based on evaluation of the evidence.

Just going down a couple of paragraphs to paragraph 6:

"The focus of the strike-out application is on the pleadings and the courts generally assume that the pleaded facts are true."

The test for the strikeout is obviously high, as indicated by the passages at paragraph 7 and 8. It's not said that our pleadings are incoherent, it is said that it is not legally correct to say that a subsidiary can enjoy being so liable, simply because it is part of the same undertaking.

At some places the defendants say, at least in their skeletons, that:

"It was necessary for the subsidiary to sell precisely the same products as were the subject of the infringement."

But I think Ms Mockford somewhat backed away from that during her oral submissions yesterday.

THE CHAIR: Getting to the same products, these products are salmon. The fact that some are brought up in Norway, no one is running the point that they are different subspecies of salmon. They are both salmon. The fact that the marketing may be different, does that -- is there any learning on whether that makes them different products, in the cases in the bundles?

MR GREGORY: Well, that sort of question typically arises in the context of a market definition analysis, which is carried out either in Competition Act cases or in merger

cases. And you have seen some of the merger cases.

The test that is applied there is very particular -- Ms Mockford talked about it a little bit yesterday -- that the idea is you find a market that provides a framework for analysing the competitive effect on an agreement or a merger. And the question is whether you take your focus --

THE CHAIR: But in all those cases, they are different products, then the question is whether they are in the same market or not. But here we have -- subject to the fact they are stocking densities and they are food, we have the same product.

MR GREGORY: Yes, that's our position.

THE CHAIR: It is like saying Charolais beef is different from Friesian beef, is different from Hereford beef. They were different, they are different breeds. But one would struggle, one would have thought, in the merger case to say -- so it is about the marketing. It is the way they are marketed.

I am not sure if you can -- perhaps it is not for you to show me -- in the bundles are there any cases saying that because, rather like champagne, you have an identity for the product and Scottish salmon is an example where people like the idea of Scottish salmon and so forth, but there is no evidence before the tribunal that if you look at them as a matter of biochemistry they are different. So how can they be different products?

They are the same product marketed differently. I am just putting that as a question. It sounds more emphatic than it is meant to be.

MR GREGORY: I am not going to argue with you about that -- our case is they're the same products or very closely related products, that the sale of which obviously satisfies the test about implementation.

In answer to your question about authorities in the bundle, I am not aware if there is authority in the bundle increasing that specific point.

In general, when you are defining markets you are looking at the extent to which customers will substitute away from one product to --

THE CHAIR: To another product -- where they are different products.

MR GREGORY: Yes. And they can be different products. In principle you could ask that question in relation to your different types of beef, or you can ask it in terms of genuinely different products, like whether people substitute bananas for apples, for example. And the marketing is obviously capable of affecting that --

THE CHAIR: Or premium phones to other phones -- we are all familiar with that. But here we have a product -- I mean, by what measure are they different? I am not sure that there is anything in the evidence to show they are different at all.

MR GREGORY: No, my primary submission on the Commission cases -- dealing with merger cases -- is that was taking place in a very different context. And the purpose of the exercise is very different as well.

There is no reason why --

THE CHAIR: I understand. It's not quite the point I am on. The point I am suggesting to you is that in those cases there are always differences you can point to. They are not identical. Here one can say: look, it is all salmon. Or one can then start saying: well, you have salmon of different weights; you have salmon of different subspecies; you have salmon of different age. And it becomes somewhat arbitrary to say you have salmon of different stocking densities or salmon that are fed.

It is all salmon, and it is -- they are marketed in different ways. And maybe the quality is different, but it is not clear the quality is -- that there isn't a massive overlap between the quality of Norwegian salmon and the quality of Scottish salmon. So just in terms of the authorities whether there is anything to assist on what one does with products in those particular circumstances.

I think the answer is you are saying there isn't anything, which is a point in your favour.

MR GREGORY: Yes.

THE CHAIR: And we will wait and see what is said in answer to that.

MR GREGORY: There is certainly no authority about that in relation to implementation, because no court has ever considered that sort of issue relevant to whether or not a subsidiary was implementing a cartel by selling a particular type of product. No one has said you should employ the SNIP test or anything like it.

THE CHAIR: Let's look again at the evidence on the similarities. I may be unfairly paraphrasing it. It was Mr Gallagher, wasn't it? Summarising paragraph 42 of our skeleton --

MR GREGORY: The reference in the paragraph of our skeleton, Mr Gallagher 2, I have here a bundle reference, is paragraphs 9 to 11 of Gallagher 2.

THE CHAIR: Yes.

MR GREGORY: It is different types of feed and different types of --

THE CHAIR: You have the RSPCA accredited standards. So you have a different diet, normally with a lower fat content. Then there is reference to -- reference to what they are fed, reference to the size of the farms. The geographical indication scheme, which just means you can't say salmon from Norway is salmon from Scotland. And then the reference of retailers.

So the high point is normally with a lower fat content. It is not suggested they are used for different purposes, as I understand it. It is not suggested they are a different breed of salmon.

MR GREGORY: I think you can assume that the defendants have made the most of the differences.

THE CHAIR: So it is really how they are marketed. If they are marketed differently -- I am querying whether there is a huge overlap between preferences of consumers, but it is how they are marketed differently. But just because they are marketed differently

it doesn't follow from that that they are necessarily -- at least at strike-out -- to say they are different products. That may be for trial. It is a very difficult question.

MR GREGORY: Again, you have to have evidence on the impact of the different marketing.

Just whilst you are on that point, can we look at paragraph 42 of that skeleton. I am going to turn to the same undertaking issue and the points that have been made about Sumal.

At various points, the defendants have said that the subsidiaries are only liable if they engage in the same economic activities as were the subject of the infringement, and I think that was the thing that Ms Mockford eventually settled on.

And there is also a reference to whether there is a subsidiary link between the activities of the subsidiary and the infringement; and also to whether or not the subsidiary supplies precisely the same product as is the subject of the infringement.

As you noted yesterday, sir, in my view correctly, one reason why this was not seen as appropriate for strike-out or summary judgment is that it is difficult to say what legal tests you should apply. The defendants have put forward different tests at different times in their skeletons --

THE CHAIR: I think we have settled on the Sumal test. That is pretty straightforward. It is just how you interpret it seems to be the difficult bit.

MR GREGORY: Not necessarily. The problem arises partly from the fact that the Court of Justice expressed themselves in slightly different ways in different places in the judgment. But it also results from the fact that no domestic court has yet considered those parts of the Sumal judgment which are relied on by the defendants. Sumal, as was pointed out, is post-Brexit and not binding. The Court of Appeal in the VW judgment that you were shown, said it was a very important judgment, it was a grand chamber, it considered lots of authorities and so on. But it only considered

those bits of the Sumal judgment that concerned decisive influence, it did not consider those bits of the judgment which related to --

THE CHAIR: You are not arguing for a test other than same economic activity, are you? I didn't understand that from your skeleton.

MR GREGORY: I am not -- but the point is whether those extra bits of Sumal are part of an established part of domestic law remains to be seen. Because we have not yet had a domestic judgment endorsing those aspects of Sumal, we don't --

THE CHAIR: Are you advancing an alternative test?

MR GREGORY: Well, what I am saying at this stage is that it is arguable that the test simply turns on decisive influence and you don't need the other --

THE CHAIR: You can't ask us to decide that now. I don't think that's a reason for having a trial. It would be a brave submission, I think, in the light of what the Court of Appeal said, but I don't want to say that that doesn't -- it's simply not the law in this jurisdiction -- of course that is open to you, but I don't think it assists you on whether this matter goes to trial or not.

So that's a short point of law.

MR GREGORY: One of the things that the authorities and the legal principles notes say is that if you have a legal question which is uncertain and potentially in the face of a development, it is better not to decide it at the summary stage --

THE CHAIR: Yes, but we may not be of the view it is uncertain.

MR GREGORY: Yes. In particular there is a specific problem here because the question is whether the subsidiaries were engaged in economic activities which were linked to the subject matter of the infringement, and the infringement for our purposes is the infringement that you will find at trial.

The defendant's case on this point is premised on the assumption that any infringement you find will necessarily be limited to the infringement that the

Commission appears to be investigating based on its very short press release that accompanied the statutory test --

THE CHAIR: You have to come to this point -- whether you say there is a cartel involving the UK subsidiaries is a point you have to come to.

MR GREGORY: Yes. There is one issue about whether the parties to the infringement, whether the parties included domestic subsidiaries, but there is also an issue about the subject matter of the infringement. So, for example, you may find at trial, based on the evidence, that the defendants colluded in relation to Norwegian spot prices, specifically in order to influence the prices of salmon globally, including Scottish salmon.

If you do find that that is the scope of the infringement, it will be very difficult for you to find that there was not a specific link between the sales of Scottish salmon by the UK subsidiaries and the subject matter of the infringement, because influencing the sales of, amongst others, Scottish salmon was, from the defendant's perspective, the purpose.

THE CHAIR: I think it is accepted that your damages claim will be entitled to reach into Scottish salmon, subject to you succeeding on the necessary element, but in principle, but that's not quite the same thing as saying that the UK defendants fall within the scope of the Sumal requirements.

MR GREGORY: Just on the Sumal test, I am just going to show you a couple more paragraphs which you were not shown. That is authorities bundle, tab 105. If you can turn forward to page 4398, I am looking at paragraphs 44 to 47.

THE CHAIR: We have seen those. We've read 44 --

MR GREGORY: The point here is that the point in 45 is it may not be right to make subsidiaries liable if they are part of a conglomerate entity and are engaged in economic fields that have no connection with the parents that -- yes.

THE CHAIR: We understand that. You say you are a million miles from that.

MR GREGORY: We are a million miles away from that. We say that is the rationale for the tests which are later articulated in Sumal. So whether it is a specific link or whether the activities are related, that is actually the policy consideration which is driving the articulation of those tests.

THE CHAIR: Yes, you need decisive influence as well.

MR GREGORY: So the position is - I should say, in paragraph 10 of the legal principles note, there is a quotation from the Court of Appeal in Intel v Via which says that questions of mixed law and facts are not generally suitable- for summary determination.

Here, we have a position where, even if you accept that Sumal is applicable, exactly what Sumal means is unclear, and the relevant facts are also unclear at this stage, amongst other things, because you don't know what findings you will make about the scope and the purpose of the infringement. So we say that is not very fruitful territory for a summary judgment application.

THE CHAIR: I think the secondhand writer would like a break.

So I think we need to sort of press on with this. I think the area where we are keen to hear from you is on this question of whether the cartel extends to the UK, whether that is arguable on the current pleading, and obviously decisive influence in relation to whether the partnership is asserting decisive influence over whichever it is.

MR GREGORY: The SSF point.

THE CHAIR: I can't remember which D it is. D12, I think. Those are the areas where we are particularly interested. Perhaps if you can crack on after the break.

(11.25 am)

(A short break)

(11.34 am)

MR GREGORY: I am going to address you on the decisive influence point.

THE CHAIR: Yes.

MR GREGORY: I would be grateful if you would turn to our skeleton, paragraph 28, and read paragraphs 28 to 31.

THE CHAIR: Yes, okay.

MR GREGORY: So those are the principles. I am going to show you one case in which those principles were applied. The court declined to grant the summary judgment application on the basis that these were not straightforward issues that should be determined at trial in the light of full factual evidence.

It is a Tesco case. It is authorities bundle, tab 39, page 1557.

This was a judgment in the Interchange litigation, with which you may be familiar. Mastercard applied for summary judgment to strike-out on the basis of ex turpi causa principle on the basis that one member of the Tesco Group, Tesco Bank, was party to the unlawful arrangements. The claims had been brought by retailer entities within Tesco Group, so the question arose as to whether the retailer companies were part of the same undertaking as the group which was liable for the infringement.

If you turn to page 1561, the easyAir principles have just been set out, and then some extra principles from the Court of Appeal. If you flick to paragraph 6, just below paragraph 10 --

THE CHAIR: We are familiar with this, yes.

MR GREGORY: And then paragraph 27, which is part of the same --

THE CHAIR: Yes, we are familiar with that.

MR GREGORY: Paragraphs 13 and 14 again just show the court has in mind some of the relevant principles which are set out in the note.

Paragraph 15, just identifies the key issue. Point one is whether the Tesco claimants and Tesco Bank are part of the same single economic entity. The judgment pre-dates

Sumal, but it covers the decisive influence point.

I would be grateful if you could read paragraph 17, then the second half of paragraph 18, the part of the Advocate General's decision to the bottom of the page. That's just the confirmation of the fact that decisive influence does not have to take the form of day-to-day interventions; parents can decisively influence how subsidiaries act in the market through high level --

THE CHAIR: Sure. So 100 per cent ownership of shares, I understand that. We are dealing here with a partnership, aren't we?

MR GREGORY: With a?

THE CHAIR: With a joint venture.

MR GREGORY: Yes. Then if you turn forward to the conclusions at paragraph 69, I won't take you to them all, but the key paragraphs are 69 to 75. The key points that are brought out -- well, the judge declined the summary judgment application on the basis it was appropriate for the issues to be considered at the trial, in light of all the evidence.

One of the reasons was because of the point that has been discussed, the concept of an undertaking is the functional concept, so it is difficult to form a final view about it until you know what the scope of the infringement is.

While the parties in the summary judgment hearing had referred to various documents which shed a bit of light on the arrangements between the different companies, the judge found that actually much more information about those issues is likely to be relevant at trial, so it is not appropriate to decide the issues on a summary basis.

THE CHAIR: Okay.

MR GREGORY: Turning to the position of the SSF subsidiaries, if you could turn to paragraph 63 of our skeleton. If you look at subparagraphs B and C, this relates to the two - D12 and D13. Since the end of 2021, they have been 100 per cent- owned

by Scottish Sea Farms, which I will come to. During the cartel period, they were 100 per cent owned by Grieg, the third defendant, which was an addressee of the Commission's statement of objections.

No evidence has been given in relation to links between those subsidiaries and Grieg during the cartel period. You have seen that where a subsidiary is 100 per cent owned, there is a rebuttable presumption that the parent exercised a decisive influence. So we say it is plain that SSF can't get - subject- to the Sumal point - summary judgment against us in relation to those two entities-.

The same applies to the Mowi subsidiaries, although they weren't even challenged.

THE CHAIR: Yes.

MR GREGORY: In relation to D12, this is the holding company. As you said, I adopt the point that you made, which is basically the holding company is there to facilitate the economic activities carried out by subsidiaries, and it appears that it also has a funding role, so it is giving the subsidiaries the money to go around and do their business.

THE CHAIR: Sorry, can I interrupt you, just because if I don't say it now, I will forget. It would be very helpful to have on a single piece of paper the shareholding relationships of the various groups and a summary of their activities. I know it is in the evidence, but it is quite scattered. I would have expected something from the defendants to be -- rather than the claimants, but would somebody be able to do that -- can we have an agreed document?

MR GREGORY: Yes.

THE CHAIR: Maybe it is there already.

MR GREGORY: Hopefully --

MS MOCKFORD: I am sure that can be done, sir. Are you concerned about the relevant period in particular, the subject matter --

THE CHAIR: Yes. I will leave it between you to decide, but I need to know, either side or not, but, yes, it is obviously the periods the parties are concerned about.

MS MOCKFORD: I am sure we can do that. I imagine it might be tomorrow --

THE CHAIR: Yes, tomorrow is fine.

MR GREGORY: We have the run-off period as well in the particulars, so if that period can be included --

THE CHAIR: Yes, if you can just liaise between you, just so everybody is on -- tracking through -- keeping in mind the various shareholding partnerships and things, and all the different names, it gets a little bit confusing. Thank you. Sorry to interrupt.

MR GREGORY: That's okay.

We have very little information about D12, literally I think all we have been told is it was a holding company. It's clearly possible that at trial we will have more evidence about the function and the role and whatever involvement, even if limited, that holding company had in the activities of the subsidiaries which it owned the shares of.

In relation to D13, D13 produces Scottish salmon, therefore produces products which were sold by D11, which is the main SSF company, which I will come to.

We don't have any information relating, for example, to the internal transfers between D13 and D11, the basis -- or the prices on which the products were potentially sold by the producing subsidiary to the company which then sold it. Again, it is not impossible that there may be relevant information relating to how those prices were calculated, which will be relevant to quantum in these claims.

In any event, I don't think it can be said, even applying Sumal, that if you are producing a cartel-like product or products, the prices of which have been influenced by the cartel, then you are engaged in an economic activity which is entirely unrelated to the subject matter of the infringement.

Turning to D11, as Mr McCarthy says, the information is actually set out at

paragraph 65 again in our skeleton -- sorry, it is 63.

THE CHAIR: What do you say to Mr Gallagher's evidence, tab 32, paragraphs 18 to 22?

MR GREGORY: Yes, everything here is based on the evidence which the defendants relied on in relation to the shareholdings and so on.

THE CHAIR: Here, he says there is no decisive influence, because they were setting their own prices.

MR GREGORY: Yes, only during the relevant period it was owned 50/50 by Leroy and SalMar and then at 65 we summarise the evidence that we have. The two parent companies each had two seats on the board of six. So between them they had a majority. And the directors turned up to, I think, biannual board meetings that set the strategic direction of the company. That's clearly pretty strong evidence that the --

THE CHAIR: You say that is sufficient?

MR GREGORY: I think at trial we may well say that is sufficient, but it certainly not a situation in which summary judgment can be found against us.

THE CHAIR: You say the fact that day-to-day decisions are being made by the company employed is inevitable --

MR GREGORY: Yes. The authorities set out in our skeletons specifically say it is not necessary for day-to-day interventions in relation to operational matters, for parents to have decisive influence over a subsidiary.

THE CHAIR: Which paragraph in your skeleton is that? Sorry, you did show me, but perhaps you can remind me.

MR GREGORY: Paragraph 29. I will take you to 29E.

THE CHAIR: Yes. 40, so your reference there is, I think Fujikura v the Commission, paragraph 48.

MR GREGORY: Yes. Paragraphs 30 and 31 set out legal principles specifically

relevant to joint ventures that have two parents.

THE CHAIR: Okay, thank you.

Is there anything else on that?

MR GREGORY: No.

THE CHAIR: So then we need to look at the US document point.

MR GREGORY: I can take you back to the -- relating more to implementation rather than direct control. I can deal with it now if it is convenient.

THE CHAIR: Thank you. What do you want to go to next?

MR GREGORY: I was going to go to implementation and start with sales.

THE CHAIR: So this is the law on implementation or --

MR GREGORY: A little bit of law, but mainly facts.

THE CHAIR: We are interested in whether you accept that Sumal is the test. You say it's interpretation. You made the point that it may not be the law in the UK; just help me with what you are saying the law is in the UK, with respect to direct implementation.

MR GREGORY: Can you go to paragraph 33.

THE CHAIR: Of your skeleton?

MR GREGORY: Yes, sorry, of the skeleton.

THE CHAIR: So on the assumption you are not part of the same undertaking now, or you are part of the same undertaking --

MR GREGORY: No, I think it is accepted you have to be part of the same undertaking.

THE CHAIR: So if you are part of the same undertaking, bang, you are home and dry. Why do you want to go and explore an additional test of implementation?

MR GREGORY: It is simply the fact that the case law has identified these different bases on which subsidiaries can be jointly and severally liable.

THE CHAIR: Right, so the defendant's position - to put it persuasively, - is the position

is Sumal: same economic activity -- then if you say, "No, no, no, there is an additional hurdle I have to get over which is knowing implementation", I'm not quite sure why you would be saying that, but you accept you have to be part of the same undertaking, so isn't that all we need to deal with at the moment?

MR GREGORY: There are different ways of implementing. There is obviously participation.

THE CHAIR: But if you are part of the same undertaking, you don't need to implement -- providing you get into the same undertaking.

MR GREGORY: Prior to Sumal, there has been domestic case law identifying the different bases on which subsidiaries can be liable for the infringement of their parents. That identifies an implementation test which included selling products, the price of which was affected by the cartel. The defendants have said: all that stuff has now been merged. With Sumal, it all becomes the same thing.

THE CHAIR: Interpreting Sumal narrowly in certain circumstances, same product.

MR GREGORY: I completely accept you can see that there has been a coming together. The only point I am making is we do not yet have a domestic judgment saying that that is the case, and saying that --

THE CHAIR: Assume against yourself for the moment for that, that Sumal is whatever the Court of Appeal may say in the future, but this tribunal is going to work on the basis that Sumal is the test. There is then a dispute as to whether the same economic activity, or the same product, how tightly that has to be argued. Then we get into the facts.

Are there any other principles of law that you rely on?

MR GREGORY: Well, one point about this early authority is it may not matter, because actually if you can -- domestic case law is saying you can influence by selling related products and that may not be any different from what you get if you apply the

Sumal test, or whether the economic activities are related to the subject matter --

THE CHAIR: Your point is that the same economic activity test/the same product test in Sumal has not yet been tested, whether it is in the Court of Justice or whether it is in UK courts, such that it is said it has to be read narrowly, precisely the same product market or precisely the same product, and insofar as there is a legal point there, that is plainly not suitable for summary judgment or summary disposal of today, (a) because there is no case law on it, and (b) because you really need to get the facts out and find out how similar these salmon products are before you can devise and apply the legal test in the light of those facts.

MR GREGORY: Yes.

THE CHAIR: So that seems to be your position.

MR GREGORY: Yes.

THE CHAIR: And I think the facts - we discussed the facts. -I am not sure there is anything else you need to add on to that -- we will look at it - -we will keep these authorities in mind, of course, at 33.

MR GREGORY: I was going to take you to an authority on the de minimis threshold or not.

THE CHAIR: Just give me your submission first, and we will see if it is necessary to look at it.

MR GREGORY: No --

THE CHAIR: No, there isn't?

MR GREGORY: It is --

THE CHAIR: Is there an authority which says it is de minimis?

MR GREGORY: Well, there is. There is the Vattenfall case.

THE CHAIR: Let's go to it.

MR GREGORY: Tab 44. The start of the case is at page 1762. A damages claim

following on from a Commission infringement decision regarding power cables. If you have detailed questions you can put them to Ms Howard who was involved, but I am just going to cut straight to the chase. D3 was the anchor defendant. The defendants applied for summary judgment on the basis there was no evidence it implemented by making relevant sales.

If you turn to page 1793, and read paragraphs 63 to 66.

THE CHAIR: I see, yes, okay, thank you. I had not got that in mind.

I think the other point is, of course, we are not talking about £8,000 in this instance. We are talking about --

MR GREGORY: On that, we have a document, a table to hand up. What we have done is collated information which is already in the bundles in various places, in particular in the confidential schedules in annex --

THE CHAIR: That has been put in the bundles, electronically, has it?

MR GREGORY: This hasn't yet but --

THE CHAIR: Can it be at some point?

MR GREGORY: Yes, yes, we can put it in.

MR JOWELL: Can I just note that we don't think all those figures are accurate and we have told the other side that.

MR GREGORY: Obviously all of these numbers are confidential to different defendants. We have circulated --

THE CHAIR: Given this is not agreed, do we actually need it? We have the gist of what we are talking about.

MR GREGORY: I can give you the gist. The precise detail does not actually matter.

THE CHAIR: We have heard the gist. They are not de minimis in the sense of £8,000 --

MR GREGORY: The first table --

THE CHAIR: I think if this is not agreed, we probably --

MR GREGORY: Okay, we will try to agree --

THE CHAIR: I'm not sure we need it. If there is a reason why we need it, you need to have it admitted, you will have to explain why. But we already have evidence that we are talking about significant -- in absolute terms --

MR GREGORY: Yes, at the very least, hundreds of thousands, and in some cases millions of pounds of sales of Norwegian farmed Atlantic salmon.

THE CHAIR: Yes. And those figures are in the transcript -- so that's not going into the bundle.

MR GREGORY: The final point just relates to the possibility that you would at trial find that some of the domestic UK subsidiaries have participated in the infringement or had knowledge of it. I have shown you that we plead in general terms that that is the case. I would be grateful if you would turn to authorities bundle, tab 31, which is the Mr Justice Sales judgment I mentioned.

THE CHAIR: Yes. I'm not quite sure whether this is really a matter of law, is it?

MR GREGORY: It's not simply that he articulates the relevant legal principles, although he does, what he does is you apply those principles to a very early particulars of claim which pleaded out the infringement, in actually closely analogous terms to the way in which we pleaded it out, and declined to strike-out the pleaded case on the basis that there is not sufficient detail or it was not pleaded out --

THE CHAIR: I have looked at this. I don't really see that we get anything. That was that case, this is this case, if you are not relying on it for legal principles --

MR GREGORY: Well, I am relying on it for legal principles as well.

THE CHAIR: Tell me what the principle is.

MR GREGORY: So the conclusions are set out at paragraphs 51 to 72. I am not going to read them all out. Essentially, the court held that, one, to plead a valid cause

of action against the defendant, only a succinct articulation of the basic ingredients were required.

Two, in circumstances where a claimant is making a claim based on a secret cartel, it is important to bear in mind, as I mentioned, the claimant's counsel are under professional obligations to constrain what they are able to plead in the light of the available evidence.

Three, the defendant's right to know the case against it is satisfied by the fact that it can seek further and better particulars at an appropriate stage, for example, following disclosure. The fact that you do not strike-out a pleading at this stage of the proceedings --

THE CHAIR: This is not really the point that is being put. The point that is being put against you is that the Commission's sustainable objection was focused on a cartel between Norwegian salmon farmers. It doesn't -- had a look at documents in respect of UK companies and there has been no allegation in respect of the UK.

So it is not a question of how you drafted your pleading, and we can talk about how you drafted your pleading, this is a substantive point that at the moment you just don't have a case that gets off the ground as against the UK companies. That's the point. This is why this is of limited assistance. I understand the general principles, but you still need some basis for your case. You can't just plead it on the off-chance something turns up. Cartel case or not.

So how do you -- what's the basis of your allegation? It's not clear to me it is in the pleading at the moment, but let's assume in your favour it is, what's the basis of your allegation that the UK company, Scottish companies, were part of this cartel?

MR GREGORY: Just to record that I don't agree with the summary of the law which you gave, because I say that is inconsistent with the approach of Mr Justice Sales. The allegations in that case were very similar in terms of the land of specificity and the

land of generality.

THE CHAIR: I am not talking about the way you have expressed it in the pleading, I am talking about the substantive matter. You need to have some basis for pleading -- let's have a look at how you pleaded it again. You pleaded it in the alternative, didn't you -- it's not actually an allegation at the moment, either, either, either. You have not identified the UK defendants. Let's have a look at the paragraph.

MR GREGORY: Well, I can tell you before we look at it, there is no specific allegation relating to participation by UK subsidiaries in the pleadings.

THE CHAIR: Well, quite. I don't want to be unfair. Wasn't it paragraph 67?

MR GREGORY: Yes.

THE CHAIR: "Other members of the defendants' group [they don't say which] directly participated in, implemented or gave effect to ..."

Understandably, the defendants are interpreting that as being consistent with their view of the case that the cartel was between the Norwegian defendants. That's a perfectly legitimate reading of paragraph 67.

I don't want to shut you out. You say: well, if that's how it has been read, it requires amendment. I am not taking a view one way or the other whether you will be entitled to amendment on that, but what is the basis --

MR GREGORY: The only evidential basis for direct participation is the evidence relating to Mr Gallagher and SSF, which Ms Howard addressed yesterday.

THE CHAIR: Can you remind me of it? I appreciate we looked at it yesterday.

MR GREGORY: It is set out in full at paragraph 45G of our skeleton, page 21 of our skeleton.

THE CHAIR: For my convenience, let's look at the third amended complaint, which is in hearing bundle 3; is that right? I am trying to work out where it is.

MR GREGORY: 249 --

THE CHAIR: It may be a bad reference. 249, I have it.

Just explain to me again what this document is.

MR GREGORY: So if we can go back up to the start --

THE CHAIR: It starts on page 208.

MR GREGORY: So it is a US claim brought by direct purchasers of salmon in the US.

THE CHAIR: And it's date is?

MR GREGORY: The date will be at the top, 28 October 2021. If you turn down to page 911 --

THE CHAIR: The date is where, sorry?

MR GREGORY: Page 211, paragraph 2.

THE CHAIR: This is just an allegation.

MR GREGORY: It is an allegation the claimants have settled, it has not been upheld in a court. What you see --

THE CHAIR: What was it based on then, the allegation?

MR GREGORY: What you see in paragraph 2 is that these allegations are based on, in particular, a review of documents that the defendants produced of the anti-trust(?) division of the United States Department of Justice and the European Commission, in connection with the litigation. So they -- it is quite common in the US to get --

THE CHAIR: You will be getting disclosure. Assuming that the UK claimants stay in -- UK defendants, sorry, stay in --

MR GREGORY: Yes.

THE CHAIR: You will be getting disclosure. In paragraph 158 --

MR GREGORY: Yes, what paragraph 158 says --

THE CHAIR: You don't have these documents yet?

MR GREGORY: No, we don't have any documents yet. But unless the claimants' lawyers in the US have simply made up quotations, it looks like they have pleaded --

THE CHAIR: Let's **have a look. Just help me through this.**

MR GREGORY: We say --

THE CHAIR: Explain to its -- so who are these people?

MR GREGORY: So SalMar is the controlling shareholder. And Beltestad, Leroy's CEO, communicated with Jim Gallagher at SSF by email. In one of those emails Gallagher referenced a recent conversation with Witzoe, of SalMar, and perhaps Beltestad of Leroy as well, regarding recent Nasdaq prices. Gallagher confirmed this. As they discussed SSF, i.e. D11, would make sure that its prices were ahead of Nasdaq prices on a week-to-week basis. He also directly asked Witzoe to contact Beltestad to confirm what prices Leroy was offering.

THE CHAIR: This is evidence on its face that those prices were linked to the Nasdaq prices.

MR GREGORY: Yes.

THE CHAIR: Which is part of your case.

MR GREGORY: Yes.

THE CHAIR: Why is that relevant to conspiracy or cartel?

MR GREGORY: It depends on the relationship between SSF and its parents. On our view, they are all part of the single undertaking. This is, as you just said, evidence that they were implementing the cartel in relation to sales of Scottish salmon.

THE CHAIR: Right, but we are not on that bit of the case at the moment, we are on the bit of the case which is whether they were part of the cartel.

MR GREGORY: Well, it is a slightly different implementation point, isn't it? There is one way to implement, which is simply to sell Scottish salmon. There is another way to implement, which is more closely connected with the cartel itself, which is to say: I am going to make sure that my sales of Scottish salmon are above the Nasdaq price.

THE CHAIR: Going back to 67, it's not evidence that they directly participated in the

cartel, it is evidence that they directly implemented or gave effect to the cartel.

MR GREGORY: Yes. That's our position, that they are part of the same undertaking. Mr McCarthy's position is that they are not part of the same undertaking, that Leroy, SalMar and SSF are separate economic undertakings --

THE CHAIR: I understand why you say this throws light --

MR GREGORY: -- if that is the case, that is a communication of your future pricing intentions to a rival.

THE CHAIR: Yes.

MR GREGORY: I am grateful to Ms Howard, the final sentence of that paragraph is a separate point. It is the penultimate sentence:

"He [Gallagher] also directly asked Witzoe, SalMar, to contact Beltestad, Leroy, to confirm what prices Leroy was offering."

So he's telling one of the parent companies to contact the other parent company to find out about their future pricing intentions.

THE CHAIR: All of which is legitimate if they are part of the same undertaking? No, it's not --

MR GREGORY: There is no suggestion that the two parents are part of the same undertaking. There are two points here. The first point which we started with is SSF communicating its future pricing intention to its two parents. If they are part of the same undertaking, that's fine.

THE CHAIR: Yes.

MR GREGORY: If they are not part of the same undertaking that's not fine.

THE CHAIR: I thought that's what I just put to you.

MR GREGORY: But this sentence here is a different point.

THE CHAIR: Okay.

MR GREGORY: So then, SSF, which is the joint venture, suggest to one of the

parents that they get in touch with the other parent to find out about that other parent's future pricing intentions. There is no suggestion that Leroy and SalMar are part of the same undertaking. They are two of the largest producers of salmon in the world. They are rival groups. They happen to be joint parents of this joint venture, but they are rival salmon producers.

So that exchange of future pricing information which appears on its face to constitute direct evidence of an unlawful arrangement, in particular the exchanging sensitive future pricing information.

THE CHAIR: Okay.

I have to say, I don't think any of this is pleaded at the moment. You will have to take a view on that at some stage --

MR GREGORY: Yes --

THE CHAIR: -- whether or not you are allowed to plead it --

MR GREGORY: Yes. In general in strike-out applications if the only problem is a point in pleading, the claimant at this stage --

THE CHAIR: Sometimes, it depends. It depends.

MR GREGORY: There'd certainly be no prejudice -- well I mean there's prejudice in terms of serving out but --

THE CHAIR: Yes, there is a lot of prejudice, yes, yes. Okay, thank you, I understand that.

MR GREGORY: Unless you have any questions, those are my submissions.

Submissions in reply by MS MOCKFORD

MS MOCKFORD: I reply in the first instance and I think Mr Jowell, and possibly Mr McCarthy, may have some other points.

I just have two issues I want to address.

On participation Mr Jowell is going to address that further, the last point you were discussing with Mr Gregory. I would note from my client's perspective that Mr Gregory said the only evidential basis for the assertion at all of participation is in relation to Mr Gallagher of SSF. So there is no evidential basis, it seems, for the allegation against my client, D4.

We have applied to strike-out. So I say the strike-out should succeed on the basis that if --

THE CHAIR: You say there is nothing that your client's participated in the cartel, I understand.

MS MOCKFORD: Precisely.

Then I wanted to come back to the discussion you had in relation to products and different product markets.

THE CHAIR: Yes, the point I was putting is that we have to bear in mind when at the early stage we are not trying this issue now. There seems to be an argument that the two products are, as a matter of biology, the same, as a matter of consumption, the same, but what is apparent is that they are marketed differently, to a degree -- to distinct markets, and whether there is anything in the authorities to say that consequently they are different products.

MS MOCKFORD: Before we get to the question of the authorities, sir, I don't accept that summary of the factual position that it is just about marketing --

THE CHAIR: So what is the difference you rely on?

MS MOCKFORD: You were taken to Mr Gallagher's evidence -- you have seen it twice -- that talks about inherent qualities in relation to the fish. So density leading to different fat levels, for example. All of those.

THE CHAIR: Let's **look at that again because how that is put is not unimportant. Tab 33, page 377.**

MS MOCKFORD: Yes, exactly. It starts at paragraph 9, actually. It talks about difference in pricing, obviously an important component of product definition in competition cases. Prices may be sufficient to take precisely what look like very similar products into different markets. If they are priced at different rates and they can command different prices, that demand-side factor may be sufficient to put things which look very similar into different price markets.

You will be familiar with that concept, sir, from things like the Trucks cases -- cars. There is always a question about is a Ford Fiesta in the same market as a --

THE CHAIR: A Ford Fiesta is different to a Volkswagen Golf. They are plainly different. I can point to 1,000 components which are different.

MS MOCKFORD: They may be.

THE CHAIR: Here -- you are not even saying there are different strains of salmon. You are not even raising -- doing that. You are saying that the same species -- the flesh from the same species, you are saying they are different products. That's a starting point as that is a surprising proposition.

Then you say, well, why are they different? And the reasons you give are that it has a different stocking density --

MS MOCKFORD: My first reason is the reason given at paragraph 9, which is that they command different prices.

THE CHAIR: Right, but that can be the way they are marketed --

MS MOCKFORD: It can be the way they are marketed --

THE CHAIR: -- so the question I was asking is -- and you are going to come to it, I understand -- is whether the fact that things are marketed differently, if they are the same, makes them different products.

MS MOCKFORD: I see the point entirely. I think --

THE CHAIR: Bearing in mind we are just saying is any of this arguable, we are not

trying to answer it, what I am sure is a difficult question.

MS MOCKFORD: I understand. The point I say is that pricing is not just a function of marketing. Pricing is the competitive condition in relation to which we are concerned normally in competition law. It is the thing which defines what the relationship is between the purchaser and the seller. If something can command a different price, that is a key indication, in my view that - in my submission things are in different product markets. You see what the CMA said about that, that Scottish salmon, market price is 10 per cent above the price of Norwegian salmon. I say that is a really important factor-.

Marketing -- it's true, I am sure marketing feeds into what the price is --

THE CHAIR: I can buy a beef steak from one restaurant for £30 and buy a beef steak from a different restaurant for £60 --

MS MOCKFORD: Exactly --

THE CHAIR: -- but that doesn't mean they are (a) different quality, or (b) the £60 steak is superior quality.

MS MOCKFORD: It might well mean that --

THE CHAIR: Might -- but we are not dealing with "might" here, we are dealing with are you showing it is unarguable.

MS MOCKFORD: I understand that entirely. But the starting point for the analysis is that price is a key component of competition, and it is a key component of what constitutes different products. So if you are willing to pay --

THE CHAIR: You will have to show me authorities for that as I don't accept that as a proposition, that price is an indication of quality.

MS MOCKFORD: That price is a component of competition, and that -- competition markets -- a key opponent of competition or market, of course it is, and it is the key thing that determines normally whether or not something is in the same product

market. That is precisely why the SNIP test which we talked about yesterday focuses on what happens if there is a small but significant --

THE CHAIR: Authorities don't refer to the product market, do they?

MS MOCKFORD: Which --

THE CHAIR: Sumal doesn't refer to product market.

MS MOCKFORD: Sumal refers to products at paragraph 52, Mr Jowell quite rightly took you back to that: are they selling the same products? They talk about economic activity. We talked yesterday about the fact that economic activity and products may be slightly different, but in this case my submission is that products -- whether things are in the same product market or not is the key indicator whether they are undertaking the same economic activity.

THE CHAIR: That's your submission.

MS MOCKFORD: That's our submission.

Pricing is addressed at paragraph 9.

At paragraph 10, Mr Gallagher goes on to talk about production and marketing. So it's both that he's talking about. In terms of production, he points to the lowest stocking densities. In accordance with different -- particular standards, different dietary regimes leading to a lower fat content -- that is a biological difference.

THE CHAIR: Where it says "normally a lower fat content." I don't know what qualification "normally" means -- sometimes it has a lower, might have a lower --

MS MOCKFORD: I am going to take you to one other document in a moment which shows you precisely what Scottish salmon must be to meet the inherent characteristics of being Scottish salmon between the key accreditation, which is the point he goes on to talk about in the next paragraph, and then paragraph 13 he talks about marketing and makes the point it was regarded as being at the premium end of the market.

My essential point is I don't accept it is just marketing, or nor do I accept the price --

THE CHAIR: You may not accept it, but have you shown it's unarguable -- the contrary view is unarguable?

MS MOCKFORD: My submission is that through a combination of the factual evidence -- and I should say in addition to Mr Gallagher talking about these things, you also have Mr Nolan talking about these things -- he works for Mowi's Scottish subsidiary. It's very similar evidence -- that's why you have not got it yet -- but for your note it is core bundle, tab 29, pages 337 to 338.

Then you have the views of the regulators, who have looked at this and concluded in the case of the CMA that Norwegian and Scottish salmon are in different markets, and said it was very likely in the case of the Commission when they looked at it, that they didn't have to reach a final view because divestments were offered in relation to the Scottish market. We went through that yesterday.

I would also take you back to the scope of the EC's investigation in this case. They have narrowly confined their investigation to Norwegian salmon. They aren't looking at farmed Atlantic salmon; they aren't looking at Scottish salmon, they have confined it.

THE CHAIR: I am not sure of the relevance of that to the point we are on. We are on a much narrower point as to whether these are different products. You point to a different price which is only 10 per cent, it is not a vast difference. You are saying it is unarguable -- on the basis of your 10 per cent pricings it is unarguable that these are different products even though --

MS MOCKFORD: Unarguable.

THE CHAIR: -- you have two of them on a plate, you can't tell the difference between them.

MS MOCKFORD: Unarguable that they are the same product.

THE CHAIR: Unarguable that they are the same product.

MS MOCKFORD: I do, that's my submission.

Can I take you to one further document before I sit down.

THE CHAIR: Yes.

MS MOCKFORD: It is tab 61 of the hearing bundle.

THE CHAIR: In the hearing bundle?

MS MOCKFORD: Tab 61 of the hearing bundle. Volume 4, I think. Page 1957. This is an exhibit to Mr McCarthy's statement where he's talking about the product specification for Scottish salmon. I just draw your attention to the fact on page 1957 at the top of the page, it describes what Scottish salmon must be. These are various things about the inherent qualities of the product.

The point is that something that doesn't meet these definitions can't be Scottish salmon and sold as such.

THE CHAIR: Right. But there is no evidence that it's not -- Norwegian salmon is not the SalMar -- that Norwegian salmon don't have a consistent shape or:

"... rounded ventral body shape ...(reading to the words)... significant tendency to collapse when the carcass is eviscerated."

I imagine there is a range of quality of Norwegian salmon and some for sure will satisfy that criteria; how does this help me?

MS MOCKFORD: My submission is it helps insofar as you can see that Scottish salmon is a product that is in its own terms, has its own qualities, and in order to market it as Scottish salmon, it has to meet these criteria.

THE CHAIR: Right. The flesh colour must have a minimum intensity of 26 on the SalmoFan scale -- I look forward to hearing what that is in due course -- but again, there is no evidence that Norwegian salmon doesn't satisfy that --

MS MOCKFORD: Of course, Norwegian salmon can't meet the third criteria, which is that it has come from the geographical area of mainland Scotland, the Western Isles

or --

THE CHAIR: Yes, but that's where it comes from, it's not about whether it's the same product.

MS MOCKFORD: Well, it is all about where it comes from, for the reasons I have given -- I think I have probably taken this point as far as I can --

THE CHAIR: Geographical indications are ingenious -- like champagne, whisky, chocolate -- yes. It is an open question as to whether or not the products are different --

MS MOCKFORD: -- you can get very nice cava but whether cava and champagne are in the same product market would fall to be tested against their own facts, and we say exactly the same is true here.

THE CHAIR: Yes.

Submissions in reply by MR JOWELL

MR JOWELL: I am going to go next on this occasion. I just want to deal with this discrete question, whether it is pleaded that there has been collusion by the UK subsidiaries on the UK market, really because it is tangentially relevant to the forum non conveniens issue as well.

THE CHAIR: I do not think it has been pleaded.

MR JOWELL: I am grateful that you say that. I just want to make that good, if I may. If one starts with -- we say it is the beginning and the end of this, which is paragraph 68, which is that statement which says although the collusion -- in Norway. And it was suggested that you can disregard that --

THE CHAIR: Let's just get it open before you start.

MR JOWELL: Page 24, paragraph 69.

It is suggested that you can disregard that statement because it was suggested it

comes after the section on the EU infringement. I am afraid that's just not right because the EU infringement is -- first of all, you see a heading above paragraph 63 on page 21:

"Particulars of the infringement."

Then in 64 and 65, you see reference to the EC/EU -- European Commission questions. Then at 66, you see a description of the anti-competitive practices.

Then at 67 and 68 you see the reference is to "the collusion" -- at 68, with a single anti-competitive economic aim.

So 69 is a clear statement that the aforesaid collusion that is described in 66 and 67 and 68 took place in Norway.

The other provisions my learned friend referred to is he referred to paragraph 6a, where he suggested, I think, that the reference is -- this is on page 6 – 6a, he suggested the first part, he said -- talking about the SDI:

"Including in particular the exchange of commercially sensitive information and the manipulation of prices on the Norwegian stock market."

He suggested, I think, that the exchange of commercially sensitive information could somehow be broader than just Norway.

But what he didn't note is what's in brackets "see further", at paragraph 80a below.

If you go to 80a below, you see -- on page 31 -- an allegation of the exchange of sensitive information reducing uncertainty in the Norwegian market for spot sales of farmed Atlantic salmon.

So it is clearly those exchanges are all aimed at the Norwegian market.

He also said, I think, that we don't know, he suggested, which of the defendants will be found to have infringed by the European Commission. That's true to an extent: we don't know whether any of them will be found. But we do know which ones won't be found and that is the UK ones because they are not subject to the SO. You see that

in his own pleading at paragraph 64. So we know they won't be found because without an SO you can't have an infringement decision.

I'll show you that this is also how the infringement was summarised in the application to serve out of the jurisdiction. If you go, for example, to tab 3.

THE CHAIR: Core bundle?

MR JOWELL: Core bundle, and to page 72, you see paragraph 10. This is the claimant's solicitor summarising their claim: the claimants seek damages for breach of statutory duty under the relevant provisions; the claimant's claim arises from the defendants' alleged collusion to exchange commercially sensitive information relating to prices and other price-setting factors with a view to fixing, increasing, maintaining or stabilising the spot prices for farmed Atlantic salmon in Norway. The cartel artificially inflated Norwegian spot prices which were and are used as the basis for the Nasdaq salmon index, which is the international benchmark for sale prices for farmed Atlantic salmon globally, including in the EEA and the UK.

THE CHAIR: Yes.

MR JOWELL: So it is very clear what the cartel is about. It may have those further knock on effects, but no infringement in the UK, participation in the UK, is pleaded. In effect, it is very clear it is in Norway.

The document they showed you, this US pleading, it doesn't show that there was participation by the UK individual in fixing the spot markets on the Nasdaq. It may support their case that there is a potential influence on the Nasdaq to other prices, I accept that, but that's a different point. That's not about participation.

Insofar as it is suggested that there was an incitement to collusion, if you like, to the parent company, again that is not really participation in the cartel either. What it is, if anything it is encouraging the one parent company in Norway to speak to the other parent company in Norway. He's not participating in any cartel.

THE CHAIR: It may be subject to argument.

MR JOWELL: Yes. But my point is that any collusion that that -- first of all, that in itself is not collusion. At most it is an incitement, if you like, to the parent company, an encouragement to the parent. Secondly, if it did lead to any collusion, that collusion would be in Norway. So there is nothing there. There is just simply no basis for it.

THE CHAIR: Right. Did you have anything?

MR McCARTHY: Sir, in fact, in light of my learned friends' submissions, I don't think I need to say anything further.

THE CHAIR: Thank you. So we are on to material non-disclosure.

MS MOCKFORD: We are, and it is me again.

MS HOWARD: Can I just intervene, there has been an extra expert report that was submitted by the defendants overnight on Norwegian law. I don't know whether you have seen that.

THE CHAIR: Norwegian law?

MS HOWARD: It is a further expert report by Professor Andenas. It is obviously not our expert report, it is the defendants. We have not had a chance to comment or respond to that.

THE CHAIR: There is not permission for any --

MR JOWELL: No. I should perhaps address you on that. We understood that the tribunal wanted to understand the position as regards the status of the decision in Norway.

THE CHAIR: Yes.

MR JOWELL: That is the only issue that Professor Andenasaddresses --

THE CHAIR: Is there any agreement?

MR JOWELL: We were hoping it would be agreed, because I thought we had -- the position that Professor Andenastakes is, broadly speaking, what I have understood to

be the sort of general consensus that emerged --

THE CHAIR: That it may be persuasive?

MR JOWELL: That it may be persuasive.

THE CHAIR: Whatever that means.

MR JOWELL: Exactly. I don't know if there is any objection to that.

THE CHAIR: Ms Howard, having not, I think, looked at this yet, I am reluctant to admit it until you have had a chance to.

MS HOWARD: We would like to respond. Whether we respond now or after lunch --

THE CHAIR: Where we reached, based on submissions, is that the decision of the Commission will not be binding on the Norwegian courts but it is likely to be persuasive.

MS HOWARD: Yes.

MR JOWELL: That's all that Professor --

THE CHAIR: If that's a common position, I really don't want to --

MS HOWARD: He does add quite an important point. Obviously you have not seen it yet but he adds a point at the end --

THE CHAIR: I was not going to look at it. That's the basis on which we are going to work at the moment.

MS HOWARD: There is an important point that he makes that there is a carve out in the EEA Agreement for fish.

THE CHAIR: Yes. As already discussed.

MS HOWARD: So the equivalent of Article 101, Article 53, it appears does not extend to fish in Norway.

THE CHAIR: I think that was a point that Ms Thomas made yesterday.

MS HOWARD: Yes.

THE CHAIR: Where does that leave us? It doesn't mean the Commission decision

won't be persuasive.

MR JOWELL: No, and that is indeed -- he confirms it is --

MS HOWARD: I think it weakens the persuasiveness and the relevance of the decision, if there is an explicit carve out for fish, given we are dealing with salmon in Norway.

THE CHAIR: As I understood it, it is a carve out from the applicable law.

MR JOWELL: All we are doing is trying to confirm the position that you just mentioned. We don't need to submit it, if that is --

THE CHAIR: If you want to review your position and say it won't be persuasive in Norway -- which you comment on today -- that it will be a different matter.

MS HOWARD: No.

THE CHAIR: But if we are all accepting it is persuasive, as I have already commented I don't actually know what persuasive means as a practical matter.

MS HOWARD: We have asked for Mr Tokvam. We are waiting for his input but obviously I didn't have much time --

THE CHAIR: I am extremely reluctant on a strike-out application --

MS HOWARD: Exactly. I know you are reluctant --

THE CHAIR: -- to have expert -- obviously we needed Norwegian expert evidence on the post-law matters, I can see a case for that. Given we are not dealing with that, I am extremely reluctant at the end of the day to start admitting expert evidence on Norwegian law. So I will say no more about it at the moment. If you have applications, you will have to make them.

MS HOWARD: I am grateful, my Lord.

Yesterday we were conscious that you were being bounced into arguments about funding in Norway and you hadn't really had chance to read the evidence in RB3, but also from the Simmons letter and the attachments. Overnight we prepared

a summary, like a route map for you, to just summarise all those sources into one statement.

MR JOWELL: I am afraid we vigorously oppose this. This is an attempt to reopen the argument. We have seen the document. The only part of it that we don't object to in principle is the translation of the Supreme Court judgment that I think, Mr Chairman, you requested.

THE CHAIR: Yes.

MR JOWELL: I think we are still considering that translation that has been provided.

THE CHAIR: Right.

MR JOWELL: I do actually, I think, have some -- I think there are some omissions or some inaccuracies in it.

THE CHAIR: The parties can liaise on that.

MR JOWELL: As to the rest of the note, it is a highly contentious, partisan summary of the evidence.

THE CHAIR: I will have careful regard to Mr Tokvam's statement that we looked at.

MS HOWARD: I am afraid, yesterday I felt that we didn't have a fair opportunity to make these observations.

THE CHAIR: Observations on what?

MS HOWARD: On the funding opportunity. I would like to clarify our position on that.

THE CHAIR: Okay.

Submissions on litigation funding by MS HOWARD

MS HOWARD: Obviously we had set out that the defendants would go first yesterday and we would start this morning so we would have overnight. I was left in a position, one against six, with 50 minutes over lunch to respond.

THE CHAIR: Quite right. If there are submissions you want to make to clarify on the

basis of materials --

MS HOWARD: I would like to make submissions. Most of this note is actually just recording points from Mr Andenas' report so it shouldn't be contentious.

THE CHAIR: I don't want to --

MS HOWARD: If I can hand up copies of it --

THE CHAIR: No, I'm not going to take copies, but I will listen to your submissions if you take us through it.

MS HOWARD: Thank you, I am grateful.

Where I would like to go first is just to make submissions on the basis of a Supreme Court ruling that is in the bundle. It is the Lubbe case. Lubbe and Cape Plc which is at tab 15 of the authorities bundle.

This case was handed down in 2000, so it is before the ruling of forum conveniens under the Brussels regulation. The facts of this case involved --

THE CHAIR: What is the point of this?

MS HOWARD: Sir, I am trying to show you why the importance of funding and the availability or lack of availability of funding will have an impact on the ability of claimants to actually bring their claims at all. Lord Bingham, in this case, found that this was a potential denial of justice that was a relevant factor in assessing forum non conveniens.

THE CHAIR: So the lack of availability of funding in another jurisdiction?

MS HOWARD: Yes. So this is not simply a procedural order or juridical advantage, it actually goes to the substance and the quality of the justice that is going to be obtained.

I am taking you to the "Held" note, which is at page 541. I will go through it briefly. Then I will take you to the relevant provisions.

This case involved a group action. It was brought in the UK on behalf of South African

citizens for personal injury claims regarding asbestos exposure.

THE CHAIR: Yes, I remember this case.

MS HOWARD: The case was against the UK domiciled parent of the South African mining subsidiaries. At first instance there were two sets of claims: the first instance in the first set held that South Africa was the more appropriate forum, and that was overturned by the Court of Appeal on the basis that that forum was unavailable. There was an appeal against that.

But then there were further group actions where the Court of Appeal stayed the litigation because it felt that South Africa had the most real and substantial connection.

If I go further down into the "Held" note, looking at section 2 of the "Held" note:

"The court had regard not just to the connecting factors of which forum was the most appropriate forum, but also looked at whether in particular this group litigation was the only way that the litigation could be handled efficiently, cost effectively and expeditiously."

In this case, he held that the type of this litigation being a group litigation was a heavy, difficult task which would require expert evidence, expert advice. And because there was no available funding in South Africa, whether by Legal Aid or through CFAs -- contingency fee arrangements -- the effect of a stay would effectively deprive the plaintiffs of the means of obtaining the representation and the expert evidence that was essential to the just disposal of their claims and would effectively amount to a denial of justice.

So if I can just take you very quickly to the relevant paragraphs, the first is just at 1554 at paragraphs F to G, where Lord Bingham sets out the relevant test based on the Spiliada. I will do this very, very quickly. Basically, where the proceedings have already been issued, the burden is on the defendant, firstly, to show that England is not the natural or appropriate forum and to establish that there is another available

forum which is clearly more appropriate.

THE CHAIR: Yes.

MS HOWARD: Once that has been done, the burden then shifts to the claimants to show that there is some other reason by which the stay should not be granted; and in that case you don't just look at the connecting factors, but you have to look at whether the claimants are going to obtain substantive justice in the foreign jurisdiction.

Further down at H, he says, even though it is not an easy condition to satisfy, if the plaintiff can establish that substantial justice will not be done, then the stay will be refused.

Now over the page at 1559, at C to D, he then started analysing the availability of funding. Unfortunately there are no paragraph numbers in this ruling. He looks at the conflicting evidence on the availability of funding in South Africa. Particularly at C to D, he said that if the proceedings --

THE CHAIR: I have read that, yes.

MS HOWARD: -- were undertaken on a CFA basis, then there seemed to be no funding available and there were no means for the attorneys to conduct this type of litigation on a CFA basis.

The important paragraph here is at -- sorry, I am just on 155 F and G, paragraph 6, where he says:

"If the proceedings were stayed in favour of South Africa, the probability is that the plaintiffs would have no means of obtaining the professional representation and expert evidence that was essential."

He then repeats that again over the page at 1560 at C. Importantly, there again he talks about the novelty of the group litigation in South Africa, which reinforces the points made about funding: it is one thing to embark on heavy group action where the process is known and understood, but it is quite another where it is novel and untried.

He said that the procedural novelty of these proceedings:

"... would in my view give further disincentive to any person whether or not to finance the proceedings."

THE CHAIR: So you are saying it falls outside the procedural advantage?

MS HOWARD: Yes. We say this actually goes to the substantive justice and whether there is a denial of justice. Just one last reference at 1561 B to D. Again he confirms about the relevance of substantive justice.

Now we have presented cogent evidence, we say, about the lack of availability of litigation funding in Norway.

THE CHAIR: We did spend quite a lot of time looking at that yesterday.

MS HOWARD: We did. But I am not sure whether, because you have not had chance, it seemed to me the points I was making --

THE CHAIR: Why do you say that?

MS HOWARD: Just because we were referring to RB3 and the evidence provided in the latest expert report.

THE CHAIR: These are expert reports that came in late?

MS HOWARD: That's right. These were submitted in response to the funding --

THE CHAIR: You don't have permission for that?

MS HOWARD: No. But we say that these points were not just going to the issue of service under the 1931 convention; they were also going to forum non conveniens.

THE CHAIR: You put in your statement - we spent a long time looking at Mr Tokvam-'s statement.

MS HOWARD: Yes.

THE CHAIR: You say that is inaccurate or that's not the position?

MS HOWARD: Mr Tokvam is our expert. We say that is accurate. And we say that Mr Andenas' statement on litigation funding, he says he's not competent to comment

on funding, but Mr Tokvam did very clearly say that the key points are that the class representative would be liable --

THE CHAIR: We will just look at it again to be sure we have it. It is in two places, isn't it, core bundle tab 9?

MS HOWARD: That's right.

THE CHAIR: You said: the class members cannot be made liable.

MS HOWARD: That's right, the class members, the class representative, is liable for the costs. In fact, that comes from Mr Andenas' report.

So if the claim is unsuccessful, then the class representative must take on the liability. That's Mr Andenas'statement at paragraph 35. In this report it is 4.2.2, which is on page 172 of the bundle.

THE CHAIR: We have looked at this. It is all marked up. We looked at this in some detail. Do you have any further submissions on this?

MS HOWARD: That's right. The point is that the Supreme Court ruling said that the court itself could not vest that liability and allow the funder to recover their damages, legislation was needed; and the Current Disputes Act does not allow the class rep to recover the costs of external litigation funding.

So the reality is -- and also Mr Tokvam makes the point - if you want to be a funder in Norway, you have to have a licence, and currently there are no entities that he's aware of -that are offering funding in Norway.

THE CHAIR: Right.

MS HOWARD: So we have a real practical impediment here to claimants, whether in group litigation or class actions, practically being able to bring funded litigation in Norway and being able to recover both their own costs or the --

THE CHAIR: You can get us a translation of the Supreme Court decision?

MS HOWARD: Yes. We say in the light of that Supreme Court, that equates to

a denial of justice that should be taken into account in weighing up the competing merits of these two forums.

Clearly, given the novelty of this type of complex litigation which is heavily dependent -- and this particular claim will be heavily dependent on expert evidence both as to the effects -- direct and indirect effects of the cartel on pricing in the UK as well as quantum, that is a material factor.

THE CHAIR: What was it you wanted me to look at in RB3?

MS HOWARD: Just the summary of his proceedings at 4.2.2 where he talks about funding. I took your Lordships to it yesterday.

THE CHAIR: That's the one we were just looking at?

MS HOWARD: Yes, paragraph 4.2.2. The other references were the Simmons letter that was sent in with the attachments.

THE CHAIR: Yes.

MS HOWARD: There are four articles published which were annexed to the Simmons letter, which show that in practice third party funded opt out litigation in Norway is simply not possible, and that funders are unable to recover their costs or their return on their investment without legislation, and there is no legislation at present.

So those are my submissions on that.

THE CHAIR: Do **you want to respond on the authority?**

Submission on litigation funding by MR JOWELL

MR JOWELL: Yes, and also briefly on the summary of the evidence.

THE CHAIR: I don't think there is anything new on the evidence we didn't discuss yesterday.

MR JOWELL: Fair enough. I think that in relation to the authority in Lubbe and Cape, two observations. First of all, that is the case where it would have amounted to

a complete denial of justice because the claims could not have been brought in South Africa at that time. That's why in those extreme circumstances, this was a factor that was considered to be relevant to forum conveniens.

The first point to observe is that that is not an allegation that is made in relation to the claimant's claim. They are not suggesting they couldn't bring their claim in Norway.

MS HOWARD: Yes, we are. We are saying if this stay is granted, then we would not be bringing proceedings in Norway because we have no funding --

MR JOWELL: I am sorry, there is no basis for that. There is simply no basis for that submission at all in the evidence.

MS HOWARD: This claim is third party litigation funders.

MR JOWELL: The expert evidence that has been put in goes to third party funding of class actions.

THE CHAIR: I understood.

MR JOWELL: And it does not go to third party funding generally.

THE CHAIR: Sorry, Mr Jowell, just let me clarify. I don't want to go off at cross-purposes. Are you saying you can't get third party --

MS HOWARD: This claim is being funded by third party litigation funding, and we would not be able to get that funding in Norway.

THE CHAIR: Where is this in your evidence? Let me just clarify where it is, and then we will let you come back.

Where is this?

MS HOWARD: We will find it.

THE CHAIR: Is there any -- the claimants are huge organisations.

MS HOWARD: This is very common. Very common for litigation funding because the companies don't want to be funding the litigation themselves, they get third party litigation funding.

THE CHAIR: I understand that. But there is no evidence that this claim will not be brought at all if it is stayed. That would have been at the forefront of your submissions to these --

MS HOWARD: These claims take years to build and develop and to get the funders to invest. You are not just looking at something --

THE CHAIR: Where is this in your skeleton argument?

MS HOWARD: We will have a look and come back after lunch. I thought it was in Ms Quierin's witness statement, but I will check.

THE CHAIR: Mr Jowell, I am assuming this is not in play at the moment. I will give you an opportunity to comment further if it is in the skeleton.

MR JOWELL: It would be interesting to compare ASDA and Morrisons and the like, to impoverished South African miners but perhaps it's not the most persuasive comparison, in my submission.

THE CHAIR: As against the class. It doesn't fall within the procedural advantage.

MR JOWELL: As we had understood this point, it is really saying there is this other claim out there that is applying certification and that claim that was asserted in the initial witness statement couldn't be brought. Because it is said we can't bring collective claims in Norway.

Both of the experts are absolutely clear that you can bring claims in Norway, and that both opt in and opt out, and there is no evidence for that and indeed, there have been several such claims that have been brought.

The only point that is made, really, by Mr Tokvam is that he says that external third party finance of lawsuits is not common in Norway. That's neither here nor there. There are currently no companies established in Norway that offer such financing. Again. That is neither here nor there.

He only says that such financing is not common --

THE CHAIR: We have had extensive submissions on these two paragraphs --

MR JOWELL: Yes, this is deja vu. As for the rest, it doesn't make any suggestion that it would not be practical for cost reasons to bring an opt in claims. As regards an opt out claim, he actually also doesn't say that they couldn't be compensated out of undistributed funds. All he says is there is no clear case law.

THE CHAIR: Yes, I mean the term that troubles me slightly is the term "undistributed funds" is ambiguous, in that it can be funds prior to distribution or it can be funds -- it can be the residual after distribution.

MR JOWELL: Yes.

THE CHAIR: In both cases they are undistributed.

MR JOWELL: Yes.

THE CHAIR: And there is not a big enough practice in this area to say "no, undistributed always means that", so when Mr Tokvam says "undistributed", does he mean the residual or does he mean prior to distribution?

MR JOWELL: I think he means the residue, to be fair.

THE CHAIR: There is an ambiguity in this.

MR JOWELL: Yes. But all he says is he's not aware of any case law relating to the entitlement of the funder to undistributed funds, but he doesn't say that they wouldn't get it.

Thank you.

THE CHAIR: Just make a start.

Submissions on material non-disclosure by MS MOCKFORD

MS MOCKFORD: My Lord, material non-disclosure. I am conscious of the time.

THE CHAIR: Make a start.

MS MOCKFORD: I propose to take things in the following order on the topic of

material non-disclosure. I want to start with the case law, how a court or tribunal in this case should approach --

THE CHAIR: We have looked at your skeleton, we have looked at the authorities, it is well known. Are there any particular aspects you want to elaborate on? Don't think you need to take us through everything.

MS MOCKFORD: Understood, thank you.

After that I am going to explain the errors that are committed in this case, and then make my submissions as to what I say the consequences of that error should be.

The case law then, bearing in mind what you just said, sir, what I wanted to do was start actually by looking at the claimant's skeleton, which is at tab 47 of the core bundle, page 557.

THE CHAIR: Can I ask you, are there any cases where material non-disclosure is more important in some cases than others? So when you are getting an ex parte injunction, it is very important. Are there any cases that you refer to which concerns a service out?

MS MOCKFORD: There are. There absolutely are.

THE CHAIR: It would be good to concentrate on those, I think.

MS MOCKFORD: That's helpful.

If I can just briefly deal with the claimant's skeleton and then take you to precisely that point.

THE CHAIR: Of course.

MS MOCKFORD: Paragraph 73 of the claimant's skeleton. The reason I want to go here is the sum total of the claimant's engagement with the jurisprudence in this area. What they start by doing at paragraph 73 is citing Lord Collins in the case of NML Capital v the Republic of Argentina, where he says the court has a discretion to set aside and require a fresh application or treat the claim as validly served and deal

with the non-disclosure by a costs order.

Two points about that. The first, it's worth noting that NML was not a case about material non-disclosure, it was a case about whether new grounds for permission to serve out of the jurisdiction can be raised, when they were not before the Judge. So this is an obiter comment. That said, I don't disagree with it, I don't demure from it, it is absolutely right that the tribunal has a right that ranges between those two options but it tells you nothing about how you should exercise that discretion and what might tip you one way or the other.

The claimants purport to deal with that in their next sentence of the skeleton, where they say:

"In particular, the application to set aside service may be dismissed, where the judge considers that the order would have been made if the full facts had been before the judge."

You would be forgiven for thinking from that, that that is really the only factor that is relevant to the exercise of the tribunal's discretion. I say that's not right at all. It is a gross over-simplification of the factors that the tribunal will take into account and that there is a very substantial body of case law which addresses that issue.

Actually, this point, whether the order would have been made regardless, is of limited, if any, relevance.

I was going to propose to take the tribunal to three authorities: Arena, Banca Turco and Tugushev. Of those, Tugushev is concerned with service out, and maybe we should start there.

THE CHAIR: Start there, yes.

MS MOCKFORD: Tugushev is at authorities file D of your hard copies, tab 52. I am conscious of the time --

THE CHAIR: Keep going. We will stop you when we get bored, don't worry.

MS MOCKFORD: In that case, I will keep going until I get an indication that I should stop and everybody is hungry. Page 2085 of the authorities bundle is the starter case. If you go to paragraph 3 on the next page, 2086, you see the point that you were just raising with me, sir, that this was a challenge both to the freezing order, and it was one of those, but also to the order permitting service out of the jurisdiction on the basis of the alleged breach of the duty of full and frank disclosure.

THE CHAIR: But there was a worldwide freezing order as well.

MS MOCKFORD: There was. There was both of those things. But if I can take you to paragraph 8 of the judgment, Mrs Justice Carr as she then was deals expressly with the point you just raised with me, sir, on page 2089. She says:

"There is no suggestion that the same principles do not apply to a without notice application for permission to serve out as they do on a without notice application for a freezing order."

And she refers to two other authorities.

So what I say is that the Britain --

THE CHAIR: Are those other authorities service out cases?

MS MOCKFORD: I will have to check that, sir. I can do that over the short adjournment.

But the point I take is that there is no difference in the principles to be applied. What there may be -- and I accept that -- is there may be a difference in how those principles are applied.

THE CHAIR: Yes.

MS MOCKFORD: depending on the context, of course that is true. In a worldwide freezing order case, the court will be particularly concerned about the exorbitant nature of the jurisdictions being exercised.

THE CHAIR: Yes.

MS MOCKFORD: But the principles on an ex parte application which is an exceptional course to take -- and I say it is an exceptional course in the case of a service out order as well -- an exceptional departure from the general principles that you have all parties before you when you make any order that effects them, the same principles apply.

What I was going to do was take you then back to paragraph 7, and Mrs Justice Carr's explanation of what those principles are.

THE CHAIR: Yes.

MS MOCKFORD: This largely mirrors the Arena principles which were set out in our skeleton, and which the tribunal has read and is familiar with. I mean, I will commend the whole of paragraph 7 to the tribunal but in the interests of time, there are four particular paragraphs that I would emphasise.

The first is Roman numeral (iv) at the bottom of page 2087 --

THE CHAIR: Yes.

MS MOCKFORD: -- which addresses the fact that:

An applicant making an application on a full and frank basis must make proper inquiries before making the application. It “must investigate the course of action asserted and the facts relied upon, identifying and addressing any likely defences."

The next point is important:

"The duty to disclose extends to matters of which the applicant would have been aware, had reasonable inquiries been made. The urgency of a particular case may make it necessary for evidence to be in a less tidy of complete form than is desirable but no amount of urgency or practical difficulty can justify a failure to identify the relevant course of action and principle facts to be relied upon."

The next point I emphasise is at (vi), which is talking about what is material in this context. Mr Justice Carr makes the point that "there will be degrees of relevance and a due sense of proportion must be kept."

I emphasise the last sentence of that subparagraph, in which she says:

"The primary question is whether in all the circumstances, its effect [sorry, the effect of the non-disclosure] was such as to mislead the court in any material respect."

That's the primary question identified.

Next I would emphasise subparagraph 10, at which she makes the point:

"Whether or not the non-disclosure was innocent is an important consideration but not necessarily decisive."

THE CHAIR: Yes, we have read that, yes.

MS MOCKFORD: 11 goes precisely to the point made in the claimant's skeleton argument that I showed you:

"The court will discharge the order, even if the order would still have been made, had the relevant matter been brought to its attention at the without notice hearing. This is a penal approach and intentionally so, by way of deterrent, to ensure that applicants in future abide by their duties."

So it is deterrent in two ways. Deterrent effect on the applicant before you but deterrent effect more generally, bearing in mind the exceptional nature of the procedure of having one party in front of you and the other not.

That is a point that is talked about in more detail by Mr Justice Popplewell in Banca Turco. I would like to go to that as well if we may, because it gives you a clear explanation of why the duty is so important and makes good the point I was just making, that it is exceptional not to hear both parties.

THE CHAIR: Although there is always the duty -- there are cases which say the duty is particularly high when you are seeking worldwide freezing orders, injunctions. And it is less stringent when it comes to the matters which cause less prejudice to the respondents.

MS MOCKFORD: Can I take you to Banca Turco and what has Mr Justice Popplewell

had to say about the nature of the ex parte jurisdiction, all together?

THE CHAIR: Where is it?

MS MOCKFORD: Tab 42, file C of the authorities.

THE CHAIR: You may say I am wrong about that, I am misremembering. File C.

MS MOCKFORD: File C, tab 42. This is another worldwide freezing order case, so I am not saying this is a service out case. But if you look at paragraph 45, on page 1716, it gives a general account of why the duty of disclosure is important on any ex parte application and I say that this account is equally applicable in the case of service out applications.

Maybe the court would like to read the whole of that paragraph.

THE CHAIR: Yes, okay. This is all familiar territory, yes.

MS MOCKFORD: The point I would emphasise about it is it explains precisely why it is important and it is because it is a derogation from the basic principle of fairness that you have to hear both sides of the argument before reaching a decision. And that, I say, is equally applicable in the service out cases and worldwide freezing order cases and again, I note that this paragraph makes the point that it does not matter that the order would have been made, had full and fair disclosure been given and that the court will incline towards setting aside, in the case of a substantial breach, even where innocent.

Also I note in the middle of the paragraph, the court talks about the need to deprive the applicant of advantage gained by the order which is something I'm going to return to in due course.

THE CHAIR: You don't have in the bundles a straightforward vanilla service out case where there is material non-disclosure and therefore the service out gets set aside, and that's the end of the proceedings.

MS MOCKFORD: There is one of those. EasyGroup v Easyfly is a service out case,

I think. My learned friend is suggesting another one as well.

THE CHAIR: Let's **just look at one more before lunch.**

MS MOCKFORD: So EasyGroup v Easyfly. That is tab 53, I think this is. Certainly this is a service out case. Whether there was also a freezing injunction, I'll have to check but I --

THE CHAIR: That is the important decision.

MS MOCKFORD: Yes. But what I rely on is the approach taken in relation to --

THE CHAIR: Do you want to have a look at this over the adjournment?

MS MOCKFORD: I think the question here is service out, but I will have to check, and jurisdiction more generally. I don't think there was that freezing order made.

THE CHAIR: Okay.

MS MOCKFORD: The claimant was EasyGroup, which owned a large number of EU and UK trademarks, like easyJet, and it complained of infringement of those trademarks, together with a claim for passing off and conspiracy to use unlawful means --

THE CHAIR: Yes, I know this case, yes.

MS MOCKFORD: Yes. And there was a challenge to jurisdiction. Yes, there was no worldwide freezing order in this case, I am right about that, sorry. But there was a challenge to jurisdiction and the order for service out on the basis of non-disclosure. It gets picked up on page 2147.

We see reference being made by Mr Justice Newby as he then was to the NML case. He makes at paragraph 115, the points I've made about NML, that it wasn't about full and frank disclosure at all.

There is a slight limit to this authority because at 116, he makes clear that he was not given much help about how to exercise his discretion. Which is what I also said about NML. It doesn't really help you with the issue. What he nonetheless goes on to say

is that the order for service out should be set aside on the basis of the non-disclosure that existed in this case. You see that at paragraph 119, and 120.

He says he will accept the arguments for the defendant that the order should be set aside. He makes a number of points at 120 about why that was. In particular, what weighed on him was that starting again -- so requiring the claimants to start again -- would reduce the damages claim by potentially two years and he considered that significant. It wouldn't be a waste of time and money --

THE CHAIR: You are saying they shouldn't be allowed to start again at all in this case?

MS MOCKFORD: My primary submission is that the order for first service should be set aside and not remade, that's true. That would be in relation to the Norwegian defendants only. So they can continue against the UK subsidiary, in respect of whom you have heard Mr Gregory say this morning that they have a brilliant case. Then it would be up to them if they were to choose to bring proceedings against --

THE CHAIR: I am pretty sure in your skeleton you say they shouldn't be allowed to bring proceedings again. It is in the skeleton somewhere.

MS MOCKFORD: I think we say the order shouldn't be remade in relation to these proceedings but of course, they could issue again against the Norwegian defendants. In that situation it would be up to them, they'd have an election to make, do they want to continue against the Scottish defendants only --

THE CHAIR: You would not say they were precluded from bringing a second action?

MS MOCKFORD: No.

THE CHAIR: Right.

MS MOCKFORD: It is for them to decide.

THE CHAIR: I was pretty sure I read that in the skeleton.

MS MOCKFORD: I will check over the short adjournment --

THE CHAIR: Maybe I misread it.

Right, shall we -- 2 o'clock.

(1.09 pm)

(The luncheon adjournment)

(2.00 pm)

THE CHAIR: Thank you. We just looked at easyJet, I think.

MS MOCKFORD: Yes, we looked at easyJet and I wanted to give you a full answer to the question you were asking about differences between the application of these principles in freezing order cases and in service out cases.

I took you to paragraph 8 of Tugushev before the break, which referred to two further cases: Sloutsker and PJSC Commercial Bank. Sloutsker, I managed to get a copy printed during the short adjournment, it should be on your desks.

THE CHAIR: Yes.

MS MOCKFORD: This was a case that was just about service out and jurisdiction. It was a liable case.

THE CHAIR: This is the other case you referred to, is it?

MS MOCKFORD: It was the case referred to at paragraph 8 of Tugushev.

THE CHAIR: Okay.

MS MOCKFORD: You asked me, Mr Chairman, whether those cases were just service out cases.

THE CHAIR: So this is -- in the easyJet case, the material non-disclosure was absolutely central to the permission to serve out, in the sense it was about whether the airline was in Colombia or the UK.

MS MOCKFORD: Yes.

THE CHAIR: That's pretty fundamental to the whole service out thing. What was the material non-disclosure in this case?

MS MOCKFORD: Yes, this was a liable claim brought against, I think, a Russian individual. In this case they found the non-disclosure was not sufficiently material to set aside the order. If you pick it up at paragraph 49 onwards, so there's no freezing order sought, it was just about service and jurisdiction.

You can see at paragraph 49, the nature of the criticism made.

THE CHAIR: Let me just see this.

MS MOCKFORD: At 51, you see the relevant principles, picked up from other cases; and 52 is what I wanted to draw the tribunal's attention to, where the submission was made:

"In approaching the issue of full and frank disclosure ...(Reading to the words)... because of the difference in impact it has on the defendant."

That submission was rejected by the court there. That's what Mrs Justice Carr in Tugushev then relied on at paragraph 8 of her judgment, that I showed you earlier.

THE CHAIR: There used to be the law in a motions court where you had applications where the party was there in an unofficial capacity, and it was said so it would be an ex parte on notice injunction and in those days they used to run into court and the other party would turn up, but they hadn't had an opportunity to put in any evidence or really taken proper instructions; and it was suggested that there was perhaps slightly less strict or slight less onerous, and there was a sliding scale of how onerous the obligation of full and frank disclosure was. I can't remember the cases, but here they are suggesting it is just as strict.

MS MOCKFORD: Yes. The authorities I am showing you reject that submission. They do recognise that the application of the principle may defer in those cases. I want to show you one more which I think mainly addresses that point head on.

It is in the bundle -- if I can just round off the answer to the question you asked me earlier, Mr Chairman, which was: do the cases in paragraph 8 of Tugushev, were they

just service out cases or just freezing orders?

I have asked in relation to Sloutsker. That was just a service out and jurisdiction challenge. The other case was a freezing order and service out case. That's not in the bundle --

THE CHAIR: Which part of this decision here says why they don't -- which is the bit where they decide not to discharge the application?

MS MOCKFORD: It goes on after paragraph 52 to say that the non-disclosure in those cases wasn't sufficient to justify setting aside of the order. It is 55 and 56. You will have understood that I am relying on it for the statement of principle made at 52 that the principles apply in the same way.

THE CHAIR: Yes.

MS MOCKFORD: If I take you to one further case in the authorities bundle, I think it is going to be file C of your hard copies, tab 40.

THE CHAIR: Yes.

MS MOCKFORD: This is a competition case heard in the Chancery Division. Again, there is no freezing order sought in this case. It was a challenge to jurisdiction, which succeeded, but there was also a challenge on service out grounds. And if you pick it up at page 1669.

THE CHAIR: Mr Justice Peter Smith.

MS MOCKFORD: No, I think it was Mr Justice Marcus Smith.

Page 1669, paragraph 201 onwards. He makes the point he doesn't need to determine this issue. That's because the jurisdiction challenge has succeeded, so the question of service out on non-disclosure grounds was obiter, but he will deal with it because he's heard full argument on the point in case the matter goes further.

He refers to the principles from Sloutsker which I just referred you to at paragraph 202. Then I think it is worth drawing your attention to what's said in paragraphs 203 and

204, and I would just invite the court to read that.

THE CHAIR: Before we do, the last case that wasn't in the bundles, where is that going?

MS MOCKFORD: That's a good question. I think it should probably go into the back of the additional bundle, the supplementary --

THE CHAIR: No, let's have it in the authorities bundle. It will just be put at the back of the authorities bundle, thank you.

Yes.

MS MOCKFORD: So at 204 we see Mr Justice Roth grappling with precisely the issue that you are raising with me, Mr Chairman. What he says is, at the bottom of page 1670, in relation to contrast of full and frank disclosure on a freezing order:

"The duty does not apply disclosure to the same degree."

THE CHAIR: Yes, that was the point I was on --

MS MOCKFORD: But he goes to say, and this is what I rely on:

"The factors relevant to an application to serve out ...(Reading to the words)... they should clearly be disclosed."

In other words, what I think Mr Justice Roth is getting at here is that the applications of course is very different to what that brings with it -- freezing order on the one hand, permission to serve out on the other -- those different duties of disclosure in terms of what is going to be relevant in terms of the tribunal's jurisdiction, the tribunal's discretion.

But the principles that are articulated in all the cases I have shown you, starting with Arena, about the seriousness of the duty and the importance of preserving it and the public interest in preserving it, hold good in both types of cases.

THE CHAIR: Yes.

MS MOCKFORD: So that is the law. I say it is substantially more developed than

paragraph 73 of the claimant's skeleton might have you believe --

THE CHAIR: Do we have to see if this was a relevant factor for service out? We need to look at that?

MS MOCKFORD: We do. I am going to come to that issue.

I also say that the question of whether or not the order might have been made anyway regardless of the non-disclosure is not particularly significant.

I want to turn to the nature of the non-disclosure in this case. I mean, there is no dispute about the essential facts. The claimants told the tribunal that any infringement decision adopted by the Commission in due course would be binding, and they were wrong to say that.

For the tribunal's note -- I don't intend to go there, but for your note if you want a full list of references made to the bindingness of the Commission decision in the application documents, you can see them all in one place at paragraph 50 of Frey 1. That's in core bundle, tab 19 --

THE CHAIR: I don't think it is in dispute that --

MS MOCKFORD: -- page 231. No, the point is they said it in multiple places.

I do want to take you to how it was discussed in the application, so you can see the way in which it was put. I think it is important that we do that, sir, because you need to understand the nature of the representations made to the tribunal and what the consequences were. So if we can go to core bundle tab 2, page 50.

The main reference is being made at paragraphs 13B, 14A and 14F. 13B, we have the statement at the bottom of page 50. 14A makes a similar statement. I make the point in relation to both of those paragraphs that they are pure assertion. They don't explain how the claimants reached the conclusion that the decision would be binding.

Paragraph 14F, however, on page 53, does offer some explanation. They say:

"Due to the fact that its investigation commence before Brexit any ...(Reading to the

words)... binding under the Brexit transitional regime."

Sorry, that's the start of a sentence:

"--- under the Brexit transitional regime."

Footnote 4 refers you to see in particular the competition amendment, et cetera, EU Exit Regulations 2019. That's really the sum total of the claimant's explanation for the error that they fell into or for their reasoning.

It is hardly a pinpoint reference because those regulations span some 80 pages. They have been amended on several occasions and the footnote doesn't elucidate which of those provisions are said to made good the submission in paragraph 14F.

I think what they must have had in mind at the time is a combination of paragraphs -- we don't have it in the bundle and I don't think that is particularly relevant -- but paragraphs 7 and 15 of schedule 4 to those regulations refer you to Article 92 of the withdrawal agreement, the EU/UK withdrawal agreement.

I am paraphrasing it slightly, but the gist of those regulations is that nothing the Commission decides after the end of the transition period will be binding, except in relation to cases in which the Commission has continued competence in accordance with Article 92 of the withdrawal agreement. So I think that must be what they had in mind --

THE CHAIR: I **don't know how they got there, but the fact is they should have known this --**

MS MOCKFORD: Yes, they should have known it -- but I think how they got there is important --

THE CHAIR: Why?

MS MOCKFORD: It is important because what they told you in that paragraph essentially, what they told the tribunal, is that they checked the Brexit transitional regime.

THE CHAIR: Yes, they made a mistake.

MS MOCKFORD: My question is: did they check the Brexit transitional regime? We don't know much about that. That's not been explained in the evidence. I am going to explain why if they had taken -- if they had looked at those regulations that I have just referred to, those would have taken you to the withdrawal agreement -- that's the point I am making -- and the withdrawal agreement would have taken them to the Commission regulations which make clear that the dawn raids were not the start of the Commission investigation in a formal sense --

THE CHAIR: A mistake was made. I am trying to unearth the absolute root of the mistake. I am not quite sure why that is relevant to anything I have to decide.

MS MOCKFORD: It is relevant because the cases that we have looked at about discretion tell you the circumstances in which the mistake was made. And the culpability --

THE CHAIR: The mistake is made, and you accept it is innocent.

MS MOCKFORD: I accept it is innocent --

THE CHAIR: It is just a question where the -- not using it in any inappropriate way -- where the error arose. But an error did arise and you are not suggesting it is deliberate, so where the error arose, whether it was --

MS MOCKFORD: You are quite right, I am not suggesting -- we made that clear in our skeleton argument --

THE CHAIR: -- I don't find this particularly helpful to try and track through the evidence.

MS MOCKFORD: I understand the point you are making. Let me just try to make the point good in two ways. You are quite right, I don't say it was deliberate. We are not making any allegation of bad faith, we do make that clear in our skeleton argument. What I do say is it's at the higher end of culpability, and in particular it is extremely

careless. That's my submission.

THE CHAIR: If you are being quite careless, one result arises; but if it's very careless, then another result arises, using English quite -- that's your position, is it?

MS MOCKFORD: Well, the cases tell you that culpability is important to your discretion.

THE CHAIR: Right. Where do they say the measure of carelessness is?

MS MOCKFORD: Well, culpability, I say, encompasses that. So the question is: if there is something -- there are cases that we have looked at, they bring back to you -- in particular the Banca Turco case --

THE CHAIR: What evidence do you have as to where the error is made?

MS MOCKFORD: I don't. I am showing you what the law is and then my submission is going to be that it be obviously wasn't checked.

THE CHAIR: Plainly. Plainly, it plainly wasn't checked -- if it had have been checked, the error would not have been made. But an error was made at some point.

MS MOCKFORD: Therefore the suggestion made that the Brexit transitional regime led you to a particular conclusion was also a nondisclosure.

THE CHAIR: Let's look at this. Do you want to show me this? Do you want to show me where the error is?

MS MOCKFORD: I want to show you a bit of it. The summary we set out in our skeleton argument. I think I can probably take it from there. The defendant's joint skeleton argument, that's core bundle, tab 48, page 576.

THE CHAIR: Give me a paragraph in your skeleton.

MS MOCKFORD: Yes, 24. This picks up the story with Article 92 of the withdrawal agreement, which I say the regulations referred to in the claimant's own application -- in turn referred to.

And as you can see there, what the withdrawal agreement does is circumscribe the

cases in respect of which the Commission retains competence.

That takes you to Article 2.1 of Commission regulation 773 of 2004, commonly known as the implementation regulation -- it is all about Commission procedures -- which says that the Commission may decide to initiate proceedings at any point in time, but no later than the statement of objections. Thus far that is maybe not particularly informative because -- saying the Commission has discretion as to when it opens proceeding.

But then if you go to the Commission's Notice on Best Practices, which is cited at paragraph 24.3, you get a very clear statement about approaching cartel cases, which is going to be the opening of proceedings normally takes place simultaneously to the adoption of the statement of objections.

So my submission is that if the claimants are going to make an assumption about when these proceedings were formally initiated, based on publicly available material, which is what they told the tribunal they did, then the assumption that they should have made was that the proceedings were not initiated until the statement of objections was issued.

That's the assumption they should have made had they done proper research. Then they could have kept if, if they wanted to check that assumption, by doing the various things referred to in the witness evidence -- you have probably seen, either making inquiries of the CMA or making inquiries of the Commission, because both retain a list of the cases in respect of which the Commission is going to have continued competence.

My point is you don't even need to get to the point of making those inquiries before the claimant has fallen into error. So this is case where we say part of material disclosure is they didn't check, and they should have checked. But it also a case where we say they have not done the basic legal research that is required in order to stand up to the

assumption that the Commission proceedings were on foot and officially opened prior to the end of the Brexit implementation period.

That is important because of what the claimants say in their skeleton. If I can take you back to that at tab 48 of the core bundle, page 577 -- sorry, paragraph 75, 557.

The first sentence says that the error was inadvertent, made in good faith and from a position of information asymmetry. I don't disagree with "inadvertent" or "in good faith", but I do say it wasn't made from a position of information asymmetry. I dispute that. Because I say the information I have just shown you about when the Commission's proceedings will normally commence is publicly available and could have been found out.

The checks that I also refer to, and that you have seen in the evidence, were made with the CMA and the Commission, when this point in fact came to light, could have been made and should have been made.

So inadvertent and good faith, okay, but from a position of information asymmetry, I don't accept.

Just to round out the point on the inquiries, checking with the CMA is what my client did when it received copies of the claimant's application. You see the account of those inquiries in Frey 1 at paragraphs 30 to 33. That's core bundle, tab 19, page 227.

The inquiries comprise of two emails and two letters that were sent and received over the course of about a month to get a final answer from the CMA.

Checking with the Commission is what the claimants did after being put on notice of this point by the defendants. Ms Quierin explains the steps her firm took in the second witness statement, at paragraphs 62 to 65, core bundle, tab 4, page 105. That took one letter sent on 4 July 2024, which was answered by the Commission on 15 July, so about ten days later.

So I say there is basic reference that would have elucidated these steps and then

basic checks which could have been made with the CMA and the Commission would have revealed the true position.

That's the nature of the non-disclosure in this case. What I want to do now is tie this all together into my submissions about the consequences it should have for the claimants and the application to serve out.

As you have apprehended, what I say is, it is of sufficient materiality to justify setting the order for permission to serve out. I double-checked our skeleton argument over the short adjournment, and we don't say they can't bring another claim.

THE CHAIR: Sorry, my mistake --

MS MOCKFORD: Not at all. Just for an avoidance of doubt, that's not a submission I make and I don't think we ever have. We say it justified setting aside the order and not remaking it in these proceedings. They can, of course, start new proceedings.

You have my point that I made earlier, that in fact in that situation they face an election about whether to continue with the proceedings against the UK subsidiaries or whether to start again --

THE CHAIR: What would be the material consequences of that? Some damages may fall out --

MS MOCKFORD: Yes.

THE CHAIR: -- is that right? You have not pleaded any limitation defences or any --

MS MOCKFORD: We have not pleaded anything yet.

THE CHAIR: No, exactly, yes. So that would be the consequence -- I am not saying that is a point in your favour or against you, but that would be -- would make a material difference.

MS MOCKFORD: Yes, we say it may well make a material difference on that basis. And the cases I have shown you refer to the fact that what it is proportionate to do in those circumstances is to deprive the claimants of the advantage they obtained by

getting the order to service out at the time they did.

THE CHAIR: We have not looked at the decision to serve out.

MS MOCKFORD: No, I am going to come to that.

THE CHAIR: You are going to come to that?

MS MOCKFORD: Yes. So there are five points I want to make -- five overarching points with some subpoints.

First, I say, well, the non-disclosure was material and it had the effect of misleading the tribunal in a substantial way.

There are three particular ways in which I say the tribunal was misled by this issue. First, it was led to think that if the Commission adopted a decision -- and this is the most obvious way in which it was misled -- then this would be a follow-on claim, where liability would be established by the Commission and the tribunal would not have to trouble itself with that.

Second, as I have already alluded to, the tribunal was led to think that the claimants had properly checked the Brexit transitional regime, as they put it in their application, but they failed to do so.

Third, I say this confusion about the Commission's procedures also muddied the waters in some other ways. So, for example, when it came to one of the putative anchor defendants, SSF, Mr McCarthy's client, you get some confusion about what was going on.

If I can take that up at paragraph 62 of Quierin 1, which is in the core bundle, tab 3, page 80, please.

THE CHAIR: Which tab?

MS MOCKFORD: Tab 3, paragraph 62:

"As noted above, there is a serious issue to be tried between ...(Reading to the words)... and is therefore a subject of the European Commission's ongoing

investigation."

Now that, in my respectful submission, is a very confused and confusing statement to make because, as Ms Quierin acknowledges elsewhere in the same statement -- if you go on to paragraph 76, for example -- the UK subsidiaries are not addressees of the SO, apparently, she says.

THE CHAIR: Right.

MS MOCKFORD: So in what sense they were said to be the subject of the European Commission's ongoing investigation is very confused. But I say it ties into this point about what the Commission was doing. The Commission's investigation was not formally opened at the point of dawn-raiding people. It dawn-raids people as part of its investigatory powers --

THE CHAIR: -- that is clarified in paragraph 76 --

MS MOCKFORD: It is --

THE CHAIR: It seems to be a separate material non-disclosure you seem to be raising.

MS MOCKFORD: No, I don't accept that --

THE CHAIR: It is not whether you accept it or not, I am interested in the submissions.

MS MOCKFORD: It is part of the same problem, I say, part of the same confusion about what it means for the Commission to have started proceedings. Because the notice, the notice on best practice which I referred you to by reference to our skeleton argument, makes very clear that there are basically two stages of a Commission investigation. You get the investigatory stages where things like dawn raids are happening, requests for information are being sent. Then you get a stage, which is the formal opening of proceedings, which in cartel cases will typically be when the statement of objections are sent.

THE CHAIR: Yes, you have made these submissions. We understand your point.

MS MOCKFORD: My point is that this confuses those two things as well, so it is the same point -- it is connected to the same point.

Because what it is suggesting is that the fact that they were dawn-raided, SSF, implies that there is somehow guilt and a serious issue to be tried. When in fact the fact that they were dawn-raided and then no SO was made against them, in my submission implies the obvious; it implies the Commission looked at it, investigated, and then it considered it didn't have material even to sustain a prima facie claims against SSF, and it excluded them from the scope of the SO.

So I say this is a connected point.

And these are ways in which I say the tribunal was misled by what was going on at the time. So misled in relation to the Commission decision, but a wider confusion was sown in the documents.

You have also seen the point Ms Thomas made yesterday, that they refer to the fact that the Commission proceedings were proceeding under Article 53 of the EA. In fact that wasn't true either.

So I say there has been a failure to properly understand what the Commission was doing and check the Brexit transitional regime in all these respects.

So that's my third point, the non-disclosure was material and had the effect of misleading.

Second -- is my second point which I have already made so I will do it briefly. In my submission, this is at the higher end of culpability, which is a relevant factor because it was extremely careless. It is common ground --

THE CHAIR: If it had been a bit careless, it would be on the lower scale of culpability.

MS MOCKFORD: Yes, it is sliding scale, that is certainly true.

THE CHAIR: Okay. I am having difficulty -- if you make a mistake in law, at what point it becomes highly or --

MS MOCKFORD: -- when it's really material to what the tribunal is considering. I say this is particularly material because whether something is a follow-on claim or a stand-alone claim is something that the tribunal is likely --

THE CHAIR: That's materiality. That is entirely different point to degree of carelessness. They are quite different concepts.

MS MOCKFORD: I think they are quite connected. If something is really material to the question you are asking the court to determine, that's something you particularly go to efforts to check. Whereas if it is peripheral, it's something you might not. So I say they are connected. If it is something that is material, it should have been checked and the carelessness is evident --

THE CHAIR: Okay, I have your submission on that.

MS MOCKFORD: Further, the issue of whether the tribunal may have given the claimants permission to serve out even if full disclosure had been made, I have shown you the law on that, that says it is of little to no relevance, actually, that issue, but I want to also talk about the position as a matter of fact.

THE CHAIR: That is very difficult for me to know because we don't know whether we are going to -- we have not made our mind up obviously with the forum non conveniens argument. So it may make no difference because we agree that Norway is the appropriate forum for this.

MS MOCKFORD: That is of course for you --

THE CHAIR: It may make no difference -- it depends what our reasons are, doesn't it? But we need to keep that in mind -- it is difficult for you to anticipate what our reasons are going to be, when you make your submissions.

MS MOCKFORD: Yes. I think maybe we are talking at slight cross-purposes because the question is not what is this tribunal going to do now --

THE CHAIR: Yes.

MS MOCKFORD: -- in relation to the forum issues.

THE CHAIR: Yes.

MS MOCKFORD: It is what would the tribunal at the time have done if full disclosure had been made to it.

That's what the cases say is irrelevant.

THE CHAIR: Okay. So what would Mr Justice Marcus Smith have done.

MS MOCKFORD: Precisely. You are quite right, it is difficult to speculate about that precisely as well, but we do have some pointers. First of all, the point I have already made, I say the distinction between a follow-on claim and a stand-alone claim is fundamental, and is likely to be one of the first things that a tribunal faced with an application of this nature wants to understand.

Second --

THE CHAIR: This never was just a follow-on case. As you rightly point out, it is focused on the Norwegian parties who have some Scottish salmon being dragged into this. So it has never been solely upon --

MS MOCKFORD: Well, I don't --

THE CHAIR: It may have follow-on aspects.

MS MOCKFORD: I don't accept that, sir, because as we have gone through at some length over the past day and a half, the focus of the illegal conduct that is alleged goes no further, we don't think, than the Commission's investigation. In that sense, it is follow-on.

So if --

THE CHAIR: Right, but you have been on your -- maybe I misrecall, but I thought you were praying in aid on the strike-out application the narrowness of the Commission's investigation.

MS MOCKFORD: Yes, yes.

THE CHAIR: So if this is looking at the impact of Scottish salmon --

MS MOCKFORD: That's about the effects of the illegal conduct found by the Commission. So in every follow on claim, you have the finding of infringement that is made by the competition regulator, whoever that may be, the Commission or CMA. Then the claimant has to come along and say: well, that infringement had these effects on me, it caused me to suffer loss in X, Y, Z way -- which may be substantially broader than the allegation of infringement, finding of infringement, that has been made by the regulator.

That's precisely what is happening here. They are saying there is Norway -- these are the points that Mr Jowell started with you yesterday -- the four-stage process. They start with the infringement that is being investigated by the Commission. And then they say that had wider consequences because that had an effect on the Nasdaq index, and that had wider consequences because that had an effect on the global market, and we bought from the global market, so we suffered loss.

But that doesn't turn it from being a follow-on claim to a stand-alone claim.

What might turn it from that is that if they are in fact making allegations of participation against the UK subsidiaries --

THE CHAIR: I don't want to revisit that --

MS MOCKFORD: Me neither. I think -- our understanding has always been that they were, for reasons that Mr Jowell elucidated --

THE CHAIR: Even if you are contending that the UK subsidiaries are part of the same undertaking, and they are on the hook, it is still, you say -- would still be a pure follow-on claim?

MS MOCKFORD: Yes, with wide effects --

THE CHAIR: -- we are just talking about the umbrella effects --

MS MOCKFORD: Exactly. Very wide effects, felt very broadly, that they would have

to prove the trial, but the infringement they were alleging --

THE CHAIR: Except it is not a follow-on because we don't have a decision yet, but that's a different point.

MS MOCKFORD: That's a different point, yes.

Now I say it is plain on the face of the order that the tribunal did make that this was something that the tribunal took into account. You can see that from the first service out order, which is in hearing bundle, tab 6. That will be volume 2 in your hearing bundle, page 676. We see here the reasons given in support of the service out order. We see here the president saying the claim has a real prospect of success and there is --

THE CHAIR: Where are you?

MS MOCKFORD: Sorry, paragraph 5.

THE CHAIR: Of the reasons?

MS MOCKFORD: Of the reasons, yes, on page 676. I will just invite the tribunal to read that.

It is express reference to the Commission's investigation. It was also said this morning by the tribunal -- and we are slightly confused about why the tribunal was sending it to us -- a transcript of the hearing that took place before the service out order was made. I don't know if we can find out anymore about quite why that happened. Someone must have asked for it, I assume, but we didn't have it before now.

THE CHAIR: We didn't ask for it to be sent to you. We were not seeking submissions on it.

MS MOCKFORD: I have hard copies if that would be helpful. We had not seen this before this morning.

THE CHAIR: There was a hearing, was there?

MS MOCKFORD: There was a hearing, yes, on 7 February, ex parte.

THE CHAIR: Over Zoom?

MS MOCKFORD: I am not sure.

THE CHAIR: Right. So what do you want us to look at in here?

MS MOCKFORD: Page 8. This is about the statement of objections. You see it is Mr Justice Smith commenting on the point. If I just ask you to look at the middle of page where he starts with:

"That leaves, I think, my other point of substance…"

THE CHAIR: Right.

MS MOCKFORD: The point I make from that, and the point I am making generally here, is that one can see that the existence of the statement of objections was operating on the mind of the judge making the order. Quite what he would have done if he had understood that the statement of objections -- the decision wasn't going to be binding, any decision adopted --

THE CHAIR: There is nothing in his decision to indicate he saw this as a follow-on claim, he just says it was under investigation by the European Commission; do I have that wrong?

He wasn't looking into the future and saying that when actually this gets heard, by then it will be a follow-on claim.

MS MOCKFORD: No.

THE CHAIR: That's not discussed in the transcript either.

MS MOCKFORD: No, I don't think that is discussed in the transcript, although, as I say, we have only had it for if a few hours.

THE CHAIR: Right.

MS MOCKFORD: My point is it is going to -- he had to assess whether there was a serious issue to be tried to the facts. And it is plain he took into account the statement of objections in reaching that conclusion. And he was labouring under the

misapprehension at the time that any decision that was in fact reached would be binding --

THE CHAIR: Where does it say that?

MS MOCKFORD: Well, he had been -- he doesn't say that, but he had been told that by the claimants repeatedly --

THE CHAIR: Yes, I understand that.

MS MOCKFORD: -- I put it no higher than that.

Then my fourth point, that although the claimants have apologised, and they have, and with some of the cases recognise that is a relevant factor, the Wragg v Opel case, for example, in my submission they have not fully grappled with the issues that the misrepresentation throws up.

They have explained to you that as a matter of fact they thought there was an ongoing Commission investigation, and that's why they thought the proceedings were going to be binding, if there was a decision.

They have still not said why they thought that as a matter of law -- the point I was making earlier, they haven't explained to you what led them into that error as a matter of law.

THE CHAIR: We have been through that, yes.

MS MOCKFORD: And they, in my submission, continued to fail to grapple fully with the consequences of the Commission's decisions not being binding for the proceedings if they continued in front of the tribunal.

You went over that yesterday with Mr Jowell. I don't want to take up too much time on it, but I think you have the defendant's submission that whilst any Commission decision may be admissible in future, it is going to be for the tribunal to make its own determinations in light of all the evidence.

And we say they are still overegging the relevance of the Commission decision to the

proceedings' ultimately -- the ultimate conclusion.

Fifth then, combining all of those factors my submission is that this it something that warranties setting out the order for service out and not remaking it in this case.

The case law I have shown you, the Arena case --

THE CHAIR: Not remaking it?

MS MOCKFORD: Not remaking the order in this case. We say that in our skeleton --

THE CHAIR: I think this is where my confusion arose.

MS MOCKFORD: Right. So an option --

THE CHAIR: So you strike out -- I understand that. Right --

MS MOCKFORD: The service out --

THE CHAIR: That was my confusion, not remaking the order means we have to start another action.

MS MOCKFORD: Precisely. Well, it continues against the claimants for whom they didn't -- the defendants for whom they didn't need permission to serve out, the UK defendants. If they want to bring back in the Norwegian defendants again, they are going to have to start again.

The reasons I say that is an appropriate thing to do, the case law makes good the proposition that the tribunal's role here is a punitive one and that there is a public interest in deterring breaches of the duty of full and frank disclosure; or putting that more positively, a public interest in encouraging compliance with that duty when ex parte applications are made to the tribunal.

The cases also make the point that where there has been substantial breach of the full and frank duty, the court will incline towards set aside. That's the language used in Banca Turco and in Arena, a case that is cited in our skeleton argument. It is cited as expressed as being the general rule that when there has been a substantial breach set aside is what follows.

I have already talked about the consequences that would have for the claimants.

An alternative to set aside, which I should -- to setting aside and not remaking is that you set aside and do remake. There is that option available to you under that discretion. So you could set aside the original order, but remake it at the date you are considering this matter and validate service as at that date.

That is an option available to you in between the two extremes talked about in Lord Collins's judgment of costs --

THE CHAIR: Just explain how that works.

MS MOCKFORD: Yes. So you set aside the original order, so service was not effective under the original order, but you remake the service out order.

THE CHAIR: So no one has accepted service yet?

MS MOCKFORD: No, we are all here contesting.

THE CHAIR: Right.

MS MOCKFORD: So if you are with me on the general principles, there are three options I say open to you. They range between a costs order and setting aside and not remaking. Those are the two outer extremes. Those are the things that Lord Collins talked about in the case we started with, NML.

In the middle there is set aside the original order, but remake it because you think that the conditions for remake the service out order are in fact met. And service then would have to -- also have an order that service is effective as at that date.

I should note that some of the defendants actually still have not been served. I think one -- one of my clients has still not been served. So as at that date or the later date when they actually succeed in affecting service under the Hague Convention.

THE CHAIR: So the dates for service were --

MS MOCKFORD: I don't have them all to hand. Under the 1931 Convention --

THE CHAIR: I know we parked it, but let's assume that there was not service under

the 1931 Convention --

MS MOCKFORD: Then the Hague Convention dates are quite recent, the ones that have happened, I don't have them --

THE CHAIR: -- if we invited them to remake, to go through the Hague again, what is going to be the gap is really what I am asking?

MS MOCKFORD: I think on average at the moment things are taking around six to eight months. I don't know off the top of my head, though. In this case, I think it was quicker than that, maybe three months is what I think -- but one of my clients still has not been served. So it ranges.

But my point is that this middle-of-the-road option, it all sounds academic, but it is not because of the precise reason they sought this whole thing on an expedited basis anyway, which is that there might be a Scottish prescription issue.

So you could have this claim ongoing, but service could be validated at a later date, when it in fact was, which may be relevant to Scottish prescription. I mean, whether it is or whether it is not is an argument that we have all parked for a later date, but there is a hybrid option.

The last option is costs and I say that in any event we would be entitled to our costs --

THE CHAIR: Costs of what?

MS MOCKFORD: Costs of this entire exercise, if we are right about it, the Norwegian defendants, up until now on an indemnity basis, that would be --

THE CHAIR: Sorry, costs of everything?

MS MOCKFORD: Yes, participating in the claim on this basis until this hearing.

THE CHAIR: Right. And you don't have an alternative submission as to a narrower compass of costs?

MS MOCKFORD: Or a substantial proportion thereof, which are attributable to the Commission decision issue, I suppose, would be the narrowest way in which we would

draw it.

THE CHAIR: Say that again, sorry, more slowly.

MS MOCKFORD: Those costs that are attributable to this issue, this issue about bindingness of the Commission decision, which would have to be a percentage -- I can't make submissions now to you about that, we don't have cost schedules and that sort of thing. But there would be ways of subdividing the total amounts, if that was what you were minded to do. It would be the costs of the Norwegian defendants, of course, that were affected by this issue.

THE CHAIR: Right. Okay. We have that, thank you.

MS MOCKFORD: Thank you.

Submissions in reply by MS HOWARD

THE CHAIR: I have some questions for you, before you start.

First of all, do you accept the position this would have been a follow-on claim had you been right in your assertion that the proceedings were afoot before the Brexit date? Do you accept in those circumstances it would have been a follow-on claim?

MS HOWARD: It would have been, if there had been a formal -- yes, if it had been open before --

THE CHAIR: So what you say about -- paraphrasing what Mr Anderson(?) said -- the character of this litigation has changed. It has gone from a follow-on claim, which would have actually been a relatively narrow compass, to now a fully fledged investigation into whether or not there has been a cartel in Norway. That seems quite a significant difference in the case.

MS HOWARD: Well, there are -- first of all, this tribunal has jurisdiction to obviously have claims that are both follow-on or stand-alone, or in most cases actually hybrid.

THE CHAIR: Yes.

MS HOWARD: In any event, this case would have been a hybrid claim because there are many elements, as we have gone through the last two days, of the alleged infringement in these proceedings, which is broader than the narrow infringement that has been posited in the SO, and presumably any eventual decision.

So as my learned friends have said, the infringement in the Commission investigation is narrowed to the spot prices of Norwegian salmon, whereas we are extending it because of the effects both to the UK, into contract prices --

THE CHAIR: Those are --

MS HOWARD: -- and Scottish salmon.

THE CHAIR: Yes, but those are umbrella affects, essentially?

MS HOWARD: They are related effects. I am sure -- I can anticipate arguments from my learned friends, saying those are outside the four corners of the infringement the Commission has found and that we have to prove those elements on a stand-alone basis.

THE CHAIR: Yes, I see. So it was --

MS HOWARD: It was always a hybrid claim.

THE CHAIR: -- it was all always contemplated perhaps that the cartel would impact not only Norwegian prices, but Scottish prices.

MS HOWARD: That's correct. Also because of the intervening events of Brexit, the division of labour between the European Commission and its powers of investigation over UK subsidiaries were curtailed. So obviously up until the end of the Brexit implementation period, it had powers to investigate UK companies, but after that period, it didn't. And that falls under the remit of the CMA.

So in any event, the decision wouldn't be able to make findings about the UK subsidiaries, and we would have to prove the UK subsidiaries' role either in participation or implementation. Because they are unlikely to rule on companies that

are outside -- they do have jurisdiction over third party entities, but I think the focus was on the Norwegian defendants.

THE CHAIR: In terms of if we were to make an adverse costs order -- I appreciate we haven't got to that -- is there an adverse cost order that you would say would be appropriate?

MS HOWARD: What, because of the consequences of this material non-disclosure that the --

THE CHAIR: Yes, so as a punitive jurisdiction --

MS HOWARD: Can I take my submissions in order --

THE CHAIR: Just deal with this first.

MS HOWARD: Yes.

THE CHAIR: Do you have a position on --

MS HOWARD: Absolutely.

THE CHAIR: -- if we find there is material nondisclosure, that there ought to be an adverse costs order, what that order should be?

MS HOWARD: There shouldn't be an adverse costs order and that's because we actually flagged this to the defendants well in advance -- and this comes in as part of our reasonable inquiries. We raised this with the defendants, we made it very clear that we were proceeding on the basis that we thought the decision was binding, and they did not respond at all.

THE CHAIR: Just show me the dates on that, please.

MS HOWARD: Sorry, I am taking all of my submissions out of order.

THE CHAIR: Yes.

MS HOWARD: So in response to the allegation that we didn't make reasonable inquiries, we wrote to the defendants on 21 December 2023. I can give you an example for Cermaq. It is hearing bundle, tab 101, page 2417.

THE CHAIR: 21 December.

MS HOWARD: 2023.

THE CHAIR: So the application to -- sorry, Mr Justice Marcus Smith --

MS HOWARD: Shall I give you some dates if it helps you --

THE CHAIR: Yes, yes, dates.

MS HOWARD: This has to be seen in the context of the prescription deadline. That's what was forcing our hand because of what I call the Gemalto dilemma, the Gemalto Court of Appeal ruling which has not been appealed, says that actually when the dawn raids are announced, that is sufficient to put you on notice.

THE CHAIR: Yes.

MS HOWARD: Obviously the dawn raids in this case were on 19 February 2019. So the five-year prescription period ran out on 19 February 2024. So we sent the letter before action on 21 December 2023. The SO was handed down on 25 January 2024 --

THE CHAIR: Sorry, just slow down. You sent the letter before action, 21 December 2023 ...?

MS HOWARD: Yes.

THE CHAIR: Yes.

MS HOWARD: We didn't get any response for six weeks. The SO was handed down on 25 January 2024. We then sent another follow -- chase-up letter on 31 January to all of the defendants. That is at hearing bundle, tab 22. Then we made -- again, we didn't get any response from them -- I think a couple of them responded, but they did nothing to correct the impression that they had been given. So the application was made on 7 February and the hearing was the same day.

If I can take you to that first letter before action at tab 101 of the hearing bundle, it is at page 2417, you will see at paragraph 11 we set out very clearly our understanding

that the Commission had initiated its investigation before 31 December 2020, under section 92 of the withdrawal agreement, and therefore the infringement decision will bind the English courts and the cartelists. We said that we would be relying on it to evidence their breach.

The defendants didn't reply to that. We got a couple of holding responses, and then we followed it up with another letter, if you look at hearing bundle 22, page 497.

THE CHAIR: Sorry, hearing bundle?

MS HOWARD: Tab 22, 497. And again at paragraph 4.

THE CHAIR: Hold on. Hearing bundle?

MS HOWARD: Hearing bundle tab 22.

THE CHAIR: An expert report?

MS HOWARD: Sorry, it is probably tab 3, exhibit 22 to Ms Quierin's statement. Apologies again.

THE CHAIR: Can I have a page number, sorry?

MS HOWARD: 497.

THE CHAIR: Yes.

MS HOWARD: All the defendants were sent a copy in identical terms. But over the page at paragraph 4, we explained again that our letter before action set out the anti-competitive conduct, it has been fortified by the recent statement of objections. At the end of that paragraph we say that --

THE CHAIR: Sorry, I do apologise, which paragraph are you on?

MS HOWARD: Paragraph 4.

THE CHAIR: Yes.

MS HOWARD: The last sentence of that paragraph says:

"If and when the Commission issues a final infringement decision that will stand as prima facie evidence of an infringement that will be binding on the addressees as well

as on the court."

So we made that very clear to all of the defendants in correspondence, and yet they did nothing to correct that mistaken impression.

THE CHAIR: I am not sure whether it is their obligation to do so.

I think we are going to rise for five minutes.

(2.53 pm)

(A short break)

(2.58 pm)

THE CHAIR: Ms Howard, we don't need to hear you further on this application.

MS HOWARD: Sorry?

THE CHAIR: We don't need to hear from you further on this application.

MS HOWARD: Right, okay. Not even on the consequences or the --

THE CHAIR: Which obviously means we are not going to accede to the application.

MS HOWARD: Yes.

THE CHAIR: The issue as to the costs of the material non-disclosure arguments before the tribunal, that we are not making a ruling on today. There will be cost consequences of this entire application on forum non conveniens and all that, so those costs are still very much in play. You shouldn't assume that you won't get an adverse costs order for that part of the case. Does that make clear, the material non-disclosure part --

MS HOWARD: Yes. Will I be precluded at that point about making arguments about how this was a very genuine and reasonable error --

THE CHAIR: No, those costs are all up for grabs another day, in principle, on that.

MS HOWARD: I am grateful.

THE CHAIR: Yes. It will be part of an overall picture of the costs, no doubt.

MS HOWARD: I am grateful. As long as we are not precluded from making our points.

THE CHAIR: Are there any further matters?

MS HOWARD: It was just the funding point. You were wanting to know the reference to the funding issues.

Do you remember I said that these claims are being funded by private litigation funding and you said, "Where is that in the evidence?" Just before the break.

THE CHAIR: It wasn't that so much. I will accept that on instructions. The question is you said that these claims will not go ahead in Norway --

MS HOWARD: Yes. We were very conscious that you --

THE CHAIR: I said, is it in your skeleton? I don't think it is.

MS HOWARD: It's not in the skeleton. We were conscious you were being overloaded with paper, and obviously litigation funding only came up in the defendants' expert report which had not had permission to be admitted.

If it helps you, we are very happy to get a short statement from the funder to explain the position --

THE CHAIR: You may have to go off and find another funder, I don't know. Anyway, that's not in your skeleton. I am not accepting that as an argument to be raised at this stage.

MS HOWARD: It's not in the skeleton. But we have made it clear that these are subject to CFA arrangements in our schedule of cost and funding, that there was a limited funding budget.

THE CHAIR: We will look at that Supreme Court case and where we got to on that. The Norwegian Supreme Court translation, who is marshalling that?

MR JOWELL: On that, there is in fact already a translation of the Supreme Court judgment in the bundle.

THE CHAIR: Is there? I do apologise, I have not read it.

MR JOWELL: It is hearing bundle tab 4, pages 1866 to 1879. It maybe that we were

provided with some extracts which were of a different kind from it, but there is a full translation there.

If any of that is contentious, then I am sure my learned friend will get back to us and we can write to the court with any disagreements.

THE CHAIR: Yes, we have the articles as well.

MR JOWELL: The only other --

THE CHAIR: It is quite short, yes.

MS HOWARD: Yes. There is a version as well in what is called the RB3 bundle. They are just different versions of the translation.

THE CHAIR: Where is the other one?

MS HOWARD: It is what is called the enclosures to RB3 bundle. From memory, I think it was tab 3.

It is tab 6 of the enclosures bundle. Of that version, the key paragraphs are 60, 71, 72, 82 to 85.

MR JOWELL: The only other thing I should just for completeness mention is that I think yesterday a judgment was handed down by Mrs Justice Bacon. Forgive me, this morning --

THE CHAIR: Yes, on forum non conveniens. Have you had a chance to look at it yet?

MR JOWELL: We have. We don't intend to make submissions on it, although it does have a useful -- every case like this is decided on its own facts. Some of the points there I think speak for themselves and underline the submissions we have been making today. But I don't think it is necessary, unless the tribunal would be assisted, for us to have further submissions on that.

THE CHAIR: We will let you know if we need further submissions. What is the name of the case?

MR JOWELL: It is Vauxhall v Denso [2025] EWHC Chancery 213.

THE CHAIR: Perhaps you could just add a copy to the bundles.

MR JOWELL: We will, sir.

THE CHAIR: It is High Court not CAT.

MR JOWELL: It is High Court, yes. Chancery Division. It contains a pithy summary of the principles as one would expect.

MS MOCKFORD: Sorry to jump up as well, but I promised you a reference earlier in the day to the Biogaran English translation, the unofficial English translation. That is in additional bundle tab 2. Supplemental bundle it might be called in your hard copies: tab 2, paragraphs 102 to 106 from pages 38 to 39.

Obviously, we have heard everything you said about the non-disclosure application. I just want to record that we don't agreed with the framing of the pre-action correspondence, but I assume we can work that up in costs when we get to costs as well.

THE CHAIR: Yes, of course. I am not sure whether that is relevant, whether you have any obligation to notify.

MS MOCKFORD: We say we actually did at least refer to it.

THE CHAIR: At any rate, we can argue that on costs.

(3.07 pm)

(The hearing concluded)