IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1352/5/7/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Thursday 28 April 2022

Before:
The Honourable Mr Justice Foxton
Dr William Bishop
Tim Frazer
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Greater Gabbard Offshore Winds Limited and Others

Claimants

v

Prysmian Cavi e Sistemi Srl and Others

Defendants

A P P E A R AN C E S

Colin West QC (On behalf of Greater Gabbard Offshore Winds Limited and Others)
Helen Davies QC ad Anneli Howard QC (On behalf of Prysmian Cavi e Sistemi Srl and Others)

Digital Transcription by Epiq Europe Ltd
Lower Ground 20 Furnival Street London EC4A 1JS
Tel No: 020 7404 1400 Fax No: 020 7404 1424
Email: ukclient@epiqglobal.co.uk

Thursday, 28 April 2022

(11.00 am)

Housekeeping

MR JUSTICE FOXTON: Good morning everyone. These proceedings are being live streamed, I must start therefore with the customary warning. These are proceedings in open court. An official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or vision of the proceedings, and a breach of that provision is punishable as a contempt of court.

Yes Mr West.

MR WEST: May it please you, sirs. My name is Colin West QC. I appear on behalf of the Claimants. My learned friends, Ms Davies and Ms Howard, appear on behalf of the Defendants, Prysmian.

This is the pre-trial review in advance of the trial of this matter due to commence with a three-week listing, on 27 June.

There is an agenda for today in the bundle at tab 0.B. The Tribunal may be aware there are three, I believe, main issues or points arising at this hearing, which are the status of an issue, or potential issue, concerning pass on by means of renewable obligations certificates; whether that is a live issue for trial or not. Secondly, some points about confidentiality and, thirdly, any necessary arrangements for live evidence at trial, which I believe is more a matter of simply updating the Tribunal.

I am happy to be able to report that in relation to confidentiality there has been a significant narrowing of the issues between the parties over the last 36 hours, which is of course very welcome. Although, for our part, we say it

would have been much more warmly welcomed if it had happened two weeks ago, when it should have happened, and not, effectively, the day before the PTR.

So, gentlemen, I propose to address the issues in that order.

I understand that my friend is preparing an updated draft order. There is a draft order attached to my skeleton argument, which has been somewhat overtaken by events. But there have been issues about getting it printed, so it will hopefully appear at some point in the course of my submissions.

MR JUSTICE FOXTON: Is it worth taking those main points in turn and hearing from each of you on them?

MR WEST: Indeed. That is precisely what I was going to suggest, sir.

Discussion re Renewables Obligation Certificates

MR WEST: Gentlemen, the first issue concerns the question of Renewables Obligation Certificates and whether they provide a mechanism by which the loss in this case may have been mitigated or passed on.

Formally, this arises because the question for the Tribunal to determine is settlement of the case memorandum wording and, if it matters, the relevant disputed wording is at tab 3 of the bundle, at page 359.

MR JUSTICE FOXTON: Sorry, tab which in the bundle?

MR WEST: Tab 3, sir.

Paragraph 19B. That says:

"The Defendants contend that account needs to be made for the fact that GGOWL may have received benefits in the form of additional revenues from the Renewable Obligation Certificates earned as part of a regulatory regime set up to encourage renewable energy generation."

The addition of those words is disputed by the Claimants on the grounds that the point is not pleaded.

In a sense, that is simply the wrapper or hanger for the point. The substantial point for the Tribunal to determine is whether this is a live issue for the trial or not.

There is no strike out application as such before the Tribunal because, as I have said, the Claimants' position is that it isn't pleaded, so there isn't anything to strike out.

What I propose to show you, therefore, are the authorities on the burden of standard of pleading, briefly, the evidence on the point such as it is, and what is actually pleaded.

Just to explain what the point is, renewables, electricity generators, are awarded a certain number of Renewables Obligation Certificates (ROCs) per unit. That is megawatt hour of electricity produced under a government scheme. These ROCs have a financial value and the purpose of the scheme is to encourage investment in renewable generation by compensating renewable generators for the difference in the cost of producing electricity on a renewable basis, as opposed to using traditional fossil fuels.

In the case of the wind farm at issue in these proceedings, Greater Gabbard, the relevant figure was two ROCs per megawatt hour. That was determined by the Department of Energy and Climate Change in 2009 and applied to all wind farm generating capacity which was accredited between 2009 and, I think, about 2013.

In deciding how many ROCs per megawatt hour to allocate the DECC took into account, of course, the different costs of renewables and generation. The Defendants' argument, or the argument they wish to raise, is if the cartel meant the cost of renewables generation were higher because the cost of the

cables was higher, then it is possible that the government awarded more ROCs per megawatt hour to generators, including Greater Gabbard. If so, that is a countervailing benefit or a mechanism by which the cost is passed on because, ultimately, the cost of the ROC scheme, as is common ground, is borne by consumers, that is to say household electricity bill payers.

The question is whether this is a live point in the proceedings.

My submission is twofold. Firstly, a point like this, a mechanism for pass on or a mechanism of mitigation of loss, however it is framed, has to be pleaded with proper particularity and, in this case, it hasn't been. If it had been -- this is a purely a technical point -- if it had been, the Claimants say we would have produced some evidence about it, factual or expert evidence about the decision and whether it might have been different.

Secondly --

MR JUSTICE FOXTON: Some more evidence about it.

MR WEST: Well, we will come on to look at what the evidence, if one can call it that, before the Tribunal currently says.

In my submission, all it really says is that there is the possible mechanism which may or may not have operated. The Defendants' expert, frankly, admits he is not able to say whether it did or did not do.

I don't necessarily criticise him for that because he isn't an expert in the Renewables Obligation Certificate scheme; he is a competition economist. So query whether that can properly be regarded as evidence.

One way or another, we would have wished to put in something from someone who is able to say positively what the position actually was.

So, the first point, not pleaded, and that is not just a technical point.

Secondly, if one looks at the evidence, such as it is, we say that would not enable

Prysmian to plead the point in accordance with the standard of pleading which applies under the authorities we will look at briefly in a second.

Just by way of preview, what those authorities say is: in order for an allegation of mitigation of loss or pass on to survive the strike-out standard, it must do more than simply identify a theoretical mechanism.

MR JUSTICE FOXTON: Just pausing there, I was obviously reaching for *Sainsbury's Supermarkets* myself yesterday, but we are in an unusual position, at least in my experience, at least at this part of the argument, of having a debate about whether something is pleadable without the draft pleading.

MR WEST: Indeed, sir. But I understand my friend to say they don't need a new draft pleading because it is already pleaded.

MR JUSTICE FOXTON: Well, they are either right or wrong about that.

MR WEST: They are, my Lord. It may therefore make sense simply to show you the pleadings. If you are of the view it isn't already there, it may be we can cut this rather short.

So, the pleadings, if I can begin with the Particulars of Claim, because those do address the question of ROCs. It's tab 9, at page 426. Paragraph 57(i).

So, the majority of the remuneration received by Greater Gabbard in respect of the power supplied by it is in the form of ROCs under the renewable obligation scheme instituted by UK government. So this is what the Claimants' plead:

"The entitlement of suppliers of power from offshore wind farms to ROCs in return for power supplied does not however vary depending on the cost of the cables for the particular project."

The response to that in the Defence, that is at paragraph 61 of tab 10. As to paragraphs 55 to 58, which includes the material I have just read out:

"It is denied the Claimants have suffered any loss to the extent to which any such overcharge has been passed on to their own downstream customers (namely the joint venture partners).

"So it is for the Claimants to plead and prove the losses which they allege that they have incurred and, accordingly, it is for the Claimants to prove that they have suffered a net loss, having regard to the price they charge for the electricity.

"Accordingly, the Claimants are put to strict proof that they did not pass on any part of the overcharge to their customers or partners or, if they did, what portion was not passed on."

That is clearly concerned with the charges for electricity and not with the ROCs.

MR JUSTICE FOXTON: Who provides the ROCs?

MR WEST: The ROCs I believe are provided by the government. So one has to declare how many units of renewable generation megawatt hours have been generated within the relevant period and then it is then accorded.

MR JUSTICE FOXTON: A state provision, as it were, to compensate for the higher production costs?

MR WEST: Indeed. They can then be sold. They have a monetary value.

Sirs, I haven't taken you to the authorities, but one of the points which the Supreme Court in *Interchange* finally determines -- it hadn't been finally determined at the stage of this pleading -- is that the burden of pleading and proof on pass on is on the party alleging it. So an allegation of mitigation by downstream pass on is for the Defendants to plead. It isn't actually pleaded here. You will see they take the position it is actually for us to plead and prove our net loss, which is wrong.

So there is no proper allegation of pass on at all, but certainly nothing in relation to ROCs.

As I understand it, my friend doesn't say that is where one finds her relevant pleading. She says it is at paragraphs 70 and 71:

"…if the Claimants can establish that the alleged infringement resulted in an overcharge, the Claimants must also take account (in calculating the true level of any damages) of the benefits that they have obtained as a consequence of the purchases in relation to which they seek to claim which would not have been received absent the overcharge. Such benefits should be taken into account in calculating the true level of damages to offset the overcharge and/or financing costs and/or to prevent unjust enrichment."

So all that is said is that there were benefits which we have to take into account. Again, one sees nothing about ROCs at all.

MR JUSTICE FOXTON: Is the purchase -- it's not your pleading, but at least your understanding the purchase is the purchase of electricity; is that right?

MR WEST: The purchases of the cables.

MR JUSTICE FOXTON: The cables.

MR WEST: So, sirs, I have various points about what the pleading standard is, what the evidence is, and why the evidence wouldn't enable the Defendants here to meet the pleading standard. But, in a sense, my prior point which I say is fatal on its own, is that the point simply hasn't been pleaded. If the Defendants wish to run this, they have to provide a draft pleading that we can look at.

As Mr Justice Foxton says, that is a much more satisfactory way, in a sense, of addressing this, rather than addressing whether a hypothetical pleading that they might be able to produce would or would not meet the standard. We don't have such a draft pleading and, to make my position clear, if and when any such draft emerges, we will certainly not be giving consent for it, including on the grounds that it is all just far too late.

I am in the Tribunal's hands whether you wish me to go on and show you the authorities and the evidence or whether you would rather hear from my friend. I reserve the right, of course, in the latter case to make some of the points I was going to make.

MR JUSTICE FOXTON: It is fair to say that this issue is not one which is developed in either party's skeleton, I think.

MR WEST: It is certainly developed in mine, I hope.

(Pause)

MR JUSTICE FOXTON: Have I done you an injustice, Mr West?

MR WEST: You may have done.

(Pause)

It is briefly mentioned, to be fair, at tab 0, page 11 of the skeleton, under the heading of "Case Memorandum".

MR JUSTICE FOXTON: I wasn't aware, and I may be wrong, but is *Interchange* in there or was it indeed in the bundle of authorities that we had at least as at yesterday for the hearing?

MR WEST: *Interchange* itself is in there only in the Court of Appeal, but we have the relevant sections of these Supreme Court judgments in the judgment from *O'Higgins*, which is in the bundle.

MR JUSTICE FOXTON: Right.

MR WEST: It is correct to say, at paragraph 40 of the skeleton, it simply says:

"…it is not clear whether the Defendants intend to seek to raise the ROC banding issue in their pleadings or, if so, how they intend to justify doing so in the light of the evidence such as it is. If the Defendants had any such intention, the PTR would be the proper occasion on which to raise the issue. As matters stand, however, there is no application and the Defendant’s position remains

unclear."

After we served a rather -- by way of exchange upon service of this skeleton, it became clear the Defendants' position is it is already there. So we are not applying to amend because we don't have to.

MR JUSTICE FOXTON: I am not sure I have been unjust then. Let me just check with my colleagues.

(Pause)

Given that there, I think, does seem to be this threshold issue of 'is it already there?' we think it probably would be helpful to hear Ms Davies on that issue first, and then see where it takes us.

MS DAVIES: I am grateful. By way of introduction we have to confess to being somewhat perplexed by this issue. What my learned friend seems to be trying to do today is to persuade the Tribunal, as it were, summarily to dispose of an issue that is very fully addressed in the expert evidence, and has been addressed very fully in that for quite some considerable time.

It is quite clear from the way it has been addressed in the expert evidence -- and I will come to it -- that the Claimants have understood this issue to be in play in these proceedings.

So I will explain: the way that both parties approached pass on in this case is to say that is a matter that is going to be developed in the expert evidence. That is what has happened.

So the background is that the Claimants, as my learned friend acknowledged, put in issue from the outset the question of whether they had passed on any loss. In addition to paragraph 57 of the Amended Particulars of Claim, to which my learned friend took you, it is also necessary to look at paragraph 44, which is in tab 9 of the bundle, at page 422.

Sorry, I think that must be paragraph 44. I have given the wrong page number, one second.

MR JUSTICE FOXTON: It is 422.

MS DAVIES: It is 422. Not in my hard copy bundle. Sorry. I have prepared my ...

At paragraph 44, the Tribunal can see that the Claimants plead:

"In relation to questions of pass on, the burden of both pleading and proof relies upon the Defendants. The Claimants' pleading in relation to questions of pass on as set out below is without prejudice to such burden."

Then, in the words they struck out in the amendments they served late in March, they explained that they addressed the matters here, and in order to meet any suggestion they have overlooked it:

"In relation to questions of quantum more generally, the Claimants' case as to questions of pass on will be set out more fully in expert reports following disclosure and the service of further information herein."

So they were adopting the position, as I said, that all these matters were going to be fully set out in expert evidence.

In response, in our Defence, we have always pleaded that the Claimants had passed on any increased costs and, in any event, account must be taken of any benefits they have received due to the overcharge.

In addition to the paragraphs my learned friend showed the Tribunal, if the Tribunal could also look at paragraph 13, in tab 10, at page 465. We pleaded:

"Further, and in any event, the Claimants have not suffered any loss as they were able to pass on any and all cost increases to their respective customers."

Then, as my learned friend showed the Tribunal --

MR JUSTICE FOXTON: Their respective customers ex facie would be those buying the electricity, wouldn't they?

MS DAVIES: And indeed the effect of the ROC is that it does go to the customers. As my learned friend points out in his skeleton, it is actually the bill payers who pay in the end.

MR JUSTICE FOXTON: That is a matter of ultimate, but not as a matter of the immediate source of the value.

MS DAVIES: Well, it is down the chain, yes.

Then, as my learned friend showed the Tribunal, paragraph 61. Then, in paragraph 63, on page 479:

"We reserve the right to plead more fully".

Then, as my learned friend showed the Tribunal in paragraphs 70 and 71, we specifically made the point in relation to countervailing benefits. That was the subject of a Request for Further Information, which is in tab 14, at paragraph 22, on page 523, where they asked us to identify the benefits. We repeated request 12, which is actually back at page 520, and we said, at 520, in the response:

"The request is a premature request for expert evidence which is not a proper use of the CPR Part 18."

Now, what then happened was the list of issues which was produced prior to the first CMC, which took place before Mr Justice Jacobs in May 2020, which is in tab 2 of this bundle and included at paragraph 11, on page 350, a general question whether and to what extent Greater Gabbard wind farm had passed on or will in future pass on any overcharge. At 14, on page 352, a general question: did the Claimants obtain any countervailing benefits as a consequence of the supplies for which they must give credit?

Albeit I acknowledge, of course, that in relation to the latter that was subject to the note on the Claimants' part as to whether that defence had been properly

pleaded.

Contrary to my learned friend's suggestion in his skeleton, there is in fact, therefore, no need for the list of issues to be amended to reflect this issue because it is in the list of issues.

Both those points were then fully addressed in both the factual and expert evidence served after the CMC. From that, it is in fact clear that the Claimants understood that the pass on issues did not just relate to price changes to customers, but extended to any revenue stream to Greater Gabbard. The Tribunal can see that, if the Tribunal looks at the evidence --

MR JUSTICE FOXTON: Can we just test this in stages? Let's assume the expert evidence has, for whatever reason, not followed the course that you say it has; do you still maintain that as a matter of pleading terms it would be open to you to pop up at trial and say: well, in fact you have received higher value of ROCs than you would otherwise have received because of the greater amount that has been spent acquiring this cable?

MS DAVIES: My Lord, it wouldn't be open to me at trial to pop up and do that because I wouldn't have any evidence to support that contention.

MR JUSTICE FOXTON: As a matter of pleadings.

MS DAVIES: Because of the way the evidence is tied into the expert report, no, I would accept then I couldn't do it either because it hasn't been raised in the expert evidence.

Here, it has been fully -- there are pages and pages in both expert reports and in the joint memorandum -- there are four separate issues in the joint memorandum, identified in amber by the experts, as being an issue of significant disagreement. It has been very fully -- they both have annexes attached to the joint memorandum addressing this. It has been very, very fully explored in

the expert evidence.

MR JUSTICE FOXTON: If you are right about that, and I do understand why you say what you say, those might be very good reasons why if you had come along today with an amendment, we would have had the battle with Mr West saying, "It has all come too late".

But to try to say this is all a debate about the case memorandum that is meant to reflect the pleadings, not supplant them.

MS DAVIES: What has happened on both sides is that the pleadings were obviously served many, many months ago, as is often in these competition cases, then the expert evidence has developed.

As the Tribunal knows, my learned friend in fact only sought to amend his pleading on 29 March of this year, to bring it in line with the expert evidence. So there are a number of amendments made, on 29 March, completely changing the Claimants' case because of the way that the expert evidence has developed.

If the Tribunal tells us that as part of the amendments we have to make to bring our pleading in line with where our expert evidence has come to we should include this point, of course we will do so. But that is what has happened in practice.

The Claimants, as you can see from the paragraph that I showed you, paragraph 44, had approached matters on the basis -- as is often the case -- that detailed issues of quantum would be developed in the expert evidence. They now, finally, before trial -- I can understand why they chose to do it -- bring their pleadings in line with that. We are bringing our pleadings in line to deal with their amendments, but we can include this issue, if that is what the Tribunal thinks we should do.

What would be grossly unfair, in our submission, would be summarily to decide

today that an issue that has, as I say, been fully explored in the expert evidence, starting from reports served in October 2021, be, as it were, summarily dismissed by the Tribunal.

MR JUSTICE FOXTON: You may have picked up that the idea of a hypothetical debate about an amendment application that is not before the Tribunal and where the form of the amendment is not known is not one that is immediately intuitively appealing.

MS DAVIES: No, I totally understand that. In fact, I was going to seek to resist the hypothetical debate as to whether one could summarily determine the issue by the Tribunal, as it were, simply reading what Mr Davies says and what Mr Bell says about this and deciding that we haven't met the Supreme Court standard in relation to identifying a mechanism for pass on. I was absolutely going to seek to deter the Tribunal from doing that. We would submit that is entirely inappropriate.

In a sense, there is not much more I can say. The Tribunal can see the pleadings, the Tribunal can see how this has developed, the Tribunal knows we gave many of the references in our skeleton to how this has developed in the expert evidence. But I would certainly invite the Tribunal, if necessary -- it is the whole of section 7 of Mr Bell's first report, section 7 of Mr Davies' first report, section 6C and D of Mr Bell's second report and, as I say, rows P1-3, which extend over some five pages plus annexes to the joint memo. It has been very fully explored.

MR JUSTICE FOXTON: How long would it take to have a properly formulated amendment application up and on its hind legs?

MS DAVIES: Well, we of course are in the process of producing our amended defence to respond to the Claimants' amendments. Under the Tribunal's

order, we were required to use our best efforts to serve that yesterday. We have not managed to serve it yesterday.

MR JUSTICE FOXTON: Your best endeavours were not enough.

MS DAVIES: Despite trying our best, we weren't able to. In fact, I have to ask the Tribunal if I could have until Wednesday morning to serve the document because we are not going to be ready for tomorrow for various reasons that I can explain.

I anticipate we would be able to include it in that document served by Wednesday next week because it is not a lengthy amendment.

I mean, my learned friend completely understands what the point is. He summarised it. I don't accept the categorisation in his skeleton that all Mr Davies has done is identified something that may or may not -- he expresses views as to the likelihood of this being the position.

That is ultimately the issue that Mr Bell disagrees with. He accepts in theory that the mechanism could work, says it is not -- there is a legal issue as to whether it is a normal pass on mechanism, but he accepts, in theory, this might have happened. But he says, in his view, looking at the material, he doesn't think it is likely. So that is the expert issue. It is how likely it happened. On which both experts have fully engaged.

So I don't accept the categorisation that all we have done is said this in theory could work. It is stronger than that. We can reflect that, if the Tribunal thinks that is what we should do, in an amendment which we can include -- I am afraid we are not going to be able to do it by tomorrow, but we are asking for 10 o'clock on Wednesday to serve the Amended Defence, and we could include it in that.

MR JUSTICE FOXTON: With Monday, of course, being a public holiday.

MS DAVIES: It is, and unfortunately the relevant key individual at our client from whom we take instructions is away this week, which has caused complications. That is, ultimately, part of the reason why, despite our best efforts, we are not in a position to do it by tomorrow morning.

MR WEST: I think we have reached a landing on this. Just in terms of timing, we, Hausfeld, wrote to the Defendants on 13 April and we said the reason we object to this amendment to the case memorandum is because it isn't pleaded.

So our position on this has been clear since 13 April. So far as we are concerned, if the Defendants wish to raise this, they need to prepare an amended pleading. It is unfortunate, to say the least, that here we are at the PTR, which is when this ought to have been happening, and indeed the Hausfeld letter, which is at tab 35, page 1410, says:

"If your clients intended to amend their Defence to plead the ROCs point, they should have done so in good time to allow the question of permission for those amendments to be considered at the PTR."

So no one has been taken by surprise by our position.

We are not attempting to shut the Defendants out from running the point, if they come along with a draft and obtain permission for it. We are simply saying it is not live on the pleadings as they stand today, and it is yet another point which we should have been canvassing today, which because of how matters have proceeded, and particularly the tardiness of the Defendants, has been put off to an occasion later than when it should have been considered, namely today.

MR JUSTICE FOXTON: This is one of these points, I think, where matters have sort of shaken down in the course of the exchanges. We do think this needs to be

the subject of an amendment application to be put forward by Wednesday, as you suggest Ms Davies.

When it comes in -- obviously, we are not going to decide it in advance of it coming in -- there may be different levels of response to it. If the response is there is not enough to meet the pleading standard, I would ask to you consider whether that is an issue that can be dealt with as well at trial as in advance. If the response is it raises issues not covered by the existing evidence, then we are in different territory and we will have to come up with a mechanism to resolve a dispute of that nature.

MS DAVIES: We understand that, my Lord. We can pretty much guarantee we won't be in the second territory.

MR JUSTICE FOXTON: I think saying anything more than that at this stage, without the form of the draft in front of us, wouldn't help you and I don't think will take matters much further.

MR WEST: I am certain that our objection will be on both grounds.

MR JUSTICE FOXTON: Well, if that is the eventuality we will find a mechanism for hearing you on that, whether in writing or otherwise, and resolving that issue. That is probably as far as we can take agenda item 1, I think.

Discussion re confidentiality

MR WEST: My Lord, gentlemen, that takes us then to confidentiality. As I said previously, the scope of the dispute has narrowed considerably.

There are six categories of documents on which points arise or previously arose. The Commission Decision itself, the access to file documents, Prysmian's disclosure in relation to comparator projects, Prysmian's disclosure of its own accounting and commercial policies. Those latter two have been referred to

as category B and C in Prysmian's disclosure.

The witness statement and expert evidence and, finally, some access to file documents emanating from Nexans which was one of the other cartelists.

MS DAVIES: I hesitate to interrupt, but the draft order we sent to you has now arrived. Just to hand that up to the Tribunal as well.

(Document handed)

MR WEST: The updated position in relation to all these points appears in certain recent correspondence that the Tribunal may not yet have had an opportunity to consider. But (inaudible) sufficiently forward for the Tribunal to read the relevant letters, rather than for me to paraphrase them, or for that matter read them out.

MR JUSTICE FOXTON: If it is -- we have been handed various letters on arrival. It may be that we have had a chance and availed ourselves of the chance to read it.

MR WEST: Let me just check if that is the case. The letter summarising the recent, or the current position, rather, on all documents or categories of documents apart from the Nexans documents, is the one which is now found at tab 48.

MR JUSTICE FOXTON: Is that the Hausfeld letter of 27 April?

MR WEST: Yes.

MR JUSTICE FOXTON: Yes. Which has a paragraph 13 summary of confidentiality issues in dispute?

MR WEST: Indeed.

MR JUSTICE FOXTON: We have had that, and we have all had a chance to read it.

MR WEST: So, in summary, Prysmian ATF documents, I believe there are now only four over which confidentiality has not yet been given up, four documents.

As I understand it three of them are in Italian. The position in relation to those is that

the confidential status is not agreed. We were told yesterday that there are only four left and confidentiality is still under review in relation to the Italian ones, as I understand it. So we would be looking for further explanations as to confidentiality claims in relation to those, but we are not asking the Tribunal to decide that.

I understand my friend's order makes provision for possibly coming back on paper if that is not resolved between the parties.

MS DAVIES: In fact, at paragraph 4 of our draft order, we had contemplated that we would list, in an annex to the order, the vast majority of these non-contemporaneous access to file documents. There is one that we have identified, and my learned friend is aware, which we say still does contain confidential information.

MR JUSTICE FOXTON: 13198, isn't it?

MS DAVIES: Yes, and then these three Italian documents, which we are still reviewing. We can include a mechanism to come back. There is a general liberty to apply in any event, but we can include a mechanism to come back.

The specific mechanism we had included to come back was in relation to the category C documents, where we have said in correspondence we are reviewing them. We already de-designated some and we anticipate de-designating some others, but because we hadn't yet told my learned friends what the outcome of that was we, in the draft order, included specific provision. Because obviously I am not in a position to say today that it is going to be as comprehensive as the position we have reached in relation to the access to file documents.

MR JUSTICE FOXTON: You would be content for the three Italian documents to have a similar clause?

MS DAVIES: Yes, of course. I am hopeful that there is not going to be an issue in relation to them.

I should say in relation to all of this, the vast majority of these documents are not in the trial bundle index. So whilst we have pragmatically adopted this approach to try to assist the Tribunal and take this issue off the agenda, the likelihood of many of these documents ever seeing the light of this Tribunal is pretty slim.

MR JUSTICE FOXTON: Does that leave us just arguing about 13198 today?

MR WEST: Not today. We don't have the documents in front of us because it was only yesterday that it was narrowed to that one document.

MR JUSTICE FOXTON: Okay. Once again, will there need to be some mechanism for the resolution of that issue in the draft order?

MR WEST: Yes, probably the same mechanism.

MR JUSTICE FOXTON: Okay, thank you.

MR WEST: The only other point to mention is that I believe 12 May is the deadline for lodging the trial bundle, so this may have some knock-on impact on that, if there is an outstanding dispute.

The witness evidence, and the position in relation to that, is that most of the designations of individual passages have been removed. Some remain, and they all relate to the same point, which is levels of authority and we are prepared accept at the moment that those shall remain without prejudice to our right to come back to that, if it turns out to be necessary.

The Commission Decision and category B documents remains (inaudible). The Commission Decision markings that we are concerned with are all concerned with the identity of the Prysmian individuals who were involved in the activities addressed in the Commission Decision. So, at various points in the Decision, either the identity of the individual is redacted altogether or it has been

marked as confidential.

MR JUSTICE FOXTON: Although it may be a jigsaw identification is possible.

MR WEST: I suspect it is very much possible, my Lord. But we simply don't understand why these markings are said to be confidential.

My friends may say the version we have is an artifact of earlier proceedings and, if necessary, in our draft order we have said: in that case, we are happy for you just to write in next to it who the person is.

But we don't understand how it can be confidential after all these years.

That leaves the category B documents, leaving aside Nexans, which doesn't concern my friend.

The category B documents, which are the comparator projects documents, we made a proposal yesterday, which was that the confidential status of those documents is retained, but that the discussions in the expert reports of the projects is de-designated, but that the project names themselves are anonymised.

We haven't had a response in writing to that, but I understand my friend's position is that is not good enough because even the material in the expert reports would enable identification.

Now, they haven't said which information in the expert reports would enable the jigsaw identification of which projects, but we don't accept that all those designations should remain simply because it may be possible in relation to some projects -- although it hasn't been explained, at least on paper -- how that might arise. We also say that many of these projects are now very old, so there can be no sensible suggestion of confidentiality in any case.

As to how this might affect the trial, it might be said it doesn't actually matter because you don't need to refer to that specific material. But I have been able to find,

in the time available this morning, a couple of examples of instances where it would affect my ability to cross-examine about these points, or my friend's ability to cross-examine about these points. For example, in Mr Bell's report, 22, volume 2, page 978, this concerns a specific point about differences in the margin between supply-only projects and turnkey projects.

MR JUSTICE FOXTON: Sorry, which page?

MR WEST: 978. If you look at paragraphs 4.17 and 4.18, you will see certain markings there. That is one example of where it is very difficult to see how one could have a dispute about the approach that Mr Davies has adopted to try to compensate for the difference he identifies in margins between those types of projects, how one could have that dispute if one wasn't able to actually say the words.

The other example I found is at page 1003, paragraph 5.35. In relation to two specific projects there is a debate about whether they could be excluded from the cohort to which the regression analysis is applied on certain grounds. Those grounds are set out in yellow, as are the project names. We don't want the project names to remain. We are happy for those to be obscured or replaced with code names.

Mr Davies says, "I am excluding these for the reasons the Tribunal can see". Again, I can't even explain the point. It isn't a case those won't affect how the trial proceeds. We certainly don't accept that in all cases this material actually is confidential, number one, or, two, if it is, a jigsaw identification is possible.

We suggest their clients have to do rather better and identify which specific markings they say (1) relate to projects which are recent enough to be confidential and (2) would enable this sort of identification to occur.

My learned friend will have to address that. The only other point relates to Nexans,

where we have now heard back from Nexans. Some of the documents in the ATF file emanate from Nexans and are marked confidential. We are requesting the de-designation of a certain number of those and originally Nexans, by the time of the skeletons, hadn't replied to our email. Since then they did reply and their position is set out in certain letters which they have asked us specifically to bring to your attention. One of those is at tab 45.

MR JUSTICE FOXTON: In terms of where we are on that issue; is the 8,891 figure correct?

MR WEST: I believe it is substantially correct. Although, of course, these are documents one anticipates that Nexans lawyers have seen before, they are also documents which the Commission marked as non-confidential. They all relate to the operation of the cartel, which finished in 2009.

So, our position in relation to those -- sorry, there is one other letter they wrote to us this morning that they also asked that we put before you.

MR JUSTICE FOXTON: We have had copies of the 28 April letter. For my part, I have not read the 28 April one. I am just going to quickly look through that.

(Pause)

Yes. Thank you.

MR WEST: Needless to say, between those two letters there is a reply by Hausfeld, which is at 47.

The position in the most recent letter is that they need to have more time. Our position is set out in this correspondence is that none of this is confidential, so we would ask either that the Tribunal -- we would ask the Tribunal make an order de-designating material, and either make it effective as of today or make it effective as of a date in the future, which gives Nexans the time they have been asking for, and if they wish to apply to set it aside in the meantime,

they can do so.

MR JUSTICE FOXTON: Just on that point, we had considered the second of those options and had in mind giving a period of 21 days for White & Case on Nexans' behalf to come back, as it were, given that they are not before the Tribunal today; do you have any observations on that proposal?

MR WEST: I have already adverted to the fact that the deadline for the trial bundles is, I believe, 12 May. So, again, if there were any issues arising for either the filing of the trial bundle or updating of the trial bundles arising out of that I would obviously have to ask that proper accommodation be allowed for that.

MR JUSTICE FOXTON: The problem is if one puts in a period that is significantly shorter than that, I would imagine the first thing the Tribunal are going to get is a letter from White & Case asking for more time.

I think at the moment we are persuaded that although there is not a lot of time available, 21 days ought to give them enough time to decide what they really want to do about this and let us know. If there are disputes, we will then determine them.

I am not sure it really ought to interfere with the preparation of the trial bundle. They could be put in on yellow paper, or something, if there are hard copies.

MR WEST: I appreciate they are not here, so I am slightly uncomfortable, but many thanks.

MS DAVIES: Can I, first of all, deal with the Commission Decision?

MR JUSTICE FOXTON: Yes.

MS DAVIES: I just need to explain the background, so the Tribunal understands it.

The Commission Decision was required to be disclosed pursuant to paragraph 6 of the Order of Mr Justice Jacobs, at tab 5, page 372.

What we were required to disclose pursuant to that was the form of the Decision that

had actually been produced by solicitors to another party in the National Grid / Scottish Power proceedings. So we were told -- Mr Bishop will remember those proceedings, but Freshfields for ABB, who were in fact the first defendant in those proceedings, had produced a form of the Decision which was disclosed in those proceedings. What we were therefore required to disclose in these proceedings was that form of the Decision that had been produced by Freshfields.

The important point to note is that before that form of the Decision was disclosed by Freshfields they had engaged in correspondence with all the addressees in the Decision in relation to redactions and confidentiality, it wasn't us.

We then produced that version of the Decision and Mr Justice Jacobs' Order, at paragraph 6, as you can see, required that to be disclosure to be provided into the confidentiality ring in this case.

The Confidentiality Ring Order, which is at the previous tab, at tab 4, at paragraph 6, on page 367, specifically provided that the decision was deemed to be designated as inner confidentiality ring information, which in fact reflected its treatment in the National Grid proceedings. So it was the court so designating it, not Prysmian.

Insofar as my learned friend has been criticising us for designations in relation to the Commission documents, with respect to him, that is not fair because it was required by the court Order.

The document that is in the bundle for the PTR, consistently with all this, reflects the final version of the documents that were disclosed in the National Grid proceedings. We have not therefore applied the confidentiality markings that appear in that document; they were applied by Freshfields following the process that I have sought to describe.

As I understand it, the position is it was not in fact Prysmian, but another addressee that requested the names of my clients' employees originally to be redacted and, although they have subsequently agreed to the lifting of those names, it was on condition that the information was placed in the confidentiality ring and not further.

Now, there isn't actually a mechanism in this order for the Decision to be de-designated or any part of it to be de-designated. So if the Tribunal looks at the mechanism in paragraph 5.5 which relates to de-designation that specifically excludes the confidential Commission documents or the Decision.

What one has in paragraph 6.2, in relation to the Decision or the Commission confidential documents, is a mechanism for showing to specific people for specific purposes, which mirrors the mechanism in paragraph 5.6 relating to the underlying disclosure.

Now, of course, I accept that the Tribunal can today revisit this, if it considers it appropriate to do so, but I am just wanting to make sure the Tribunal understands the scheme that the other addressees are aware of before the Tribunal does that.

So far as my clients are concerned, we do not object to the names of our employees being de-designated, but I felt I should draw that to the Tribunal's attention because it will require a Tribunal order; it can't be done by consent by us, and that the Tribunal understands why we are where we are, and it is not obfuscation on my clients' part at all.

So that is the position in relation to the Commission Decision.

So far as the comparator projects are concerned, the category B documents, as I understand it, and my learned friend confirmed this morning, we are now in a position where my learned friend is not in fact seeking the de-designation

wholesale of those documents; he accepts they should remain in the ring.

The issue before the Tribunal is how -- and in a sense the only issue before the Tribunal -- is what to do about the confidentiality markings in the expert evidence. Because the reason -- as the Tribunal will appreciate, the reason those documents were disclosed in the first place was to enable the experts to do their analysis of overcharge by reference to comparator projects and so both expert reports do draw on material that is contained in those comparator documents.

Now, in our submission, the information that is contained in the expert reports in relation to price, cost and margin of specific projects is information which is confidential, as Mr Justice Marcus Smith in fact accepted in the Britned case on which my learned friend has relied, if I could just show the Tribunal the relevant paragraph of that. It is paragraph 332 in the authorities bundle, tab 6, at page 278.

Before coming to the detail, I would just note for the Tribunal that this judgment was delivered in 2019, and the comparator data in that case had been generated in respect of both the cartel and post-cartel period, as in this case. The cartel period ended, as the Tribunal is aware, in 2009, so some 10 years before the judgment.

What the Tribunal sees is, in paragraph 331, Mr Justice Marcus Smith set out information derived from in fact the Defendants' expert, Mr Biro, his margin analysis. It did set out price, cost and margin information for a project, but the project names were anonymised in that table. Mr Justice Marcus Smith explains that in paragraph 332, where he says, halfway through:

"The prices, costs and margins of the specific projects are confidential to ABB, but open justice requires that this data be set out, it being material to this

judgment. I consider that ABB's confidentiality is appropriately protected by anonymising the project names. The specific project names are not material to this judgment."

So, for the purposes of his judgment, he could protect the confidentiality by this process of anonymisation. It doesn't actually follow from that, at the trial, the expert evidence was put forward in this form. We simply don't know. He hasn't explained it in his judgment.

Insofar as my learned friend is suggesting -- what he is now suggesting as regards expert evidence reflects what happens at the trial of Britned, I am afraid we can't deduce that from this judgment, and we simply don't know and he hasn't pointed to anything to identify that.

The problem in this case is that the confidentiality of the margin, price and costs as regards specific projects cannot be protected by the anonymisation in the way that Mr Justice Marcus Smith accepted in Britned, for the reason that the expert evidence contains other information which allows the projects, even if they were de-anonymised in this way, to be identified.

If I can show the Tribunal why that arises.

MR JUSTICE FOXTON: Yes.

MS DAVIES: If the Tribunal takes, first of all, Mr Bell's first report, at tab 21, and table A4.7, at page 899, the Tribunal can see that for Mr Bell's base sample he set out quite a lot of detail in relation to the various projects that are included in it.

He has treated -- consistently with the point I am making -- the price, costs and margin information as confidential, but the other material he has set out in this table, namely year of project, voltage, the type of project, and whether it is supply or installation, and volume, hasn't been treated as confidential because

it doesn't actually matter that these projects are identifiable if the price, cost and margin information is kept confidential. Much of that information is in fact publicly available; it is not confidential.

But the problem is if you simply change the names in the list on the left-hand side to anonymised versions of the names, the remainder of this information will allow you to identify the project.

I will come to explain why that is in a moment.

Just to show the Tribunal the extent of the problem, in Mr Bell's second report, the next tab, at page 1067, table A3.1, you have a similar restated overcharge data set where he is, again, including that sort of information. Then if the Tribunal looks at Mr Davies' first report, in tab 23, at page 1212 -- sorry, starting at 1207, Mr Davies has two appendices, appendix A and appendix B, which set out for the sample projects, as well as names, the cable type and voltage in the first one, appendix A, and in the second one, appendix B, the timings, so the years, and the type, as well as the project name.

Now, this is not just a theoretical problem. In the time available to us overnight we did, for example, a Google search on Prysmian projects in 2007. If the Tribunal looks at page 1212, the Tribunal can see that there are two identified items, 11 and 12.

We did a Google search on Prysmian UK projects 2007. It came up with material that identified these two projects. It identified the voltage for those two projects, which one can see back at page 1208. So simply with the years and the voltage, you will be able to identify which project is concerned, even if the name is anonymised.

I hope the Tribunal has seen Mr Day's witness statement, which is in the PTR bundle, at tab 42, in which he seeks to explain why the margin, costs and

revenue information is confidential. He does that in particular at paragraph 6, on page 2; 8 and, at 12 to 15, at pages 4 to 5, explains why a five-year period is not appropriate in this context and why a longer period is necessary.

Now, I don't want to spend time reading those paragraphs out to the Tribunal, but those paragraphs explain the problem.

Then paragraphs 9 and 12 explain why anonymising the names doesn't sufficiently address it.

Now, so far as how this then feeds through to how we address matters at trial, the information that we are seeking to protect is information as to price, costs and margin specific to each project. We are not seeking to protect average margin information.

So the two examples that my learned friend took the Tribunal to -- and I am not criticising him in the time available for picking those two, but both of those relate to areas where there are average margins or broad phrases such as "higher margins", with the anonymisation of the project names, that is fine and those sorts of examples we can deal with. It is where it is specifically linked to a specific project, and a number is not going to solve the problem for the reasons that I have sought to identify.

So far as those are concerned, we don't actually understand why it would be necessary for either party to cross-examine by reference to that material.

MR JUSTICE FOXTON: So there would be no problem with saying the margin of project A is higher or lower than the margin in project B?

MS DAVIES: Yes. Or average margins for supply-only projects are different to average margins for installation projects. No problem with that.

It is where it is tying specific margin information, or costs or price information, to a specific project and the anonymisation doesn't solve the problem for the

reasons that I have tried to identify.

So far as that is concerned, we don't understand why anyone would need to actually refer to that in open court. There isn't actually any dispute between the experts as to the accuracy of the information that they have put in their reports as to any specific projects. The issues, instead, are as to which projects it is appropriate to include or exclude in the samples that they have each used for their respective expert analysis.

There is also a dispute as to what is the right way of comparing things. But, leaving that to one side, when you get to the specific project information, the real question is: should you include this project because it has a much higher margin and therefore is an outlier or this project because it is much lower and is an outlier for that reason?

So, we submit it certainly is possible to cross-examine without revealing in open court the specific margin price or cost information identifiable to a specific project, even if it is identified by a code name, rather than the actual name of the project, because they haven't -- it is not as if we are having to deal with for project 15, say, Mr Bell has calculated the margin as being X and Mr Davies has calculated the margin as being Y, and that affects the results on the overcharge and, therefore, we have to cross-examine about who has done the right maths; that is not where we are at all thankfully.

We are, instead, should project 15 -- and I am picking that by random. I am not saying it is project 15 -- be excluded or included because it is a outlier. Again, one doesn't need to look at the actual specific price, costs or margins for projects in specific context. I hope that's helpful.

This is confidential information, as Mr Day seeks to explain, as indeed Mr Justice Marcus Smith accepted. We of course recognise that we have to

find a way forward which means that the Tribunal is able to sit in public and, save where absolutely necessary, going into camera. We don't actually think it would be necessary to go into camera if we adopted the approach that we are suggesting, but for the reasons that I have sought to explain we do urge the Tribunal simply not just to accept my learned friend's approach, which is just saying all the confidentiality markings and the expert evidence can be de-designated if we have anonymised project names.

MR JUSTICE FOXTON: Thank you.

MR WEST: Very briefly, I don't accept all this information is confidential. My friend's Google examples she took you to were two projects from 2007. Mr Day says the five-year presumption in competition law is not necessarily appropriate here because projects might last longer than that, but, on any view, the project from 2007 would have finished probably in 2013 at the latest. It just isn't confidential.

There may be some more recent ones where my friend has a more compelling point, but I don't accept they are all confidential.

My proposal, I think, when I addressed this previously was that those instructing my friend should go through and identify what material they say actually does enable a jigsaw identification. She took to you the tables and perhaps there is a point to be made about those tables and whether they give the game away, but in my submission that is what should happen. Instead of the Tribunal maintaining all of these designations, they should properly explain which of them these points apply to and why.

As I say, that was my proposal before as to how this should proceed.

In relation to the Decision, I think ultimately where we arrived at was my friend said she didn't oppose the de-designation of the names. That was another

deathbed thrashing, I am afraid, because Macfarlanes wrote to us, I think it was last Friday, saying they did. But there we are.

MR JUSTICE FOXTON: We are where we are.

Ignoring the finer points of the correspondence file, we are just going to adjourn briefly now and have a chat on these confidentiality issues.

MR WEST: I can complete the point in 30 seconds:

"In light of the above explanation, our clients do not consider it appropriate to amend the confidentiality designations made ..."

MR JUSTICE FOXTON: All right.

(12.04 pm)

(A short break)

(12.07 pm)

Ruling on confidentiality issues

MR JUSTICE FOXTON: Thank you both very much for the submissions and also for the work that has been done to narrow the issues, however timely or otherwise it may or may not have been.

In relation to those two outstanding issues, we agree with Mr West. It is not appropriate, Ms Davies, the name should not be redacted. We know that is in keeping with the approach Mr Justice Marcus Smith took in the BGL holdings case. Absent some compelling reason, none having been identified, we think those redactions should come out. So far as the margin information is concerned, we are persuaded that the figures themselves are confidential information and, whilst we accept some of the projects come from some time ago, it doesn't seem to us it has been pointed to any sort of sufficient sea change or break such that that information has lost the commercial value it

may once have had.

It seems to us that it will be possible to conduct the hearing in open court at all times, given Mrs Davies' confirmation that average figures can be used, that the projects can be code named, and that adjectives of comparison, "greater", "lesser", et cetera, can all be used.

If we got to the hearing and it turned out that proceeding in that way wasn't working, we would reserve the right to revisit that issue, because plainly every step must be taken to ensure the case is in open court if at all possible. We hope that, on that basis, the parties will be able to agree on wording that will reflect the discussion we have had.

Discussion re witness and expert evidence

MR WEST: I am very grateful. That leaves witness and expert evidence which, as I said before, is more of a question of updating the Tribunal.

Prysmian's factual witnesses are due to appear and that confirmation has been given. The Claimants very much contend they should be in person. Prysmian's skeleton argument appears to accept that, whilst reserving the right to seek an appearance by video. Our position is that if such an application were to have been made, it ought to have been done today, but again I can't shut my friend out from making it late.

We confirm that our witnesses, Mr Dibble and Ms Bibby will be appearing in person, and my friend has helpfully confirmed that they have no cross-examination for Ms Richardson, whose evidence will therefore be taken as read.

So far as the experts are concerned, the parties are agreed, subject to the Tribunal, that this is an appropriate case for concurrent expert evidence, or so called hot-tubbing. Prysmian has prepared a draft protocol for concurrent expert

evidence, which I don't think has yet been supplied to the Tribunal because it hasn't had input from the Claimants, although I think it is available if the Tribunal would like to see it. We received that yesterday so we have not yet responded to it, but I am optimistic it should be possible to file an agreed or substantially agreed protocol within a reasonable period.

That, I think, is all I propose to say, save just very briefly to mention the position on the dramatis personae. It is on the agenda, although I am not asking the court to do anything about it. The Defendants have supplied such a document and the parties have agreed that it should be filed in agreed form by the date for filing the reading list. I just mention, because it is on the agenda, that the draft we have received identifies various individuals whose involvement in the case is not completely clear to us and who weren't selected as custodians, but hopefully the parties can get to the bottom of that in correspondence.

The other point is that the whole thing is currently marked as inner ring confidential information but, in light of the Tribunal's other rulings today, that can hopefully be revisited.

That was all I proposed to say.

MS DAVIES: I don't have much to add to that, save to say, I'm sure the Tribunal has seen it from the skeletons, the parties have agreed a timetable for the trial, subject of course to the Tribunal's approval. We have sought to give reading time. On the assumption that we are having concurrent evidence, we have sought to split the reading time so the Tribunal has more reading time immediately before the evidence, given that the Tribunal will obviously be more heavily engaged in the expert evidence that if we had not had concurrent evidence.

MR JUSTICE FOXTON: We have been considering the expert evidence. We are persuaded that hot-tubbing is the way to go. If the parties are able to make progress on a protocol, that would be appreciated. It would be of course Mr Bishop, I think, who will take the leading role in steering that.

MS DAVIES: We took the initiative to produce a draft because we had the draft from the National Grid proceedings which had been put before the Tribunal. What we have sought to do -- obviously the issues are somewhat different -- is use the same approach but then build on the issues. I appreciate my learned friend only received it yesterday but I do hope we can reach agreement in relation to it. That is the approach we took because we are, of course, aware that Mr Bishop had approved that in National Grid.

MR JUSTICE FOXTON: You have currently allowed, I think, four days for the combination of the experts' cross-examination. We wondered -- you don't need to commit now -- whether that might prove overgenerous and we might get there in three?

MS DAVIES: Indeed, that might well be the case. My learned friends had originally proposed four. We were happy to agree to that but it may well be the case, as the Tribunal indicates, that we only need three.

Housekeeping

MR JUSTICE FOXTON: Is there anything else that we need to deal with before we break?

MS DAVIES: Can I just clarify, for the sake of clarification, the Amended Defence. I think we have already addressed the question of whether -- I formally need an extension from tomorrow. I think we have already effectively addressed it because it is now going to include the position in relation to the ROCs but I do

formally apply to have until Wednesday morning for that.

MR JUSTICE FOXTON: Yes. I think, Mr West, pragmatically I rather solved the pass on that, giving until Wednesday for the amendment application.

MS DAVIES: I assume, as regards the debate about the Case Memo, we should adjourn that pending the service of the Amended Defence?

MR JUSTICE FOXTON: Yes, I think we will address the dog rather than the tail. I can't say we look forward to receiving the documents on Wednesday but we will await them.

I have been reminded that the draft order, we hope you will be able to agree, needs to be sent in Word version to the Tribunal.

MS DAVIES: Yes. Actually, as I sit here, I am going to mention that, given that I did show the Tribunal pages of the expert evidence which include confidential information, so the Tribunal has notionally read that in open court, we will include a provision preserving the confidentiality of that information. I assume that won't be controversial.

MR WEST: Given that it is possible we may need a further hearing to address this application to amend, I don't know if it is a point for the Tribunal or the Registrar, whether we need to get a date in the diary for that? I simply mention that in case steps can helpfully be taken.

MR JUSTICE FOXTON: We have a relatively short period between now and I suspect when we will know. How quickly after Wednesday -- you are telling us in advance it will be opposed but we would like you to look at it and think about that again. How soon after that -- presumably by the end of next week you will be able to give us a definitive position, having seen what has been put forward?

MR WEST: Yes. I have said already I am certain we will oppose it, the only

question is if we need to put some evidence in, for example, about what we would have done had this happened earlier, how long that might take.

MR JUSTICE FOXTON: Amendment applications obviously tend to follow -- opposed ones -- a fairly familiar course. Is that something that really requires a hearing or can we deal with that through an exchange of written submissions?

MR WEST: It is pretty important. We haven't got on to this, what the effect of this amendment would be and what the effect of this defence would be if upheld. As I understand Mr Davies' evidence, it is that the value of the additional ROCs which Greater Gabbard would have obtained if this mechanism works is much larger than any sum at issue in this case; in the order of ten times larger. So it totally wipes out the claim. As a result, it is an extremely important point.

Of course, it doesn't get my friends off the hook necessarily, it just means that there is a consumer claim which is ten times larger which they would potentially face, which is why it is important they make their minds up what they really want to say about all of this.

In light of that, I suspect we will wish to come before you, if we possibly can.

MR JUSTICE FOXTON: Remotely or otherwise.

MR WEST: Remotely or otherwise.

MR JUSTICE FOXTON: In that eventuality, I think we will all have to be pretty flexible in terms of the date and the time to ensure that it can be dealt with as quickly as possible.

Thank you very much.

(12.17 pm)

(The hearing concluded)

1

2

3

4

5

6

7

8

Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
…	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?