

1 This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be
2 placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to
3 be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive
4 record.

5 **IN THE COMPETITION**

Case No: 1435/5/7/22 (T)

6 **APPEAL**

7 **TRIBUNAL**

8
9 Salisbury Square House
10 8 Salisbury Square
11 London EC4Y 8AP

12 Monday 15th April 2024

13
14 Before:

15
16 Justin Turner KC
17 Sir Iain McMillan CBE FRSE DL
18 Professor Anthony Neuberger

19
20 (Sitting as a Tribunal in England and Wales)

21
22
23 BETWEEN:

24
25
26 **PSA Automobiles SA & Others**

Claimants

27
28 **V**

29
30
31 **Autoliv AB & Others**

Defendants

32
33
34
35
36 **A P P E A R A N C E S**

37
38
39 Colin West KC & Sean Butler (Instructed by Hausfeld & Co. LLP) on behalf of the
40 Claimants.

41
42 Sarah Ford KC & Robert O'Donoghue KC (Instructed by Macfarlanes LLP and White
43 & Case LLP) on behalf of the Defendants.

Monday, 15th April 2024

(10.30 am)

THE CHAIR: I should read this out. Some of you are joining us via livestream on our website. I must start with the customary warning. An official recording is being made and an authorised transcript will be produced but it is strictly prohibited for anyone else to make an unauthorised recording whether audio or visual of the proceedings and breach of that provision is punishable as a contempt of court.

Application by MS FORD

MS FORD: Members of the Tribunal, this is the joint application on behalf of Autoliv and ZF for permission to rely on their own separate experts in relation to the issue of overcharge. Mr West, in his skeleton, has cited the Court of Appeal authority of *Tibbles v SIG plc* [2012] 1 WLR 2591 for the circumstances in which the Tribunal may revisit and vary its previous order. It may do so where there has been a material change of circumstances since the order was made.

THE CHAIR: I don't want to interrupt you so early, but I think we probably, subject to anything the Defendants say – the Claimants say -- we probably don't need to hear you on any principle. We can look at this again. Obviously, things have moved on inasmuch as we have one less Defendant group and also you have now seen the Claimants' expert evidence and, I think, as we indicated earlier, we would obviously revisit the issue when the need arises, while at the same time appreciating we have not got that long. So perhaps, if we move on to the substance.

MS FORD: Sir, yes. The first development is the fact that the Court of Appeal has granted the Defendants permission to appeal in relation to this issue and that is

1 relevant, not because we are trying to undermine the concept of an appeal, but
2 because it raises obvious concerns about timetabling in circumstances where, as the
3 Tribunal has just indicated, we have a trial in October. The fact that permission has
4 been granted means that the Court of Appeal considers the Defendants' position to be
5 at least arguable, and if the appeal succeeds then the question becomes how to
6 accommodate the outcome of that within the time available.

7 We have made very clear that we are concerned to maintain the present timetable to
8 trial and the Tribunal will have seen that we have instructed economists to get on with
9 the discrete issues of pass-on and financing losses, where we say no conflicts arise,
10 to try to deal with that as efficiently as possible in the time available, but that still leaves
11 the core issue of overcharge. The reality of the matter is that timetabling challenges
12 are easier to address now, rather than waiting for the hearing before the Court of
13 Appeal on 30th April and then waiting for the Court of Appeal to hand down its
14 judgment, and then potentially convening a further hearing in order to seek to amend
15 the timetable to accommodate the outcome at that stage. That is why we have
16 highlighted the Court of Appeal's permission decision as the first material development
17 in our application.

18 As to the other material developments we have identified –

19 THE CHAIR: The Court of Appeal hearing is on 30th April did you say?

20 MS FORD: 30th April. Just to provide the Tribunal with some background to that, we
21 did seek expedition on the basis of the timetable to trial. What Lord Justice Popplewell
22 said in relation to that is that he didn't think it was appropriate to grant expedition
23 insofar as that meant that the May deadline for the Defendants' expert reports would
24 necessarily be maintained, but he did direct that, if possible, the appeal be heard
25 before the end of the Easter term. In our submission, what he was recognising there
26 were the obvious timetabling consequences if we were to succeed.

1 THE CHAIR: I appreciate that.

2 MS FORD: Each of the other material developments that we identified relate to
3 matters which the Tribunal initially took into account in its ruling and so were clearly
4 material to the reasoning at the time, but in relation to which, in our submission,
5 matters have obviously moved on.

6 The second one we identify is the fact that the claim against one of the three Defendant
7 groups, Tokai Rika Co., Ltd, has now been withdrawn by consent.

8 In the Tribunal's ruling, the Tribunal expressed concern at the prospect that it might
9 be faced with three different expert reports from the Defendants. That was the
10 Tribunal's ruling at paragraph 19, subparagraph 3, and paragraphs 24 and 32. That
11 situation has evolved in two respects.

12 Firstly, the Tribunal will now only receive two Defendant expert reports, one from ZF
13 and one from Autoliv and, secondly, those expert reports will be limited to the question
14 of overcharge, with matters of pass-on and financing losses being addressed in
15 a single joint opinion. In our submission, that is a material development in relation to
16 one of the factors that the Tribunal identified as being pertinent to its reasoning.

17 The third factor that we have identified is that the Tribunal expressed the expectation
18 in its ruling that the Claimants would properly particularise their case and that concern
19 arose in particular in relation to their standalone cartel allegations that go beyond the
20 scope of the Commission decisions.

21 Just to remind the Tribunal what was said in relation to that, the ruling is behind Tab 20
22 of the first bundle.

23 If we look at paragraph 27, the Tribunal highlighted:

24 *"As yet there is no particularised case as to why it is said, by the Claimants, that the*
25 *cartel is between only two of the Defendant groups or for that matter which two. The*
26 *issue is raised only as an unparticularised alternative case. We made clear during the*

1 *course of argument that this is not satisfactory. It is not appropriate for the Claimants*
2 *to throw various possibilities at the Tribunal – an unspecified two out of three – as*
3 *a safety net to an otherwise defective claim. It is open to the Claimants to run an*
4 *alternative case – that there was a cartel between only two of the Defendant groups –*
5 *but if they are to do this they must properly particularise that case.”*

6 Then further down in paragraph:

7 *“Pending particularisation of any such case ... it is not proposed that the Claimants’*
8 *economic evidence will seek to distinguish the position between Defendant groups.”*

9 I am going to come back to the significance of that particular point, but that was one
10 of two places where the Tribunal expressed its expectation that there will be further
11 particularisation. The other one is paragraph 30, on the opposite page. The Tribunal
12 says:

13 *"We have identified the lack of particulars in the Claimants' pleaded case that the cartel*
14 *may be between two (rather than three) unspecified Defendant groups. In submissions*
15 *the Claimants gave the impression this was unlikely to form a major part of their case.*
16 *We have therefore ordered that, after disclosure, any alternative case should be*
17 *properly pleaded."*

18 THE CHAIR: But this is two out of three, and now we have two, so that all sort of falls
19 away, doesn't it?

20 MS FORD: Sir, that is the convenient way the Claimants have chosen to seek to
21 address it. Perhaps I can show you what they have done. Tab 31 of the bundle, which
22 is the other bundle.

23 THE CHAIR: By the way, at some point, it doesn't have to be today, the colours are
24 getting increasingly difficult to read, so it would be very helpful to have a sanitised
25 version. My eyesight is the problem, not anything you have done. Sorry. Where did
26 you want to go?

1 MS FORD: Paragraph 39. The Tribunal will recall that this is the paragraph that
2 pleads the standalone case of a cartel allegedly going beyond the Commission
3 decisions. The Tribunal can see in the struck-out version that the previous version
4 pleaded a cartel between the undertakings to which the addressees of the decision
5 belonged, or any two or more of them in combination, and that was the particular issue
6 the Tribunal was focusing on in its ruling.

7 The new addition is the allegation that the cartel at all times included Autoliv and ZF.
8 It is a convenient new addition, because those are the only two Defendant groups left
9 standing. Autoliv and ZF are said to have been involved at times with one or more of
10 the other addressees of the decisions.

11 THE CHAIR: Uh-huh.

12 MS FORD: There were no new contemporaneous documents pleaded in support of
13 that change of position. The straightforward change is that, whereas previously the
14 case admitted the possibility that one of Autoliv or ZF might have been involved, and
15 the other might not have been involved, now it is simply asserted without any further
16 particulars that, in fact, they were both involved for the entire time period.

17 Now, in our submission, that's an amendment which is superficial in the extreme. It
18 doesn't provide proper further particularisation of the Claimants' case and, in our
19 submission, it does not provide sufficient information of the actual case that's going to
20 be run at trial to enable the Tribunal to satisfy itself with confidence that there can be
21 no conflict of interest here.

22 When I come on to address the Tribunal on the substance of why we say there
23 continues to be a material risk of conflict of interest, I will be relying on this
24 paragraph, and the very superficial changes that have been made.

25 But dealing first of all with what we say are the particular changes in circumstances,
26 the fourth one is that we have now received the Claimants' expert evidence, and

1 having been able to see the contents we say that there are two further aspects of the
2 Tribunal's reasoning in its decision in relation to which there have been material
3 changes.

4 The first is what was said by the Tribunal in paragraph 24 of the ruling. This is back
5 in the first bundle, Tab 20, page 175.

6 THE CHAIR: Uh-huh.

7 MS FORD: There the Tribunal expressed the expectation that the Claimants' single
8 expert report would provide the Tribunal with conclusions based on their analysis of
9 the totality of the data. The "*totality of the data*" is the phrase that the Tribunal uses
10 about --

11 THE CHAIR: Okay, but, I mean, I don't attach too much significance to that. As
12 I understand it, what the Claimants' expert has done is look at a period and say the
13 prices are higher during this period – by reference, I think it was, to PSA data – than
14 a later clean period.

15 MS FORD: Yes.

16 THE CHAIR: So, you're going to have to respond to that. You don't have to, but one
17 assumes you will wish to respond to that. The key question seems to be, what is it in
18 your response that gives rise to a conflict?

19 MS FORD: Well, Sir, I am, at the moment, separating out the question of conflict from
20 the question of material change of circumstances. We will come on to address what
21 we say is the substance of the conflict point but, at the moment, I am identifying
22 matters that have changed.

23 THE CHAIR: Right. Nothing has changed inasmuch as the expert evidence wasn't
24 served when paragraph 24 – I mean, we can have an argument about what we meant
25 about the "*totality of the evidence*". The Claimants have looked at the – I thought we
26 might have been – anyway. The Claimants have looked at the data and the evidence

1 and they have identified a price difference by reference, one assumes, to the best data
2 available to them and the most suitable data. So, I am not really agreeing with you
3 that this is a change.

4 MS FORD: Sir, that assumption is obviously something which is open to us to
5 challenge in our expert reports as to whether it is the best available data and the most
6 suitable data. The relevance to the Tribunal's ruling is that the Tribunal was drawing
7 a comparison between the anticipated approach of the Claimants, which it expected
8 would cover the totality of the data, and the anticipated approach in the Defendants'
9 individual reports, which would opine on different subsets of data, and the implication
10 was that it was preferable to opine on the totality of the data, and the point we make
11 is that, in fact, having now been received, the Claimants' expert report has not done
12 that. It has only commented on a sub-set of the data.

13 THE CHAIR: But, as I say, and I am looking forward to you getting to it, the question
14 is: how are you going to be responding to this evidence and what are you going to be
15 demonstrating based on your own econometric analysis?

16 MS FORD: Sir, the Defendants set out their anticipated approach in their evidence
17 last time round and they indicated that they would be relying on their individual data
18 sets. The Tribunal, in my submission, would be assisted by that, because that is
19 something that the Claimants' experts simply have not grappled with and have not
20 addressed. So, insofar as the Tribunal wishes to understand the content of the totality
21 of the –

22 THE CHAIR: The data sets to do what? I understand there are the data sets, but then
23 there is perhaps the more important question as to what it is you are saying the data
24 set, the analysis of that data set shows.

25 MS FORD: Sir, I am not in a position to pre-judge the outcome of the experts' analysis
26 in terms of the substantive conclusions. What they will be analysing and potentially

1 challenging is the assertion that it shows an overcharge.

2 THE CHAIR: I mean, this is important, because we are getting quite close to trial. You
3 are not in a position to say what your economic data is going to be directed at, at the
4 moment, other than saying that it is not - there wasn't an overcharge? You can't give
5 me any more particulars than that?

6 MS FORD: Well, Sir, the position hasn't changed since the detail that we gave before,
7 that the Defendants propose to conduct an analysis based on their own subsets of
8 data and that, in my submission, will assist the Tribunal in understanding whether there
9 was or was not an overcharge, because it will complement and potentially challenge
10 an analysis which has been performed on one third of the data available from the
11 Claimants.

12 THE CHAIR: Right. So, you're going to analyse the prices you charged, I assume
13 you mean by data, the prices you charged to the Claimants. Is that right?

14 MS FORD: I anticipate that's at least one element of it, yes. I hesitate to say that
15 that's the sole input into the analysis, but –

16 THE CHAIR: Well, I think if you are coming here saying there is a conflict if you use
17 a data set, we do need to understand that with some clarity today. This evidence is
18 due in on 24th May. I would have understood if I was asking you this question six
19 months ago, you may be a little unclear as to what it is you are going to be doing, but
20 you now have the Claimants' expert evidence so you must have an idea of the
21 potential evidence you're going to be putting forward and I think we need perhaps
22 greater clarity as to what it is you are proposing and why it is you need an extra expert.

23 MS FORD: I was going to come on to that. May I deal with one last point, what we
24 say is the material distinction, and then I will come on to the substance of what we say
25 is the conflict that arises.

26 THE CHAIR: I am still saying, at the moment: what is it that you are proposing your

1 expert evidence is going to show?

2 MS FORD: Sir, you will appreciate the basis of this application wasn't made – we
3 have not sought to put evidence before the Tribunal for the purposes of this application
4 to set out the present basis of our expert evidence, not least because, of course, we
5 are still hoping that we will be able to pursue it with a standalone expert rather than
6 a joint expert.

7 THE CHAIR: Right, but, first of all, leaving aside which data set one uses, whether it
8 is your data or the other parties' data, or a combination, leaving aside which data set,
9 what is it you are anticipating that analysis will show? Just saying that there is not
10 an overcharge, I mean, I do get that bit, but more specifically. What the Claimants'
11 expert has done is looked at a period. This is the price. It's X% higher with this percent
12 variability than the second period. Now, are you going to do the same thing or do
13 something else?

14 MS FORD: It is my expectation that there will be a before and after analysis of the
15 cartel period including the clean period post cartel. I am going to come on to explain
16 to the Tribunal why the actual periods that are analysed are a particular source of
17 potential conflict because, of course, the Tribunal will recall that there are differences
18 between –

19 THE CHAIR: So, you are going to do a before and after analysis to look for price
20 differences and you would prefer to do that – you are proposing to do that using your
21 own data set and not the data set from the other Defendants.

22 MS FORD: That was the proposed approach that we put before the Tribunal. We
23 would also potentially analyse whether the periods on which the Claimants focus are
24 the correct periods, the most informative or the most robust periods, and the reason
25 why that becomes particularly material is because the periods of time in which each
26 of the Defendants have been found by the Commission to have participated in

1 | infringements differ. They differ as between various infringements, and they differ as
2 | between various products. So, the position of the Defendants may well be different
3 | as to what they say are the relevant periods one must analyse and where the cut-offs
4 | are, and I am going to come on to show the Tribunal that this is a particular point that
5 | the Claimants' expert has focused on and taken a position on.

6 | THE CHAIR: Just tell me what you want to do. What period do you say is the relevant
7 | period?

8 | MS FORD: I am making this application jointly, insofar as I was making a submission
9 | on behalf of the ZF Defendants, we would say that the relevant position to focus on
10 | would be driven by only those infringements that the ZF Defendants have been found
11 | to participate in. So, they were only an addressee of the OSS2 decision. They were
12 | not an addressee of the OSS1 decision. Therefore, we would say that one would need
13 | to formulate an approach which properly takes into account a distinction between at
14 | least those two.

15 | THE CHAIR: Right. Let's get out the pleading. Tab 31. As I understand it, you are
16 | pointing to – tell me if I have got this wrong. You are suggesting that because ZF /
17 | TRW was not subject of OSS1 and only OSS2, the relevant dates will be starting in
18 | 2007.

19 | MS FORD: They will be, certainly, we would say –

20 | THE CHAIR: It is paragraph 24.

21 | MS FORD: Yes. That is the relevant start date for the purposes of the ZF / TRW
22 | Defendants. I will come on to show the Tribunal what the Claimants' expert has done
23 | in this respect –

24 | THE CHAIR: I know what the Claimants' case is because we have their expert report.
25 | I am really trying to pin down why you say you need a separate expert and in order to
26 | do that it is necessary to understand what it is you are going to be saying. So, you

1 | would analyse your data from 2007 until?

2 | MS FORD: It is not simply a case of one only analyses the period of participation in
3 | an infringement. What one would want to do would be to formulate a model which is
4 | capable of analysing relevant distinctions between periods. So, for example, what is
5 | considered a clean period for the purposes of my clients wouldn't necessarily be the
6 | same period as would be considered the clean period for the purposes of the Autoliv –

7 | MR TURNER: Okay.

8 | MS FORD: – participation.

9 | THE CHAIR: So, there will be a later clean period. I will not pin you down on a date
10 | for that. So, you are going to compare from – let's say until 2011 for present purposes,
11 | but I understand that's not a date that you are settling on at the moment. You'd look
12 | at prices. Prices charged to whom? To the Claimants?

13 | MS FORD: It is not limited to the Claimants, not least because these infringements
14 | weren't addressed to the Claimants, but I hesitate to make submissions – the data
15 | that is available is the Claimants' data and the Defendants' data concerning sales to
16 | the Claimants. So, to that extent, it is prices to the Claimants.

17 | THE CHAIR: So, it is the prices to the Claimants and you will be saying that the prices
18 | are the same or they are not as – there's not as much overcharge as contended by
19 | the Claimants?

20 | MS FORD: That would be what the Defendants' analysis would seek to explore. I am
21 | not purporting to, in any way, pre-judge what the independent expert would conclude
22 | is the case, but that is the issue which one would seek to explore.

23 | THE CHAIR: Right. Fine. Yes. That's fine. Then is your expert evidence going to
24 | include anything else?

25 | MS FORD: Yes. Again, without wanting to tie the hands of the relevant experts, one
26 | of the characteristics that the Tribunal will have noticed of the Claimants' approach is

1 that they have conducted one single analysis producing one level of overcharge which
2 purports to take into account the infringements found in the OSS1 and OSS2
3 decisions, the allegations of cartel conduct as yet unproven, which they make on
4 a standalone basis and –

5 THE CHAIR: Sorry. You are going too fast. My brain is not following you, at the
6 moment. Just take that more slowly. What else is it that you want to do?

7 MS FORD: We would look at, separately, the questions of what, if any, consequences
8 arose from the OSS1 and OSS2 decisions.

9 THE CHAIR: How are you going to do that?

10 MS FORD: One would seek to formulate a model which draws appropriate distinctions
11 between, for example, time periods and products.

12 THE CHAIR: So sorry. My question is – I understand what the Claimants have done.
13 The Claimants have done something very simple. I am not in any way wishing to
14 deride the work they have done, but it has actually been conceptually simple. They
15 have said the prices are this during that period, and something else during that period.
16 Their model is neutral as to what the causes are. It is just a simple analysis of price
17 differences. I understand you are going to do something similar, are potentially doing
18 something similar, and you may get a different result. I understand that, but how are
19 you going to – you are now saying you are going to do something additional, which is
20 look at OSS1 and OSS2, which obviously didn't involve the Claimants at all.

21 So, what is it that you are going to do which is going to be relevant to what this Tribunal
22 has to decide as a practical matter – how are you – you already say you are going to
23 look for price differences. What else is your economist going to do?

24 MS FORD: The economist would seek to explore – address separately the question
25 of: what are the consequences of OSS1 and OSS2, which are infringements which
26 have been found by the Commission?

1 THE CHAIR: What are the consequences on the Claimants?

2 MS FORD: Yes.

3 THE CHAIR: How are you going to do that other than looking at prices in one period
4 and prices in another period?

5 MS FORD: One would seek –

6 THE CHAIR: How can the economic model distinguish between – how can
7 an economic model know it was something to do with OSS1 rather than OSS2? How
8 could your economic model begin to ...?

9 MS FORD: Sir, that's the expertise of the economists, that they must specify the model
10 in such a way as to seek to draw these issues out –

11 THE CHAIR: That's not an answer to my question. Do you want to take instructions
12 on this and find out if we need to rise, find out what it is an economist would do if you
13 were given permission, in either case, whether it is a joint economist or separate
14 economists, what it is they are going to do to throw light on this issue of whether it is
15 OSS1 or OSS2? Would you like us to rise for five minutes while you take instructions
16 on this?

17 MS FORD: I think that would assist.

18 **(Short break)**

19 MS FORD: There are two different effects that the economists might be asked to
20 analyse. One is a cartel effect, and the second is an umbrella effect. There can be
21 no cartel effect in relation to OSS1 and OSS2, because those decisions did not
22 concern a cartel directed at the Claimants. There may be, and this is the Claimants'
23 case, that there would be a cartel effect insofar as they are able to establish that there
24 is a cartel – a standalone cartel which was directed at them. So, the economists would
25 be looking at that question of whether there is a cartel effect.

26 Insofar as the Tribunal were to find as a question of fact that there was no cartel which

1 went beyond the findings in the Commission decision, then the economists would be
2 looking at the umbrella effect. So that would be the extent to which infringements
3 which have been found which are not targeted at the Claimants might nevertheless
4 have had an impact on the prices to the Claimants. So those are the two
5 headline questions that one would expect the economists to look at.

6 In doing so, what they would seek to do is to identify relevant distinctions between
7 causal factors that they're trying to separate out. So, for example, relevant distinctions
8 between the infringements found in OSS1 and OSS2, and an obvious example of that
9 is the different time periods.

10 Now, I appreciate that the Tribunal is asking me about our experts, but in my
11 submission, it does assist to look at the judgements that the Claimants' expert has
12 made in doing this because it illustrates the judgements the Defendants' expert will
13 have to make.

14 THE CHAIR: We will get to that in a minute, but you have not really pinned down or
15 answered my question. I want you to be much more specific about what it is that you
16 want your economic expert to do. As I understand it, you want to look at the difference
17 in price for the products you supplied – you want to look at the prices you supplied
18 and compare them to what?

19 MS FORD: What they would have been in the counterfactual absent the relevant
20 infringements and, of course, the relevant infringements –

21 THE CHAIR: Okay. I just want to pin down what it is you want to do. You want to
22 look at the prices of the products you supplied and compare them to what other period?
23 So, what are the periods you want to compare?

24 MS FORD: That's the exercise of judgement for the experts and the answer to that
25 question –

26 THE CHAIR: But you are serving your evidence in a month. You must have some

1 idea of what it is. Without pinning you down to the day and the time, you must know
2 broadly speaking what it is you want to do.

3 MS FORD: Sir, to put it bluntly the expert who is instructed on behalf of ZF will be
4 instructed to investigate whether or not they are able to specify a model which
5 distinguishes between the infringements that ZF has been found to –

6 THE CHAIR: I am sorry. What is it that you want the economist to measure?

7 MS FORD: The economist identifies, on one way of doing it, and I am not limiting,
8 relevant time periods over which their model applies and the choice of time period
9 enables them to scrutinise the potential causes of the effects that they are identifying,
10 and this is the point where I do think it is helpful to look at what the Claimants have
11 done because it illustrates exactly how one does that as an economist.

12 So, if we look at –

13 THE CHAIR: We will get to that. I just want to understand what it is you are saying.
14 You are looking at the price of the articles you have sold to the Claimants. You won't
15 be looking at – so the Claimants looked at – they picked PSA, I think, and then they
16 looked at the price of articles you supplied and articles that the other group supplied.

17 MS FORD: Yes.

18 THE CHAIR: You just want to use a subset of that, as I understand it, look at the price
19 of the articles that you supplied and try to control for various factors and look at
20 differences between different periods.

21 MS FORD: We would focus on our data as to the products we supplied, so it's a subset
22 in the sense that it wouldn't include Autoliv's products, but it is not a subset in the
23 sense that it is a different data set. They have looked at PSA data. We will be looking
24 at ZF data.

25 THE CHAIR: To PSA.

26 MS FORD: To all Claimants. So, in that respect it adds to the sum of knowledge.

1 THE CHAIR: You will be looking at – again you are not in a position to tell me what
2 periods you will be looking at, at the moment?

3 MS FORD: Well, we will obviously conduct an analysis which seeks to meet the
4 allegations the Claimants have made. So, in that respect it would cover the entire
5 period, but the subtlety is how one then breaks up the periods in order to try to
6 interrogate whether or not there are different causal things going on in different periods
7 of time. So, if one were to instruct an expert on behalf of ZF, one would say "ZF has
8 been found to be party to a cartel during this period. Please investigate whether or
9 not this period prior to that and this period post that exhibit any relevant distinctions.
10 What does your data tell you?"

11 THE CHAIR: But, on its face, it seems all the expert can do is say there are price
12 differences in that period. The economic analysis can't say whether the price, even if
13 it is a meaningful question, which I doubt, say whether the price differences arise
14 because of what was going on at Toyota or whether the price differences arise
15 because of what was going on at Volkswagen, i.e., umbrella effects, or whether the
16 price differences arise because of direct cartel activity with respect to the Claimants.
17 It's just not going to be – there is no economic magic which enables you to distinguish
18 between those two unless you are able to explain to me why there is.

19 MS FORD: Sir, you are right to a point, in that the identification of an effect doesn't
20 necessarily answer what is caused by that effect. However, one would seek to break
21 down the overall period into sub periods which enables that effect to be interrogated
22 more effectively and the choice of sub periods would differ depending on when the
23 relevant party has been found to have infringed and when it is an issue as to whether
24 they infringed or not.

25 If one, for example, to take an extreme example, were to only look at one entire global
26 period, that would not enable one to comment on the effects – the potentially varying

1 effects, within that period. So one might then break it down into a period (a) which
2 predates any finding of infringement, a period (b) which includes infringement by one
3 party but not infringement by another party, a period (c) which includes infringements
4 by both parties, a period (d) in relation to which, for example, one party – again one
5 party’s infringement went on longer but one party’s infringement ceased, and one
6 would seek to analyse what the data tells you, having sought to incorporate the
7 relevant differences.

8 THE CHAIR: Okay. So, the obvious – I don’t know why we are being quite so abstract,
9 but the date – you say the OSS2 finding started on 4th January 2007 and there’s
10 nothing from the OSS decisions to suggest that you were involved in cartel activity
11 before that date.

12 MS FORD: That is correct for ZF. I am obviously making an application jointly, so
13 I am being careful to distinguish the submissions I am making.

14 THE CHAIR: Who are you representing from OSS1? I am getting confused now.

15 MS FORD: The application to vary the order is made jointly by both ZF and Autoliv,
16 so in that respect I am acting for both. In so far as you are asking me about what we,
17 ZF, would instruct our expert to do, you are right that ZF is party to OSS2 only. Autoliv
18 is party to both.

19 THE CHAIR: Sorry. Autoliv was in the earlier OSS? I am trying to separate you out
20 at the moment.

21 MS FORD: (Overtalking).

22 THE CHAIR: Let’s concentrate on ZF. You, as ZF, might say “Look, we weren’t
23 involved pre-January 2007”. There is no evidence that the Commission found that.
24 So, you would want an analysis pre-2007. You are speculating that there might be
25 a difference in respect of overcharge post-2007 and pre-2007.

26 MS FORD: That is a simplistic version of what the economist would do, but that is the

1 | important thing.

2 | THE CHAIR: Why is it simplistic? What is it the economist is going to do that's different
3 | to that, because that's all the Claimants' economist has done, is looked at price
4 | differences between the periods.

5 | MS FORD: Because it is not simply the case of January 2007 and looking before and
6 | after. There are multiple – one must control for various factors.

7 | THE CHAIR: Which factors are you controlling for?

8 | MS FORD: The factors that one seeks to control are those that would affect price
9 | other than the cartel effect, so, for example, costs.

10 | THE CHAIR: Yes, of course, yes, but that – okay. Right, but that's not going to give
11 | you any information about the causes of the –

12 | MS FORD: Well, it is –

13 | THE CHAIR: It is not going to distinguish between umbrella effects and direct cartel
14 | effects.

15 | MS FORD: No. What one seeks to do is identify the distinctions between the
16 | infringements that have been found and allegations that have been made. The
17 | additional complexity comes when one has an additional alleged standalone cartel
18 | which is based on individual alleged contacts, and one says "Okay. Well, the contact
19 | that is relied on pre-dates this point where there has been a finding of infringement,
20 | but post-dates that point", and one then must take into account the various factors that
21 | one is trying to separate out. That is what the Claimants have done. I appreciate you
22 | are asking me, but it does assist --

23 | THE CHAIR: I am asking what you are going to do. I am not asking what the Claimants
24 | are doing.

25 | MS FORD: What my expert will do is exercise similar judgements to the ones the
26 | Claimants' expert has made, but will seek to extrapolate in a more granular way than

1 the Claimants have done, because it is not in their interests to do so. They don't seek
2 to identify or distinguish between potential causes and effects because they have no
3 interest in doing so. My clients do have an interest in seeking to distinguish between
4 the infringements in which they have been found to have participated and anything
5 else.

6 THE CHAIR: I don't understand how you are going to do that other than look at certain
7 dates.

8 MS FORD: Dates and potentially also the identity of the products in the sense that at
9 least in the OSS1 case there were cartels which targeted particular products, whereas
10 in OSS2 there were cartels which targeted – were found to have targeted more than
11 one product and that's a relevant factor that one will seek to look at. Of course, the
12 Claimants have found varying levels of overcharge in respect of different products.

13 Insofar as the Defendants have been part of the cartels involving different products,
14 again their interests in seeking to explore the causes and effects of that will differ.

15 PROFESSOR NEUBERGER: The only question I had is that I was facing with some
16 trepidation the notion that at trial we will have experts, whatever number of experts,
17 on the overcharge talking from different data sets. Isn't this going to be a problem in
18 just making the trial unmanageable? It sounds like people singing from different hymn
19 sheets altogether?

20 MS FORD: What one seeks to do to try to see the extent of common ground is that
21 the experts get together and agree to disagree. It may be that they are able to assist
22 the Tribunal in what can be drawn from each other's data sets. What normally
23 happens is they have a positive case. So, for example, the Claimants would have said
24 "We think that the PSA data is the only one worth looking at", but in so far as
25 a Defendant has looked at a different subset of data, the Claimants' expert will analyse
26 that and indicate the extent to which they think there are things they can agree with or

1 the extent to which they think that there aren't. So, there will be a process of interaction
2 between them that ought to enable the Tribunal to seek to reconcile those, but in my
3 submission, it is important that in contrast to the expectation that the Claimants will
4 produce a global analysis which does traverse all the data, we now know that they are
5 producing an analysis which is limited to a subset.

6 It is a matter for the Tribunal to decide whether that is a correct judgement or not,
7 whether it is right that that's the only data that provides you with an informative answer
8 or not, and so the Tribunal is assisted in that exercise by having the Defendants
9 looking at different data sets.

10 PROFESSOR NEUBERGER: But if the Claimants are basing their case on a data set
11 which is unnecessarily restricted, doesn't that mean that they will weaken their own
12 case? I don't understand why – I don't understand why the grounds – why the
13 argument can't be on the basis of a single data set and if it shows – if there is enough
14 data there which is of credible quality to show what's claimed, then that stands. If it is
15 not strong enough to support the claim, then the claim fails.

16 MS FORD: Well, we would certainly say that that is the correct analysis, that if there
17 is enough -- if there is not sufficient data in that data set, then the claim fails. However,
18 it is also open to us to seek to attack their analysis in other ways, and it is not – in my
19 submission, it would not be appropriate to limit us to dealing with the ground that the
20 Claimants have chosen to fight on. We are entitled to look at other data sets and put
21 forward a case based on those.

22 PROFESSOR NEUBERGER: I am just worried that we would then have to spend lots
23 of time looking at two different data sets or three different data sets with basically the
24 same information but all sorts of inconsistencies between them and that sounds like
25 a terrible way of spending a trial.

26 MS FORD: Mr O'Donoghue is pointing out that the Claimants have already

1 commented on the Defendants' volume of commerce data at the very least. He is
2 pointing at 6.3.1 in their report. So, they have, to a certain extent, begun the process,
3 although their primary case is looking at PSA data, they have looked across the piste.
4 So, there will be an interaction between the various preferred approaches.

5 PROFESSOR NEUBERGER: No, no. I can understand perfectly well on volume of
6 commerce that there may well be different views about what the numbers are and how
7 to get at them, but I am much more worried about – because that doesn't involve
8 complex econometric analysis. What I am really concerned about is being faced with
9 complex econometric analyses based on three data sets. That just seems to me to
10 create huge problems for the Tribunal and for yourselves.

11 MS FORD: Well, Sir, it does potentially mean that there is a question for the Tribunal
12 to decide about which is the most robust data set and that is potentially a matter that
13 will be in issue and one on which the experts will express their views, and then the
14 Tribunal would have to determine whether it is right that only this data set is a viable
15 one or not. It may be that the answer isn't quite as straightforward as that. It may be
16 that multiple data sets are potentially informative and then the Tribunal again will have
17 the assistance of the experts in seeking to reconcile the outcomes of multiple data
18 sets.

19 Insofar as those things are in issue between the parties, in my submission, that is
20 a matter that then falls to be decided by the Tribunal. In my submission, it wouldn't be
21 appropriate to preclude such issues arising by shutting out the Defendants from
22 bringing forward their case.

23 THE CHAIR: Can I ask you: is it your case that there are umbrella effects?

24 MS FORD: My expert has yet to reach a concluded view. I anticipate that the answer
25 will be “no” because the only infringements which have been found to exist were limited
26 infringements targeted at particular entities and the factual mechanisms by which

1 pricing occurred – I am now speaking about the evidence for the ZF Defendants – the
2 factual mechanisms by which pricing occurred were such that the pricing to one OEM
3 would not have influenced the pricing to another OEM and therefore our factual
4 expectation is no, there will be no umbrella effects but, of course, you will appreciate
5 I am not constraining what the expert concludes.

6 THE CHAIR: You are saying – this case has been going for a very long time and we
7 are a month away from service of your evidence. You must know whether you are
8 going to be advancing a case of umbrella effects. You are not doing this from scratch,
9 starting tomorrow.

10 MS FORD: Sir, I certainly think as a matter of pleading -- I think we have denied it as
11 a matter of pleading.

12 THE CHAIR: So, to be clear, and I do need you to be clear on this, you are not saying
13 that there are umbrella effects from OSS1?

14 MS FORD: In so far as the outcome of the econometric analysis were to identify
15 effects, if one can exclude the possibility that there are – there is a standalone cartel
16 and we, of course, do resist that possibility, then there is a question mark as to whether
17 those effects are properly attributable to OSS1 or OSS2 or both, and it will be in my
18 clients' interest to say that in so far as there are effects, they are not attributable to
19 OSS2, which is the infringement to which my client had been found to be a party.

20 THE CHAIR: Without being self-serving, as I understood it, you just said to me there
21 aren't umbrella effects. Therefore, it is no part of your positive case that the OSS1
22 activities impacted the prices that your clients were charging?

23 MS FORD: That would be a primary case, but we have to contemplate the possibility
24 that the Tribunal finds, contrary to our primary case, that there were effects as
25 a consequence of the econometric analysis.

26 THE CHAIR: You are not going to be putting forward economic evidence to say there

1 were umbrella effects?

2 MS FORD: Not positively but we need to address defensively the possibility that the
3 Tribunal might find to the contrary, including based on what the Claimants find.

4 THE CHAIR: In terms of trying to get away from theoretical conflicts can you explain
5 to me why, this close to service of evidence, why it is that even if different periods may
6 carry different weight, there's a conflict between ZF and Autoliv.

7 MS FORD: Because it is in ZF's interests to seek to explore in the econometric
8 analysis whether any effects can be attributed to matters other than those
9 infringements that ZF has been found to be party to. Autoliv has the opposite interest,
10 which is that they would wish to explore with their expert whether any effects can be
11 attributed to matters other than the infringements that Autoliv has been found to
12 participate in.

13 One very concrete way in which the experts will do that, and the Claimants' expert has
14 already started to do that, is to look at which periods their model should focus on and
15 seek to specify the period in such a way as to enable them to interrogate the data and
16 draw potential conclusions about where these effects are coming from and in doing
17 that exercise, in exercising that judgement, if one is seeking to analyse what is
18 attributable to ZF's infringement, one would approach it differently, potentially, than in
19 seeking to analyse what is properly attributable to Autoliv's infringement.

20 THE CHAIR: I am still struggling to understand how you are going to do any of this.
21 All you can look at is price differences.

22 Perhaps I can just ask you another question. Let's assume you want to distinguish
23 between the period of OSS1 from the period of OSS2, so we are dealing with pricing
24 as against the Claimants during that period. Are you advancing a positive case that
25 you weren't involved in any cartel activity as against Toyota, Honda or Suzuki during
26 the period of OSS1. I appreciate there is no finding to that effect but there is not a

1 finding that you weren't. It is just simply not dealt with in the OSS1 decision.

2 MS FORD: It is dealt with in that effect. We deny any infringement beyond that which
3 has been found in OSS2.

4 THE CHAIR: So, you are going to be producing evidence to show that the OSS1
5 period is a clean period? The date when your collusion started, your cartel activity
6 started – are you going to be explaining to the Tribunal why we can assume from your
7 perspective that the OSS1 period is a clean period?

8 MS FORD: Well, we will certainly be saying that we deny any involvement in any
9 infringement at any other relevant time.

10 THE CHAIR: Yes, but are you putting forward a positive case to that effect? Denial
11 is not a positive case. It is just saying you have not shown it.

12 MS FORD: We have factual witnesses who are giving evidence as to the way prices
13 were set, and those factual witnesses – their evidence is essentially that there would
14 have been no collusion with competitors.

15 THE CHAIR: So, you will be explaining – you will be giving factual evidence as to
16 when the collusion started?

17 MS FORD: Well, ZF accepts the findings of the Commission decision and doesn't
18 seek to dispute them.

19 THE CHAIR: No, but if you want to pull out the OSS1 period as different – again I am
20 just repeating the question. I am not sure you are answering it. Will you be saying
21 that that's a clean period and adducing evidence to show it is a clean period?

22 MS FORD: I am not sure how much further I can go. We certainly – we will say that
23 it is a clean period because we did not commit any infringement beyond that found in
24 the Commission decision. We will bring forward factual witnesses who explain the
25 way in which pricing was undertaken, who also say that there was no infringement
26 beyond that found in the Commission decision. So, from ZF's perspective we would

1 say that any period other than that found in OSS2 is properly to be treated as a clean
2 period.

3 THE CHAIR: When are you filing your fact evidence?

4 MS FORD: Fact evidence is in.

5 THE CHAIR: We haven't got it, have we? I have not looked at it.

6 MS FORD: I don't think it is in the bundles.

7 THE CHAIR: That would explain it then. Thank you. Was there anything else? You
8 wanted to show me something on dates.

9 MS FORD: Yes. I wonder if I might briefly deal with the three heads of conflict of
10 interest dealt with in the ruling because it is important to emphasise where we come
11 out.

12 The first one is simple apportionment. The Tribunal will have seen the Court of
13 Appeal's indication that it considers it to be at least arguable that a conflict arises by
14 reason of the question of apportionment, which may be determined by reference to
15 the expert evidence -- .

16 THE CHAIR: So how will apportionment work? When, if and how?

17 MS FORD: The Claimants' position before this Tribunal last time round was that it
18 would not happen in this trial. That is not right, because they have in their expert
19 evidence traversed questions of respective responsibility as between these Defendant
20 groups. So, there is evidence –

21 THE CHAIR: That's not how I read the evidence. As I understand it, that table to
22 which you refer merely says who sold the goods.

23 MS FORD: Well, it is headed "overspend" which I understand to mean overcharge.
24 So, it is evidence which goes to the respective responsibility of the Defendant groups
25 in these proceedings. We cannot leave it unchallenged.

26 THE CHAIR: No. I am really not reading it that way. In fact, I think the report even

1 says, as I understand, that it is joint and several liability. If you sold a steering wheel
2 for £20 instead of £10, obviously you have overcharged, because you have sold it.

3 MS FORD: No, Sir. Then one has to ask: "Did you sell it in a period of time during
4 which you were party to an infringement? If not, to what extent is the overcharge
5 properly an umbrella overcharge?". It is not anywhere as simple as that. It is fine from
6 the Claimants' perspective to say: "from our perspective it is joint and several liability,
7 so don't worry", but as between the Defendants there is a concern about the respective
8 breakdown of responsibility between them. They do not want to be attributed
9 an overcharge for which they are not responsible and insofar as, for example, the
10 overcharge appears in a period where they weren't party to an infringement, that's very
11 relevant and something they would want to investigate.

12 THE CHAIR: So, you will be inviting this Tribunal to apportion losses?

13 MS FORD: No, but we have to grapple with the evidence that has been put in on
14 behalf of the Claimants, which does purport to separate out relevant responsibilities.
15 We can't leave it unchallenged.

16 THE CHAIR: I will ask Mr West about that. That was not my reading of it. I may be
17 misreading it. So, you will not be asking any apportionment from this Tribunal?

18 MS FORD: We will potentially seek to challenge any material that has been put in
19 which seeks to attribute a certain volume of responsibility to particular Defendants,
20 because that is material which will then be pertinent to any subsequent exercise of
21 apportionment, including that it would be potentially binding in relation to subsequent–

22 THE CHAIR: Parking umbrella for a moment. Insofar as there is direct cartel activity,
23 you must stand and fall together. One of you can't be responsible if the other one isn't.

24 MS FORD: Sir, no, in my submission, because although the Claimants' headline
25 allegation is that each of the Defendant groups were involved throughout, it is entirely
26 conceivable that the factual position on a proper analysis is that it transpires that they

1 weren't. So even if this Tribunal were to find, for example, that there were relevant
2 cartels involving both parties for a certain period, experience from the Commission
3 decisions, for example, suggests it is unlikely to be that simple. There may well be
4 periods when –

5 THE CHAIR: That's the case when – I will ask Mr West, but, as I understood it, the
6 case was you were in a cartel with each other and if one of you drops out, that is it.
7 Although others may be involved in the cartel, you both have to be present in order for
8 that you both have to be involved in that cartel activity in order for his claim to succeed.

9 MS FORD: That is certainly the way in which he has now pleaded his claim
10 conveniently in order to attempt to avoid any questions of conflict. It may succeed or
11 it may fail in relation to particulars –

12 THE CHAIR: But it can't succeed as against one of you and not the other. There can't
13 be any issues of apportionment arising on this.

14 MS FORD: Well, certainly the pleaded case is together at all times with any other
15 addressee of the Commission decision. It may be that the Tribunal, on analysis,
16 decides that one of these Defendants was involved and one of them wasn't. One can't
17 rule that out. I am certainly happy to embrace the possibility that that means the claim
18 fails in its entirety.

19 THE CHAIR: That's my understanding. Mr West, is that your understanding at the
20 moment or not?

21 MR WEST: It is, yes. We don't allege a one-person cartel.

22 THE CHAIR: One person with somebody who is not in the court.

23 MR WEST: Yes.

24 THE CHAIR: So that point falls away.

25 MS FORD: To be clear, the case is not that one of these Defendants with another
26 party at any period of time was involved in the cartel. It always has to be both

1 Defendants?

2 THE CHAIR: Yes. So, you got something out of today. So how will apportionment
3 work on the umbrella claims? You say: "One of us could be involved in the OSS2
4 cartel, Autoliv, but ZF wasn't involved in the earlier one". So how would we go about
5 apportioning, bearing in mind there's a direct cartel claim as well?

6 MS FORD: Evidence has been put in against both Defendants purporting to quantify
7 the extent of their responsibility for the infringements. That will need to be challenged
8 in these proceedings. So, it is not that my client is inviting the Tribunal to apportion.
9 It is that material relevant to debates about apportionment is before the Tribunal and
10 will need to be addressed. In those circumstances one comes back to this issue of
11 what can the economists be instructed to do to explore the question of whether or not
12 that table does, in fact, reflect a fair apportionment as between these parties or
13 whether or not, for example, there are periods when the only infringement that was
14 active at the relevant time is attributable to one Defendant but not the other.

15 So, notwithstanding that they made the sales, one can infer that they were not liable
16 for any overcharge during that period. That exercise necessarily has to be done not
17 least because this information has now been put before the Tribunal and will be
18 challenged, and as a matter of practicability it will always have to be done.

19 THE CHAIR: You are speaking to Mr O'Donoghue at the moment – sorry, the parties
20 are speaking to each other, and legal advisers are speaking to each other with regard
21 to preparing expert evidence. You are not in a position to identify any conflicts that
22 have arisen specifically. There's no evidence on any conflicts that have arisen as
23 I understand it.

24 MS FORD: There is a direct conflict, because in relation to a period of time where, for
25 example, there was an infringement found in OSS1 but no infringement in OSS2, it will
26 be in my clients' interest to say that we are not responsible for any overcharge during

1 the period where we were not found to participate in an infringement.

2 THE CHAIR: I understand.

3 MS FORD: It would be in Mr O'Donoghue's clients' interests to say the opposite.

4 THE CHAIR: I understand that, but I don't think that necessarily follows. So, you

5 weren't involved, you would say, at an earlier date in the Toyota and Suzuki matters.

6 So, insofar as we were concerned with a bare umbrella claim you'd say "well,

7 obviously, if it is a bare umbrella claim we can't be liable, because the umbrella doesn't

8 cover us". Mr O'Donoghue would not have that defence. I don't see necessarily that

9 would give rise to a conflict. It is just a different – you just weren't around.

10 MS FORD: These are the points we want to explore with the expert, the extent to

11 which there is a basis for, for example, my clients to say that, or Mr O'Donoghue may

12 want to ask the expert to explore the periods that are relevant for his clients.

13 THE CHAIR: But at the moment you have not identified any – you are not coming to

14 court and saying "We are preparing the evidence jointly and there is a point on which

15 our interests differ".

16 MS FORD: I do say that this is a point on which our interests differ.

17 THE CHAIR: Just tell me that point again so I have it with some precision.

18 MS FORD: The Claimants' expert evidence has purported to put in data which is

19 clearly pertinent to the apportionment of responsibility as between the ZF Defendants

20 and the Autoliv Defendants. In seeking to challenge that apportionment –

21 THE CHAIR: Just so we are not at cross purposes, the evidence you are speaking

22 about is –

23 MS FORD: It is summarised in the tables I drew the Tribunal's attention to, tables 1.5

24 and 1.6.

25 THE CHAIR: So, I am looking at Mr Hughes' expert report.

26 MS FORD: Yes.

1 THE CHAIR: I assume you are talking about 1.5. Yes.

2 MS FORD: 1.5 and 1.6, and then explained at 6.2 of the report.

3 THE CHAIR: Let me write this down. 1.5 and 1.6 and where?

4 MS FORD: Section 6. One sees again – this is the section of the report headed

5 "*Estimation of Overspend*" and again what he is doing is putting in issue in these

6 proceedings data that goes to apportionment of responsibility between Autoliv and

7 TRW.

8 THE CHAIR: Again, all that is in the Autoliv column is sales made by Autoliv and then

9 in the TRW column sales by TRW. It's not any – it is not seeking to attribute blame

10 or liability or – it is just: that's what you sold. Do you disagree with that?

11 MS FORD: I do, because the table is purporting to identify overspend. This was

12 what's being claimed by the Claimants jointly and severally. There is necessarily a

13 commercial dispute between Autoliv and TRW as to the extent to which, within that

14 joint and several liability to the Claimants, each party must bear these losses. So,

15 I am challenging these figures. In meeting them and responding to them our interests

16 are directly opposed.

17 THE CHAIR: But you add them together and you are jointly and severally liable for

18 the total.

19 MS FORD: Yes, but –

20 THE CHAIR: You are not inviting this Tribunal to apportion?

21 MS FORD: I need to challenge any data which purports to constitute

22 an apportionment for these proceedings, because of course –

23 THE CHAIR: If Mr West confirms it is not an attempt to apportion, then the weight will

24 fall away.

25 MS FORD: Sir, no, it won't, because first of all, there are provisions in the Contribution

26 Act which are potentially binding. As a matter of practicability, they will be binding.

1 So, one can't leave unchallenged data which is put in issue in these proceedings which
2 purports to constitute an apportionment.

3 THE CHAIR: If we make clear in our ruling, assuming we get as far as finding liability,
4 which is unknown, at the moment, if we say: all we were doing is identifying who sold
5 what, this is in no way an attempt to apportion quantum, then that's the end of the
6 matter, isn't it?

7 MS FORD: Sir, no, it's not. I am checking whether or not the authorities bundle has
8 the relevant provision of the Civil Liability (Contribution) Act. Yes. Tab 14 of the
9 authorities bundle.

10 THE CHAIR: I have got one now. Thank you very much. Where is it? Which Tab?

11 MS FORD: Tab 14.

12 THE CHAIR: Tab 14. Second volume.

13 MS FORD: Section 1, which is the entitlement to a contribution. The portion I have in
14 mind is sub-section 5:

15 *"A judgment given in any action brought in any part of the United Kingdom by or on*
16 *behalf of the person who suffered the damage in question against any person from*
17 *whom contribution is sought under this section shall be conclusive in the proceedings*
18 *for contribution as to any issue determined by that judgment in favour of the person*
19 *from whom the contribution is sought."*

20 So, there is a specific legislative provision saying that the effect of this Tribunal's
21 judgment will be conclusive in relation to these issues.

22 THE CHAIR: Right, but if you make -- all right. Okay. Was there anything else you
23 wanted to --

24 PROFESSOR NEUBERGER: Can I just ask -- to make sure I understand -- as
25 I understand it, in the Claimants' expert report the only numbers in the section you are
26 referring to which are Defendant-specific are volumes of commerce from each of the

1 two Defendants, and you are saying there is a conflict of interest – is your argument
2 that there is a conflict of interest – a potential conflict of interest between the two
3 Defendants on the amounts of the volume of commerce?

4 MS FORD: No, Sir. Although it is based on volumes of commerce data, the relevant
5 tables are setting out the Claimants' case on overspend and damages. One can see
6 that at page 748, for example, heading 1.9, "*Overspend and damages*". It is based on
7 volumes of commerce data but it is going further. It is setting out a breakdown of the
8 claimed damages. Just to pick up while we are here, it is doing it in relation to particular
9 periods, so what's defined as the early period and the main period is relevant to this
10 assessment and this judgement and the experts' exercise as to what should be the
11 relevant period one analyses.

12 It is setting out, for example, in table 1.5, overspend and damages. That's not simply
13 a volume of commerce dispute. It is a quite fundamental question as to the matters in
14 issue that the Claimants seek to recover from both of us, as to which our interests are
15 diametrically opposed.

16 PROFESSOR NEUBERGER: But that's based on the assumption that the
17 apportionment would be based on volume of commerce and if it is not based on
18 volume of commerce then there is nothing here which is relevant to apportionment.

19 MS FORD: Are you putting to me, Sir, that one might base it on, for example, relative
20 responsibility for the conduct in question?

21 PROFESSOR NEUBERGER: I have no idea. I don't know how apportionment would
22 be dealt with. All I read here is something to do with volume – what is Defendant-
23 specific is volume of commerce. It doesn't – I just find – I am finding some trouble in
24 understanding why there should be a conflict of interest between the Defendants on
25 respective figures for volume of commerce.

26 MS FORD: It is not simply how much we sold. It is how much we sold to which

1 a certain overcharge is applied over a certain period and for which, therefore, implicitly
2 or explicitly, in fact, each Defendant is responsible for that volume of sales at that
3 overcharge over that period, and those are the propositions that each Defendant would
4 wish to be able to analyse and challenge.

5 PROFESSOR NEUBERGER: I understand you.

6 MS FORD: I did say I would show the Tribunal the concerns I have about time periods.

7 THE CHAIR: Yes, if you could. Thank you.

8 MS FORD: So they are – if we start, for example, in the report at page 782.

9 THE CHAIR: 782. Just before we go back, just taking it in stages, just looking at the
10 introduction section, where there are tables but they don't refer to any dates. I am
11 looking at tables 1.3 and 1.4. That is correct, isn't it? We can't tell the dates from
12 them. We are going on to where you are suggesting –

13 MS FORD: Sir, I have the dates on –

14 THE CHAIR: Have we got the dates of the early period? We have actually. The early
15 period is 2004 and 2006 depending on category. It varies a little bit.

16 MS FORD: If the Tribunal looks at (inaudible) early in May. So that breakdown
17 (inaudible). Actually --

18 THE CHAIR: Sorry. I am with you now. So you were taking me to where?

19 MS FORD: Starting at page 782 –

20 THE CHAIR: Yes.

21 MS FORD: -- there is a heading "*Factors to consider when analysing whether there*
22 *have been Cartel overcharges on the Claimants' OSS product prices*". At 2.8.2 you
23 get:

24 "*In this case, the precise start dates of the Cartels (including any associated tacit*
25 *coordination thereby facilitated) are uncertain based on the contemporaneous*
26 *documents disclosed by the Defendants.....and vary across product categories.*

1 *These varying dates suggest that it should be tested whether New Contract and*
2 *Amendment overcharges started earlier than the dates indicated in OSS1."*

3 Then the analysis which follows – (a), (b), (c) – sets out the earliest collusion date in
4 OSS1 in relation to, for example, steering wheels, which is in 2006, the earliest
5 collusion date in OSS1 in relation to seat belts, which is in 2004. Then airbags, the
6 earliest collusion date one can find there is in 2005. One sees a similar analysis at
7 2.8.4 in relation to the end dates. Three out of four of the end dates there identified
8 come from OSS1. The Tribunal will have the point that, of course, ZF, my client, wasn't
9 actually party to OSS1. So, their position as to the appropriate start date and end
10 dates of this analysis might well be different.

11 One can see how that's then factored into the judgement that is to be made at 5.6 on
12 page 817. There's a heading "*Capturing the impact of uncertainty as to the start dates*
13 *of the Cartel Period*". What one sees is the approach the Claimants' expert takes to
14 grapple with uncertainty by control during what he defines as an early period and
15 during a main period. Then he looks at five or six periods he has chosen, which is
16 how he has defined the early period and the main period.

17 THE CHAIR: Right.

18 MS FORD: My submission is that whether that's the appropriate way in which one
19 defines the period, whether one might want to look at different periods or not, might
20 well differ as between my client and Mr O'Donoghue's client. That is an exercise of
21 judgement for the expert as to which period they think it is appropriate to select, in
22 relation to which there is a potential conflict of interest as to the relevant dates as
23 between us. It is a core part of the analysis, a core part of the methodological
24 approach that the Claimants' expert has taken, that our experts will wish to interrogate
25 and exercise their own judgement in relation to.

26 THE CHAIR: You have considered which dates are appropriate to analyse. Have you

1 discussed those with Mr O'Donoghue to see if there is a conflict there and if he
2 disagrees?

3 MS FORD: No, but I make the submission that there are potentially self-evident
4 conflicts. For example, my client will wish to say one doesn't include periods – one
5 must exclude or have the ability to interrogate periods when ZF has not been found to
6 infringe, and then Mr O'Donoghue would wish to say one would wish to interrogate or
7 potentially exclude periods where his client has not been found to infringe.

8 THE CHAIR: Why can't they all be interrogated? Why is that a conflict?

9 MS FORD: Because the expert has to exercise judgement as to the best way, the
10 most robust way in which to find answers to these issues. It may well be that that
11 judgement is impacted by differing considerations in relation to –

12 THE CHAIR: But you say the expert has to make decisions. As I understand it, you
13 want to say: "We want to pull out and analyse separately the period in which we may
14 or may not have been involved in a cartel". Why can't the expert just be instructed to
15 do that?

16 MS FORD: Because the exercise in specifying the model is not --

17 THE CHAIR: It is not specifying the model. It is just the period you are using –

18 MS FORD: That's specifying a model.

19 THE CHAIR: Really? It is just a period. You have an econometric model which is
20 controlling for all sorts of variabilities such as costs, transport, and all those sorts of
21 things, interest rates. I don't know what it has in it, but you could come up with a single
22 econometric model and then you can apply that at different dates, but that is different
23 to saying "No, no, no. I need two different experts to come up with their own different
24 econometric models, both of which may be equally legitimate and ..."

25 MS FORD: Well, Sir, the assumption that you are making is that there is a right or
26 correct date that one feeds into the model and that, in my submission, is not

1 necessarily the case. The authorities –

2 THE CHAIR: It is not a matter for the expert to say what the right date is. The Tribunal
3 will be investigating what the appropriate date is based on the facts, not based on an
4 econometric judgement, surely.

5 MS FORD: Well, it is a matter of judgement for the expert to formulate his model in
6 such a way as to seek to provide as much insight as possible, and that is an exercise
7 of judgement. There is not a concrete right answer, and in exercising that judgement
8 the expert may find themselves to be in a position of conflict of interest where different
9 dates are particularly relevant for different parties.

10 THE CHAIR: Just so that I understand the answer to my question, why can't the model
11 be used, but applied at different dates? I mean, you keep talking about lots of different
12 dates. There is only one date that matters, which is before OSS2. Why can't the
13 analysis be performed before OSS2 if your clients feel they can get something
14 additional out of that? When they look at the data, it may be there is actually nothing
15 to be said about it.

16 MS FORD: The Claimants' expert has looked at least at six different dates because
17 he breaks them down by relevant products.

18 THE CHAIR: But for each product. You understand what I am saying. For each
19 product. Let's say we are talking about steering wheels. You look at the relevant date
20 for OSS2. You will say "Right. Before OSS2 it is a clean period as far as we were
21 concerned. Let's look at what happened in that period", and why does the expert have
22 to say – what does it have to do with the expert? If you want him or her to look at that
23 period, why don't you just instruct them to do so?

24 MS FORD: Because it's not for the parties to dictate to the expert how best to
25 formulate their model. It is an exercise of judgement for the expert in the light of their
26 instructions to formulate their model appropriately.

1 THE CHAIR: Thank you. Okay. Was there anything else you wanted to ...?

2 MS FORD: To draw your attention to the fact that the dispute is not only in relation to
3 dates. There are also differing outcomes in relation to different components. This is
4 5.10 under "*Conclusions*", page 824.

5 THE CHAIR: Yes.

6 MS FORD: What we see is that there are different conclusions in relation to different
7 components and different periods.

8 THE CHAIR: Yes.

9 MS FORD: Again, in my submission, how one responds to and interrogates that may
10 well differ as between my clients and Mr O'Donoghue's clients.

11 THE CHAIR: Uh-huh.

12 MS FORD: In relation to umbrella damages we do place some emphasis on the
13 observation made by Lord Justice Popplewell when he gave permission –

14 THE CHAIR: We, as the Tribunal, have to decide to do what we think is appropriate
15 in all the circumstances. We are not responding to Lord Justice Popplewell's decision
16 to give permission to appeal other than as it affects the timing. Lord
17 Justice Popplewell – the Court of Appeal will tell us if we have got this wrong. We are
18 not here to sort of second guess what's going to happen in that appeal and respond
19 to it. So, I am not sure –

20 MS FORD: No.

21 THE CHAIR: Mr O'Donoghue, was there anything you wanted to add?

22

23 Application by MR O'DONOGHUE

24 MR O'DONOGHUE: I wanted to pick up on a point being made which is that in an
25 ideal world, for obvious reasons, it would be better if the Tribunal could look at one
26 dataset using one model. I fully understand that.

1 Now the difficulty based on Mr Hughes' report is, in a sense, that the cat is
2 unfortunately out of the bag already. If we go to his report, section 4. You have the
3 headline point that he is only looking at PSA data when it comes to overcharge. Then
4 he has a section saying why the Autoliv five databases are not suitable and then
5 likewise for ZF for three databases, he also says these are not suitable. There will, as
6 you will apprehend, be a debate as to whether he is correct that you should look at
7 one PSA set of data to the exclusion of Autoliv and ZF data.

8 Now whether there is a joint report or a single – two single reports, Autoliv – I can
9 certainly say this on instructions – we will be saying loud and clear that the Autoliv
10 databases are a better source of information. We are entitled to make that point. It
11 may or may not be accepted.

12 Now I understand the Tribunal's perspective at trial that it may well be a painful and
13 undesirable debate to have. I am simply making a preparatory point about efficiency,
14 which is that whichever approach is taken, the question of the correctness of excluding
15 the Autoliv data and indeed, I apprehend, the ZF data will be a live question at trial.
16 Therefore, the efficiency savings –

17 THE CHAIR: I don't think anyone is talking about excluding any data, Mr O'Donoghue.
18 The question is whether you need separate experts.

19 MR O'DONOGHUE: Indeed, Sir.

20 THE CHAIR: You can analyse whatever data sets you say is right –

21 MR O'DONOGHUE: Therefore, the efficiency of the single joint expert in that respect
22 has evaporated.

23 THE CHAIR: No, because the single joint expert will use a single econometric model
24 as opposed to two different experts who will be, and I use the term lightly, bickering
25 about which is the preferred econometric model –

26 MR O'DONOGHUE: That's the very point. In the joint expert report to come Autoliv,

1 whoever may be the signatory of that report, Autoliv) will be saying that in any event
2 the Autoliv databases have to be looked at. Now whether there is one econometric
3 model or two as a result, that doesn't matter. The databases have to be grappled with.
4 Therefore, from my perspective, the efficiencies have either evaporated or
5 substantially so. That's the only point I wanted to add.

6 THE CHAIR: Okay. I am grateful.

7 Mr West, before you start, what I really want to hear you on is this umbrella claim,
8 which is – let's just have a look at your pleading perhaps. So the umbrella claim – the
9 point is made against you, or against us, – the point is made that insofar as there is
10 an umbrella claim, if you look pre-2007, the parties' interests, the Defendant groups'
11 interests are not the same. There obviously is a point to be made there.

12 So, to what extent – as I understand, your expert is not really delving into whether it is
13 umbrella, whether it is direct collusion or really doing anything at the moment, just
14 looking at some price differences. Is it part of your case that there's an umbrella claim,
15 a self-standing umbrella claim before 2007 and, if so, can you explain how you are
16 going to prove that?

17

18 Reply by MR WEST

19 MR WEST: So, if one is talking about a pure umbrella claim, that's a pure follow-on
20 claim, so we are stuck with the findings of the Commission.

21 THE CHAIR: We have been using "umbrella" I think a little differently in this case.
22 You know what I mean. It is your paragraph 14 – where is it? Yes, paragraph 44 of
23 your claim.

24 *"Even if there was no cartel concerning ..."*

25 MR WEST: Yes, and we rely on the cartel found by the Commission.

26 THE CHAIR: Right. How are you going to – let's assume we look at all the documents

1 and conclude there is no evidence of a cartel based on the e-mails, letters and fact
2 evidence and so forth. I am going to call this alternative claim “umbrella” just for
3 simplicity. How is this umbrella – how are you going to prove this umbrella claim?

4 MR WEST: Well, in terms of liability, of course, we don't have to prove it, because the
5 Commission's findings stand and therefore the only question is whether my client
6 suffered any loss by reason of that. So, the price is inflated by reason of the umbrella
7 effects, but as far as the dates go, we are stuck with the dates in the Commission
8 decision, and so as far as Autoliv is concerned I think their first participation in OSS1 –

9 THE CHAIR: Hold on. Sorry. You have jumped the crucial – the crucial bit is how are
10 you going to prove that – you recast more accurately my question, but then you didn't
11 answer it. My question was: how are you going to show that there are these umbrella
12 effects impacting your client? Then you corrected me that it is actually damage flowing
13 from – all right. I have got that, but what's the answer?

14 MR WEST: I expect we will largely be reliant upon Mr Hughes' finding that prices fell
15 at the end of the Commission period – the periods covered by the Commission
16 decisions.

17 THE CHAIR: Right.

18 MR WEST: So, we will say that indicates that they were higher during the period of
19 the Commission decisions and therefore that demonstrates that there was an effect
20 from the Commission decisions, even if the Tribunal finds there was no direct cartel
21 against my clients.

22 Then in terms of how one allocates that responsibility, clearly Autoliv is on the hook,
23 as it were – if the Tribunal finds that there was that overcharge, Autoliv is on the hook
24 for sales from March 2006, I believe it is, onwards, and then both Autoliv and ZF /
25 TRW from January 2007. We're stuck with that, because that's what the Commission
26 held, and this element of the claim is a follow-on claim.

1 THE CHAIR: So ZF make the point that they need a separate expert to look at that
2 earlier period. What do you say to that?

3 MR WEST: I think what they are saying is they need a separate expert to look at the
4 non-overlapping nine-month period to see if they can identify whether the level of
5 overcharge during that period was different to the level of overcharge during the period
6 when both cartels were in operation.

7 THE CHAIR: That's my understanding, yes.

8 MR WEST: And if it was different, to try and make some submission about how that
9 then means one can, as it were, allocate the effects when there were both cartels and
10 say part of that effect was from one and part of that was from the other.

11 This is not incidentally a new point. This has been dealt with by Mr Hughes expressly
12 in his December letter, which is at Tab 36.

13 THE CHAIR: I am not really interested in whether it is a new point or not.

14 MR WEST: Well, it is relevant to whether this is an appropriate case for a variation.
15 What he says –

16 THE CHAIR: As I say, I am not at the moment interested – I am trying to get at – if
17 there is a conflict which we have overlooked or has become apparent, there it is, and
18 we need to deal with it.

19 MR WEST: What he says in his December letter is for the period when both cartels
20 were in operation, one can simply observe whether the prices were higher or not. He
21 as an expert can't say it was due to one or due to the other. For the nine-month
22 period – that happened from 2007 to 2011, so almost all of the period of operation of
23 these cartels. It is true that there is that brief nine-month period when only one was in
24 operation, and what Mr Hughes says is:

25 I do not anticipate that the data will allow me to calculate a separate overcharge.

26 So, it is not even a separate overcharge in relation to that period. It would be in relation

1 to contracts concluded during that period. So, the actual purchases may be
2 subsequent to that period. So, it is not even a question of looking at what were the
3 prices prevailing at different periods of time.

4 THE CHAIR: Show me why it is only nine months.

5 MR WEST: It's because Autoliv was first held to participate in OSS1 in March 2006.
6 This is just taken from the Commission decision.

7 THE CHAIR: In March Autoliv ...

8 MR WEST: Yes. If you look at the Commission decisions which are in Tab – OSS1
9 is in Tab 34.

10 THE CHAIR: Oh, I see. Sorry. I have missed that. Okay. 2006 for Autoliv.

11 MR WEST: I think it is right to say that the Commission found –

12 THE CHAIR: Hold on. It is only a few days.

13 MR WEST: No, because OSS2 then starts in January 2007. That's why I say nine
14 months.

15 THE CHAIR: This is December 2006. Sorry. Am I misreading this?

16 MR WEST: It's two different cartels. So, I think the earliest period –

17 THE CHAIR: There is one for July.

18 MR WEST: The earliest period is in March, if we look at infringement 4.

19 THE CHAIR: Yes. Okay. For Honda. Yes. Okay. So, it is up to nine months.
20 I understand. You talk about going back to 2002 at various stages.

21 MR WEST: But that's obviously not the umbrella.

22 THE CHAIR: Okay. I understand.

23 MR WEST: This point is all about the umbrella point.

24 THE CHAIR: Yes.

25 MR WEST: Mr Hughes – it might just be worth going to this because he deals with it
26 directly, and it's never been contradicted. Tab 36, his letter back in December, which

1 he was ordered to supply by the Tribunal at CMC 3, paragraph 4.3 he talks about
2 something called the "Secondary Case". Just to be clear, he is talking there about the
3 umbrella case. So he says:

4 *"The Secondary Case scenario envisages that there may be a distinct Price*
5 *Overcharge for each underlying OSS product cartel identified in the EC decisions,*
6 *during the period each was operating. However, the ability to estimate separate Price*
7 *Overcharges depends on whether the time periods affected by each underlying Cartel*
8 *differ, or in other words on the extent of the overlap(s) between the periods. In the*
9 *Secondary Case scenario, a number of different cartels were in operation (those found*
10 *in the two EC Decisions), which raises the question whether it is possible to establish*
11 *econometrically whether any cartel overcharge which is found is attributable to any*
12 *particular such Cartel, to the exclusion of the other(s). However, during the overlap*
13 *period both Cartels were operational and thus it is not possible to disentangle the*
14 *effects of an individual cartel – all that can be observed is their combined effect."*

15 THE CHAIR: So, for this nine-month period what's your case on there having been
16 a cartel between Autoliv and ZF?

17 MR WEST: Our case is that there was a cartel between Autoliv and ZF throughout
18 the period.

19 THE CHAIR: Yes, I know, but for that nine-month period how are you going to
20 demonstrate it? What's your evidence, which I gather is already in?

21 MR WEST: We rely on a number of documents to show that there was collusion.

22 THE CHAIR: So, you have documents going back to that period?

23 MR WEST: Yes, we have documents throughout the period which the claim covers.
24 Obviously, they are not uniform, as it were.

25 THE CHAIR: No, no, no. Sure. You say you will have some, in other words, fact
26 evidence –

1 MR WEST: Some fact evidence.

2 THE CHAIR: – for that nine-month period and, in fact, going back earlier. I hadn't
3 appreciated that.

4 MR WEST: Our case is built around two elements primarily. One is the factual
5 evidence, the documents indicating collusion directed at my clients. This is the direct
6 case I am talking about now rather than umbrella. The second is Mr Hughes' finding
7 of an overcharge during this period, because he does find an overcharge during this
8 period. It doesn't separate this period out.

9 THE CHAIR: But at trial you won't – probably won't be able, in any econometric
10 analysis, to distinguish between umbrella effects and direct collusion effects.

11 MR WEST: That's just not possible.

12 THE CHAIR: It's not possible.

13 MR WEST: If I can just explain, Mr Hughes in the passage I just read, dealt with the
14 overlapping period. He then deals with the non-overlapping period over the
15 page about four lines up from the end of 4.3, which says:

16 *"Likewise, there were only some five months after the end of the Cartels ..."*

17 Sorry. At the top of the page:

18 *"the period when only those Cartels identified in the first EC Decision were in effect,*
19 *prior to any of those identified in the second EC Decision coming into effect, is only*
20 *a few months (six months for Cartels I and II in the first EC decision and nine months*
21 *for Cartel IV)."*

22 So the nine-month period is actually only for one of the OSS2 cartels. He goes on to
23 say:

24 *"I expect that there will be insufficient data to separately identify the individual effects*
25 *of specific cartels over the very short periods of time they operated in isolation."*

26 So, he says it is not possible just based on the nature of the data to separate out

1 a different overcharge in relation to purchases made during that nine-month period or
2 purchases made under contracts concluded during that nine-month period.

3 Mr Hughes has recently submitted a further letter to the Tribunal, which I think is at
4 Tab 8, where he confirms his view remains the same, and, of course, he has now put
5 in his report, and his report does not separate out this specific nine-month period. As
6 the Tribunal has seen, he separates out three periods: the main period, which is when
7 any of the cartels found by the Commission were in operation, an early period, which
8 is anything before that –

9 THE CHAIR: Before 2007?

10 MR WEST: Before 2007.

11 THE CHAIR: Yes.

12 MR WEST: And then what he calls a wind-down period –

13 THE CHAIR: Yes, yes, yes.

14 MR WEST: – because he finds that the cartel started unwinding in the last year. So,
15 that is his position. It can't be a surprise to the Defendants that that's his position,
16 because they have known it since last December, and at no stage has their expert
17 come along and said, "This is not right. In fact, it is possible to do it, and they are
18 going to do it, and based on that they are going to be able to identify the overcharge
19 resulting from one of the OSS2 cartels rather than the other".

20 In our skeleton argument at paragraph 21 -- I am not sure if it's found its way into the
21 bundle or not – we point this out. Paragraph 21:

22 *"Nor have the Defendants submitted" -- about halfway down -- "any new evidence on*
23 *the basis of which the Tribunal could conclude there was some material change in*
24 *circumstances, and it is not open to their counsel to give such evidence at the hearing."*

25 So, again they have been on notice since our skeleton that if they are going to be
26 saying there is some evidence which affects the existence or otherwise of a conflict,

1 they ought to bring it forward.

2 THE CHAIR: Well –

3 MR WEST: The evidence would, of course, be something from their expert saying,
4 "This is possible, and we intend to do it", but the evidence before the Tribunal now is
5 that if this is a risk of conflict, it falls under the heading of "theoretical", precisely the
6 category the Tribunal identified at the last hearing as not justifying separate expert
7 reports. It hasn't been transformed into a real risk of conflict by anything that has
8 happened or anything that my friend has said today.

9 THE CHAIR: Thank you. Is there anything else?

10 MR WEST: I am happy to leave it at that unless you would like to hear me further.

11 MS FORD: Sir, I would simply pick up on one point that my learned friend made, which
12 is the way in which he characterised the exercise of seeking to establish whether or
13 not there was an umbrella effect, and he said that the exercise was that one looks at
14 a certain period and one tries to establish whether prices fell after the end of the cartel
15 period.

16 In my submission, that exercise is one of judgement, which requires the expert to
17 determine what periods does one look at. How does one formulate the model in order
18 to establish whether prices fell or not? It is simply not a case of looking at a line on
19 a graph and saying "Prices fell from this point. Therefore, there was no cartel after
20 that point". It is a detailed exercise of analysis which requires the exercise of
21 judgement by the expert and that is one in relation to which, in my submission, there
22 is a clear conflict of interest between parties who have been found to infringe over
23 different periods.

24 THE CHAIR: I am grateful. Can we – we will rise for – what's the time now?

25 PROFESSOR NEUBERGER: 12.25.

26 THE CHAIR: We will rise for ten minutes at least. It may be longer.

1 (Short break)

2

3 RULING AND DIRECTIONS

4 THE CHAIR: Right. We are not going to vary our order with respect to the sharing of
5 experts. We are going to provide written reasons in due course. We will try to get
6 them out in the next week or so, because it would seem sensible for you to have them
7 by the time you go to the Court of Appeal.

8 Yes. Is there anything else – we need to deal with directions generally to trial. Is
9 there anything else we need to discuss with respect to that?

10 MR WEST: We would like to seek the costs of the application.

11 THE CHAIR: Yes. What happened to the costs the last time we argued this?

12 MR WEST: The last time was at the CMC.

13 THE CHAIR: No, it wasn't. The first time was at a CMC and then we had – my
14 recollection might be wrong. You weren't present, Mr West. We then had –

15 MR WEST: The CMC 3 in October.

16 THE CHAIR: Yes. It was really just the costs issue. I suspect I might have reserved
17 them.

18 MS FORD: It was, in fact, the CMC the second time it was argued as well.

19 THE CHAIR: Was it?

20 MS FORD: Yes.

21 THE CHAIR: Right. I see. I am inclined to reserve costs at the moment for a number
22 of reasons, yes, unless you want to argue. I mean, obviously, standing here today,
23 you have a strong case to say you should have your costs –

24 MR WEST: Well, exactly.

25 THE CHAIR: – but then again we still – not only is there the appeal, which is
26 a separate matter, but if conflicts emerge between now and trial or something

1 happens, we may need to revisit it.

2 MR WEST: In my submission, that would not justify having made the application on
3 the basis of the current findings.

4 THE CHAIR: Well, it may be a good argument, but there is no particular downside in
5 reserving them, is there?

6 MR WEST: Can I ask: reserved until when?

7 THE CHAIR: Until trial.

8 MR WEST: My instructions were to seek the costs of the application, it is difficult to
9 say more than that without seeing the reasons in the judgment, although my client
10 does appear to have succeeded based simply on the decision which has been made.

11 THE CHAIR: Right. Well, we can reserve them to the next CMC, and you can argue
12 costs at that stage. You say you would like to see the judgment. We will discuss when
13 there is going to be the next CMC, but we are going to need one sooner rather than
14 later.

15 MR WEST: At least we will have the reasons.

16 THE CHAIR: The reasons, yes. Are you content with that, Ms Ford?

17 MS FORD: I am content with that. For the record I'm expecting my clients to resist
18 an application for costs anyhow.

19 THE CHAIR: Thank you. Right. Where are we on directions? You sent me current
20 and proposed revised directions. At the moment – I suppose the other – sorry.
21 Before we get on to that, the other question is I know you have not seen the judgment
22 yet, so you can't answer this question, but bearing in mind you are appealing the earlier
23 decision, would you want to appeal this one at the same time or would it be necessary
24 to formally get that up to the Court of Appeal? How would you ...?

25 MS FORD: It rather depends on the reasoning given by the Tribunal for its decision.
26 The reason I say that is that the application was made on a relatively confined basis,

1 on the basis that we said: would the Tribunal be prepared to revisit based on changes
2 in circumstances?

3 THE CHAIR: Uh-huh.

4 MS FORD: That was careful to avoid cutting across the question of principle as to
5 whether there is or is not a conflict of interest, which we say is the one thing we will
6 appeal, and then so far as the judgment were only to say: "We are satisfied that nothing
7 has changed", that doesn't seem in my submission to be something that then needs
8 to be dealt with.

9 THE CHAIR: Things have changed, as I said at the outset, in the sense you now have
10 the Claimants' evidence and the Defendants are now two parties. So those are clear
11 changes. Two groups at least.

12 MS FORD: Insofar as –

13 THE CHAIR: We will try to get the judgment out, and then if you want to make
14 an application for permission to appeal on paper, obviously that can be done.

15 MS FORD: Certainly, what we would not want is to find that, even were we successful
16 in the Court of Appeal, there was an argument to the effect that because we had not
17 appealed the subsequent judgment, in some way that had not been challenged and
18 therefore that stood. That would seem to be a very –

19 THE CHAIR: Or some question mark as to what the Court of Appeal would have
20 thought, yes, about the later judgment... So, it makes sense that they are all before
21 the Court of Appeal, I would have thought.

22 MS FORD: It does, whether that requires a formal appeal or simply to draw the Court
23 of Appeal's attention to the existence of the further judgment. Certainly, what we don't
24 want to do is to fall into a procedural hole in that way. What may be the most
25 proportionate means of doing that, it may be that the Tribunal will be prepared to grant
26 permission purely in order to get it before the Court of Appeal without prejudice to the

1 content of the ...

2 THE CHAIR: Yes. It may not be necessary to – Mr West, do you have a view on
3 this? It does make sense for the Court of Appeal to have this judgment in front of them
4 in addition to the earlier judgment. I appreciate you have not seen it yet. That might
5 be a difficult question, but –

6 MR WEST: The judgment as a judgment will be capable of being relied upon as an
7 authority, as it were.

8 THE CHAIR: Yes. I will leave you to think about it. We will try to get it out in the next
9 week or so and then you can let us know how you want to deal with that.

10 Where are we on directions? Assuming the Court of Appeal doesn't – I appreciate
11 there is going to need to be some readjustment if the Court of Appeal says two experts,
12 but otherwise we are on track, are we?

13 MR WEST: Certainly, my understanding is that these amendments to the directions
14 were sought in the event that the application succeeded.

15 MS FORD: One query which Mr O'Donoghue rightly raises: is the Tribunal proceeding
16 on the basis that the questions of a split trial and such like do not arise in the light of
17 the ruling on experts?

18 THE CHAIR: Yes. None of the parties were keen on a split trial. I don't think we were
19 particularly keen on it either. We just thought we should think about it and so that
20 doesn't arise.

21 MS FORD: Then the present position as to our expert is that there was obviously
22 an extension by consent for the time period for the Claimants' expert report and then
23 an equivalent extension for our expert report. I am not in a position today to make
24 an application for a further extension, but I am reserving my position as to whether
25 that may be necessary in the light of the progress that the expert has made.

26 THE CHAIR: So, you are likely going to be seeking an extension, but you are not sure

1 | how long, is my interpretation of that.

2 | MS FORD: A fair interpretation.

3 | THE CHAIR: All right. That's probably better – so we're going to need to refine
4 | directions after the Court of Appeal hearing. We imagine the Court of Appeal will be
5 | fairly prompt in at least its decision, if not its judgment. So, there may be a need for
6 | a further directions hearing on timing shortly after that, but in any event I think there
7 | should be a CMC in July. Have we – that's not timetabled at the moment.

8 | MS FORD: I don't think there is presently one in July.

9 | THE CHAIR: As I see it – I appreciate, Ms Ford, you might have been playing your
10 | cards close to your chest for good reasons today, because there are lots of issues
11 | going on behind the scenes that you don't wish to reveal, being privileged and so forth,
12 | but from some of your answers it seemed that there was a lack of clarity as to how you
13 | would be putting your case, and therefore I think it would be appropriate just to see
14 | where we all are in July in any event once you have served your evidence, and then
15 | we can look at it more clearly, particularly with regards to, yes, what issues the
16 | experts – are going to be in issue between the experts at trial. So, if we can start
17 | getting a date in the diary for July.

18 | MS FORD: Perhaps the parties can take that offline.

19 | THE CHAIR: Yes, take that offline. Then whether you want to pencil in a hearing – it
20 | may be other directions can be done on paper. So, it may not be necessary for
21 | a hearing. I expect it will be necessary to have a hearing if the Court of Appeal say
22 | two experts. I imagine the directions may be a little bit more difficult, but we will see.
23 | Is that all right with you, Mr West?

24 | MR WEST: Yes. It is simply pointed out to me that we have a reply report to put in
25 | currently in mid-July. So, it may make sense to have the CMC after that at the end of
26 | July.

1 THE CHAIR: Because?

2 MR WEST: Well, the team is going to be very busy.

3 THE CHAIR: Oh, I see. Yes, yes. No, I understand that. Yes, but if the dates get
4 pushed back ...

5 MR WEST: Yes.

6 THE CHAIR: Ms Ford is indicating that she may – which I take as a moral certainty
7 she is going to – be seeking an extension of time for her expert report.

8 MR WEST: Let's have the hearing at the end of the July. That gives the
9 best opportunity for all of these steps to have been gone through.

10 THE CHAIR: Or maybe the beginning of July when you are less busy. Shall we
11 leave – I am not sure when this Tribunal is going to be available at the moment. So
12 ...

13 MR WEST: Well, in that case (inaudible).

14 THE CHAIR: We'll try to avoid –

15 MR WEST: We will not yet have the reply then.

16 THE CHAIR: Well, if you don't, you don't.

17 MS FORD: Really just a point of clarification in case it has not emerged. We envisage
18 that we will in any event be working with a single joint expert in relation to pass-on and
19 financing losses. Insofar as the Court of Appeal refuses the appeal, of course, the
20 permission is for it in any event and so that scenario is covered. If the Court of Appeal
21 were to grant the appeal in relation to overcharge, just to clarify that nevertheless we
22 would still be working.

23 THE CHAIR: I understand that.

24 MS FORD: And that might (inaudible).

25 THE CHAIR: Yes. If it is a single joint expert – sorry. Let's leave that. We have done
26 enough on it.

1 MR WEST: Would the Tribunal like the parties to draw up the order or will the Tribunal
2 do that?

3 THE CHAIR: I am sure it will help if you could – I mean, it's costs reserved. That's it,
4 isn't it? Application refused.

5 MR WEST: The CMC.

6 THE CHAIR: The CMC. That's fine. You can do that. Thank you very much.

7 (12.51 pm)

8 **(Hearing concluded)**

9

10

11

12

13

14

15

16

17