IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1440/7/7/22 & 1518/5/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 22 May 2024

Before:

Andrew Lenon KC
The Honourable Mr Justice Richards
Professor Anthony Neuberger
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Proposed Class Representative & Claimants

Clare Mary Joan Spottiswoode CBE
&
London Array Limited & Others
v

Defendants

Nexans France SAS & Others

A P P E A R AN C E S

Daniel Jowell KC & Gerard Rothschild (Instructed by Scott & Scott) on behalf of Spottiswoode

Colin West KC (Instructed by Hausfeld) on behalf of London Array

Paul Luckhurst (Instructed by White & Case) on behalf of Nexans France SAS

Jemima Stratford KC, Fiona Banks & Jack Williams (Instructed by Macfarlanes) on behalf of Prysmian

Victoria Wakefield KC & Daniel Carall-Green (Instructed by Addleshaw Goddard) on behalf of NKT

Wednesday, 22 May 2024

(10.30 am)

(Proceedings delayed)

(10.43 am)

THE CHAIR: I am going to start with the customary warning. Some of you are joining us live-stream on our website, so I am going to start with the customary warning. An official recording is being made, 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 contempt of court.

Submissions by MR JOWELL

MR JOWELL: May it please the Tribunal, there are four main issues or questions for you today.

The first is whether there should be a trial of certain preliminary issues concerning the renewable obligation certificates in the Spottiswoode claim of part of the London Array trial; subject to the Tribunal's views, the parties are all agreed that in principle that should occur. The second issue is the identity of the precise preliminary issues to be tried. The third issue is disclosure, and the fourth issue are the appropriate directions to the hearing including the

confidentiality club and various dates.

So on the first issue, unless the Tribunal has any difficulties with that, I think we can proceed on the basis that there will be certainly certain issues.

THE CHAIR: Yes.

MR JOWELL: Then turning to the second issue which is the identity of those preliminary issues, you will see that the parties have collaborated as requested to produce a combined proposal for the ROC issues, as we call them. The first is the question of the volume of commerce and subject to the 2013 question which I will come on to, that question is common ground, and that volume of commerce matters because it is the product of the volume of commerce and the overcharge on that commerce that gives rise to the additional cost per megawatt hour which in turn has the capacity to affect the ROC banding decisions.

Now, the contentious issues between us can, I suggest, be divided into really three sub-issues. The first is -- and I am going to take these together -- is whether to include two additional issues, namely the ROC 2013 issue and also the issue that you will see over the page in red, which is effectively the issue of whether, if there were an effect on -- assuming there were an effect on the number of ROCs awarded, would that be

passed on down the chain as lower renewable costs to suppliers.

Now, I mention those two issues together because they both raise the same point of principle, and the point of principle is this: should we include within the preliminary issues to be tried all of the issues relating to ROCs on the one hand, or should we on the other hand only include those issues that are overlapping with the London Array proceedings.

So if the aim is to get rid of all the ROC issues in one go, then you should include both of those additional issues, the 2013 issue and the, if you like, the pass-on issue, pass on to suppliers issue.

If, on the other hand, the intention is simply to resolve the overlapping issues with London Array, then we say that neither of those issues should be included since neither of them arise in the London Array proceedings.

There are, we recognise, advantages and disadvantages of either approach.

MR JUSTICE RICHARDS: Is it common ground that they stand and fall together, they are a package?

MR JOWELL: I think it is not common ground.

MS STRATFORD: No.

MR JUSTICE RICHARDS: It is not common ground.

MR JOWELL: But in our submission it makes sense and it is fair and just for them to stand and fall together.

On the one hand, we say that there is a certain neatness in resolving all the ROC issues on a single occasion and doing so is likely -- could be said to be likely to facilitate settlement. On the other hand, we can see that having only the overlapping issues reduces the disruption and delay to the London Array trial, and also reduces, importantly, the risk of an overrun of time, because we do not know at this point precisely what trying both of those points will involve, and although my learned friends say confidently in their skeleton argument that their issue on supply pass-on is a short point, we are much less confident that it is necessarily a short point that will not require evidence.

So we say that there is the risk that including these additional issues could jeopardise completing within the time slot, and so we are really in the Tribunal's hands as to which way it wishes to go, but we do say that it should do so consistently.

I should say that in relation to the 2013 ROC issue that it is not entirely discrete from the 2009 and 2010 ROC issues, because we say it does throw some light on those, because we see from it that the government was

willing to reduce the ROCs by a decimal point in the case of ROC 2013 which rather, we would say, undermines the defendants' theory that the government was not willing to change ROCs by small -- or the ROC ratio by small increments but only by whole numbers.

It is also not the case that ROC 2013 is some sort of afterthought or based on a speculative theory of an overhang effect. It is included in our claim because we consider that it is likely that the 2013 ROC banding was affected by cost information including potentially London Array's cost information that was itself affected by the cartel.

So we say there are some interlinks, if you like, between 2013 and 2009 to 2010. I cannot go as far as to say that it is impossible in any way to resolve 2009 and 2010 separately, and we can make reference to those interlinking points in any event, but there we are. So we say it is a matter of principle, and it really depends upon which approach the Tribunal opts for as a matter of principle.

I do not know whether it is convenient for me to go through the other points or whether it is convenient to hear from Ms Stratford on this point at this juncture. I am in your hands.

THE CHAIR: Would you like to deal with the other points?

MR JOWELL: Yes.

So the second contentious point we say is whether to opt for our single issue on overcharge which seeks to establish effectively the tipping point of cost and indeed overcharge that would, on the balance of probabilities, be likely to affect the number of ROCs or whether we split the point into two as the defendants propose and the first question asking whether an overcharge of 26% specifically would make a difference and then the second issue to determine whether, if it would, at what particular cost or overcharge below that there would be a change.

In substance, this issue turns on whether it is correct that we have either sought a maximum overcharge of 26% or whether the Tribunal can decide here and now that no overcharge above 26% is remotely plausible, and the answer to the first question is we have not and never have sought a maximum overcharge of 26%.

As is clear from our pleading and Mr Druce's report, the 26% is our provisional high estimate because we were obliged to provide an estimate of damages for the purposes of proceeding with a collective action, but a high estimate is not the same as a maximum, and we make very clear that the basis for the 26% is very much just an estimate. It is effectively a placeholder which

is derived from a very well-known study that found that 26% is the average overcharge for international cartels, but of course precisely because it is an average overcharge there will be many international cartels that will have had overcharges above that.

So this is a claim for damages that are at large in the High Court, one would say it is a claim for damages that are to be assessed, not -- we have not ever said that one can -- that 26% is some maximum.

THE CHAIR: But presumably at some point you will have to commit to a figure.

MR JOWELL: No, absolutely, absolutely, but that will be once we have received disclosure from the defendants or from third parties that enable us to actually reach an informed estimate of overcharge based upon the data.

THE CHAIR: Do you have any idea when that might be?

MR JOWELL: Well, that depends on when we get disclosure from the other side, but it is not likely to be in advance of this hearing. We certainly will not be able to -- or at least -- well, I do not think we will be in a definitive position to do so in advance of this hearing.

Of course if things change, we will let the Tribunal know and if we get the disclosure early, all the better.

The question then is whether the Tribunal itself can

exclude an overcharge of over 26%, and we say that the Tribunal obviously is not in a position today to make such a determination. The defendants say: ah well, none of the previous claimants have claimed above 26%, and that appears to be true based upon the annex to their skeleton argument.

Some of them, it seems, got perilously close, there's one a little above 25%, and of course most of those are themselves simply estimates, also effectively just placeholders, not intended to be maximum overcharges charged.

So if one pauses and asks oneself can the Tribunal at this stage say that this would clearly be a strikeable claim if, say, it can rule out an overcharge of say 27% or 28%, the answer is clearly not, and so on that basis, we say it is more appropriate to have the single question that we have asked which gets one to the same point anyway.

I should mention that of course we recognise that if it turns out that the tipping point overcharge is enormously above 26%, we will obviously have to consider whether we can, you know, continue with this element of our claim, but if, say, it turns out that the tipping point overcharge is only slightly above that sort of figure then we are entitled, we say, to continue to

take -- decide to take a view in the light of the evidence on disclosure and our expert advice as it emerges.

THE CHAIR: Is your preferred formulation -- have you got this leaflet?

MR JOWELL: Yes.

THE CHAIR: It is 2 minus the red type, is that right?

MR JOWELL: Yes, that is absolutely right.

THE CHAIR: Okay.

MR JOWELL: So that is the second issue.

The third issue is --

MR JUSTICE RICHARDS: Sorry, so the difference between you and the other parties is they introduce questions (a) and (b), or question (a) and (b)?

MR JOWELL: No, we actually introduced I think a (b) -- I should explain, so the difference between us is really the wording in red.

MR JUSTICE RICHARDS: Yes.

MR JOWELL: Which is they wish to hold us to a maximum amount, they say we have a maximum amount claimed at 26%, that is simply not correct, we do not have a maximum amount, we only have an estimate, and what we have done with the addition of (b) is simply to add an additional question which asks one, well, what is the minimum average percentage overcharge on purchases of

relevant products that would on the balance of probabilities have resulted in fewer ROCs being awarded in a counterfactual.

That question (b), the answer to that could actually strictly be mathematically derived from the answer to 2(a) and question 1, because 2(a) asks you what is the minimum level of total elevated costs, and 1 asks you the volume of commerce, so it is possible to figure out from those two what the answer is on overcharge on (b).

But just in order to -- because overcharge is rather important that everybody at the end of this process comes out with, if you like, what is the overcharge figure that we would need to meet, and indeed that London Array would need to meet, we have added that (b), but that is simply -- you could say it is strictly unnecessary, but we think it is convenient to have it just in case there may be some debate about how, say, the maths is to be done.

THE CHAIR: Is there any debate as to what relevant products comprises?

MR JOWELL: That, I think, is incorporated within question 1 on value of commerce which also refers to the relevant categories of costs.

THE CHAIR: Right, okay.

MR JUSTICE RICHARDS: Sorry, if (b) is controversial, which

it suggests it is controversial, it is in blue, it rather suggests it is a bit more than a mathematical derivation.

MR JOWELL: I think the only reason it is controversial is that if you have their red question which asks what would happen in the maximum amount, then they would say, well, then, we then can proceed to the question of the total level of cost below that amount, below the 26%, whereas we think that it is -- because we say there is not this 26% cut-off, we want to find out, well, what if it was a 30% cut-off, therefore we include the (b) as well, but I do not think -- I mean, my learned friends will correct me if I am wrong, but I do not think that if you take out the red, if you were inclined to take out the red language, as we say, I do not think there's an objection to the imposition of (b).

MS STRATFORD: There is, but I can explain.

MR JOWELL: Oh there is. Well, I am sorry, I was not aware of that. We do not quite understand why there should be.

The final question is whether to include the language in green which relates to the London Array proceedings only, and this is a matter on which we are entirely neutral and which we understand the claimants in London Array and the defendants are agreed upon. We

are neutral on the basis that the outcome of this should not be binding in our proceedings. They are effectively proceeding on the basis of a hypothetical overcharge, not the one that actually affected the decision, but they are both prepared to proceed on that hypothetical basis, and they are prepared to run the risk of inconsistency with our proceedings.

That is a matter for them. As long as we are not expected to bear any liability or cost in relation to that issue, they are entitled to resolve it between them as far as we are concerned.

So those are our submissions on the issues in dispute.

THE CHAIR: Thank you.

Submissions by MS STRATFORD

MS STRATFORD: Sir, the defendants and indeed London Array have been approaching this on the basis that the intention is to resolve the ROC issue to the extent that it is efficient to do so as a preliminary issue or, we should say, an issue in London Array. So that is how we approach it, not on the sort of tit-for-tat basis that Mr Jowell has been describing it.

If I could just explain why we say it would not be efficient or appropriate to include the 2013 order first. Perhaps even before coming to that I should just

say, because Mr Jowell did not mention it, no one is suggesting that we should not have both the 2009 and 2010 orders considered together, but I should mention that because strictly it is the 2010 order that applies to the London Array proceedings, but that was an amendment to and built upon all of the analysis behind the 2009 order. 2010 was a short updating order if you like, and that is why all of the parties are agreed it should be 2009/2010 together.

But coming to the three main reasons why we say 2013 should not be included. First, and most importantly, and this Mr Jowell has addressed, it is not of relevance for the London Array proceedings, and just for your note that is because the 2013 order set banding levels for the period 1 April 2013 to 31 March 2017, and the London Array wind farm was accredited during the period when the 2010 order applied, in the financial year 2012 to 2013.

Second, and this has not been referred to yet, the infringement ended in January 2009, and the 2013 order was only made in March 2013, so more than four years later, and that means that the process of analysis and reports that led to the 2013 order had not even begun when the infringement ended, so there is in relation to 2013 in the way that there is not for 2009 or 2010

a real issue as to whether for temporal reasons the infringement could possibly have impacted the 2013 order, quite apart from all of the other difficulties that the defendants say arise under the earlier orders and which also apply to 2013, and it is striking that Mr Druce, Ms Spottiswoode's expert, did not even seek to advance a claim in relation to the 2013 order in his first lengthy report.

The third reason which is linked is that the 2013 order was based on completely separate and different data and analysis, so that for the Tribunal to consider it would require a completely separate set of evidence and analysis.

I do not think that that fact is controversial. Ms Spottiswoode's skeleton for this hearing describes the inputs into the 2013 order, so the Arup report, the Pöyry modelling and in addition we have made the point that the 2013 order was made at a time when the prevailing expectation was that costs for these renewable projects was falling, there was a new levy control framework introduced so it was a quite different context from that which had applied earlier and it further constrained the costs of the renewables obligation scheme.

So we do say that all of these new and different

factors meant that the 2013 order raises separate issues and should not be tacked on to the London Array proceedings to which it does not relate.

Now, as for the tit-for-tat approach, well, we will not have 2013 if we do not have our what is now composite draft question 3. We say that is an unprincipled way to approach the question. The Tribunal should, as I said at the outset, include the issues that can sensibly and efficiently be included and that will assist both the Tribunal and the parties in the most cost-effective resolution of the proceedings, and for the reasons I have just explained, the 2013 order should not be included.

I should say there is a real risk in relation to the 2013 order that does not arise in relation to the 2009/2010 orders that the Tribunal could have to be looked at again during the main trial even if it is included in the ROC issue because of the temporal point in particular that I mentioned. No one has suggested that that could be determined ahead of the main Spottiswoode trial.

So turning to question 3 and why we say that is in a different category and the two should not necessarily fall together, first we say it is a short discrete issue which can be relatively easily determined in the time

available.

It needs to be determined if there is to be no risk of the Tribunal having to revisit the 2009/2010 orders at the main trial, so we were proposing its inclusion in order to avoid that potential need to go back to those.

Just to explain that a little more, it is a fallback issue for the defendants and for London Array. It arises even if the ROC banding would have been different in the counterfactual. It is a point that Mr Moselle has addressed in his first report. It takes only four pages of that report. So, it is a narrow point, and, as I think the Tribunal appreciates, the defendants submit it cannot simply be assumed that a lower number of ROCs awarded to offshore wind would have necessarily resulted in the overall costs of the scheme to suppliers and therefore to consumers being lower.

Mr Moselle has explained that in his report. He has explained that the government could have altered other parameters of the scheme, for example, by allocating any saving which on this assumption occurred to other renewable technologies.

It is a short point --

THE CHAIR: It is a short point, but there might be quite a lot of evidence that you would need to look at in order to get to the bottom of it.

MS STRATFORD: Well, obviously we are all at an early stage. We can see in the witness statement that London Array have put in, I do not know whether the Tribunal has had any opportunity to look at it, but there is some reference to it in the skeletons, the witness statement of Mr McNeal who is perhaps about as well placed to address this sort of point as one can envisage someone being as a former employee of the relevant department, and he explains that DECC's policy objective was to bring forward as much renewable energy as possible and explains why that was the case both to meet obligations such as EU targets and bring industrial benefits.

So one can imagine there may be that sort of evidence --

THE CHAIR: There would have to be third party disclosure from the relevant government department presumably?

MS STRATFORD: We are going to come on to discuss that, and that in any event for the purposes of the ROC issue, I think we are all agreed that, and Ms Spottiswoode has trailed it for some time, that there will be a request for third party disclosure from the government and if necessary an application, and on our side we are very keen for that process to get going as soon as possible, but we do submit that this is a short point that could be dealt with within the available two weeks.

MR JUSTICE RICHARDS: I understand the short point submission, but what I for my part do not yet understand is if it were not dealt with as part of the preliminary issue trial, what would be so bad?

MS STRATFORD: Frankly, if contrary to all of our expectations on this side we do not succeed on the ROC issue at the initial stage, it would leave an argument available for us still on the 2009/2010 orders to run at the main trial, so in that sense you could say why are we complaining, but we have genuinely approached this trying to think about what will divide up the issues in the most efficient and helpful way for the Tribunal and, therefore, it seemed to us that we could sensibly conclude all of the 2009/2010 issues in the two weeks at the end of the London Array trial, so that is why we have proposed it.

I am so sorry, apparently I referred to question 4 concerning London Array when of course I should not have done. It only concerns the defendants in Spottiswoode. I apologise for that.

So if I may then turn on to question 2 and starting with the first paragraph of question 2 and the words in red there which include the disputed 26%, so the whole purpose about what was our original question 2 now, the first part of question 2, was to take Ms Spottiswoode's

current best case -- I should say not only as to percentage overcharge but also as to the scope of products or services alleged to be tainted in order to ascertain whether even on that scenario she is capable of establishing that the renewables obligation scheme was a causal route to loss.

So from the Tribunal's perspective we respectfully submit the attraction of having that question or something close to it, if the word "maximum" is so strongly objected to that could perhaps be removed, but having that, the answer will be a simple yes/no for the Tribunal, and that is to be contrasted with question 2(a) and I will come on to question 2(b) as well, which require the Tribunal to determine what the numerical tipping point would have been to lead to a different outcome on ROC banding.

So it seems to us important that the first part of question 2 provides the most concrete and straightforward way for the Tribunal to approach the issue, and that is why we persist with it.

I should say the parties, apart from Spottiswoode are confident that we will succeed on question 2 which is one reason why we do maintain our submissions that we should have it, and it would avoid the Tribunal having to grapple with a whole host of other issues. So it is

a straightforward route through.

Now, Ms Spottiswoode says: well, this is just our initial pleading, and the actual level of overcharge that we eventually decide, we want to claim may be higher than that. We say that is not only unpleaded but completely unrealistic.

This is not a case where we have a bare bones initial pleading. Ms Spottiswoode's expert Mr Druce has produced no less than three reports, and he has put forward 26% as his high case in those reports on a considered basis. So it is not right to say it is just an estimate as Mr Jowell put it.

Mr Jowell referred to annex 3 to our application for the ROC issue. It is at bundle {I/41/15} if the Tribunal wants to look at it, and what we say the Tribunal can get from that table is that 26% is already an outlier claim.

The annex 3 figures, just to be clear, are those pleaded after service of expert evidence, so they are the best figures the claimants in those cases considered they could plead following disclosure, and most of them, as you will see, are far lower than the 26% of Mr Druce.

The highest previous claim that Mr Jowell mentioned just a moment ago was the 25.4% in *BritNed* but that is salutary, we submit, because the court in *BritNed* found

an overcharge suffered by the claimant of 2.6%.

So in respect of the only source on which Mr Druce relies which is specific to this cartel, the overcharge found was a tenth of that which he puts forward as his high case, and we therefore submit it is sufficiently fanciful that Ms Spottiswoode will properly be able to claim for, let alone achieve, an overcharge level higher than 26%, that the court should proceed on the basis that it does represent a useful and pragmatic way through.

We, with respect, do not see why the Tribunal should be asked to determine whether an even greater level of overcharge which has not even been named let alone pleaded and which is wholly unrealistic would have had any impact on ROC banding, so for those reasons, we do submit that the red wording at the start of 2 should be included.

Coming on to 2(a) and 2(b).

MR JUSTICE RICHARDS: Sorry, just thinking about practicalities: how much saving does your yes/no question actually produce in terms of time and effort, because if we have your yes/no question, presumably neither side is just going to address the yes/no question. Both sides' experts are going to have one eye to what the answer might be if the answer to the

question is there could potentially be an effect at 26%.

MS STRATFORD: Our position of course is that there could be no effect at 26%.

MR JUSTICE RICHARDS: Yes.

MS STRATFORD: So our expert then is not going to need to go on to consider lower percentages which is the premise for 2(a) and 2(b).

MR JUSTICE RICHARDS: Right.

MS STRATFORD: And question 3 -- but mostly -- for the Tribunal, if one imagines how the hearing could proceed or at least how judgment could proceed, the Tribunal would not need then to grapple with the much more granular, nuanced questions that arise under 2(a), 2(b), 3 would fall away and 5.

MR JUSTICE RICHARDS: So your expert is going to put in a report no doubt that says even at 26% overcharge there would be no effect on the level of ROCs.

MS STRATFORD: We have that.

MR JUSTICE RICHARDS: And you have that?

MS STRATFORD: We have that already.

MR JUSTICE RICHARDS: Okay, and so you simply would not feel the need to address the position below -- I mean, even as a precautionary or fallback matter.

MS STRATFORD: Well, if our position is that 26% would not have made a difference, I cannot see our expert

addressing 15% or 20%. That is and has always been, at least Prysmian's case. I am grateful.

2(a) is the elevated costs question, and just to explain, we drafted that to explain why it is useful to have total elevated costs rather than just a percentage here. That is because, as we understand it, it is possible at the end of the main trial that there could be more than one overcharge percentage determined. That is because the class representative has signalled that they may seek to argue that the scope of the Commission decision extended to cover some disputed cost categories.

So just to take one perhaps simple example, reference has been made to installation costs and we know that in some cases installation was outsourced and was not a service provided by the defendants.

If the class representative proposes to claim in respect of all installation costs, whether part of a defendant's cable project or not, then there plainly would be an issue about whether that was within the scope of the infringement and, even if it was, whether it was subject to any overcharge or to the same percentage overcharge as the cables.

So I think it is helpful for the Tribunal to have that in mind. It explains why we say what could

usefully be decided, most usefully, at the London Array trial is the minimum level of total elevated costs on the relevant benchmark wind farms that would have affected the ROC banding.

2(b), just to explain my comment earlier that 2(b) is not agreed, I heard Mr Jowell say it was just a mathematical point, but we struggle greatly with the reference to a minimum average percentage overcharge. We do not understand what average is intended to refer to or how an average overcharge could be of any practical value or meaning.

If it is intended to refer to some average overcharge rate across different cost categories, so the different categories that I was just mentioning such as installation costs and outsource costs and so on, then we do not accept that it would in any way be appropriate or useful to ask the Tribunal to determine an average rate.

It cannot be used as an input into the questions that the Tribunal will ultimately need to determine once any overcharges are found, so in other words, whether those specific overcharges when applied to the value of commerce would have made any difference to the bands that were set.

So that is why we submit that the right question to

ask at this stage is to focus on total elevated costs and not on a percentage, an average percentage as it is put in 2(b).

Ms Banks says I may have misspoken when I referred to installation costs being outsourced which was my shorthand. She points out that it is that they may have been supplied by others. I apologise if I was too loose in my language there.

On question 4, the green question, I do not need to say anything on that, because that is really a matter for Mr Luckhurst and Mr West to address you on. It arises solely in the London Array proceedings and we certainly do not object to it.

Submissions by MR LUCKHURST

MR LUCKHURST: I gratefully adopt Ms Stratford's submissions on the first set of questions.

On the final question that is green in the order before you, the wording of this issue is agreed by the parties to the London Array proceedings and the class representative is neutral as to its inclusion.

I therefore do not need to make detailed submissions on it, but I want to flag one point about how the issue in its agreed formulation may fall to be applied by the Tribunal in due course, and it arises from Mr West's skeleton argument for the London Array claimants.

The relevant wording, if you have it before you, is the part that says for the purpose of the London Array proceedings only and {A/1/11}:

"... based on the material before the Tribunal in those proceedings."

So the question is what does that mean "based on the material before the Tribunal in those proceedings"? Mr West's skeleton assumes that the overcharge found on the London Array cables, if any, is found at all, will be used as the proxy for the overcharge on the 2010 benchmark wind farms. That is one possible approach that may commend itself to the experts and the Tribunal.

However, until the expert evidence has been served and tested, it is too early to assume that that is the only approach or the best approach. It is theoretically possible that there was an overcharge on the 2010 benchmark wind farms and not on the London Array cables. You have to remember that the London Array contract was finalised after the infringement period, and Nexans' pleaded case is that it was unaffected by the infringement and the London Array claimants' fallback case is there was an overhang effect and there may of course be a tapering of an overhang effect.

So it is possible that the experts' analysis, although obviously focused on the London Array cables in

that trial, may enable the Tribunal to take an independent view on the 2010 benchmark wind farm overcharge for the purpose of question 5, and, in that regard, we have given disclosure of five wind farm projects in addition to the London Array project. Those may or may not be benchmark wind farms for 2009 or 2010 ROOs, but the disclosure on those projects may be either directly relevant because they were a benchmark wind farm or relevant as a form of proxy.

So it is too early to say at the moment before the expert process has taken its course how it will play out, how that data will be used, but what we should not be doing is deciding now that the only relevant proxy is the overcharge on the London Array cables if any is found at all. So I just wanted to clarify that point so that we did not proceed on a misunderstanding, but, as I say, I think the wording is agreed and that is something that will play itself out when the evidence is served and at trial.

THE CHAIR: Is your approach agreed by Mr West?

MR LUCKHURST: Well, I do not think it is. I think based on his skeleton he assumed it would simply be the London Array cable overcharge, if one is found, used as a proxy. We say actually it may be more sophisticated and subtle than that, we have to see what the experts do

with the data and how that plays out.

MR JUSTICE RICHARDS: But if there is daylight, if you are seeking to retain the possibility of there being daylight between a London Array overcharge and a wind farm -- and a reference wind farm overcharge, what is the point of doing this? There is still a point, is there, in making this determination as a preliminary issue? It is still a meaningful question to ask even if there is the daylight?

MR LUCKHURST: Yes, it is, because this is -- the whole conception of this is to try and minimise or mitigate the risk of injustice to Nexans in having to pay twice, as it is being put, because we have a direct purchaser on one hand and a consumer class on the other, and the final question is a pragmatic attempt to do the best possible on the available data before the Tribunal at the London Array proceedings to ensure that that does not occur.

As I have said in my skeleton argument at paragraph 17.1, from our perspective, we think that this is probably going to be an entirely academic question because we think we will succeed at the first question, which is that the ROCs just would not have passed on loss in the manner contended for by Ms Spottiswoode.

So this is a sort of sweep-up safety net to ensure

that if we get that far, which we do not think we will, the London Array claimants can have judgment at the end of their trial.

On one of the points raised by Mr Jowell, which was the election point, I endorse what Ms Stratford says about that not being a principled approach. You either have in the 2013 ROO and our sweep-up point that it would not have made any difference given the overall costs of the scheme being taken into consideration either they are both in or they are both out, but if we are -- if contrary to what Ms Stratford has said we are put to our election on that and the Tribunal thinks that they should stand or fall together, then Nexans' position is that neither should be in, they should both be out, and that is because 2013 ROO is not overlapping and it does raise complexities which could put pressure on the parties and the Tribunal in terms of getting through the material in the available time, and that is a point that was made in the joint application letter at paragraph 17 at {I/41/4} for your reference.

That was all I had on the issues.

THE CHAIR: Thank you.

Submissions by MS WAKEFIELD

MS WAKEFIELD: In our skeleton argument, we said that we would update the Tribunal today in relation to our

position on the preliminary issues. Consistent with our position up until our skeleton argument, we do support the making of the preliminary issues, and we support their formulation, subject to a couple of points which I would like to make, if I may, about the VOC. We are happy with the formulation in the draft, but we have turned our mind, and what gave us pause for thought was the question of how the VOC would be determined and how binding it would be, and although that means I am taking things slightly out of order because I am going to address very briefly disclosure which I know comes later in the agenda, it may well be that the Tribunal feels it cannot really think about preliminary issues without also taking into account how it is likely that they would be determined.

So in the case of VOC, which was a relatively late addition to the formulation of the ROC issue, it is the case that the relevant question: is the VOC in the mind of DECC, the VOC for their purposes, what they thought the costs were.

So they are going to be the party that holds, the non-party that holds the relevant information. So that is step one, to try and get the information from them. We will come to this in due course. We say that is not a joint application, it is an application for the class

rep, but certainly it is DECC that holds them.

It has also been suggested that that data may be imperfect, rough and ready, may have gaps in it, and so the defendants may also in due course be asked to provide some disclosure as well to help fill in the gaps and allow proxies, approximations, interpolations and so on. That may or may not be sensible in due course, but that process would obviously have to be very limited in the time available. It cannot conceivably be a proper disclosure exercise in relation to VOC.

So for that reason, the VOC which we are going to end up using and sensibly using, for the purpose of the ROC determination will be whatever DECC has and a rough and ready quick look at any information the defendants may have.

Now, we are happy to sign up to that VOC being binding for the purpose of the determination of the high case, the 26% case, assuming that is in, and also binding for the determination of the minimum cost elevation which is a sum of money, it is going to be something like £500 million or £5 billion or something or other, but it is going to be a figure, and we are happy for the VOC to be the input that gives us that total figure, but at present we would have significant concerns about signing up to anything more binding than

that, and that is because in due course there will be proper disclosure, if I can put it that way, in relation to a whole gamut of different projects, different wind farms, benchmark wind farms, and in due course at the ultimate trial, the Tribunal is going to form a view on effective VOC and affected by how much. That question has to be properly at large and we say at least at present -- in due course the Tribunal may want to make a different ruling, but for today's purposes we cannot be taken to have accepted that at trial the VOC for any of these cost categories has been determined by that rough and ready DECC plus whatever we can provide in the time available-type approach.

I respectfully endorse the submissions of my learned friends Ms Stratford and Mr Luckhurst on the issues thus far, but if I just return perhaps to Ms Stratford's remarks in terms of the percentage question that Mr Jowell has inserted, and I think perhaps this bindingness points explains the difference in approach, because from our perspective we are not accepting that all of those categories of costs were affected by the infringements, and so one can have a minimum percentage overcharge across the big total amounts of all costs, but if ultimately installation is out and only half of the cables were actually affected, then you have a much

smaller VOC and so stating the mathematically obvious, you need a much higher percentage to get to the 500 million or whatever the threshold is.

So that is why it is not just -- and this is just a mechanistic question -- it is that at trial, you will find out what was actually affected and only then will you know: well, if DECC needed 500 million, gosh, that is an overcharge of 150%. So that is the point. That is why that does not make sense.

Just turning to the point which Mr Luckhurst dealt with at the end of his submissions, if 2013 is in, then we also have the waterbed argument in, namely that if this was lower, more money would have been spent elsewhere on other renewables. I agree with the submissions made already that it is a non sequitur to say they are both in or they are both out.

I would respectfully suggest that it is very sensible to have that waterbed argument in because it is likely that it comes out in evidence in any event. When one is having this two-week exploration of what went on in the mind of the decision-maker in 2009, 2010, they will say: oh gosh, well I do not really know, but, you know, if that had gone down, probably it would have made no difference because this thing would have gone up. If that is actually what happened, they will give

that as part of their evidence. It is a full explanation of their decision-making process. So it arises naturally as part of the exploration of 2009/2010 in a way that 2013 is a distinct endeavour and one which I have to say as well is a considerable and imposing endeavour in terms of the disclosure burden.

So for those reasons I would entirely endorse the approach that one could have 2009/2010, goes down there, comes up over there in, but one does not have 2013 in, they are not the same sort of endeavour at all.

Finally, I would endorse the approach taken by Mr Luckhurst on behalf of my clients as well that if it were to be the case, both in or both out, then they should both be out. That is everything that I wanted to say, unless I can be of any further assistance. Thank you.

Submissions by MR WEST

MR WEST: Gentlemen, I am in a perhaps unusual position as a representative of a cartel claimant of adopting the submissions of Ms Stratford for one of the cartelists, and so I will not repeat anything which she said but limit myself to a few additional points and points of clarification.

On 2013 and the inclusion of that decision within the common issues trial, we do wonder what is motivating

Ms Spottiswoode to ask for that because Mr Jowell seemed to accept that it would be perfectly possible to try it separately as part of the main trial, and the answer to that may appear in the disclosure order which we will come to in due course, but just to mention it.

Ms Spottiswoode is seeking disclosure from the London Array claimants in relation to the ROC process, that is any information they may have supplied to DECC, going up to 2013, and so the intention may be that if the 2013 decision is included in the common issues trial, that means any disclosure which London Array has to give for the purposes of the common issues trial would include 2013 and therefore that can be sought on an inter partes basis, whereas if one puts 2013 off to the final trial which London Array would not be party to, it would have to be third party disclosure and if that is what is really motivating Ms Spottiswoode's position, in my submission that would be a case of the tail wagging the dog.

The issues for the common issues trial should be defined by reference to what is procedurally appropriate and what are genuinely common issues and not by Ms Spottiswoode's desires in relation to disclosure.

On the 26%, again, I have nothing really to add to what has been said previously, except that Mr Jowell did

appear to accept that if the Tribunal's view was that if, in any event, the overcharge would have to be substantially more than 26% at that stage he would not, he seemed to accept, be asking the Tribunal to indicate whether it would be 50 or 100 or 150. So one approach would be rather than to take the 26, one might take perhaps 30. I just suggest that as a possible compromise, because he did seem to accept that there does come a point at which there is a maximum.

In relation to the question 2(b), for my part I still -- no doubt it is me -- I still do not really understand what this adds. Mr Jowell appeared to accept that it was simply a matter of mathematics based on what is already in 1 and 2(a), and in my submission having an additional question which does not add anything is more likely to confuse matters than the contrary.

The London Array claimants are neutral in relation to question 3 in red on the basis that we take the view that it is unlikely, as has been submitted, to substantially increase the costs estimate and slightly to turn on evidence the Tribunal will be hearing anyway, but that ultimately is not a matter for us because that question does not arise in our proceedings.

Then finally on the question in green at the end, if I can explain our position on that, as Mr Luckhurst

said, we had rather assumed and I said it in my skeleton argument, that what was meant by the material before the Tribunal was the London Array overcharge. However, I accept as well that in deciding or determining or giving evidence on what that overcharge may be, the experts may cast the net wider and look at other products which are affected by the cartel, and they may do so for a number of purposes.

One is by means of a cross-check on the result they have got to on London Array to see if that is a credible figure. Another is in order to iron out potential differences between projects, idiosyncrasies between projects that might affect a project-specific overcharge number. And if the experts are going to be looking at other affected Nexans projects anyway, then there will be additional material before the Tribunal and we would not object to the Tribunal looking at that material in deciding question 5.

I think what would concern us would be if there is a suggestion that the experts should embark upon some sort of more general roving enquiry as to the overcharge during the cartel period for the purposes of this common issues trial because the purpose of this trial is not to determine the industry-wide overcharge, and so I think what it comes down to is whether by question 5 in green

the Tribunal is being asked to decide questions which are not currently pleaded in London Array because the only pleaded issue is the overcharge in London Array, and so long as it is understood that the Tribunal is not being asked to go beyond the pleaded issues we think that is fine and I hope on the basis of that explanation the footnote to question 5 can be parked, as it were, and resolved on that basis.

So those were my only submissions on the ROC issues.

MR JUSTICE RICHARDS: Do you suggest there needs to be a change to the wording in green to accommodate that, or are you just articulating your position? Because on the face of it, the question in green just invites the Tribunal to make a decision based on material before the Tribunal. It is difficult to see how the Tribunal can do anything else.

MR WEST: Indeed. Well, if there were to be a clarification, it would be that by asking the Tribunal to resolve question 5, the parties are not asking it to resolve issues going beyond the pleadings in the London Array case.

MR JUSTICE RICHARDS: So you suggest perhaps for the purpose of the London Array proceedings only and based on the material and pleadings before the Tribunal in these proceedings?

MR WEST: I am very grateful for that suggestion.

Submissions in reply by MR JOWELL

MR JOWELL: Briefly our position is not one of tit-for-tat; our position is based on a simple principle distinction between those issues that have an overlap with the London Array proceedings and those which do not, and there is a consistency and a fairness in including either only those that overlap or additional ones that do not overlap but nevertheless relate to ROC.

The additional issue on the supply -- the pass on to suppliers is indeed short to express as a point but as the Tribunal, as I think realised in its questions, it may well be a complex evidential question that takes some time to resolve, and we certainly do not accept the submission that whereas 2013 is some completely different beast, this issue is somehow closely connected. On the contrary, if anything, the issue that they raise is one of a different nature and 2013 is of a very similar nature to the issues that we will be addressing on 2009 and 2010.

So we stand by our submissions that these either both should come in or both be excluded.

In relation to the question of 26%, it was submitted that Mr Druce put forward the 26% not as an estimate. That is simply not correct, and if I could show you,

I think it is the first time we have gone to the bundles, it is in {G/1/17}, and you will see it I think on the screen. If one can look at paragraph 28, this is in Mr Druce's first report, he says this:

"At this initial stage of the litigation, I believe that an overcharge assumption of 26% of the actual price paid would constitute a reasonable holding assumption, based on the average overcharge found to result from international Cartels, according to a report commissioned by the Commission ... I consider this to be one reasonable initial estimate given that the Commission found that the HV cables Cartel was international in its scope..."

And so on.

So it is in terms put forward as a reasonable holding assumption that is merely an initial estimate.

The objections that are taken to our issue (b) I said in opening that I did not understand there were any objections. I have heard objections, but I confess I still do not entirely understand them for two reasons. First, because the question of the -- if it is said: well, one cannot possibly derive an average overcharge, well, then, how does one get at the 26% that they want to consider? That surely itself has to be an average overcharge. It is said they do not understand

what the average percentage overcharge means. Well, it is the average overcharge on the benchmark projects, and there are a number of benchmark projects, so one needs to arrive at an average across those projects, and it is also an average that is expressed, as one sees in the preamble, the chapeau to both (a) and (b) "in light of the value of commerce as found under question 1 above". So it is simply what would be the average across the value -- the average overcharge across the value of commerce as found and that must surely be capable of mathematical deduction from the minimum cost elevation. Indeed, it is not clear that one could get to a minimum cost elevation unless one also had an overcharge built in there. It all comes to the same thing, since the minimum cost elevation is simply the product of the value of commerce multiplied by an average overcharge. So we do not understand -- we still do not really understand why such objection is taken to that.

Finally in relation to Mr West's point, it is certainly not the case that our motivation for including 2013 is in order to save some costs on disclosure. We will expect disclosure from him, and we will come to that momentarily in relation to the matters that are relevant, but the Tribunal is within its powers to regulate the costs of that as it sees fit. That is not

a relevant consideration.

So those are our submissions on the points.

THE CHAIR: Thank you.

MR JOWELL: I do not know whether the Tribunal wishes then to proceed to the next issue or whether it wishes to resolve this one now.

THE CHAIR: To what extent do you consider that the other issues hinge on our view on the preliminary issue, or do you think we can deal with them independently?

MR JOWELL: I think we can deal with them independently really.

THE CHAIR: Well, let us do that, then.

Submissions by MR JOWELL

MR JOWELL: The next point on my list is disclosure and I have to start, I am afraid, with a bit of a gripe, which is that on the last occasion we came to the CMC understanding, believing, that there had been disclosure as between the parties to the London Array proceedings that were relevant to these proposed preliminary issues and we were then hoping to get that disclosure as soon as possible.

As it transpired, or as has since transpired, there had indeed been requests made by the defendants of London Array of disclosure, but the request was withdrawn or abandoned shortly before the last hearing.

We knew that there had been a compromise of a disclosure application, but we did not know that it related to the very thing in respect of which they sought a preliminary issue.

Now, we do say that it is important that these proceedings are conducted on a cards on the table, open on the table basis and not cards up one's sleeve and we hope that in the future at least that that sort of thing will not continue, but we are where we are, and so there has not been disclosure of this issue in the London Array proceedings.

We have started the correspondence as regards the potential categories of disclosure. We do not think that on this occasion it is possible to resolve all of the disputes that have arisen on disclosure, but there is one which we do want to get on with and which we think is indubitably a relevant category, and you will see that in the -- I think you should have a composite draft directions order, and you will see on page 3 the category in paragraph 3 which are:

"Communications to and from the Department of Energy and Climate Change, the Department for Trade and Industry, Ernst & Young [and so on] in relation to renewables obligations banding levels in the period to April 2013."

Those other entities mentioned were the government's advisers and produced reports and suchlike that were relevant to the banding decisions, and we seek those from the London Array claimants because we believe they are the ones who are likely to have those documents because they are communications from London Array that we are seeking, or potentially -- and I come to this -- from parent companies from whom they may be able to obtain those documents.

I do not think it is suggested by London Array that this category is not a relevant category. Forgive me, it is. Well, in our submission it clearly is a relevant category because it is going to be informative, potentially informative, as to the basis on which the government decided how to fix the renewables obligation banding levels, which is precisely the issue that is in dispute.

What is, I think, said, and tell me if I am wrong, is London Array itself may not have these documents. Well, if it does not have the documents then it can put in a statement with a statement of truth saying it does not have the documents, but of course it is not just its own possession of the documents that is at stake, it is whether it has those in its control, and we apprehend that it may well that be the case that even if the

communications were between the parent companies of the London Array joint venture, it may well that be the joint venture has an unfettered right to seek those documents from its parents in these circumstances, it may have contractual rights. So, again, it should confirm that it has them neither in its possession nor a right to control of such documents. If does not have them, it does not have them, it can say that and then we can proceed to try to seek them from its parent company by way of third party disclosure application, but we say that it should provide them, and we need to get on with it, some disclosure now, and so we do seek disclosure in this category.

Submissions by MR WEST

MR WEST: Gentlemen, this application is opposed on a number of grounds.

The first is a procedural objection which is there is not any application before the Tribunal for this category of disclosure, and neither is there any evidence in support of it. That means not only is there no evidence before the Tribunal for anything that my friend has said, but my clients also have not had any opportunity to put in any evidence in answer to any of what he just said. Instead, it is simply asserted in my friend's skeleton with no evidence that London Array is

likely to hold such documents, that is paragraph 30 of his skeleton, and, as I say, no evidential basis for that is accepted.

Previously in correspondence, Ms Spottiswoode has said that this information that London Array is likely to hold such documents has been obtained from her experts, so that is what her expert has told her. That is a letter {I/36/2}, but, again, there is nothing from the expert explaining what he has been told or what he knows or understands. Again, had there been we may have wished to respond to it.

It is now also suggested that if the documents are held by the parent company and perhaps that is what the expert knows or understands, that E.ON, for example, had communications with DECC as it then was, that raises a question as to whether those are communications which are within the possession or control of the project companies, because it is the project companies which are the claimants. Again, that is a matter we may have wished to address. It is instead being raised on the hoof.

It is also implicit in the suggestion that London Array holds such documents that London Array was one of the benchmark wind farms, but Mr Druce's position in his expert report, as I understand it, is that he does not

know who the benchmark wind farms were for the 2009 banding decision round.

Even if such documents exist, as I said, we do not accept they are relevant, and the reason is that DECC's decision would have been based on the totality of information obtained from the benchmark wind farms and simply obtaining documents from one of them, even if London Array is one, as to which as I say there is no evidence, would not necessarily advance matters, and that is precisely why, as we understand it, Nexans' request for disclosure of this category of documents was dropped.

It was objected to on the basis that it would not cast any light on the actual decision-making process being only one piece of the jigsaw, as I say in my skeleton argument, and on that basis it was not pursued.

Clearly the appropriate approach for Ms Spottiswoode to take is to seek the full suite of documents which will actually cast light on DECC's decision-making processes by means of a third party application to DECC or its successor in title, and that is what they say that they intend to do in any event, and, therefore, in my submission, the proper approach is for Ms Spottiswoode to pursue her third party disclosure application rather than seek these documents from London

Array or rather a partial subset of the documents from London Array.

The only other point I would make is that at the moment the draft of this order refers to disclosure up to April 2013 which is a point I have already referred to, and of course, if contrary to my submissions the Tribunal were minded to order this category, whether 2013 is the appropriate cut-off would depend on the Tribunal's ruling as to whether 2013 is within the common issues -- the 2013 ROC banding decision is within the common issues trial.

THE CHAIR: Are you saying that your client does not have these documents in its possession or control?

MR WEST: We have not so far been ordered to search for them, and so I am not in a position to give you a definitive answer to that question.

Submissions by MR LUCKHURST

MR LUCKHURST: I would just like an opportunity to respond briefly to what Mr Jowell said about my client's conduct at the last CMC, and I would also like clarification on whether paragraph 25 of the order is pursued because we would also perceive that to be an application for disclosure.

MR JOWELL: It is pursued, but we were going to deal with that as a matter of direction in due course.

MR LUCKHURST: I will save submissions on that for due course.

Just on the point about what was not sought by Nexans at the June 2023 CMC. Paragraph 31 of Ms Spottiswoode's skeleton argument is not an accurate description of events, and Nexans did not take actions that were calculated to put the class representative at a disadvantage by imposing a burden on her.

At that CMC, Nexans initially raised a request for disclosure from the London Array claimants. It was perceived to be relevant as to whether they passed on or avoided their losses. The London Array claimants explained, supported by a note from their expert, Mr Bell, why they did not hold such documents, and amongst the points he made was that London Array was subsidised based on the 2010 ROO and London Array itself was not a 2010 ROO benchmark wind farm, and therefore communications between London Array and government consultants would shed no light on whether London Array avoided its loss pursuant to ROC subsidies under the 2010 ROO. That is paragraphs 3.4 to 3.6 of his note at {G/2/6}, and having considered Mr Bell's evidence, the request was not pursued by Nexans.

The proposal for a trial of the ROC issue alongside the London Array proceedings was first floated by the

defendants on 29 February 2024 as an alternative to seeking to strike out the class representative's case on the ROCs issue at the certification hearing. That is at {I/10/1}.

We therefore do not understand the suggestion at paragraph 31 of Ms Spottiswoode's skeleton argument that the disclosure request was not pursued at the June 2023 CMC whilst the Spottiswoode defendants were simultaneously pushing for the ROC issue to be determined as a preliminary issue in the London Array proceedings. Those events were eight months apart.

The suggestion that Nexans abandoned the request in a calculated way so as to put Ms Spottiswoode at a disadvantage is just wrong. It was unremarkable that Nexans did not pursue a contested disclosure request at the June 2023 CMC when faced with weighty evidence rebutting the request, so there is no proper basis for that inference in my submission.

My solicitors have also explained in correspondence that the class representative attended the same joint CMC, was told that disclosure issues had been compromised and was subsequently provided with Mr Bell's note. That is the letter at {I/28/2}. So there was no attempt on Nexans part to keep this secret. If the fact that the disclosure request had not been pursued was not

apprehended by Ms Spottiswoode that was not a deliberate act on my client's part. I just wanted to clarify that.

Submissions in reply by MR JOWELL

MR JOWELL: I am not going to go back over what happened. It is water under bridge. I am grateful for that explanation.

Mr West contends on a rather formalistic basis that no application has been made, and that is true, but we are in the CAT. The Tribunal ordered a CMC to be heard. You made it very clear that we would be hoping to receive disclosure in advance, indeed in advance of the CMC, and certainly it is within our rights to pursue a limited disclosure request at the CMC and his client has had adequate notice of this limited category in advance.

It is not contested by him that they do not have these documents. They say they have not carried out the searches. They are in our submission plainly relevant, potentially relevant, and there is no reason why we should not get on with it.

We accept entirely of course that we will have to make a third party disclosure application or applications in due course, and that will be dealt with under the various directions, but that is no reason why London Array should not start with its disclosure.

Insofar as a point is taken that if 2013 is out, the disclosure should not be given, we respectfully say that is not correct. The disclosure should still be given because it is still an issue in our proceedings, but at most it could be said that my client could arguably bear the cost of that disclosure upon the basis that, for the latter part, it is effectively a third party disclosure application.

That seems to us to be a rather formalistic approach given that we are all having a common issue, but that would be at most the result, it would be a question of dealing with the costs. So those are our submissions on disclosure.

I think the next issue we have are directions and I will hand over to Mr Rothschild.

Submissions by MR ROTHSCHILD

MR ROTHSCHILD: It may be perhaps convenient first to deal with confidentiality.

The first confidentiality issue is whether there should be a confidentiality ring in the Spottiswoode proceedings. It is agreed with the defendants that there should be. In the short term, this is at least for disclosure of the Commission decision and the Commission file.

The defendants have agreed to a process for that

which is copied from the process followed in the London Array proceedings.

If the Tribunal has the draft order, that process is set out at paragraphs 19 to 24, and it involves as it did, so I understand, in the London Array proceedings the so-called *Vattenfall* versions of these documents, and there being a first stage, beginning at paragraph 20, where those with an interest may -- confidentiality may raise objections before these documents then being released into a ring.

In the longer term, a confidentiality ring order in the Spottiswoode proceedings, one can expect further documents of a confidential nature to be added to it.

So the draft confidentiality ring order is again modelled on the ring in the London Array proceedings. It is at {A/2/30}, and I invite the Tribunal to make a confidentiality ring order in those terms.

The second confidentiality issue, if I may move on to that, is whether selected representatives of Ms Spottiswoode be added to the London Array confidentiality ring so that they can use information in that ring for the purposes of the joint trial.

So this is -- I make submissions for the time being on whether the facility should be there in the sense there should be the mechanism to allow that. Plainly if

there is to be a common issues trial there should be some equality of arms and it is wrong to have an imbalance of information. London Array representatives and Nexans representatives will be able to see information within the London Array ring, indeed, the Tribunal will be able to, and if Ms Spottiswoode's representatives are also there at the joint trial, at least insofar as it concerns the common issue, then in my submission it is plainly appropriate that they should know what is going on, and for that reason in paragraphs 17 and 18 of the draft directions order, there is provision for a small amendment to the existing London Array confidentiality ring order allowing the class representative and her legal representatives and selected experts to be admitted into the ring, and then, in 18, to be allowed to use such information for the purposes of any issue which is being tried together with the London Array proceedings. So that is the second confidentiality issue.

There is potentially a third one, it is raised by Mr West for London Array as to whether there should be a third confidentiality ring. This may overcomplicate matters. I leave it perhaps to Mr West to advance if he wishes to, the suggestion being that there should be a third ring just for the common issues trial. I do not

believe there are any documents yet to put in that ring; it may be necessary in due course. So those are the submissions on confidentiality.

There is perhaps also an outstanding issue in relation to disclosure which was touched on but has not yet been addressed.

So this is at paragraph 25 of the draft order, the sharing of documents from the London Array proceedings, and we for Ms Spottiswoode seek an order that the London Array parties provide and continue to provide documents disclosed, filed and served in the London Array proceedings to the Spottiswoode parties to redress this information imbalance. The cases it is proposed will be to a degree tried together. It appears even from submissions by Mr Luckhurst today at page [27] of the transcript, that Nexans has given disclosure in the London Array proceedings of five wind farms which could potentially have been included in the benchmarks for the 2010 order. There is plainly an overlap in many areas, and I seek that order at paragraph 25.

I see Mr Luckhurst rise. Would it be appropriate for him to make submissions on that before I proceed to other directions matters?

THE CHAIR: Yes.

Submissions by MR LUCKHURST

MR LUCKHURST: I am going to take them in the opposite order because paragraph 25 informs the issue of confidentiality arrangements.

What the class representative seeks by that paragraph is that all of the disclosure given and all of the evidence served in the London Array proceedings to date and all future disclosure and evidence in those proceedings be provided to the class representative whatever that may be.

There are several objections to this. The first point is the one I make at paragraph 25 of my skeleton argument which is there are no applications for disclosure before the Tribunal, a point made by Mr West earlier.

The second point is that the alleged need for all of the London Array proceedings material to be disclosed for the purpose of the ROC issue has not been developed or justified by the class representative in correspondence.

In fact, we had understood from the correspondence that the request had been abandoned and was not supported by the class representative's experts. I will just show you that.

If we start with {I/12/2}. This is a letter from

the class representative's solicitors, Scott+Scott, of 5 March 2024, and at the bottom of the page at subparagraph 2.5(c), you can see observations on what the scope of the ROC issue should be, and I just draw attention here to the fact that at this stage, it was being suggested that the common issues might go further than the ROC issue, this is five lines down, six lines down:

"For example, it is possible that the matter of overcharge established in the [London Array] Claim will have some read-across to our client's claim."

That is no longer the case as the Tribunal has seen this morning, but then over the page, so at page {I/12/3}, at the top of the page, subparagraph (d):

"Our client's agreement [that is agreement to the trial of a preliminary issue in the Spottiswoode proceedings] is subject to an agreement by the parties in the [London Array] Claim that Ms Spottiswoode be provided with all disclosure and evidence that has been exchanged or will be exchanged in the [London Array] Claim ..."

That is then responded to by my solicitors at {I/14/1}. At the bottom of the page at subparagraph 4(b) my solicitors explain:

"Our clients agree in principle that Ms Spottiswoode

should be provided with disclosure and evidence from the [London Array] Claim that is relevant to the common issue(s)."

So that is the key to that point, "relevant to the common issues".

If we then turn to {I/27/2} at paragraph 2.4, the class representative's solicitors requested on 24 April 2024 that:

"... the Nexans Defendants ... or London Array provide the complete list of categories of documents and/or any relevant list of documents which have already been disclosed, together with ... Disclosure Reports ...or [EDQs], so as to enable our client to consider her disclosure proposals."

We provided the list of categories of disclosure. They appeared in an annex to the Tribunal's directions order of 26 June 2024. We did not provide disclosure reports or EDQs because we considered those to be irrelevant.

If you then turn to {I/39/2} and paragraph 2.2, this is a further letter from the class representative's solicitors having considered that material. At paragraph 2.2:

"With that in mind, we set out in the Annex to this letter the categories of disclosure which

Ms Spottiswoode and her experts consider are necessary for the resolution of the ROC Issue, together with a brief explanation of the relevance of the category of data requested."

If you then go to page {I/39/4}, this is the annex referred to in the letter, and this contains three categories of suggested disclosure. The first two relate to London Array, the third relates to the defendants. It is at page {I/39/6}, and that third category is related to the narrow question of volume of commerce only.

So the outcome of that process of correspondence was therefore a narrow request for volume of commerce-related disclosure. There is no attempt to say that the entirety of the London Array proceedings disclosure and evidence is relevant.

So that is flatly inconsistent with the order that is sought at paragraph 25 of the class representative's draft directions.

The third point is that most of the disclosure and evidence in the London Array proceedings is not relevant to the ROC issue. It might be helpful to take up paragraph 26 of my skeleton argument. That is at {A/3/10}.

As I said at paragraph 26, putting to one side the

question of volume of commerce, the core question in the ROC issue is what a third party decision-maker would have done in a hypothetical counterfactual in which the costs of benchmark wind farms were lower. That decision-maker is ministers at DECC, and that question is not an issue on which Nexans holds relevant documents.

Then at paragraph 28 of my skeleton at the foot of the page, I have accepted there is a discrete question relating to volume of commerce for benchmark wind farms. The third party disclosure that we hoped to obtain -- I think we are going to come to that in the directions in due course -- the third party disclosure may confirm both the identity of the relevant benchmark wind farms and the volume of commerce, and, if it does, then no disclosure will be required from the defendants on volume of commerce.

Furthermore, until we know the identity of the benchmark wind farms and we do not at this stage know all of them, we do not know what projects need to be the subject of volume of commerce disclosure, so it is premature for any volume of commerce disclosure to be sought from the defendants.

The fourth point is that it is not appropriate to seek under the framework of the ROC issue acceleration

of a separate disclosure process that will occur in due course in the Spottiswoode proceedings.

That process should be separately managed so that categories of disclosure can be identified in an orderly way and orders made against all parties to those proceedings. There will be disclosure and evidence in the London Array proceedings that simply are irrelevant to the class representative's case. One example is the disclosure the London Array claimants have given in relation to their compound interest claim. That is clearly of no relevance to the class representative and it may be commercially confidential for the London Array claimants. So it is wrong in principle to just drag and drop the disclosure from one set of proceedings into the other.

The fifth point is that if one looks at the order sought, paragraph 25 of the draft directions, it is an order that all future disclosure and evidence is shared, so it is an order for disclosure of matters that are not yet known, bearing in mind that the trial is nearly a year away and there is a continuing duty of disclosure, matters may develop on the pleadings and so on, and it is in my submission wrong in principle for a third party to those proceedings to be granted an open ended right of this nature with no constraint as to

relevance to her own claim.

So we therefore say that paragraph 25 of the class representative's draft directions is not an appropriate order for this CMC. Now, I emphasise that we are not necessarily shutting the door, but if disclosure is sought, it needs to be properly justified and developed in correspondence, and we will respond cooperatively.

Turning then back to the confidentiality ring issues, the first and second point raised by my learned friend, the class representative's draft directions at paragraphs 17 and 18 proposed adding the class representative only to the London Array proceedings confidentiality ring. That does not work because it leaves out Prysmian and NKT. So any confidentiality ring for the ROC issue needs to include all of the parties.

What we have suggested along with Prysmian is a ROC issue confidentiality ring which all parties are members of. We are happy for that to be established immediately. It may help when writing to third parties seeking third party disclosure to be able to indicate to them that a confidentiality ring has been established and that, if they require information to be held within that confidentiality ring for the ROC issue, that can be done, subject to the supervision of the Tribunal.

Apart from third party disclosure, it may be the case there is not actually much disclosure to be given in relation to the ROC issue for the reasons I have just explained.

One minor point of detail -- and I should say that in relation to that ROC issue only confidentiality ring, we would envisage it being in identical terms to the Spottiswoode ring and the London Array ring, so there is no confusion, and documents can obviously sit in multiple rings to the extent necessary, and will all fall to be treated in the same way, because the undertakings will be drafted in the same way.

Then just finally one minor point of detail is that in her proposals for the class representative's addition to the London Array proceedings confidentiality ring it has been suggested that Ms Spottiswoode herself should be put into the inner ring. The inner ring in our view would normally be reviewed for external advisers and not parties. It is not an issue that you need to resolve today because all of these rings contain or will contain a mechanism for resolving disputes about admitting a person to the inner or outer rings. So, for example, if you look at {E/3/5}, at subparagraph 5 of this order -- that is not the right reference, I will find the right reference for you, but the short point is that

all of these rings contain a mechanism as is usual in these types of proceedings, for a party to propose the addition of a member of the ring. If there is objection, then that can ultimately be referred to the Tribunal following a procedure that is dictated in the ring.

So I just put down a marker on that, that there may in due course be an issue between the parties as to whether or not clients should go into the inner ring.

THE CHAIR: What is the point of having an additional ring for the ROC issue?

MR LUCKHURST: It seemed to us that that was the neater solution because there are two separate sets of proceedings. The actual disclosure that is relevant to the ROC issue may be fairly narrow, and it would be helpful when writing to third parties to say there is a ROC issue, we would like disclosure in respect of that issue, there is a dedicated confidentiality ring governing this, we are happy for your information to be held within that ring subject to the supervision of the Tribunal. At the moment in the London Array proceedings confidentiality ring there is a lot of material that is totally irrelevant to the ROC issue.

So it would not be impossible to just do it by way of addition of parties to the London Array ring, but

that would be using a ring that was not designed for the ROC issue purpose, for that purpose. So it just seemed to us that it would be neater to have a dedicated ring. That was the pragmatic suggestion.

THE CHAIR: Okay.

Submissions by MR WEST

MR WEST: The London Array claimants also oppose the proposal for disclosure in paragraph 25. Like Mr Luckhurst I think that really comes first before the question of a confidentiality ring.

Mr Rothschild's basis for this is that absent that disclosure there will not be a level playing field because Ms Spottiswoode and her team will not know what is happening at the trial because they will not have access to the disclosure documents, but of course the trial which is going to take place beginning next April is a bifurcated trial with four weeks initially limited to issues in the London Array case, followed by a two-week trial -- we will come back to timetable -- but on the current proposal, of the common issues and there is therefore no need for Ms Spottiswoode to understand what is going on in relation to the part of the trial which is limited to London Array to which she is not a party and has not been made a party.

So the suggestion that she will not necessarily

understand all of the debates happening during the purely London Array part of the case is not a good reason to give her disclosure.

As my friend has said, with one or two exceptions, the disclosure in London Array is irrelevant to the common issues. As the Tribunal has already heard, there has not been disclosure in relation to the question of the ROC banding decision process, and so the disclosure in that case is primarily directed to questions like overcharge, financing losses, and so on, which are not amongst the common issues.

Now, I accept that there may be one or two documents which are relevant to the common issues, for example, the contracts on London Array for the supply of the cables, or at least redacted versions of them, and if that is what Ms Spottiswoode was seeking, we would of course consider that request, but that is not the request which is for all of the disclosure, and, again, one wonders what is really going on here and it appears that rather as in case of the 2013 decision, what Ms Spottiswoode really wants is not disclosure in connection with the common issues but disclosure in relation to the issues which are not common and which will be subject to a subsequent trial in relation to questions like overcharge and she is seeking that now so

that she can obtain it on an inter partes basis. So it is the same point again.

So for all those reasons that application -- it is not even an application -- that request should be refused.

In relation to confidentiality, our primary position is that this point is premature because unless and until it is clear what documents Ms Spottiswoode is being given from the London Array proceedings, and at the moment we say there is no proper basis for her to be given any documents, the question of a confidentiality ring order does not arise.

If it is simply a question of providing some redacted contracts from 2010, that is unlikely to raise issues of confidentiality, and, as my friend says, the proper confidentiality order to put in place may depend on what happens in due course. For example, the third party may wish to be a party to any confidentiality ring order so that it is able to enforce the provisions of that order. I do not know what their position will be in relation to that.

As Mr Luckhurst said, the suggestion simply of adding Ms Spottiswoode to the London Array confidentiality ring order does not work because paragraph 25 requires the documents to be disclosed from

the London Array proceedings to all of the Spottiswoode parties. That includes, of course, Nexans which is already party to the London Array confidentiality ring order, but also Prysmian and Nexans who are not.

So in my submission the question of the appropriate confidentiality arrangements to put in place for any disclosure from London Array to Ms Spottiswoode can be parked for the moment and it may be appropriate to look at that again at the time that the third party disclosure application is being considered.

Those are my submissions on those points.

THE CHAIR: On paragraph 25, would you have any objection if it was limited to documents relevant to the preliminary issues?

MR WEST: May I take instructions briefly? (Pause)

MR LUCKHURST: Sir, while Mr West is taking instructions --

THE CHAIR: Let us see what he says first.

MR WEST: There is no objection to that.

THE CHAIR: Okay.

MR LUCKHURST: As I said in my submissions, there is no objection in principle to sharing relevant material, but it does rather beg the question as to what those are, and we do say there should be some correspondence seeking to establish that. So whether or not that order is made is a matter for the Tribunal, but we would

suggest that the orderly process might be, you know, correspondence and then, if necessary, an application but we would hope that it would not result in an application.

MR ROTHSCHILD: I am conscious the transcriber has not had a break but it is already 12.30, I do not know whether --

THE CHAIR: I am sorry for the transcribers. We have nearly finished, I think.

Submissions in reply by MR ROTHSCHILD

MR ROTHSCHILD: Yes, that is right.

In relation to this point, the request goes beyond documents solely for the common issue, for the ROC issue.

These are closely related cases. A substantial issue in the London Array case is overcharge. It is the same cartel, there are common defendants, and, as is set out at the start of our skeleton argument, we for Ms Spottiswoode are quite a long way behind procedurally because inevitably we had to wait for the collective proceedings order which was only made in April this year before our case got going. The pleadings in our case will not close until November of this year.

So the Tribunal asked earlier to Mr Jowell when we would be able to state a case on overcharge. We have no

documents on overcharge. An advantage of getting broader disclosure, a full sharing, going beyond the ROC issue will be that we will be able to catch up. The proposal is made for reasons of efficiency.

My learned friends Mr Luckhurst and Mr West seek to put roadblocks in the way. They invite extra work and extra debates as to what might be relevant and might not be relevant, but there is already a set of documents there, and we suggest the proportionate way is simply to share those documents with us.

It was said by Mr Luckhurst that there was no formal application for this, but it was very clearly identified at the 11 April collective proceedings application hearing that we considered that full sharing of documents and correspondence would enable us to get up to speed. Otherwise this set of documents is going to take many more months to arrive and it will only slow down the efficient case management of the Spottiswoode proceedings which I am sure is a high priority for the Tribunal and it certainly is a priority of Ms Spottiswoode.

Submissions by MR LUCKHURST

MR LUCKHURST: Sir, can I now respond to that because it is now put on a different basis to the way it was originally put which is that it would be a good idea to

accelerate disclosure for the purposes of the Spottiswoode proceedings.

We have agreed to give substantial early disclosure in the form of the *Vattenfall* versions and the confidential version of the Commission decision, so all of the access to file documents, and normally if further disclosure is sought in those proceedings, there might be a CMC in those proceedings convened, there would be a discussion as to whether or not it was best to do that before or after pleadings, so disclosure could be by reference to the pleadings.

Again, I emphasise, I am not trying to shut the door on this and we will be cooperative in correspondence, but this is not the right way to go about it procedurally, we would say.

MR ROTHSCHILD: Would the Tribunal require further submissions on these points or shall I proceed to others?

THE CHAIR: What other points are there?

Submissions by MR ROTHSCHILD

MR ROTHSCHILD: The dates and the directions generally, so going through the order.

On confidentiality I think the Tribunal has my submissions. We do not strongly object to a separate ROC issue ring, but we consider it to overcomplicate

matters. We do not object to Prysmian and NKT being also added to the London Array ring on the same terms, but that is for them to advance and they have not advanced that case yet.

Submissions by MS WAKEFIELD

MS WAKEFIELD: If I might just rise because of that last comment. We do advance and we would take it as a given that NKT and Prysmian would be joined just as Spottiswoode are, either to a smaller ring or the big ring, we do not mind which. Thank you.

Submissions by MR ROTHSCHILD

MR ROTHSCHILD: Would it be convenient to turn up the annotated draft order to see what the outstanding issues are, and they are mostly issues relating to dates for the next steps. To ensure nothing is missed it may simply be appropriate just to go through all of the highlighting at this stage.

On the second page after the introduction, the first highlighting about a third of the way down relates to the confidentiality ring order which I have addressed.

At the bottom of page 2 there is the issue as to when the trial of the ROC issue should take place, and this relates to the availability of the Tribunal during the Whitsun vacation 2025.

The parties have liaised as the Tribunal requested.

The class representative is amenable to each of the -- at least three options which have been debated between the parties. One option would be for the Tribunal to sit during the Whitsun vacation, a second option would be for the Tribunal not to sit during the Whitsun vacation and instead extend the current six-week period for the London Array trial into a seventh week, and the third option would be not to sit during the Whitsun vacation week but condense the London Array part of the case so that the six weeks are condensed into a total of five weeks.

It is probably for Mr West and counsel for Nexans to make submissions on this given that the class representative is amenable to each of those options and there may be an additional one.

THE CHAIR: Yes, could I make it clear the Tribunal does not propose to sit during the Whitsun vacation.

Submissions by MR WEST

MR WEST: Just on the London Array aspects, I am afraid from my personal perspective I am not available in that seventh week because I have another trial in this Tribunal starting on 10 June 2025. However, the issues in the London Array trial have somewhat reduced.

There was at one stage an allegation that London Array had passed on the loss via the prices it charges

for the electricity which is generated by the wind farm, and under the draft amendment that has been put forward by Nexans and is in the bundle, that allegation has been withdrawn or will be when those amendments go through.

In addition, questions of potential overcharge via the ROC banding decision process have been moved into the common issues trial, and there was at one stage also a very prominent issue about whether the dawn raids by the Commission in January 2009 had featured in the procurement process. I am not sure to what extent that is maintained. I suspect the position is that it is formally maintained, but there is almost no evidence about it in the witness statements that have been served and likewise very little or no disclosure.

So the issues in the London Array trial, as I say, have somewhat diminished and it may be, therefore -- and I anticipate that it would be possible to deal with the non-overlapping issues in three weeks. That would enable the Tribunal then to sit for a week to address the common issues, not sit during the Whitsun vacation week and then come back for the second week of the common issues thereafter. I accept that is not ideal, but that is our proposal as best we have been able to come up with one.

MR ROTHSCHILD: I do not know if Mr Luckhurst may wish to

make submissions at this juncture.

Submissions by MR LUCKHURST

MR LUCKHURST: It is very helpful to have those indications from Mr West.

We on our side would have been able to sit for the additional week at the end of the period to accommodate a break over the vacation, but we hear what Mr West said about his availability on that.

There has not yet been detailed discussion between the parties to the London Array proceedings about structuring the timetable of that trial in order to squeeze it down to three weeks. Without necessarily accepting everything that Mr West said about the characterisation of the remaining issues, we do agree that the volume of witness evidence means that it may be possible to condense the trial. We are, however, conscious that expert evidence has not yet been finalised or served in those proceedings.

So we think it could be possible, but at the moment we are not in a position to say 100% that it would be, and I think it might be helpful if the parties engaged in some discussion about how that trial would be precisely timetabled with sort of periods of opening, closing, witness evidence and so on.

MR ROTHSCHILD: Shall I move on to the next section of the

draft order?

THE CHAIR: Yes.

Submissions by MR ROTHSCHILD

MR ROTHSCHILD: So paragraph 3 on page 3, Mr Jowell has made our application in that regard already.

Paragraphs 4 and 5 relate to disclosure from non-parties, third parties. This is specifically considering government departments which may hold documentation relevant to the ROC issue.

The parties are agreed that they should jointly approach those non-parties in correspondence within the next two weeks, so by 5 June 2024. There is obviously some work to be done by the parties in liaising in this regard, and then there is disagreement as to what should happen next in terms only really of the dates. So towards the end of paragraph 4, the Tribunal will see two dates highlighted in yellow.

We consider for Ms Spottiswoode that those third parties who so far have had nothing to do with this case ought to be given one month to respond. That will enable them to do proper searches and give careful consideration to the requests. They are government departments with doubtless large archives not necessarily readily available.

By contrast, Nexans, Prysmian and the London Array

claimants suggest that they should respond within two weeks and we think that is simply unrealistic. So that explains our date of 5 July.

Turning to paragraph 5, it may be that the disclosure is forthcoming without need for an application, but we cannot assume that, and therefore paragraph 5 provides for disclosure applications against such non-parties and also against main parties, and we propose that such applications be made within 10 days thereafter, in other words, 10 days after the 5 July deadline for hearing back from the government departments. That is quite a quick turnaround but of course it is important for issues to be explored properly in correspondence before an application is made to the Tribunal. We think that is the quickest realistic date, 15 July. The suggestion of 28 June we say is just too soon, it is unrealistic.

Towards the end of that paragraph, it is suggested that to the extent such applications are unopposed they should be determined on the papers. That is agreed subject to the Tribunal. It may be that the non-parties do not oppose, but we simply do not yet know, but to the extent they are contested, there will clearly need to be a hearing and it is suggested that that be at the very end of July 2024, if that is convenient to the Tribunal.

It is obviously important to get this disclosure from the third parties as soon as possible if the rest of the timetable is to be met, and the parties are agreed, paragraphs 6 and onwards, that witness statements of fact for the ROC issue be served by 4 October and expert evidence, you will see the dates there, paragraph 8 by 20 November. It will become very tight if the disclosure is not provided by September or thereabouts.

I hope that explains the yellow highlighting on page 3, and if I may turn over to page 4, there is a comment against the date for expert reports at paragraph 8 which relates to a point raised by the London Array claimants as to how the directions in their case are affected, but the dates are agreed and indeed the whole of page 4 is agreed.

Going over to page 5, similarly this is agreed.

Page 6, the yellow highlighting against paragraphs 17 and 18 relates to a point on which I have already made submissions, the amendment of the London Array collective -- I am sorry, confidentiality ring order in order to allow permission for representatives of Ms Spottiswoode.

Section C of this order relates to the agreed procedure for disclosure of the Commission decision and

file on which I have already made submissions, and that continues to paragraph 24 on page 8.

Paragraph 25 you have heard submissions on that on the sharing of documents between the proceedings.

It is agreed at paragraph 26 that costs be in the case, and the liberty to apply provision on paragraph 27 is -- well, there is some highlighting for the addition of the words "the London Array claimants" but we do not object to that addition. It is an unusual liberty to apply provision only in that it mentions the other addressees referred to in paragraph 20, those are the third parties who might have an interest in preserving confidentiality aspects of the Commission decision, and it is proposed to include in Annex 1 the ROC issue and in annex 2 the limited list of those from the Spottiswoode proceedings who would be admitted to the London Array confidentiality ring and we would have no objection to a list of NKT and Prysmian individuals if that is required.

Unless the Tribunal has questions at this stage, those are the submissions on the order.

THE CHAIR: Thank you.

Submissions by MS STRATFORD

MS STRATFORD: I am just going to say something I think on behalf of this side of the Tribunal about the timing of

the third party disclosure request.

So we see this, as you will have heard already, as the key to unlocking disclosure on the ROC issue, and that is why we are very anxious that it should be progressed as quickly as possible.

We are certainly not in our date proposals seeking to put undue pressure on the recipients of this request, and we appreciate that this will come out of the blue, but we are dealing with principally or perhaps solely here a government department, and we suggest that it is actually not realistic to think that they are going to receive a letter, have a hunt around their documents and then be happy to provide or feel comfortable providing third party disclosure.

We suggest, based on our collective experience that the government will actually welcome a formal application and will want the cover of an order in order to provide the documents. Of course we are talking about very historical documents here going back to 2009/2010, so I think there is a real prospect that because it is all relatively old, there may not be sensitivity or real commercial or other concerns, but nevertheless we anticipate that there probably will need to be an application and, therefore, we just want that to happen as quickly as possible.

We also did not see why the Tribunal should be confined to the very last week of July for a hearing if one is needed. For our part, we would be content for that to happen sooner if it was convenient for the Tribunal.

So that is our position and I believe London Array also adopts that position.

Submissions by MR WEST

MR WEST: We do, yes.

My friend Mr Rothschild said that the timetable does become tight if the disclosure is not received by December or thereabouts, so this does need to be progressed.

Clearly if the deadlines cannot be complied with, they can be -- extensions can be sought and so on.

Before I sit down, can I just mention one point which is referred to in my skeleton which is the question of costs.

Paragraph 26 of the order says costs in the case. It is perhaps necessary just to understand what is meant by that.

The two claims, London Array and Spottiswoode, are not being consolidated and in our submission the costs of each case remain separate. So that is perhaps slightly misleading, the wording in that case.

I did say in my skeleton argument that if Ms Spottiswoode's view is that London Array may be potentially liable for any of her costs that is something she should make clear because London Array's position is that there is no even theoretical possibility of that happening. I know she has not said that, but I put a further marker down -- I do not think anyone has put a marker down today so that is probably a record -- in relation to that issue.

MR JUSTICE RICHARDS: Do you think the right order then in 26 is that as between the parties to Spottiswoode proceedings, costs in the Spottiswoode proceedings, and as between the London Array parties, costs in the London Array proceedings?

MR WEST: I think that is probably right, yes.

Submissions in reply by MR ROTHSCHILD

MR ROTHSCHILD: We simply cannot predict how the government will respond. We think applications to the Tribunal should be well thought through and informed by correspondence and two weeks is likely to be an unreal time.

As to the date, precise date for the hearing, whether it is the last week of July, the penultimate week of July or even the first week of August, it may depend on the availability of the third party's

representatives and of course the Tribunal.

THE CHAIR: Anything else?

The Tribunal is now going to rise until 2.30 at the earliest.

(12.51 pm)

(The short adjournment)

(2.43 pm)

Ruling

THE CHAIR: I am going to run through the order that the Tribunal proposes to make.

Starting with the preliminary issues and taking the combined proposal document, issue 1 should be as set out, subject to the deletion of the reference to the renewables obligation order 2013. This is because in the Tribunal's view the 2013 order is not relevant to the London Array proceedings and raises separate issues which would require consideration of different data and analyses. Its inclusion would jeopardise the tight timetable for the trial of the preliminary issues.

Issue 2 should be as set out in the draft with the inclusion of the red insertion so that the red insertion should read, rather than "in the maximum amount claimed at 26%", simply "at the rate of 26%".

The inclusion of the reference point of 26% would potentially enable the Tribunal to make a determination

in relation to the ROC issue without the need to determine the minimum cost elevation issue in subparagraph (a).

It was submitted by Mr Jowell on behalf of the claim representative in the Spottiswoode proceedings that it would be wrong to confine her to the 26% maximum overcharge as this was only a provisional estimate, and it might be that after disclosure, the overcharge would be claimed at a higher level.

The Tribunal accepts this as a possibility but the determination of the issue by reference to 26% is not intended to shut her out from advancing a claim for a higher overcharge. The determination of the issue by reference to 26% would not be determinative of the effect of an overcharge at a higher level. In other words, if the Tribunal were to determine that a 26% overcharge had no effect on the number of ROCs awarded, it would still be open to the claim representative to show that there was a higher overcharge and that this did have an effect on the ROCs, but the Tribunal considers that the framing of the issue by reference to 26% is appropriate on the basis of the materials currently before the Tribunal.

As to subparagraph (b), the Tribunal takes the view that if, as Mr Jowell submitted, subparagraph (b) is

simply a matter of arithmetic calculation that can be derived from the volume of commerce and the minimum cost elevation, its inclusion would serve no useful purpose. The Tribunal is also concerned that this issue may raise other contentious issues which would disrupt the trial of the preliminary issues.

Issue 3 should be removed. The Tribunal considers that the issue of whether, even if in the counterfactual fewer ROCs per MWh were awarded to offshore wind under either or both of the orders, would the overall cost of the renewables obligation scheme to electricity suppliers have been less should be decided in the context of the Spottiswoode proceedings and there is no sufficient benefit to including that issue at the trial of the preliminary issues.

Issue 4 is essentially agreed. The reference to material before the Tribunal in those proceedings should be clarified by making clear that the issue is to be determined by reference to both the material before the Tribunal and the pleaded issues in those proceedings.

Turning to the draft order, the direction for disclosure at paragraph 25 should be limited to issues relevant to the preliminary issues. What is relevant will have to be agreed in correspondence and the direction can, if necessary, be brought back to the

Tribunal.

Paragraph 3 should come out. The Tribunal is not satisfied that it would be appropriate to make an order in the terms sought at this stage. Given that the relevant disclosure will be in the hands of the government and other third parties, that disclosure should be obtained first. The Tribunal is not shutting out the Spottiswoode claim representative from applying for the correspondence which she seeks, but such application should await the third party disclosure.

With regard to paragraphs 4 and 5, the Tribunal prefers the later dates on the basis that these will give the recipients of the requests a more realistic period in which to respond.

As to the confidentiality ring, the Tribunal considers that it would be preferable, particularly with regard to the obtaining of confidential documents from third parties, to establish a new confidentiality ring limited to the preliminary issues.

Finally, the order for costs should make clear that costs in the case means costs of the relevant parties in each of the two sets of proceedings.

I hope that that covers everything, but if not please now is your chance.

Oh yes, as far as the listing of the trial is

concerned, the Tribunal is provisionally in favour of reducing the time estimate for the London Array claim to three weeks. There will then be one week for the trial of the preliminary issues. There will then be the Whitsun vacation and there will then be the second week of the trial of the preliminary issues after the Whitsun vacation.

(2.51 pm)

MS STRATFORD: In relation to the third party disclosure application which is obviously going to be one of the most immediate things to happen, by adopting the later dates, did you intend to indicate that the Tribunal would be able to have a hearing, if one was necessary, in the week of 29 July?

THE CHAIR: Yes.

MS STRATFORD: Thank you. That is very helpful.

MR WEST: Paragraph 25 has been limited to relevant documents, but in terms of the date for that disclosure, currently the drafting says "forthwith".

THE CHAIR: Yes.

MR WEST: But as I understand it, the Tribunal has ordered that the parties are to seek to liaise to agree the scope of that order, so the wording of "forthwith" should --

THE CHAIR: Should come out?

MR WEST: Should come out, yes.
THE CHAIR: Let us leave the date open.
MR ROTHSCHILD: May I ask for clarification as to the position with paragraphs 17 and 18, whether there is to be an amendment to the London Array CRO or simply a new confidentiality ring?
THE CHAIR: A new confidentiality ring, yes.
MR ROTHSCHILD: I am grateful.
MR JOWELL: I think that that deals with everything and it just stands for me, on behalf of everyone, to thank the Tribunal for their time.
THE CHAIR: Well, thank you very much for all your submissions.
(2.53 pm)
(The hearing adjourned)