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IN THE COMPETITION

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

APPEAL
TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 1st October – Tuesday 29th October 2024

Before:

Justin Turner KC
Sir Iain McMillan CBE FRSE DL
Professor Anthony Neuberger

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Claimants

Stellantis Auto SAS & Others

V

Defendants

Autoliv AB & Others

A P P E A R A N C E S

Colin West KC & Sean Butler (Instructed by Hausfeld) On Behalf of the Claimants.

Sarah Ford KC & Prof. David Bailey (Instructed by Macfarlanes) On Behalf of the Sixth to Tenth Defendants.

David Scannell KC & Derek Spitz (Instructed by White & Case) On Behalf of the First to Fifth Defendants.

Wednesday, 2 October 2024

(10.30 am)

THE CHAIRMAN: Right. I probably should read the warning again.

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MR WEST: Before Mr Scannell begins, can I hand up the dramatis personae we have produced overnight as requested.

THE CHAIRMAN: Yes, thank you very much.

MR WEST: As with the chronology, it is not yet agreed, but we will endeavour to obtain the Defendants' input into it and it can be updated --

(Handed).

THE CHAIRMAN: There is going to be a really handy guide to acronyms as well, is there not, at some point?

MR WEST: There is already a glossary.

THE CHAIRMAN: Oh, is there? Where is that?

MR WEST: It is in bundle S. That is agreed, I am happy to say, with all of the acronyms, or most of them.

1 THE CHAIRMAN: So where do I find it?

2 MR WEST: The dramatis personae will also be added to bundle
3 S.

4 THE CHAIRMAN: S, okay. Thank you very much.

5 Opening submissions by MR SCANNELL

6 MR SCANNELL: Good morning.

7 I appear with Mr Spitz for the Autoliv Defendants.

8 The Claimants say that they have suffered an overcharge
9 on every steering wheel, airbag and seatbelt they bought
10 over an uninterrupted period of nine years. On that
11 basis, they claim over €770 million from my client and
12 from TRW/ZF.

13 Their primary case is that that overcharge was
14 caused by a global cartel to which the Defendants were
15 parties, a cartel that affected supplies of OSS
16 components to all car manufacturers from 2002 to 2011.
17 If that is wrong, the Claimants' first alternative case
18 is that the overcharge was caused by different cartels,
19 quite possibly with different parties. They do not
20 actually trouble to identify who the parties to any of
21 the cartels they allege were. Each one of those cartels
22 supposedly targeted individual claimant companies and
23 the aggregate effect of those cartels is identical, they
24 say, to the effect of the global cartel: an overcharge
25 of exactly the same magnitude on every seatbelt, airbag

1 and steering wheel they bought between 2002 and 2011.

2 If that is wrong and there was no cartel at all,
3 the Claimants have a second alternative case and that is
4 that the effect of the infringements the Commission
5 found was identical to the effect the Claimants allege
6 on both the primary case and the first alternative case
7 measured using exactly the same economic methodology as
8 they used for their primary and first alternative case.

9 THE CHAIRMAN: So just -- thank you for that helpful
10 summary, but just where those three different cases are
11 set out by the Defendants -- by the Claimants, sorry,
12 where are they set out?

13 MR SCANNELL: The primary case is set out at paragraph 39 of
14 the 4APOC.

15 THE CHAIRMAN: 39 of the ...?

16 MR SCANNELL: I am going to refer to the Fourth Amended
17 Particulars of Claim as the 4APOC unless that offends
18 anybody on the Tribunal.

19 THE CHAIRMAN: No. It is just as long as I am reminded what
20 you are talking about and then ...

21 MR SCANNELL: Yes.

22 THE CHAIRMAN: Can we just pick those up as we go? Sorry.
23 I mean, if you are coming back to it there is no need to
24 do it now, but ...

25 MR SCANNELL: So the 4APOC is in two different places in

1 the bundle --

2 THE CHAIRMAN: Yes, I have got that. One has been --

3 MR SCANNELL: -- {A/2/1}.

4 THE CHAIRMAN: -- sanitised, which is very helpful, thank
5 you.

6 MR SCANNELL: Okay, so primary case, global cartel,
7 paragraph 39 {A/2/17}. First alternative case, targeted
8 cartels --

9 THE CHAIRMAN: Sorry, first alternative case is?

10 MR SCANNELL: First alternative case, I am leafing through
11 to find ...

12 Almost there.

13 THE CHAIRMAN: Paragraph 43, I think?

14 MR SCANNELL: Yes. Yes, 43 is the first alternative case
15 {A/2/26}. Then 44 --

16 THE CHAIRMAN: Hold on, let me just read it.

17 (Pause).

18 Yes, sorry. Yes.

19 MR SCANNELL: Second alternative case, over the page,
20 paragraph 44 {A/2/27}, and the Tribunal will be very
21 familiar with paragraph 44 from the Tokai Rika
22 application to strike out.

23 THE CHAIRMAN: So, 44? Sorry, it is not over the page on
24 my ... you do not mean 44A, you mean ...?

25 MR SCANNELL: I mean 44, page 27.

1 THE CHAIRMAN: Yes:

2 "In the further alternative ..."

3 Yes. Thank you.

4 MR SCANNELL: Now, we say that that claim is untenable.

5 THE CHAIRMAN: Which one, the third one?

6 MR SCANNELL: The entirety of that.

7 THE CHAIRMAN: The entirety, right.

8 MR SCANNELL: Fully conjugated, it asserts that there is
9 actually no need for the Claimants to establish a cartel
10 against them at all because the effect of
11 the Commission's decisions is that -- is identical to
12 the effect that would have been caused had there been
13 a cartel affecting them. In other words, according to
14 the Claimants, it makes no difference whether
15 the Defendants sat down in a room together and agreed
16 that they would cartelise every single RFQ that every
17 single claimant issued between 2002 and 2011, or if they
18 did not do that and instead decided that they would
19 compete against each other vigorously for all of those
20 RFQs. Either way, according to the Claimants,
21 the effect is identical and we say that is nonsensical.

22 In my submission it is abundantly clear why
23 the Claimants have brought this case. The primary and
24 first alternative cases are makeweights; they are highly
25 implausible, and I will get to that. They refer -- they

1 rely on inference upon inference to be drawn to avoid
2 collapsing, but all the Claimants can point to to
3 justify drawing all of those inferences is a smattering
4 of documents, none of which are incriminating in the way
5 that the Claimants allege, and most of which,
6 importantly, were considered by the European Commission
7 over an eight-year period without reaching
8 the conclusion that these Claimants are inviting you to
9 draw.

10 The real reason they have brought this case --

11 THE CHAIRMAN: I mean, Mr West says, well, you cannot draw
12 any conclusion from the fact that the Commission does
13 not necessarily pursue every abuse or every aspect of
14 the cartel issue, so --

15 MR SCANNELL: We fundamentally reject that, that --

16 THE CHAIRMAN: You reject that, yes, okay. You will need to
17 help me with that at some point.

18 MR SCANNELL: -- way of thinking.

19 THE CHAIRMAN: Yes.

20 MR SCANNELL: The way that is put in the skeleton argument
21 is that the European Commission goes about its
22 enforCement business by plucking low hanging fruit from
23 trees.

24 THE CHAIRMAN: Yes, that is what was said. Yes.

25 MR SCANNELL: That is absolutely an unfounded statement of

1 the way the Commission goes about its business. The way
2 that the Commission goes about its business is by
3 conducting thorough-going reviews of documents and
4 deciding on the basis of those thorough-going reviews,
5 supplemented by requests for information and oral
6 hearings if need be, the inferences that they are
7 capable of sustaining, and if they feel that
8 the documents cannot sustain an inference they will not
9 draw it, but if they can, they will.

10 The real reason they have brought this claim, we
11 say, is that they have seen these two Commission
12 decisions, and, no doubt encouraged by their lawyers,
13 they feel that they can leverage those two decisions to
14 get a gargantuan pay out at the expense of their own
15 suppliers.

16 Now, they must appreciate that these two European
17 Commissions do not relate to the OSS components that
18 they bought. They relate to certain OSS components that
19 other OEMs bought at clearly defined times.

20 They must also appreciate this, that if Toyota,
21 Suzuki, Volkswagen, BMW, Honda, if they were
22 the Claimants in this case, the companies that were
23 actually found by the Commission to have been
24 the targets of cartel activity, those companies could
25 not hope to claim what these Claimants are claiming,

1 which is that 100% of their volume of commerce was
2 affected by those infringements. We know that because
3 the European Commission expressly found in the decision
4 that the cartel behaviour only affected some supplies,
5 that not every instance of concertation led to an
6 agreement and that not every agreement was complied
7 with. Yet these Claimants, none of whose trade was
8 found to have been targeted by any OSS supplier, not
9 just ZF and Autoliv, think that they can persuade
10 the Tribunal that 100% of their trade was affected by
11 those infringements.

12 Now, we say that is just opportunistic. To put it
13 bluntly, it is a try-on, and we trust that the Tribunal
14 will see through that.

15 Now, we say that this claim should be dismissed for
16 five main reasons. The first is that there is no basis
17 for concluding that Autoliv participated in a global
18 cartel of the sort alleged at paragraph 39 of the 4APOC.

19 The second is that there is no basis for an
20 inference that Autoliv participated in targeted cartels.

21 The third is that, even if the Tribunal were to
22 conclude, contrary to those points, that there was
23 either a global or targeted cartels, there is no basis
24 for concluding that that would have had a material
25 effect on the prices that these Claimants paid for their

1 OSS components and I will explain that.

2 The fourth is because, if the Tribunal rejects
3 the Claimants' case alleging a global cartel or targeted
4 cartels, as we say it should, then there is no basis to
5 conclude that the infringements the Commission found
6 affected their prices either. The Claimants' attempt to
7 allege otherwise using their spillover case or indirect
8 effects case, whatever they want to call it, is hopeless
9 and should be rejected.

10 And, finally, even if the Tribunal was to find that
11 there was some basis for saying that there was some
12 effect on some of the volume of commerce of
13 the Claimants, that effect could not have been anything
14 like the effect that Mr Hughes has detected before one
15 ever gets to pass-on.

16 The remainder of my submissions is going to be in
17 three parts. First, I want to address the Claimants'
18 case that there was either a global or targeted cartels
19 and I want to address the overall probabilities of that,
20 and I use that nomenclature from my learned friend's
21 skeleton, and I want to refer to some of the documents.

22 Second, I will address the Claimants' spillover case
23 and explain why it should be rejected. Now, at that
24 point, I am going to sit down and I am going to pass
25 over to my learned friend Ms Ford because she is going

1 to address the Tribunal on the overcharge issues arising
2 in the case. I will then resume my submissions to deal
3 with pass-on. That will be on Friday morning.

4 I propose to address questions of limitation under
5 German law and financing losses in closing, taking my
6 lead from the Tribunal's indication at the PTR.

7 SIR IAIN MCMILLAN: If I could just put a question to you.

8 MR SCANNELL: Of course, Sir Iain, yes.

9 SIR IAIN MCMILLAN: Is it your argument that

10 the European Commission saw some of the Defendants'
11 evidence, emails, discussions, telephone calls, and
12 actually ruled out any wrongdoing on their part?

13 MR SCANNELL: They certainly did not do that. They found
14 that the Defendants were guilty to the extent that is
15 reflected in the decision.

16 SIR IAIN MCMILLAN: Oh, indeed. No, but I am talking as it
17 applies to this case. You appear to suggest that
18 the European Union had found in OSS 1 and OSS 2
19 wrongdoing there but had ruled out wrongdoing in
20 the case that we are hearing just now. Is that
21 the point you are making, because they saw some evidence
22 and discounted it?

23 MR SCANNELL: No, we fully accept that you will not find in
24 the OSS decisions an express finding saying, "This is
25 the full extent of the cartelism and there was no

1 possibility of any further cartelism", but we deny that
2 there was that further cartelism, and insofar as
3 the Claimants are relying on documents that were before
4 the Commission to suggest that that is enough to
5 generate that sort of conclusion, we reject that.

6 SIR IAIN MCMILLAN: I hear that you are rejecting that, but
7 you are not claiming that the European Commission
8 rejected it? They did not take their investigation that
9 far to do so; is that the point you are making?

10 MR SCANNELL: We do say that the European Commission had
11 before it the documents -- many of the documents that
12 the Claimants are now relying on.

13 SIR IAIN MCMILLAN: Yes.

14 MR SCANNELL: So they would logically have been reviewed
15 over an eight-year period and I am suggesting to
16 the Tribunal that it is fair to assume that if
17 the European Commission felt that those documents were
18 capable of generating the sort of inferences that
19 the Claimants are now suggesting should be drawn from
20 them, they would have said so. There was nothing
21 preventing them from saying so. But I fully accept that
22 they did not in terms say, "We have considered whether
23 there was cartelism in respect of Peugeot, for example,
24 and have dismissed that". They tend not to.

25 SIR IAIN MCMILLAN: Right, I understand that. So

1 the European Commission did not say that, but your
2 argument is that they thought that because they had seen
3 that evidence and had taken their enquiries no further?

4 MR SCANNELL: I hesitate to ascribe any particular thought
5 or intention to the European Commission. However,
6 the way I would put it is that it is a fair assumption
7 to draw that they did not consider that the documents
8 were sufficient to generate the inferences.

9 SIR IAIN MCMILLAN: Right, I see. Thank you very much.

10 MR SCANNELL: So turning first to the Claimants' allegation
11 that there was a cartel going beyond
12 the anti-competitive conduct found by the Commission,
13 and, Sir Iain, I hope that this will flesh out even
14 further the submission that I have just made to you.

15 To begin with, the legal principles that
16 the Tribunal should apply, we have set those out at 33
17 to 39 of our skeleton argument. I am not proposing to
18 turn those up. Ms Ford may have more to say about those
19 legal principles. We do say, however, that what we have
20 set out at 33 to 39 {S/2/12-14} of our skeleton is
21 correct and the Tribunal can rely on those.

22 We agree with the Claimants that the standard of
23 proof is the balance of probabilities and does not go
24 higher than that. In applying that standard, you must
25 take account of the seriousness of the allegations and

1 the inherent improbability of serious wrongdoing having
2 been committed and I believe that, too, is common ground
3 with the Claimants. My learned friend took you to *In*
4 *Re B* and the speech of Lord Hoffmann in that case.
5 Lord Hoffmann did not challenge any of the propositions
6 I have just given you, he merely observed that if
7 the question arising is whether a person, C, was
8 sexually assaulted, the court would have to take account
9 of the inherent improbability of that having happened,
10 but once it is established that C was in fact sexually
11 assaulted, if the only question that remains is whether
12 the culprit was A or B, the inherent improbability of
13 the serious wrongdoing having happened falls out of
14 consideration and you are left with the ordinary
15 standard of proof without considering any further
16 improbabilities.

17 Realistically, none of that is likely to assist you
18 in the task now before you. Now, we do not accept that
19 we are in the world of a cartel having been established,
20 this is not a traditional follow-on damages claim, it is
21 a stand-alone claim that these cartels existed.

22 I would, however, add this. My learned friend
23 sought yesterday to split hairs on the standard of
24 proof, but however one splits those hairs, the Tribunal
25 will recall that it asked a perfectly straightforward,

1 understandable question on the spillover case: how
2 exactly is it that the Claimants allege that
3 the infringements that the Commission found caused harm
4 to the degree that the Claimants allege? My learned
5 friend responded to that by suggesting that one
6 possibility was that the Defendants had benchmarked on
7 price, and if that was not the case, then they might
8 have benchmarked on margin, and if that was not
9 the case, then they might have benchmarked on discounts.
10 Now, that, without more, is almost the textbook
11 definition of what is insufficient to discharge
12 the standard of proof. It clearly does not satisfy
13 the balance of probabilities to present a range of
14 possibilities, and I will say more about that when I get
15 to spillover.

16 As to inferences, the Tribunal may draw them from
17 the facts established on the balance of probabilities,
18 but if the evidence viewed in the round admits of
19 a plausible innocent explanation, the benefit of
20 the doubt should be given to the defendant and no
21 infringement should be inferred. Now, the most recent
22 reaffirmation of those principles was set out by
23 Mr Justice Roth in his judgment in *Phones 4U*. If we
24 could turn that up quickly. It is in {AUTH2/39/1}.

25 THE CHAIRMAN: My bundles are slightly different.

1 MR SCANNELL: Are you using the hard copy, Mr Chairman?

2 THE CHAIRMAN: Yes.

3 MR SCANNELL: Yes. I am --

4 THE CHAIRMAN: My tabs -- did you say 39?

5 MR SCANNELL: I did say 39, yes.

6 THE CHAIRMAN: Yes, so it is volume 4 of mine. Yes, okay.

7 That is fine, I have got it. Thank you.

8 MR SCANNELL: I am going to proceed electronically all

9 the way through my submissions just in the interests of

10 time, but do tell me to stop talking if I am going too

11 quickly.

12 THE CHAIRMAN: Sure, of course, yes.

13 MR SCANNELL: So *Phones 4U* was a case that arose, as you may

14 know, from the collapse of the high street mobile phone

15 connections vendor *Phones 4U*, and *Phones 4U* alleged that

16 the decision that various mobile network operators took

17 to leave them and to stop selling their mobile phone

18 connections through *Phones 4U* was not a decision that

19 was taken independently by each of them, it was taken

20 collectively and pursuant to sort of cartel arrangements

21 and collusion. The High Court rejected that contention.

22 Could we turn then to page {AUTH2/39/33}.

23 THE CHAIRMAN: Sorry, I misheard? Page 33?

24 MR SCANNELL: Yes.

25 THE CHAIRMAN: Yes.

1 MR SCANNELL: At the bottom of the page, Mr Justice Roth
2 referred to the landmark judgment in *Aalborg Portland*
3 *v [the] Commission* which is often referred to
4 as the "*Cement*" case.

5 Then over the page {AUTH2/39/34}, just above
6 paragraph 85, the Tribunal will see that at paragraph 57
7 of *Cement*, the Court of Justice said:

8 "... in most cases, the existence of [an
9 anti-competitive practice or agreement] which, taken
10 together may, in the absence of another plausible
11 explanation, constitute evidence of an infringement of
12 the competition rules."

13 His Lordship then observed in paragraph 85:

14 "*Cement* concerned a hard-core cartel, but the same
15 approach was directed as regards a looser form of
16 concerted practice in ... *Eturas* ..."

17 THE CHAIRMAN: No pun intended, I take it? Sorry, do not
18 worry. Just keep going.

19 MR SCANNELL: Then at paragraph 86, further down the page,
20 his Lordship said:

21 "At the same time, before drawing inferences
22 the Court must be careful to ensure that there is no
23 equally plausible and innocent explanation for
24 the fragmentary evidence on which reliance is being
25 placed. To do otherwise would be to reverse the burden

1 of proof as regards serious allegations. Altogether,
2 I consider that the Court has to consider the evidence
3 in the round, looking at the particular items of
4 evidence relied on in context."

5 They are the principles to apply.

6 PROFESSOR NEUBERGER: Can I just understand, because, not
7 having a legal background, I cannot work out whether
8 there is any issue at stake between you and
9 the Claimants. I mean, it seems to me that we will have
10 to make a decision about whether on the balance of
11 probability there was or was not a cartel or cartels and
12 I am not sure that any of the argument I have heard so
13 far adds or subtracts very much from that.

14 MR SCANNELL: Well, I am grateful for that intervention,
15 Professor. Just to set your mind at rest, I do not
16 understand that there is a difference of opinion between
17 us in relation to these principles either, and if there
18 is, there should not be. This is not so much an
19 argument as it is a presentation to the Tribunal to
20 assist you in the task ahead.

21 PROFESSOR NEUBERGER: Thank you. I am grateful for that.

22 MR SCANNELL: So stepping back from the burden of proof and
23 the mechanics of inference, as a matter of practicality,
24 forensic practicality, a finding of cartelism or
25 collusion is a really extreme and extraordinary one.

1 Mr Justice Roth remarked on that fact in his judgment
2 refusing permission to appeal in *Phones 4U*. We do not
3 have to turn that up, but his Lordship observed that:

4 "... alleged collusion between major companies is
5 generally the subject of investigation by a competition
6 authority, leading (unless collusion is admitted) to
7 a lengthy decision prepared by a team of officials.
8 Because of the complexity of the matter, it is wholly
9 exceptional for such allegations to be determined in
10 adversarial litigation ..."

11 I commend that statement the Tribunal as one of
12 which it can take --

13 THE CHAIRMAN: Sorry, where is it in the bundle,
14 Mr Scannell? I know you refer to it in your skeleton,
15 but --

16 MR SCANNELL: Authorities bundle 2, tab 40, page 11,
17 paragraph 39 {AUTH2/40/11}.

18 THE CHAIRMAN: So it is the next tab, paragraph 39.

19 MR SCANNELL: Yes.

20 THE CHAIRMAN: Thank you.

21 MR SCANNELL: Allegations of collusion, particularly when
22 they are made against large undertakings with hundreds
23 and perhaps even thousands of employees, generally
24 require very substantial volumes of evidence to be
25 produced in support of them. That evidence then has to

1 be carefully scrutinised in the context of the market as
2 a whole before any safe conclusion can be drawn. It is
3 true that the CMA and the European Commission have far
4 greater resources and expertise at their disposal to
5 undertake that sort of investigation than any court or
6 Tribunal and they also have time. Now there is a world
7 of difference between an eight-year investigation and
8 a four-week trial, and that is one of the reasons why
9 this tribunal needs to view with real caution
10 the assertion, insofar as it is made, that in material
11 respects the European Commission or other regulators who
12 looked at documents somehow got it wrong because they
13 failed to detect a global cartel or targeted cartels.

14 Now, one can see from Mr Justice Roth's judgment in
15 *Phones 4U* {AUTH2/39/1}, which does merit a read -- it
16 runs to 729 paragraphs, unfortunately, but one can see
17 from it the extent of the evidence deployed by
18 the claimant in support of its claim and one can also
19 see the judicial expectation that the claimant prove its
20 case on the facts. So if the facts do not convincingly
21 support the allegation, there really is no room for
22 a conclusion that there was a cartel and no amount
23 of "cart before the horse" testimony from an economist
24 saying that there must have been an overcharge and then
25 purporting to look backwards at the evidence and read it

1 to fit that conclusion can change that legal reality.
2 Economic experts are experts in economics, they have no
3 special expertise in the interpretation of factual
4 evidence; that is the Tribunal's domain.

5 The same thoroughness of approach as one sees in
6 *Phones 4U* can be picked up from any CMA decision or
7 Commission decision the Tribunal might care to peruse to
8 get a feel for how cartels are conventionally proven.
9 They generally run to hundreds of pages in length, they
10 are characterised by the comprehensiveness of
11 the document reviews that underpin them and
12 the establishment of a compelling case that admits of no
13 alternative explanation.

14 Now, I mention those facts and those judicial
15 remarks because we say that the Claimants' case is
16 conspicuously different from certainly any case that
17 I have encountered in which a standalone claim of
18 a cartel has been alleged. It lacks the detail and
19 the comprehensiveness of analysis that I have
20 identified. On the primary and first alternative cases,
21 the Claimants do not identify who was a party to
22 the cartels they allege, they do not say for how long ZF
23 and Autoliv are supposed to have participated in those
24 cartels, they do not say what the scope of the cartel
25 was, they do not suggest how the cartel might have been

1 implemented, how it was enforced, whether it operated
2 effectively in 100% of cases. They just do not answer
3 those questions, and they, we say, are fundamental
4 omissions from the Claimants' case. They make it very
5 difficult indeed for this tribunal to conclude that
6 there was a cartel. Certainly no court, tribunal or
7 regulator that I am aware of has ever declared
8 the existence of a cartel on such a vague basis.

9 Now, no doubt aware of all of these considerations,
10 the Claimants, in their skeleton argument for trial, now
11 suggest that tacit collusion might explain
12 the overcharge that Mr Hughes identifies. So they say
13 that the terms of the direct cartel that they allege
14 might somehow have been inspired by -- and I quote here
15 from paragraph 153 of my learned friends' skeleton
16 argument {S/1/46}:

17 "... a tacit understanding to apply to supplies to
18 non-named OEMs the principles underlying the OSS1 and
19 OSS2 cartels, such as the principle of incumbency or
20 upholding the status quo ..."

21 So the Tribunal is supposed to believe that
22 the terms of cartels the Claimants say were entered into
23 in 2002 were inspired by infringements which the
24 Claimants now accept were not committed by Autoliv
25 before March 2006 and were not committed by ZF before

1 January 2007. Now, we say that just does not make
2 sense.

3 So that leads me to the plausibility of
4 the Claimants' primary and first alternative
5 cases: is it plausible that there was a global cartel
6 that affected all OEMs, including the Claimants, or one
7 or more cartels targeted specifically at the Claimants?
8 We say that the answer to both of those questions is no,
9 for multiple reasons.

10 Now, before I begin, at the PTR, we had an
11 interesting discussion about whether the Claimants'
12 primary and first alternative cases were more or less
13 likely as a result of the OSS decisions and I said
14 I would return to that in opening, so let me deal with
15 that first.

16 We say it is not tenable for the Claimants to say
17 that the fact that the Defendants admitted infringements
18 to the Commission makes it more likely that they
19 committed different infringements that they did not
20 admit. Each of the OSS decisions was initiated by an
21 application for immunity by one of the investigated
22 companies and each of the -- those --

23 THE CHAIRMAN: Say that again?

24 MR SCANNELL: Each of the OSS decisions was initiated by an
25 application for immunity by one of the investigated

1 companies.

2 THE CHAIRMAN: Yes, sure.

3 MR SCANNELL: Which does in fact I believe answer one of
4 the questions yesterday, which was: how did these OSS
5 decisions come into being? The answer is that a company
6 came to the Commission and said, "Hands up ..." --

7 THE CHAIRMAN: Yes, I understand that.

8 MR SCANNELL: Each of those applications was followed by
9 successful applications for leniency or reduction of
10 fine by the other companies.

11 Why is that relevant? It is relevant because all of
12 those applications were made under the EU's leniency
13 notice and applications under the Leniency Notice are
14 made following full internal audits to ascertain whether
15 there was anything remotely indicating an infringement
16 of competition law involving any OEM, not just the OEMs
17 that end up being named by the Commission. The leniency
18 notice requires immunity applicants to give a full and
19 frank account of whatever cartel arrangements have been
20 made. That includes identifying what products were
21 cartelised, what the geographic scope of the cartel was,
22 when exactly the arrangements were on foot and who
23 the participants were.

24 THE CHAIRMAN: You say "a full internal audit". Just
25 elaborate on that a bit.

1 MR SCANNELL: Logically, the only way an undertaking can
2 comply with the demands of the Leniency Notice, which
3 requires a full and frank account of any conceivable --
4 any cartel arrangements that are on foot, is going to
5 have to be prefaced by a full internal audit --

6 THE CHAIRMAN: Unless --

7 MR SCANNELL: -- otherwise it is impossible.

8 THE CHAIRMAN: -- (overspeaking - inaudible), yes.

9 So the obligations under -- on the defendant in
10 these circumstances, where are they set out?

11 MR SCANNELL: They are set out in the Leniency Notice.

12 I was not proposing to turn it up in the interests of
13 time, but for your note --

14 THE CHAIRMAN: Just tell me where it is.

15 MR SCANNELL: -- {AUTH3/4/2}.

16 THE CHAIRMAN: Authorities bundle 3, tab 4.

17 MR SCANNELL: Yes, Mr Chairman, we might want to check
18 together that it is there.

19 THE CHAIRMAN: Well, that does not quite make sense to me.

20 So I have got so just tab 4. So I think my tabs may be
21 different to yours, which is ...

22 MR SCANNELL: Yes. This is --

23 THE CHAIRMAN: It is legislation. Sorry, I was ... okay.

24 MR SCANNELL: It is there.

25 THE CHAIRMAN: I have got a very confusing system of three

1 bundles and then bundle 2 has four volumes. Right,
2 okay, so ...

3 Yes. No, that is helpful. Sorry, anyway, I have
4 that in mind, so ...

5 MR SCANNELL: So the Leniency Notice requires immunity
6 applicants to give a full and frank account of whatever
7 cartel arrangements are in place. That was the point
8 I had just made. Genuine cooperation is --

9 THE CHAIRMAN: Sorry --

10 MR SCANNELL: Sorry. Sir Iain?

11 SIR IAIN MCMILLAN: Who carried out the internal audit?

12 MR SCANNELL: The internal audit at Autoliv?

13 SIR IAIN MCMILLAN: Yes, you referred to the internal audit,
14 did you not? Who did that? Who carried it out? Was
15 that an external firm of investigators? Lawyers?
16 Accountants?

17 MR SCANNELL: I am told by those behind me that external
18 counsel were brought in to conduct the internal audit.

19 SIR IAIN MCMILLAN: External.

20 MR SCANNELL: External.

21 SIR IAIN MCMILLAN: Yes, thank you.

22 MR SCANNELL: Yes.

23 So I was making the point that genuine cooperation
24 is required. For your note, the relevant paragraph is
25 12(a) of the Leniency Notice, and all relevant

1 explanations, information and evidence must be given.

2 Now, in each of the OSS decisions, the Commission
3 expressly found that the requirements of the Leniency
4 Notice had been satisfied. That is a fact, it cannot
5 simply be ignored.

6 THE CHAIRMAN: Which paragraph is that in the decision? It
7 does not matter. You can pick it up later, that is
8 fine.

9 MR SCANNELL: OSS 1, recitals 132, 136, 141 and 143, so that
10 is saying that each one of the companies complied.
11 OSS 2, recitals 116 and 123.

12 THE CHAIRMAN: Thank you.

13 PROFESSOR NEUBERGER: Compliance would have extended to any
14 cartels involving any other OEM?

15 MR SCANNELL: What it would mean is that the Commission was
16 satisfied that these companies were not holding
17 something back, they had complied with their obligation
18 of genuine cooperation. So they certainly --
19 the Commission certainly did not detect a lack of
20 genuineness, or some sort of gap that was unexplained.

21 PROFESSOR NEUBERGER: Would that specifically cover all OSS
22 to all OEMs?

23 MR SCANNELL: We say that logically it would because of
24 the prior obligation to identify all wrongdoing and not
25 just the wrongdoing which is the subject, for example,

1 of a dawn raid.

2 PROFESSOR NEUBERGER: Right.

3 THE CHAIRMAN: There is, presumably, some limit. I mean, if
4 you are selling -- if you are a large company and you
5 have got a pharmaceutical division and an electronics
6 division and a car parts division, does it necessarily
7 encompass all those parts, or does one take a view that,
8 no, this is about car parts, or is it about specific car
9 parts or about specific customers, which I think is
10 what --

11 MR SCANNELL: In reality, the way these tend to work, and
12 one occasionally is asked to advise companies which have
13 to conduct these internal audits -- is that if
14 the company was structured in the way you, Mr Chairman,
15 have just suggested, with very different divisions, it
16 may be acceptable to confine the internal audit to
17 the pharmaceutical division, for example, if
18 the allegation related to pharma without going into
19 the car parts division. The counsel of perfection would
20 always be that it should be as wide as is necessary, and
21 if one document suggests that there is wrongdoing and
22 that leads to another, that trail must be followed.

23 THE CHAIRMAN: But you say it is inconceivable that someone
24 would take the view that it only covers the specific
25 OEMs -- sorry, the specific customers, I beg your

1 pardon, that have been identified, by virtue of the dawn
2 raids? It would embrace other customers?

3 MR SCANNELL: Certainly.

4 THE CHAIRMAN: Certainly.

5 MR SCANNELL: Yes. What we say is that if the Tribunal were
6 to find that, despite the Commission's acceptance that
7 the Leniency Notice had been complied with, if
8 the Tribunal were to draw the inference that
9 simultaneously both ZF and Autoliv were parties to
10 a cartel targeting the Claimants, or a global cartel,
11 the Tribunal would either have to conclude that every
12 one of the investigated undertakings, again, not just
13 Autoliv and ZF, had either lied to the commission in
14 their leniency applications, or that they had
15 coincidentally made exactly the same error as regards
16 the participants in the wrongdoing, the scope,
17 the targets, the duration of the wrongdoing that was on
18 foot.

19 THE CHAIRMAN: The documents we have been looking at Mr West
20 relies on, they could have emerged either from the dawn
21 raids, either from RFQs or from being appended to
22 a leniency notice or filed with a leniency notice, all
23 those three are possibilities?

24 MR SCANNELL: Later today, sir, just to avoid taking us out
25 of the flow but just so that you know, later today I am

1 going to hand up a document you. It is a table, and on
2 this table will be every document my learned friend
3 referred you to yesterday and it will be highlighted in
4 yellow if that document was in the Commission file so
5 that you can see at a glance the proportion, roughly --
6 it has to be rough because of course my learned friend
7 did not have time to refer to every document in this
8 case, but you can see at a glance how many of these
9 documents were before the Commission. If they were in
10 the Commission file, they were considered by
11 the Commission, and so we do say that the overwhelming
12 preponderance of the documents were considered by
13 the Commission, and where they were not, it will be
14 highlighted.

15 THE CHAIRMAN: Yes, that was not really my question, it was
16 just how they got to the Commission. It could be
17 through the Leniency Notice or it could be as a result
18 of a dawn raid or it could be as a result of ...

19 (Pause).

20 MR SCANNELL: Yes, is the short answer.

21 THE CHAIRMAN: Yes, okay. So let us assume documents are
22 filed with the Leniency Notice. The Commission may see
23 some evidence of cartel activity against a customer --
24 let us assume it is Peugeot, for example -- this is
25 hypothesising, I am not saying that such documents exist

1 -- they see evidence of cartel activity against Peugeot
2 but there is not a lot there and at that stage they are
3 trying to -- but they are absolutely content that
4 the OEM has complied with its obligations on
5 the Leniency Notice, what does it do? So it has got
6 evidence of some cartel activity falling far short, or
7 short of a conclusion that there was a cartel against,
8 let us say, Peugeot, but it is at the stage where
9 a leniency notice has been complied with. How does
10 the Commission deal with that? Does it say, "Okay, we
11 are now going to carry on with investigations but there
12 is nothing really to carry on with"? Does it issue
13 further requests for information? How is that dealt
14 with?

15 MR SCANNELL: It is a little from column A and a little from
16 column B and a little from column C of that menu of
17 options. So, yes, the Commission can issue further RFIs
18 to the companies. Oral hearings can be held; if they
19 really want to conduct oral hearings, they can conduct
20 oral hearings and effectively cross-examine individuals
21 to work out what exactly is going on. Or they can form
22 the view that they have what is out there and there is
23 no basis for a conclusion, so they are not going to take
24 it any further.

25 THE CHAIRMAN: But they could be taking the view that there

1 has clearly been cartel activity against three
2 customers, 4 and 5 there is a question mark over, there
3 is some evidence, not necessarily at this stage
4 conclusive without further investigation or further
5 study, they could take a view that, "Well, we are going
6 to issue a fine based on the three but it is not
7 proportionate to carry on investigating customer 4 and
8 customer 5, what is the point"? You say that is
9 unlikely, but I do not understand why that is unlikely.
10 Resources are limited, the Commission has a lot on its
11 plate, there is a lot of anti-competitive behaviour
12 going on, they are making decisions all the time on what
13 they pursue and what they do not pursue.

14 MR SCANNELL: One tends to find -- I am reluctant to give
15 evidence on my feet, but one of the --
16 the proportionality considerations that the Commission
17 tends to take on board apply at the stage of deciding
18 whether or not to launch an investigation.
19 You know: are we going to launch an investigation in
20 relation to OSS components? They issue formal decisions
21 when they decide not to and one can appeal against them.
22 But once they have picked up the cudgels, they tend to
23 be bloodhound-ish in their approach. They just want to
24 get to the truth of the matter and if they think that
25 there is a "fauxness", as they would say in Europe,

1 the whiff of wrongdoing, then they pursue the whiff and
2 they get to the bottom of the situation. What they do
3 not do is say, "Well, we can see that there are some
4 troubling documents here, but we have got enough to go
5 on, we can find four infringements, that is enough".

6 THE CHAIRMAN: Your -- I mean, both you and Mr West are in
7 the same position. You are saying Mr West is submitting
8 that it is plausible the Commission -- plausible -- he
9 might have even gone further and said "likely"
10 the Commission will not pursue the low hanging fruit.
11 You are saying that is implausible. Neither of you are
12 really pointing to anything, apart from common sense, to
13 arrive at your respective positions.

14 MR SCANNELL: Well, I would suggest that, you know,
15 insofar as one is dealing with the balance of
16 probabilities, the real question is which of these two
17 is more likely, and what I am addressing is
18 the suggestion that is made that because there are
19 admissions of wrongdoing lying behind the OSS decisions
20 that makes it more likely -- that is what is put against
21 me, it is more likely -- that the Defendants committed
22 the infringements that the Claimants suggest, and I do
23 not accept that at all. My suggestion to the Tribunal
24 is that it is in fact more likely and I do not have to
25 put it any higher than that, it is in fact more likely

1 that they did not.

2 THE CHAIRMAN: So on the one hand you say, "Well, you are
3 known cartelists, you engage in cartelist behaviour,
4 senior people engaged in cartelist behaviour, it seems
5 likely or it would seem surprising ..."-- sorry, this is
6 not the Tribunal expressing an opinion -- "... it would
7 be surprising if you would have limited your cartelist
8 behaviour to particular customers and not others, why
9 would you?" That is on the one hand.

10 On the other hand, you say, well, the Commission
11 have been over this with a fine-tooth comb, they have
12 identified the extent of the cartels and then you -- so
13 you are both pointing to the decision and reaching
14 completely opposite conclusions, as no doubt any good
15 counsel would in your positions, but it is very
16 difficult for the Tribunal to resolve those rival
17 submissions.

18 MR SCANNELL: The difference is that you do have from
19 the European Commission itself an acceptance that
20 the Leniency Notice has been complied with and
21 the Leniency Notice is mandatory. So we know that these
22 companies, which distinguishes the position the Tribunal
23 is dealing with from a situation where, for example, it
24 is a question of whether somebody who committed a crime
25 on one day might have committed a crime on another.

1 THE CHAIRMAN: Okay, so how does the -- sorry, (inaudible)
2 you but how does the Commission decide whether
3 the Leniency Notice has been complied with?

4 MR SCANNELL: I am not privy to their internal workings.

5 THE CHAIRMAN: But what is their process?

6 MR SCANNELL: They give the indication in the first decision
7 that they reach. So indications are given to
8 undertakings throughout a leniency process, that they
9 are on the right track and that they are doing the right
10 things and that they are being cooperative and they are
11 being full and frank, and if a decision --

12 THE CHAIRMAN: So they are producing lots of documents, they
13 are --

14 MR SCANNELL: Yes.

15 THE CHAIRMAN: -- answering questions fully --

16 MR SCANNELL: Yes.

17 THE CHAIRMAN: -- they may have engaged auditors --

18 MR SCANNELL: Yes.

19 THE CHAIRMAN: -- no doubt they would tell the Commission
20 that if they had.

21 MR SCANNELL: Yes.

22 THE CHAIRMAN: But, equally well, they might be hiding
23 something, they may be confessing to some crimes and
24 keeping other crimes -- I am not suggesting that would
25 have happened in this case, but I mean that is possible.

1 There is no check. There is no --

2 MR SCANNELL: That is a risk, but of course it is a risk
3 that can be audited by the Commission, because
4 the Commission has the documents and -- has documents,
5 sorry --

6 THE CHAIRMAN: Yes, from the raid, initially, and from
7 further requests.

8 MR SCANNELL: Yes, and you would say perhaps not all of
9 the documents, but they have documents, and that is
10 a fair point. But if they felt that there was something
11 untoward in those documents that required further
12 analysis, then that would snowball with further RFQs in
13 the normal way, and one does not have that here, is
14 the point.

15 I have already referred to 12(a), actually, of
16 the leniency -- of the --

17 THE CHAIRMAN: Yes, you have. Yes, yes. Thank you very
18 much, yes, I have got that.

19 No, I understand the obligations. So it is not
20 greatly dissimilar to obligations on disclosure in
21 the High Court.

22 MR SCANNELL: Yes.

23 THE CHAIRMAN: You know, there are serious obligations on
24 parties to comply with the requirements of disclosure
25 and specific disclosure requests, but there is no check,

1 you do not go in and then re-audit and no one double
2 checks whether that has been complied with.

3 MR SCANNELL: No. Analogies are always slightly risky.

4 THE CHAIRMAN: Yes, maybe we can leave that.

5 MR SCANNELL: Yes.

6 THE CHAIRMAN: But I think I understand where we are.

7 MR SCANNELL: Yes, okay.

8 So putting the decisions aside for a moment -- and
9 of course I am going to return to them when I come to
10 the spillover case -- we say that the primary and first
11 alternative cases in any event are highly implausible.

12 So I am going to begin by setting out a few general
13 points about implausibility, about why we say that this
14 case is implausible and then I am going to get to
15 a point on causation which I say is really something of
16 a show-stopping point relating to plausibility.

17 So, to begin with, the only way that a cartel such
18 as the one the Claimants imagine might have worked would
19 be if multiple individuals in the Autoliv business units
20 responsible for sales to different OEMs participated to
21 some degree in it, and we say that that is not credible.
22 It is one thing for the Commission to say that
23 individuals in the Autoliv business unit responsible for
24 dealings with Honda in Japan may have exchanged
25 information with a Japanese competitor in relation to an

1 RFQ that Honda issued, but it is quite another to
2 suggest that persons in every Autoliv business unit
3 shared information relating to every OSS component
4 supplied to every OEM in the world over a nine-year
5 period. Within Autoliv, it is important to appreciate
6 that OSS supplies to different OEMs were managed by
7 different personnel and those personnel structured
8 Autoliv's bids and they negotiated prices with
9 particular OEMs for which they were responsible.

10 So that the Tribunal can see a reflection of that in
11 the evidence -- and I will try to take this quickly --
12 can we go to {C/1/1}, please. So this is the first
13 witness statement of Mr Fabrice Corbut.

14 THE CHAIRMAN: Yes.

15 MR SCANNELL: He has worked at Autoliv France for 28 years
16 in a variety of roles. He is now in the business unit
17 responsible for supplies to Peugeot and he has been --
18 sorry, he was for seven years. Within that statement
19 could we turn to {C/1/6}, please. At paragraphs 16 and
20 17 {C/1/6-7}, please, and could I ask the Tribunal
21 simply to read 16 and 17.

22 THE CHAIRMAN: Yes, we have read those, yes.

23 MR SCANNELL: You have read them.

24 THE CHAIRMAN: We have this very much in mind, yes.

25 MR SCANNELL: I am very grateful for that.

1 So that leads to the second reason why
2 the Claimants' standalone claims are implausible, which
3 has also been mentioned already, and that is that OSS
4 components are bespoke components. Now, it was
5 mentioned yesterday that that was common ground, but in
6 fact there has been significant resistance to
7 the suggestion that they are bespoke products, coming
8 from the Claimants, and I am going to refute that in
9 a moment.

10 The relevance to the primary and first alternative
11 cases of the bespokeness point is that it simply would
12 not be possible to coordinate on price, for example, in
13 a way that accommodated all of the variations
14 simultaneously and certainly not without regular,
15 uninterrupted coordination with competitors on a scale
16 that simply is not credible and is certainly not
17 reflected in the documents.

18 Mr Corbut addresses this factor, too, in the next
19 paragraph of the statement, which is paragraph 18
20 {C/1/7}. If I can take it that the Tribunal has read
21 from 18 to 24 {C/1/7-8} --

22 THE CHAIRMAN: Yes.

23 MR SCANNELL: -- of Mr Corbut, they are very important
24 paragraphs, so if they could be highlighted, I would be
25 very grateful.

1 THE CHAIRMAN: We will highlight them, yes.

2 MR SCANNELL: I am grateful, Mr Chairman.

3 So could we next turn up {C/3/1}, please, and this
4 is the witness statement of Mr Squilloni.

5 THE CHAIRMAN: Tab 3?

6 MR SCANNELL: Tab 3 of C3. I think the C bundle is also
7 divided into numbers.

8 I believe you are in C1.

9 THE CHAIRMAN: I have Mr Squilloni, yes.

10 MR SCANNELL: You have got Mr Squilloni, that is excellent.

11 Mr Squilloni worked in the business unit responsible
12 for supplies to Fiat and he is now responsible for
13 supplies to Stellantis. Within that statement
14 the reference is page {C/3/4}, please, and
15 the paragraphs to mark are 12 to 15 {C/3/4-5}, and they
16 provide a very helpful insight, I would propose, into
17 bespoke. He explains that OSS components are not
18 only technically bespoke, they are also bespoke in terms
19 of price, which is important. Volumes affect prices,
20 how far from the factory these components have to travel
21 affect prices, customs duties and so on.

22 We know that OSS components also underwent
23 substantial modifications after the time that RFQs were
24 issued and awarded to suppliers and that affected how
25 they were made and what they cost. Even after the start

1 of production, it was common for OEMs to demand that
2 the components be modified in line with modifications in
3 the design of the car, as that evolved. That had
4 knock-on effects on engineering and knock-on effects on
5 costs and price.

6 Other witnesses speak of the facelift staging post
7 along the production timeline and at that stage, too,
8 further modifications could be made with yet further
9 modifications on price.

10 Finally, before we leave this point, could we turn
11 up bundle {J2/91/1}, please, so that we can see what
12 the European Commission itself has said about
13 bespoke-ness.

14 THE CHAIRMAN: {J2/91/1} I do not have in my hard copy, but
15 that is fine, bring it up on here, and we can ... and if
16 it could be slotted into the J bundle, we would
17 appreciate it.

18 MR SCANNELL: Absolutely.

19 So as the Tribunal can see, this is the Commission's
20 merger decision when TRW and Dalphi Metal España, which
21 was mentioned yesterday, merged, which happened in 2005.
22 Ultimately, the Commission did not oppose that merger
23 and it went ahead, and I will be returning to this
24 decision in another context later.

25 The relevant paragraphs are on {J2/91/4}, please, at

1 paragraphs 8 and 9. If the members of the Tribunal
2 could just spend a minute casting an eye over those two
3 paragraphs, I would be grateful.

4 (Pause).

5 THE CHAIRMAN: Okay. But I think the Defendants criticise
6 the Claimants for pointing to what is going on in other
7 jurisdictions and findings and *Hollington* is referred
8 to, but, what, are you not inviting us to draw
9 conclusions from that?

10 MR SCANNELL: This is a European Commission decision.

11 THE CHAIRMAN: These are factual findings.

12 MR SCANNELL: Yes, making factual findings, based on what
13 the European Commission has been told by the OEMs
14 themselves, incidentally, because the Commission has
15 asked the OEMs about this, and making findings which
16 just relate to the bespoke nature of OSS components.

17 THE CHAIRMAN: Yes.

18 MR SCANNELL: It should be uncontroversial.

19 It is not a finding about any of the findings
20 that --

21 THE CHAIRMAN: No, background. Background facts.

22 MR SCANNELL: Background, yes.

23 So the next factor going to implausibility, of
24 the primary case at least, is that, depending on
25 the circumstances, there were some contracts that OSS

1 suppliers wanted to bid for and others that they did not
2 want to bid for and there was no way of anticipating in
3 advance, on a "once and for all" basis, in a single
4 agreement, what those circumstances might be. So,
5 again, the only way that a cartel could work is if there
6 was an extremely high degree of concertation and
7 regularity of contact and we say that the smattering of
8 documents that you have been shown comes nowhere close
9 to establishing that.

10 So various considerations went into the mix when
11 considering whether to bid. They included, for example,
12 the supplier's capacity to undertake more work,
13 the current relationship with the OEM, how profitable
14 the existing contracts were with the OEM that issued
15 the RFQ, and that, of course, had to take account of
16 the fact that one of the ways the OEMs controlled
17 the prices they paid for their components was that they
18 would insist that winning bidders amortise their income
19 streams from supplies that they were already making
20 under contracts they had already won and simply give
21 some of it back to the OEM.

22 A further important factor was perceptions of
23 chances of winning the bid and whether it was likely to
24 win future work from the OEM if it was successful. That
25 was an important consideration because, as I will show

1 the Tribunal, OEMs used historical bid prices to fix
2 the prices that they were willing to pay for components.
3 So if a supplier felt that there was not much chance of
4 winning an RFQ because there was already --

5 THE CHAIRMAN: OEMs use historical prices or customers use
6 historical prices?

7 MR SCANNELL: OEMs.

8 THE CHAIRMAN: Okay.

9 MR SCANNELL: Yes.

10 THE CHAIRMAN: Willing to pay for components. I understand,
11 yes, sorry.

12 MR SCANNELL: So if a supplier felt that there was not much
13 chance of winning an RFQ because there was already, for
14 example, an incumbent in place who could only be ousted
15 by making an ultra low bid, the supplier might not want
16 to bid, because bidding risked baking in the ultra low
17 bid into the expectations of that OEM for future similar
18 RFQs. But, equally, the supplier might consider that it
19 is worth bidding.

20 THE CHAIRMAN: Ousting is difficult, because, essentially,
21 what you are saying is that you have to price quite low
22 to oust somebody.

23 MR SCANNELL: You do, because the incumbent --

24 THE CHAIRMAN: Just remind me of the evidence. Where is
25 the evidence for that?

1 MR SCANNELL: I will --

2 THE CHAIRMAN: It does not have to be now.

3 MR SCANNELL: -- get the references for you, yes, but, this
4 is traversed in the evidence.

5 Equally, if the supplier is facing that situation,
6 the supplier might think that it is worth bidding, it is
7 worth making an ultra low bid, even if that involves
8 losing money on the supply, because the car in question
9 might be on a platform which will also generate other
10 models of cars which might sell in greater volumes, and
11 so being the incumbent might hold the promise of more
12 work down the line. The point I would make is that
13 the considerations then that went into whether to bid,
14 whether not to bid, they were manyfold and there was no
15 way that the Defendants could anticipate, years in
16 advance, all of those permutations.

17 That brings me to what we say is the fundamental
18 problem with the -- at the heart of the Claimants' case
19 and that relates to causation. Now, the causation
20 element of the Claimants' second alternative case we say
21 is implausible because it is premised on the spillover
22 theory and I will get to that separately. The point
23 I am about to make applies to any way that the Claimants
24 want to put their case, whether it is the primary case,
25 the targeted cartels case or the spillover effect, and

1 that is that we do not accept that it is plausible that
2 any concertation could have had a material effect on
3 the prices the Claimants paid for their OSS supplies and
4 it is pure fantasy to imagine that it could have
5 affected those supplies in the way that Mr Hughes has
6 suggested.

7 The reason I say that is because it is clear from
8 the evidence that the OEMs themselves essentially
9 controlled the prices that they paid for their
10 components and to a very great extent they also decided
11 who would supply them for reasons other than price.

12 THE CHAIRMAN: I have difficulty with that submission and
13 reconciling that with why the Commission -- you engaged
14 in cartel activity by object. If it was -- why would
15 you engage in such activity if it had no possibility of
16 raising prices? That seems implausible.

17 MR SCANNELL: Well, what -- we need to be quite clear about
18 what the Commission was saying in the OSS decisions.
19 What the Commission was saying in the OSS decisions was
20 that there were contacts, there were exchanges of
21 information and they are by object infringements of
22 competition law.

23 THE CHAIRMAN: Yes.

24 MR SCANNELL: What they were not saying is that
25 the infringements that we found had an effect --

1 THE CHAIRMAN: No, absolutely, they did not, but --

2 MR SCANNELL: -- on prices.

3 THE CHAIRMAN: -- but why were you doing it if it did not

4 have an effect?

5 MR SCANNELL: Indeed. Why occasionally in correspondence

6 do -- or in the documents, do you see what look like

7 inappropriate conversations happening? And --

8 THE CHAIRMAN: Which has been held by the Commission to be

9 inappropriate contact.

10 MR SCANNELL: I accept that.

11 THE CHAIRMAN: Yes.

12 MR SCANNELL: I accept that, and I am going to try to

13 explain to you some of the dynamics of this market that

14 actually drove that sort of communication and I am going

15 to say that those reasons why they were speaking were

16 never going to affect prices, actually.

17 PROFESSOR NEUBERGER: Can I just understand, though, is

18 the argument that because these are so bespoke, because

19 of the complexity of negotiations in particular cases

20 that you would have need a lot of documentation to do

21 concertation on particular bids, particular RFQs?

22 I mean, it seemed to me possible if you have got a few

23 major RFQs that any agreement with a competitor, that

24 actually you are not going to compete too actively on

25 this deal and you will try and go for that deal, would

1 not require a huge amount of exchange and therefore may
2 not leave very much in the way of traces.

3 MR SCANNELL: I agree with you, Professor. That is
4 a perfectly fair summation of how one should put a case
5 like this with moderation. Of course it is true that in
6 respect of an individual RFQ there could be an exchange
7 of information between the bidders where they say, "For
8 this RFQ we are going to try something". But that is
9 not the case we have to meet.

10 THE CHAIRMAN: That was not your submission. Your
11 submission was: we do not accept it is plausible that
12 any cartel activity could have a material effect on
13 the prices. That is how you put it.

14 MR SCANNELL: Yes.

15 THE CHAIRMAN: I understand your global point that it may
16 not affect every -- and you criticise Mr West's case for
17 being too broad based, but I did not understand that
18 last submission. Maybe I took it down wrong in my note.

19 MR SCANNELL: I am going to try to persuade you that there
20 are explanations for discussions between OEMs -- OSS
21 suppliers that one sees reflected in the documents which
22 make it unsafe to conclude that what they are actually
23 doing is affecting bid prices, but that even if what
24 they are doing is trying to affect the bid price,
25 the price that the OEMs end up paying really has nothing

1 to do with the bid price. That is what I am trying
2 to --

3 THE CHAIRMAN: All right, well, we had better get to that.

4 MR SCANNELL: -- address.

5 Now, the first step along that line is to understand
6 that the OEMs, all of them, Peugeot, Fiat, Vauxhall,
7 they all had countervailing buyer power when they
8 procured their components. Now, that was and remains
9 a feature of this market that all of the Claimants'
10 witnesses understate. They do not mention it at all, in
11 fact. But the European Commission has repeatedly found
12 that OEMs, including these Claimants, have
13 countervailing buyer power and that it is a defining
14 feature of this market.

15 Now, what is apparent, including from the Claimants'
16 own witnesses, is that they used that countervailing
17 buyer power. They manipulated their suppliers' market
18 shares to maximise the chance that they would be
19 supplied by the companies they wanted to supply them,
20 irrespective of the bid price, and once they got to
21 a position of selecting a supplier, they entered into
22 negotiations, bilateral negotiations with those
23 suppliers, which forced the purchase price down to rock
24 bottom levels, and they used a variety of commercial
25 techniques to achieve that. Then, even after

1 the supplier agreed a price with the Claimants, that
2 price was not the final price, it was driven further
3 down still. All of those renegotiations of the bid
4 price were bilateral negotiations, they happened between
5 the relevant claimant company and the OSS supplier that
6 the claimant chose to supply it. They had nothing
7 whatever to do with any other supplier, so no
8 coordination between suppliers could possibly have
9 affected them. All of those renegotiations drove
10 the price that the Claimants ultimately paid further and
11 further away from the bid price that had been made so
12 that, by the end of the negotiation process, the bid
13 price was, we would say, a historical footnote, but it
14 is the bid price that the Claimants now allege was
15 the subject of collusion.

16 Now, I will get to the witness evidence relating to
17 that in a moment, but before I do -- and I will take
18 this very quickly -- could I draw your attention to one
19 or two of the Commission decisions addressing this
20 point.

21 The first is {J2/92/1}. Again, we will ensure that
22 all of the Commission decisions are put into
23 the Tribunal's hard copy files. (Pause).

24 THE CHAIRMAN: Sorry, J2?

25 Yes, I am there, okay.

1 MR SCANNELL: So we may have to address these
2 electronically.

3 THE CHAIRMAN: That is fine.

4 MR SCANNELL: So this is the Commission's 2004 decision in
5 *Magna / New Venture Gear*. As I say, I am going to take
6 it quickly, so turning to {J2/92/7} at section C, one
7 can see the Commission begins its competitive assessment
8 of that merger and whether it would affect competition.

9 Further on, on {J2/92/9}, at the bottom of the page,
10 recital 40, we can see the Commission noting that
11 NVG and *Magna* each had strong positions on the market
12 but that that did not give rise to serious doubts about
13 market power.

14 Then at recital 44 {J2/92/10}, on the same page,
15 the reason that did not give rise to a serious concern
16 is that, "the Commission considers that [the] OEMs have
17 countervailing buyer power".

18 THE CHAIRMAN: I am still not clear why we are looking at
19 this and what conclusions we can ... I mean, that is not
20 background fact, that is an area of some dispute,
21 I think.

22 MR SCANNELL: We will have to hear whether this is in
23 dispute. I am going to take you to what the Commission
24 had to say about how countervailing buyer power
25 translates into the way that OEMs procure their OSS

1 components.

2 THE CHAIRMAN: I am just -- yes. I am not sure why we are
3 reading this Commission decision. You are not trying to
4 find principles of law, you are extracting principles of
5 fact. Do we not have to assess -- sorry, extracting
6 facts. Do we not have to assess the facts on
7 the evidence before this tribunal?

8 MR SCANNELL: Well, none of the Claimants' witnesses have
9 come to the Tribunal saying, "We either have or we do
10 not have countervailing buyer power". Now, that is not
11 a criticism, they are dealing with the particular points
12 that they are dealing with.

13 This is a point about the whole market relating to
14 the supply of OSS components to OEMs, and it is
15 important for the Tribunal to have that context when it
16 is considering the negotiation processes that were
17 entered into.

18 THE CHAIRMAN: Right, but I do not know why you are
19 referring to this document and not to your evidence.

20 MR SCANNELL: The best source of evidence in relation to
21 market-wide -- the conditions on the market as a whole
22 is the European Commission, which has conducted
23 a market-wide survey to work out what the dynamics of
24 the market actually are.

25 THE CHAIRMAN: Was this served as a Civil Evidence Act

1 notice, or appended to any of your witness statements or
2 reports or has this just been plucked out for present
3 purposes?

4 MR SCANNELL: It is not exhibited to any of the witness
5 statements.

6 THE CHAIRMAN: Okay, well, let us take it swiftly.

7 MR SCANNELL: Yes, I will take it as swiftly as I possibly
8 can.

9 The relevant recitals are 47 and 48. They are on
10 {J2/92/11}. So:

11 "The Commission ... noted in previous cases in
12 the automotive components industry that OEMs have buying
13 power towards the component manufacturers."

14 And there is a footnote to other Commission
15 decisions in that regard:

16 "OEMs usually have an excellent knowledge of prices
17 and costs for components on a world-wide basis and seek
18 offers from suppliers prior to contracting components
19 which is often done for the life of the respective car
20 model. The market for tenders is highly competitive at
21 the tender level ... the threat to meet internally
22 the whole or part of the OEMs' component requirements is
23 a powerful bargaining tool to gain cost or other
24 concessions from component suppliers. The notifying
25 parties have therefore argued that the market shares are

1 a much less reliable indicator of market strength of
2 automotive component manufacturers than in other
3 industries."

4 Then:

5 "The parties have argued that the number of OEMs has
6 been shrinking rapidly, with many OEMs adopting common
7 global vehicle platforms over multiple vehicle lines and
8 reducing the number of suppliers they deal with."

9 Now, one sees from that account not only that
10 the OEMs have buyer power, but also that they, the OEMs,
11 have reduced the number of suppliers they deal with.
12 Now, that is addressed in the Claimants' evidence, so
13 there is -- we do see complaints from Mr MacQueen and
14 Mr Carosso of Fiat, who complained that there were few
15 suppliers to choose from.

16 The next one is {J2/93/2}, please. This is
17 the Commission's merger decision in *U-Shin / Valeo* and
18 the relevant page is {J2/93/7} where the competitive
19 assessment --

20 THE CHAIRMAN: J2, tab? Sorry.

21 MR SCANNELL: This is J2, tab 93, and at page 8, recital 36
22 {J2/93/8}, the Commission observes that:

23 "As a result of this merger, the OEM/OES supply
24 market for locks ... locksets ... will reach a higher
25 level of concentration. However, the parties state that

1 [that] will not raise significant competition concerns
2 because of the presence of viable alternatives and
3 the OEMs' countervailing buyer power."

4 Then at recital 41 on {J2/93/9}, that is addressed.
5 For this decision, I am just going to give the relevant
6 recital numbers. So that is 41 and 42, 44 and 46.

7 PROFESSOR NEUBERGER: Can I understand, Mr Scannell, is
8 the argument that the OEMs had strong buyer power, is
9 that meant to lead to some conclusion about
10 the likelihood of a cartel forming or the ability of
11 a cartel to extract money from the OEMs?

12 MR SCANNELL: Yes, it is. It is -- it provides two things.
13 It provides the context for interpreting some of
14 the documents that you will see in the case.

15 PROFESSOR NEUBERGER: Yes.

16 MR SCANNELL: Where you are wondering why is it that there
17 is any contact at all between suppliers, might
18 the explanation be something other than the fact that
19 they want to collude on price? Might it have something
20 to do with the fact that they are being effectively
21 bullied by OEMs?

22 But, secondarily, it relates to the fact -- it
23 contextualises the submission that we make, which is
24 based on the Claimants' evidence about how negotiations
25 worked, that the OEMs were in control when it came to

1 determining what the price was. They effectively fixed
2 a target price for what they were willing to pay for
3 components, everybody else then had to bid to get to
4 that price, and a lot of the bidding process was just
5 about being selected. Once you were selected and you
6 were in the door, then the price negotiations would
7 begin, and these OEMs, because of their countervailing
8 buyer power, would drive down the price to the price
9 they wanted to pay in the first place.

10 PROFESSOR NEUBERGER: But could you not use the same
11 argument the other way round to say that the weakness of
12 the position of the suppliers gave them an inducement to
13 get some strength from unity and a few concerted
14 practices to protect themselves against an overpowerful
15 OEM? I mean, it is not clear to me that the power of
16 the OEMs necessarily leads one way or the other on
17 the likelihood of forming a cartel or the ability of
18 a cartel to maintain prices.

19 MR SCANNELL: I take that point, Professor. To be clear,
20 the context of the points that I am making in relation
21 to countervailing buyer power are causation points, so
22 they are points that are directed at the implausibility
23 of there being a cartel on price when the OSS suppliers
24 were unable to affect what the price actually would be
25 that was ultimately paid.

1 PROFESSOR NEUBERGER: Thank you.

2 MR SCANNELL: Finally, in relation to these decisions, could
3 we go back to the Dalphi Metal decision? That is in
4 {J2/91/1}.

5 THE CHAIRMAN: Sorry, J2/92 was which decisions?

6 MR SCANNELL: We were in J2/93, which was *U-Shin* --

7 THE CHAIRMAN: We have been to J2/92 and J2/93, I thought.
8 Am I writing that down wrong?

9 MR SCANNELL: Yes. J2/92 was *Magna / New Venture Gear*.

10 THE CHAIRMAN: Yes, okay.

11 MR SCANNELL: We are now going back into Dalphi, which we
12 saw before.

13 THE CHAIRMAN: Dalphi, yes, yes.

14 MR SCANNELL: So we have looked at recitals 8 and 9
15 {J2/91/4} and now I would like to pick it up at
16 recital 21 {J2/91/7}. So the Commission is considering
17 whether the merged entity between TRW and Dalphi could
18 distort competition in the market. Page 7 of this. So
19 21:

20 "The parties have submitted that consolidation among
21 the OEMs has increased the latter's buyer power, which
22 is reflected in decreasing prices, competitive tendering
23 with multi-sourcing, frequent switching of suppliers and
24 shorter supply contracts. This is to a certain degree
25 reflected in the evolution of market shares and

1 the bidding data, with market leaders Autoliv and TRW
2 loosing market share to Dalphi, Toyoda and Takata. None
3 of the OEMs consider that the concentration would make
4 them overly dependent on TRW/Dalphi. To this effect,
5 OEMs have pointed to the relative ease with which
6 suppliers can be switched and the possibility to
7 accelerate the introduction of new suppliers [like]
8 Tokai Rika ... to continue putting pressure upon the
9 established players. Also, the OEMs have confirmed the
10 complementarity of TRW and DME with regard to their
11 product offering."

12 Then 23:

13 "It can be concluded that airbags and steering
14 wheels are buyer markets, with significant buyer power
15 that has increased over the years as a result of
16 the consolidation in the car manufacturing market and
17 the OEMs' cross brand sourcing strategy. The OEMs feel
18 confident that stringent cost and quality audits,
19 on-line auctions, combined demand across platforms and
20 unilateral renegotiation of supply contracts is
21 sufficient to counter this level of concentration."

22 THE CHAIRMAN: Okay, this is on the basis that there is
23 going to be no cartel activity, presumably, this was --

24 MR SCANNELL: Yes.

25 THE CHAIRMAN: -- written on that basis, and -- but

1 the Commission then became subsequently -- or became
2 concerned about cartel activity, but you are saying that
3 they were really -- their priorities were misplaced
4 because the buyer power of the car manufacturing market,
5 they really need not have worried about it because it
6 was going to have no effect on the market anyway? I am
7 completely confused with your submissions at the moment.

8 MR SCANNELL: I am only taking this point as a plausibility
9 point on the likelihood of there being a global cartel
10 or cartels targeted at the Claimants and I am suggesting
11 that there is a causation issue that goes into the mix,
12 and that causation issue is: can they establish that if
13 there was concertation of some sort that it actually
14 affected the prices that they paid? My submission in
15 relation to that is it is most unlikely to have affected
16 the price that they actually paid and certainly not at
17 the level that is being suggested against us.

18 THE CHAIRMAN: Is that a convenient moment to take
19 five minutes for the stenographer?

20 MR SCANNELL: Yes.

21 THE CHAIRMAN: Five minutes.

22 (11.56 am)

23 (A short break)

24 (12.08 pm)

25 MR SCANNELL: I am grateful.

1 I was reminded over that short break that a further
2 consideration to take into account when you are
3 considering leniency applications, if I can just very
4 briefly go back to that, is that of course if it were
5 the case that the Commission, having audited
6 the documents that it has, got the sense that
7 a particular leniency applicant had not been forthcoming
8 in providing all of the relevant information, then all
9 of the leniency that that undertaking was applying for
10 could be whipped away from them, which could have
11 massive implications for that.

12 THE CHAIRMAN: In your leniency -- is it called leniency
13 submissions -- in your application for leniency, we do
14 not know what you said, do we? You might have said all
15 sorts of things that are relevant to this case, but, for
16 good reason, disclosure of that was not ordered.

17 MR SCANNELL: Yes, they are generally protected documents
18 under the Notice itself.

19 THE CHAIRMAN: Indeed. Indeed, yes.

20 MR SCANNELL: Yes.

21 THE CHAIRMAN: So we do not actually know what you fessed up
22 to.

23 MR SCANNELL: No. However, there is clearly always
24 a prisoner's dilemma that goes on with leniency
25 applications. The leniency applicant does not know what

1 any other leniency applicant has said in their leniency
2 applications.

3 THE CHAIRMAN: Yes.

4 MR SCANNELL: There is always a risk that you are not going
5 to get it right --

6 THE CHAIRMAN: Yes, yes.

7 MR SCANNELL: -- and you are going to be found out, and if
8 it is found out, it can make hundreds of millions of
9 euros of difference.

10 THE CHAIRMAN: (Overspeaking - inaudible).

11 MR SCANNELL: I will leave it at that.

12 I am just going to give you the references to one
13 final Commission decision in relation to this market as
14 a whole which provides a context for understanding
15 documents and negotiations and causation, {J2/95/1}.

16 I do not believe we have got to that one.

17 THE CHAIRMAN: Have you got some paragraph numbers?

18 MR SCANNELL: Yes, I will give you recital numbers
19 presently.

20 {J2/95/1}, please. So this is the Commission's
21 merger assessment in *KSS / Takata*, and again, that was
22 not objected to ultimately by the Commission, and
23 the relevant page is {J2/95/16} and the relevant recital
24 on page 16 is 84.

25 "... in the present case, automotive OEMs would

1 likely be able to counter attempts of airbags, steering
2 wheels and seat belts manufacturers to increase prices
3 through coordinated behaviour."

4 So that is grappling with the likelihood that
5 coordinated behaviour, if it were to happen, would
6 actually have an effect on the prices that the OEMs pay.
7 Now, we do say that that is relevant. We say it is
8 relevant to the assessment of plausibility of the case
9 that the Claimants bring and especially the plausibility
10 of their case on causation.

11 Now, turning to the witnesses. PSA's procurement
12 witness is Mr MacQueen, Vauxhall/Opel's is Mr Saternus
13 and Fiat's is Mr Carosso. They were not introduced by
14 my learned friend yesterday, I will do that work for
15 him. So each of those claimant witnesses describes how
16 the RFQ process actually worked and they all explain
17 that it began with a vetting procedure. So they used
18 that to ensure that they would only receive bids from
19 companies that they wanted to become their suppliers.
20 They all used a similar traffic light system of red
21 lights, amber lights and green lights essentially to
22 pre-select suppliers before they ever issued an RFQ, and
23 that was part of a wider strategy that they speak of
24 which controlled their suppliers' market shares on
25 a global basis. They did that for a variety of reasons,

1 many of which perfectly understandable, ensuring
2 continuity of supply, but it no doubt suited them to
3 ensure that none of the OSS suppliers would become
4 large --

5 THE CHAIRMAN: Broadly speaking, that is not in dispute.

6 MR SCANNELL: No.

7 THE CHAIRMAN: No. So what it would assist the Tribunal --
8 sorry to interrupt, but if -- now is an appropriate
9 time. What is going to assist the Tribunal greatly is
10 if the process of receiving and issuing RFQs, receiving
11 the bids, selecting, in the normal world, absent cartel
12 behaviour, amendments, new contracts, all those things
13 that are traversed in the evidence is produced in an
14 agreed document, because actually the story is told --

15 MR SCANNELL: Disjointedly.

16 THE CHAIRMAN: -- four, five or six times.

17 MR SCANNELL: Yes.

18 THE CHAIRMAN: Of course there may be areas of dispute, so
19 there may be areas of dispute that do not matter that we
20 do not have to resolve and there may be areas of dispute
21 that we do have to resolve, but ... I am not asking
22 for it now, it can be after cross-examination, but it
23 would be helpful if we could have a document which is as
24 agreed as possible so we have got the process set out in
25 a single document and then of course we can resolve any

1 disputes.

2 MR SCANNELL: Yes.

3 THE CHAIRMAN: Mr West, does that seem feasible?

4 MR WEST: We will certainly do our best.

5 MR SCANNELL: I anticipate that there may be some variation
6 between suppliers. Of course, they did not have exactly
7 the same procurement process.

8 THE CHAIRMAN: Yes, I can appreciate there were slight
9 differences.

10 We may need to, once we have heard the evidence,
11 just discuss what topics, some topics it may be unclear
12 whether they fall within or fall without that, but
13 perhaps you could turn your minds to it, at least what
14 it could address. Because you will appreciate it is
15 told in the witness statements, different witness
16 statements several times, it is in the skeletons; every
17 time it is put it is sort of the same, but slightly
18 different.

19 MR SCANNELL: Yes.

20 THE CHAIRMAN: Yes.

21 MR SCANNELL: I do understand and I am grateful for that
22 indication.

23 Just to see a document which shows how blunt
24 the OEMs occasionally were when it came to telling
25 suppliers what they could and could not bid for, could

1 we turn to {J2/32/1}, please. So this is an internal
2 Autoliv email. It is sent by a Mr Sean Nayeri.

3 THE CHAIRMAN: Well, we have been shown this, I think, have
4 we not? J, tab 32, yes?

5 MR SCANNELL: J2/32 is my reference and it should be on
6 page 2 {J2/32/2}. So an internal Autoliv email from
7 Sean Nayeri, who works for Autoliv's GM business --

8 THE CHAIRMAN: No, that is not. So I have got the -- it
9 starts, "Dear Veronica"; is that it?

10 MR SCANNELL: No. We need to be in bundle J2, at tab 32.

11 THE CHAIRMAN: So my bundles are different to yours. I have
12 got -- I have got "J/OR" in red, which starts ... okay,
13 sorry, yes.

14 MR SCANNELL: Could we take this one electronically and
15 I will endeavour to ensure that this is in your hard
16 copy bundle?

17 THE CHAIRMAN: I thought my tab numbers were the same as
18 yours.

19 MR SCANNELL: I am proceeding on the electronic Opus files
20 and this may be an electronic document that has somehow
21 not found its way into the hard copy.

22 THE CHAIRMAN: I have got a tab 32.

23 MR SCANNELL: Is it empty?

24 THE CHAIRMAN: No, I have got the "Dear Veronica" email.

25 MR SCANNELL: Oh. Could you turn to page 2 of that?

1 THE CHAIRMAN: I have got, "Best regards, Peter", on page 2.

2 MR SCANNELL: I believe you are looking at J1, sir.

3 THE CHAIRMAN: Okay.

4 MR SCANNELL: You need to be in J --

5 THE CHAIRMAN: So just to be clear -- and I think at some
6 point this is going to start --

7 MR SCANNELL: Causing a problem.

8 THE CHAIRMAN: -- getting complicated --

9 MR SCANNELL: I think it is already.

10 THE CHAIRMAN: -- or annoying, but I have got J, I have got
11 volume 1 and volume 2, volume 1 goes up to 427 or
12 thereabouts, and volume 2 starts at 432 and goes up to
13 something in the thousands and they are not sequential,
14 for the reasons Mr West explained. So that is just
15 called "bundle J" and there is volume 1 and volume 2.
16 Then I have got a bundle J "Key disclosure OR".
17 I do not know what the "OR" in red ... what does that
18 stand for? I have got "IR" and "OR".

19 MR SCANNELL: Yes, that is outer ring and inner ring.

20 THE CHAIRMAN: I assumed because of the red it was
21 confidential. So it would be really helpful if that was
22 marked confidential. Then I have got two documents in
23 that.

24 MR SCANNELL: Yes.

25 THE CHAIRMAN: Tab 2 is raw material indexation agreement

1 document, I am sure I can say the title.

2 MR SCANNELL: I think that what we are experiencing here,
3 sir, is a non-insertion of an electronic document into
4 the hard copy J bundles and --

5 THE CHAIRMAN: That is understandable, but I am just
6 concerned that all the tabs you have been giving me,
7 which I have not go, are actually the wrong tabs. So
8 perhaps over the adjournment someone could at least find
9 out what the problem is and then we can work out how to
10 solve it.

11 MR SCANNELL: Yes.

12 THE CHAIRMAN: So let us bring it up on here. So this
13 is ...?

14 MR SCANNELL: {J2/32/2} on the Opus system and it is an
15 internal Autoliv email from Sean Nayeri to others on
16 19 February 2010 and it is addressing an RFQ issued by
17 General Motors, which at the time owned Opel. He
18 writes:

19 "Please see attached all the RFQ documents.

20 "The important piece is what I have attached here
21 which shows what programs we get to quote.

22 "The biggest surprise, which is in Europe is that
23 our theory with Opel Junior turned out to be wrong. We
24 only get to quote DAB/SW."

25 Driver airbags and steering wheel:

1 "My guess is that since it is Fam 3 carry over, they
2 are having us quote this together with *Takata* since
3 *Takata* also has Family 3.

4 "Also since they don't want us to grow more, they
5 are having everyone else quote the rest!!!

6 "So Handan and Mathias ... You are off the hook.

7 "Urban, Renaud ... Rock 'N roll!!!"

8 What he means by that is: we have been told by Opel
9 that we are allowed to bid for some things but we have
10 been told that we cannot bid for other things. So
11 the people who are dealing with the things we are
12 allowed to bid for, it is time to get to work.

13 The others, you can take a holiday. So that is what he
14 is saying there.

15 THE CHAIRMAN: Mr Nayeri is not giving evidence in these
16 proceedings?

17 MR SCANNELL: No.

18 So I want to move on --

19 THE CHAIRMAN: What are you going to say -- I mean,
20 the point has been put firmly against you that you are
21 just not calling the relevant people. These senior
22 people whose names are all over the emails that we were
23 looking at yesterday, you are not calling them. Is
24 the Tribunal entitled to draw inferences from that as
25 a matter of law?

1 MR SCANNELL: We say not, and there is a particular reason
2 for that. The legal principle that is generating this
3 objection is the sort of objection that was ventilated
4 by Lord Justice Green in the Court of Appeal in *Trucks*,
5 and the point that Lord Justice Green made in *Trucks* was
6 that when the Commission has established a cartel and
7 a follow-on damages claim is brought on foot of it and
8 the issue to be determined is the quantum of loss that
9 has been caused to the claimant by that cartel,
10 insofar as the court would be assisted by evidence from
11 people working for the cartelist as to how it works and
12 what its mechanics were, adverse inferences will be
13 drawn if they do not turn up, or they can be drawn if
14 they do not turn up.

15 This case is different, because in this case there
16 is no cartel. It is alleged that there is a cartel, it
17 is denied that there is a cartel.

18 THE CHAIRMAN: My question was a little broader based than
19 that. As a matter of law, we are entitled to draw
20 inferences on your failing to put in evidence from -- on
21 certain topics from certain people. My understanding is
22 -- I cannot remember what the name of the Polish case is
23 on the case with the Polish name, but as I understand,
24 as a matter of law, we are entitled to draw inferences
25 on that, whether inferences are appropriate or ... is an

1 entirely separate matter.

2 MR SCANNELL: Yes, I am not going to resist the suggestion
3 that you are entitled to draw inferences. Of course you
4 are, sir, and I am not going to make an unrealistic,
5 unhelpful submission to you.

6 THE CHAIRMAN: Are you going to make submissions as to why
7 what Mr West says are the relevant people who were
8 identified in the Commission decisions, senior people
9 who would have been looking at -- not in particular
10 sales teams but were above the sales teams, are you
11 going to be making submissions as to why those people
12 have not been called and why the Tribunal is not being
13 assisted in these matters, or ...?

14 MR SCANNELL: Well, I am happy to address that, sir. So --

15 THE CHAIRMAN: It does not have to be now, but at some
16 point.

17 MR SCANNELL: I am happy to address it now. If it is of
18 concern to the Tribunal then I am certainly happy to
19 address it now.

20 I have dealt with the distinction between
21 the present case and a case like *Trucks*. We are denying
22 that there is a cartel, so an adverse inference cannot
23 be drawn against us that we are not explaining a cartel,
24 the existence of which we deny. That really would be
25 unfair. The burden of proof is on the Claimants to

1 prove a cartel and there is no obligation on a defendant
2 in a standalone claim to lead evidence from any
3 particular witness. Beyond that, the Claimants'
4 criticism seems to be that it would be rather useful to
5 cross-examine defendant witnesses so that more pressure
6 can be brought to bear in them in relation to particular
7 documents.

8 Most of those documents are now 20 years old, and it
9 is, with respect to the Claimants, rather a hollow
10 objection that we are not calling witnesses to remember
11 and assist with the interpretation of 20-year-old
12 documents. I mean, in that regard, it is useful to see
13 what has been said judicially about that sort of
14 situation in the past.

15 If we could turn up bundle AB-- that is authorities
16 bundle 2, tab 39, please {AUTH2/39/1}. So we are going
17 back to *Phones 4U*. Page 20 {AUTH2/39/20},
18 Mr Justice Roth referred to the judgment of
19 Mr Justice Leggatt as he then was in
20 *Gestmin v Credit Suisse*, where he was dealing with
21 the question of really how useful live oral evidence is
22 going to be when you are interpreting documents.

23 Mr Justice Leggatt said --

24 THE CHAIRMAN: Sorry, where are you? Which page?

25 MR SCANNELL: We are in paragraph 44 of page 20 of Auth2,

1 tab 39, and we are looking at Mr Justice Leggatt's
2 judgment in Gestmin.

3 "... the best approach for a judge to adopt in the
4 trial of a commercial case is, in my view, to place
5 little if any reliance at all on witnesses'
6 recollections of what was said in meetings and
7 conversations, and to base factual findings on
8 inferences drawn from the documentary evidence ..."

9 THE CHAIRMAN: There is nothing surprising in this.

10 MR SCANNELL: There is nothing surprising in this at all.

11 Really, I am showing it to you to remind you and
12 the Tribunal that fundamentally the task is to look at
13 the plausible inferences that can be drawn from
14 the documentary trail, and realistically, this tribunal
15 is not going to be helped by a succession of witnesses
16 coming along and saying, "This is a 20-year-old email,
17 I cannot remember it", which realistically is as far as
18 that could be taken.

19 THE CHAIRMAN: I mean, up to a point, but the point being
20 made against you is that: look, you accept that you have
21 been engaged in illegal cartel activity, that is not in
22 dispute. You could have come along and said, "Look,
23 although we were engaged in cartel activity against BMW
24 and Suzuki and so forth, and Toyota, for the following
25 reasons we never engaged in cartel activity against

1 the claimant companies", and offer some sort of
2 narrative. This is a submission that Mr West has made,
3 quite powerfully, and he says, look, these are the key
4 people who were questioned in relation to those previous
5 cartels, some of them are still working for you, if you
6 really had clean hands, you would have come forward and
7 explained the limits of your cartel activity and that
8 would have actually been the real kibosh on
9 the inferences he is seeking to draw.

10 That is not quite the same as saying, "Look at an
11 email", you are not assisted in explaining the words.

12 MR SCANNELL: No, but of course you will appreciate, sir,
13 that what Gestmin says, what Mr Justice Roth said in
14 *Phones 4U* is relevant to this as a whole, as is the
15 distinction between this case and *Trucks*.

16 Now as to the individuals that my learned friend
17 referred to yesterday, he mentioned in particular
18 Torben Schönborn, Arthur Blanchford and Joachuim Aigner.
19 We deal with them at paragraphs 75 to 82 of our skeleton
20 argument {S/2/24-26}; they are no longer employed by
21 Autoliv.

22 THE CHAIRMAN: Right.

23 MR SCANNELL: Then, in their skeleton, the Claimants say
24 that there are four current or former senior officers of
25 Autoliv who should have been called, Lars Westerberg,

1 Jan Carlson, Veronica ErikSSon and Pelle Malmhagen.
2 Now, as to them, the Claimants do not suggest that any
3 of those individual actively participated in any of
4 the cartels they allege on their primary or first
5 alternative cases, save to the extent that the Claimants
6 suggested there was some sort of tacit collusion.
7 The criticism is apparently levelled only because
8 the Claimants imply that it would assist their indirect
9 effects case or tacit collusion case. They say that
10 Messrs Westerberg and Carlson were involved in
11 determining Autoliv's position in response to RFQs and
12 that Mr Malmhagen was involved in Autoliv's dealings
13 with other OEMs, such as the Claimants, and there is
14 a handful of documents that they have cited.

15 Now, as to the indirect case and the spillover
16 effects case, we have consistently said that that case
17 was not adequately pleaded. The Tribunal has seen that
18 from paragraph 20 of our skeleton argument {S/2/8}. It
19 is only in the Claimants' skeleton argument for this
20 trial that they have sought to allege that tacit
21 conclusion is somehow an important factor for their
22 direct case, so we do not accept that it is fair to
23 criticise us for not calling the likes of, you know,
24 Lars Westerberg and Jan Carlson as if we should have
25 anticipated that the tacit collusion case would become

1 a big feature.

2 THE CHAIRMAN: I did not understand, I thought some of
3 the documents that Mr West was pointing to were not
4 tacit collusion, they were evidence -- direct evidence
5 of cartel activity directed against --

6 MR SCANNELL: These are documents that are in the file that
7 mention by name people like Jan Carlson and
8 Lars Westerberg. They have been fished out by my
9 learned friend, no doubt because they are senior people
10 and no doubt he hopes that it will cause corporate
11 embarrassment for their names to be bruited in public.
12 But what matters is what exactly has been alleged in
13 relation to those individuals. I am focusing on what
14 has been alleged, because that goes directly to our
15 choice of who will be a witness and who will not be
16 a witness. It is important to appreciate that
17 Mr Carlson, Mr Westerberg, they only got mentioned by
18 these Claimants in their Re-Amended Reply, which they
19 served on 31 July this year. Now, the witness
20 statements were served in this case in February, so
21 the suggestion that we should have somehow anticipated
22 that they were going to drop these senior people's names
23 into documents that would become public is unwarranted,
24 in my submission.

25 As for Ms ErikSSon, whose name was pointed to on

1 the organogram yesterday, she was not a senior officer
2 at the relevant period and she is mentioned in just one
3 email referred to in the 4APOC and that document relates
4 to price amendments. Now, we have been up hill and down
5 dale with the Claimants about whether or not price
6 amendments even form part of this case. It is not at
7 all clear whether they do, because Mr Hughes has been
8 unable to find any overcharge which is referable to
9 price amendments. So, again, we do not accept that it
10 is fair to criticise Autoliv for not calling
11 Ms ErikSSon. Ms ErikSSon does still work for Autoliv in
12 the human resources department.

13 So we do not accept that it is fair to criticise us
14 for not calling these witnesses. All we could do, all
15 Autoliv could do is respond to the case as it has been
16 put and re-put and redefined over time by the Claimants,
17 but the insertion into the submissions that are made and
18 the pleaded case is belated, particularly in respect of
19 Messrs Westerberg and Carlson. They came after
20 the witness evidence had to be served in the case and we
21 do not accept, for that reason, that it is fair to
22 criticise the Defendants.

23 So I was talking about the procurement processes and
24 what the Claimants say about the process. So I talked
25 about the vetting procedure that they applied, and then,

1 just to get a feel for how they sought to shape
2 the question of who would bid and who would not bid in
3 the case, could we turn up Mr Squilloni's witness
4 statement again {C/3/1}, and the relevant page is
5 {C/3/17} and paragraph 59:

6 "Another example of [Fiat]'s strong bargaining
7 position is its ability to compel suppliers to bid ..."

8 THE CHAIRMAN: Sorry, where are we?

9 MR SCANNELL: We are on the final paragraph of
10 Mr Squilloni's first witness statement, which I hope is
11 in bundle C/3 --

12 THE CHAIRMAN: Yes, got it.

13 MR SCANNELL: So:

14 "... compel suppliers to bid for RFQs, even in
15 circumstances where [they] do not necessarily want
16 the business. For example, Autoliv did not consider it
17 desirable or worthwhile to bid for the supply of OSS for
18 the Alfa Romeo ... back in 2012, but we were not in
19 a position to decline to submit a bid (as failing to
20 tender for projects has previously been escalated by
21 the FCA Purchasing team to FCA's management to take up
22 with Autoliv in the past). We ended up having to supply
23 that project despite our reservations about deploying
24 substantial resources for development of a project with
25 very low volumes (less than 1,000 vehicles a year).

1 Similarly, we currently supply OSS for Maserati
2 vehicles, which, in light of the relatively low volumes
3 for luxury vehicles is not very desirable business for
4 Autoliv, but which [Fiat] has been able to pressure
5 Autoliv to take on by bundling the supply with more
6 attractive business that Autoliv would want to take on."

7 So that is an example of how the OEMs compel
8 suppliers to bid so that they would win, but they also
9 compelled suppliers to bid so that they would lose, and
10 that happened where there was already an incumbent
11 supplier that the OEM wanted to remain in place. Now,
12 in that situation, the OEM could simply have said,
13 "Well, I am not going to issue an RFQ, I have got an
14 incumbent, I am happy with the incumbent", but instead
15 they often compelled the incumbents to participate in an
16 RFQ process so that they would effectively bid against
17 themselves and lower the prices while other OEMs were
18 expected to make ultra low bids against them to displace
19 the incumbent, but of course those bids would then
20 become baked into the expectations of the OEM for future
21 supplies.

22 Now, both the OEMs and the OSS suppliers were aware
23 of this dynamic. Mr Corbut, who was a director of
24 Autoliv's PSA business unit, addresses that. He is
25 responding to a point that Mr MacQueen makes in his

1 witness statement where Mr MacQueen is saying that
2 because there were price differences between the prices
3 OEMs paid from project to project, that might be
4 indicative of collusion, and what Mr Corbut says
5 is: absolutely not, that is nonsense for multiple
6 reasons. Quite apart from the fact that every RFQ was
7 different and these were bespoke products, Autoliv knew
8 that Peugeot had capped its market share at 50% so it
9 knew that there were RFQs that came along that it could
10 never win and it knew the implications of that. It
11 meant that PSA could use Autoliv's bid as a stick to
12 beat down other suppliers' bids on price and it was not
13 in Autoliv's commercial interest to submit those ultra
14 low bids, because that would then shape the expectations
15 of the OEM going forward, despite the fact that Autoliv
16 had no prospect of winning.

17 That, incidentally, is the true context of
18 the *Takata* email that Mr West showed you yesterday,
19 where *Takata* said, "We are not going to bid this time
20 round, we are not going to play Fiat's game of making
21 ultra low bids with no prospect of winning". It is also
22 the context of the internal Autoliv email he showed you
23 from Bénédicte Chassery to --

24 THE CHAIRMAN: Sorry, because we saw a lot of emails, can
25 you just bring that one up, just show -- perhaps bring

1 it up on the screen maybe? Is that --

2 MR SCANNELL: {J1/72/5}. So this is at the top of the page,

3 "Fiat LAAM":

4 "An opportunity to present a quotation ..." --

5 THE CHAIRMAN: Just a moment. Right, so this is from?

6 MR SCANNELL: It is from Airton Evangelista at *Takata* to

7 [redacted].

8 THE CHAIRMAN: Right. So *Takata* to ... *Takata*?

9 [redacted] -- it is an internal *Takata* ...

10 MR SCANNELL: Yes.

11 THE CHAIRMAN: Right. Okay, yes. Sorry, I just needed to

12 remind myself.

13 MR SCANNELL: Yes. So I am contextualising that email, what

14 does an OSS supplier mean when it says, "We are not

15 going to play Fiat's game"? Well, this is what they are

16 talking about, they are talking about being forced to

17 bid against incumbents at ultra low prices.

18 It is also the context of --

19 THE CHAIRMAN: Sorry, I am catching up.

20 Sorry, just make that submission again, I did not

21 have the document in front of me when you made it and

22 I did not understand it. Sorry.

23 MR SCANNELL: I apologise, sir.

24 THE CHAIRMAN: No need to apologise.

25 MR SCANNELL: So I am contextualising one of the documents

1 that you were shown yesterday --

2 THE CHAIRMAN: Yes.

3 MR SCANNELL: -- where the observation is made by
4 a supplier, "We are not going to play Fiat's game", and
5 I am suggesting that what is actually going on in
6 the background of emails like that is a dynamic like
7 the one I have described, where Fiat is forcing an OSS
8 supplier to bid against an incumbent supplier by making
9 an ultra low bid, so Fiat wants the incumbent to lower
10 its prices midstream and it wants everyone else to go
11 even lower to try to oust them, whether they want
12 the incumbent gone or not, and it was just a dynamic of
13 the negotiation process.

14 THE CHAIRMAN: So what is the reference to the, "This
15 discussion with Autoliv is not acceptable to have",
16 while you are contextualising?

17 MR SCANNELL: Sorry, sir, could you repeat the question?

18 THE CHAIRMAN: The bit that was relied upon by Mr West was:

19 "... I think it is the right decision to not be
20 aggressive on Fiat ... but this discussion with Autoliv
21 is not acceptable to have."

22 So it indicates there was a discussion between
23 *Takata* and Autoliv, insofar as we are interested in
24 discussions between *Takata* and Autoliv.

25 MR SCANNELL: Yes. Or at least that that was something that

1 had been posited as a possibility, yes. I do not have
2 the reference to that exact quotation to hand.

3 THE CHAIRMAN: Well, it is on the same document.

4 MR SCANNELL: Yes, you have the hard copy. It is page 1
5 then of the -- as I say, I am using the electronic
6 version, sir, so I do apologise for that {J1/72/1}.

7 THE CHAIRMAN: Right. That is all right.

8 MR SCANNELL: So it may be -- any conversation between one
9 OSS supplier and another is, to a competition lawyer,
10 problematic.

11 THE CHAIRMAN: Yes.

12 MR SCANNELL: I am not denying that. I am simply
13 contextualising this within the context of what
14 the procurement process was so that you can understand
15 the context of these documents.

16 THE CHAIRMAN: Well, at the moment, the context seems to be
17 that one supplier is talking to another, which you have
18 acknowledged should not be happening.

19 MR SCANNELL: Yes.

20 So that same dynamic, that same motivation, if you
21 like, lies behind the document that Mr West showed you
22 from Bénédicte Chassery to Christophe Rivière, noting
23 that *Takata* had not been overzealous in bidding for
24 the A9 project, which was the Peugeot 208, compared to
25 how zealous it had been for the B7 project, which was

1 the Citroën C4. The document reference for that is
2 {J1/51/1}. I was not proposing to turn it up.

3 THE CHAIRMAN: I recall that one, yes.

4 MR SCANNELL: Yes.

5 So Autoliv's read on that, rightly or wrongly, was
6 that *Takata* must have known that Autoliv was
7 the incumbent and that it did not have the stomach to
8 make an ultra low bid to oust them because that would
9 have been unprofitable. It is important to appreciate
10 that that is the sort of consideration that can occur to
11 any OSS supplier. They are all aware of these dynamics.
12 It is the sort of consideration that can occur to them
13 without concerting with anybody; they just know that
14 there is an incumbent in place and they know the games
15 that the OEMs are playing, so it is a plausible
16 explanation for some -- for some indication that this is
17 the way OSS suppliers are behaving.

18 Now, I want to contextualise some of the price
19 negotiation strategies that you will come across in
20 the course of the case when you hear from the witnesses,
21 and I want to speak briefly about how the Claimants
22 controlled the prices that they paid.

23 So the first step in that is that they -- and this
24 is explained by the witnesses -- settled on a target
25 price internally. Now, as to how they settled on

1 a target price that they would ultimately pay, they did
2 that in two stages. First, they determined what the OSS
3 component should cost and they called this the "should
4 cost" cost. Now, they are car manufacturers themselves,
5 of course, so they have engineering assets, and no doubt
6 of this strong views about what things should cost, and,
7 importantly, they also had access to cost breakdowns
8 which were given to them by all of the OSS suppliers
9 historically. So they linked the prices that they
10 wanted to pay today to the prices that they had paid in
11 the past. Then the OEMs decided how much margin they
12 wanted to make on their cars and they adjusted
13 the "should cost" price accordingly, and then they
14 cross-checked those prices against what they had paid
15 for OSS components on the same platform.

16 Now, once the target price was chosen, the RFQ would
17 be issued and then those RFQs were often bundled RFQs,
18 so one RFQ would cover multiple components and
19 the supplier would be expected to make a package deal
20 offer to supply all of them. Even if there were
21 separate RFQs for each of the components, if one
22 supplier won more than one of those RFQs, they would
23 still be expected to make bundled price offers.

24 We are told by the witnesses that Peugeot and Fiat
25 at least eventually moved to a carryover system where

1 they tried to use the same safety components for new
2 cars as they had used in old based on the same platform
3 as a way of saving money. But even then, instead of
4 telling their suppliers that a new model was being
5 launched and that it would have to increase output, they
6 issued change notices, so the existing supplier had to
7 reduce the payments that it received as a thank you to
8 the OEM for the extra business.

9 Then, once they selected a potential supplier --
10 a supplier, not a potential supplier now -- once they
11 selected a supplier, the price negotiations began, and
12 it is at that stage that the OEMs really flexed their
13 countervailing buyer power to an even greater degree.
14 So I mentioned that they used historical breakdowns when
15 they were forming the target price. The reason they had
16 them in the first place is because once a supplier was
17 selected, the OEMs required them to provide a breakdown
18 of all of the costs they would incur in manufacturing
19 and transporting the component. The OEMs would then
20 audit those costs using dedicated cost engineers and
21 they would repeat that process with every engineering
22 change that happened between RFQ and SOP.

23 The level of granularity that the Claimants brought
24 to bear on that process is really quite striking.
25 Mr MacQueen, for example, says that if PSA thought that

1 the cost of materials was too high, Peugeot would simply
2 ask the supplier to lower the cost estimate, and if they
3 thought that the same component could be made using
4 the same machinery but just for a little less time, they
5 would let that be known to the supplier and expect
6 the supplier to lower the price. Then, of course,
7 the OEM would tell the supplier that the price had to be
8 in the same ballpark as the historic bid, and if
9 the quoted bid was higher, they would reveal their
10 target price and say, "Explain the difference and come
11 down".

12 So the net effect of all of those negotiating
13 strategies was that OSS suppliers had really virtually
14 no prospect of imposing anything like the price that
15 they wanted to charge for any component that they
16 supplied to the Claimants, and of course we know that
17 further amendments were made beyond the amendments
18 I have just described, so all of the witnesses attest to
19 the fact that they expected -- all of the Claimants'
20 witnesses that is -- that they expected their suppliers
21 to reduce their payments, the payments they received,
22 after the supply contracts were entered into. There
23 were year-on-year reductions after the first year of
24 production simply because they were long-term contracts.
25 Peugeot, for example, targeted a 3% reduction year by

1 year. But even then, the price expectations were not
2 exhausted, because a further pretty striking way that
3 the Claimants wielded their purchasing power was that
4 they expected any bidder who had already -- who was
5 already supplying the OEM that had issued the RFQ would
6 simply give back some of the money that they were
7 getting under their old contracts in order to improve
8 their chances.

9 We say that all of that evidence that is coming
10 predominantly from the Claimants, but it is all
11 supported, in fact, by the witnesses for the Defendants,
12 makes it extremely difficult to conclude that OSS
13 suppliers could possibly have colluded effectively in
14 a way that would materially affect either incumbency or
15 prices. We say that the Claimants, the suppliers,
16 controlled the selection process and they controlled
17 the prices, not the Defendants. It is against that
18 background that the Tribunal has to assess
19 the likelihood that Mr Hughes is correct when he says
20 that PSA's data -- he only looks at PSA's data, he does
21 not look at the other two Claimants -- as meaning that
22 it, still less anyone else, was subject to an
23 overcharge.

24 THE CHAIRMAN: So if you take the OSS 1 decision, which
25 discusses the difference between certain types of

1 coordination and the relevance of effect -- I do not
2 know if you can bring -- have you got that?

3 MR SCANNELL: Yes, it is {A/10/1} for me and it should be
4 A1, tab 10 in hard copy, too.

5 THE CHAIRMAN: They are just referring to the case, "... it
6 is apparent ..." -- sorry, once you have got it.

7 (Pause).

8 "In that regard, it is apparent from the General
9 Court's and Court of Justice's case law that certain
10 types of coordination between undertakings reveal
11 a sufficient degree of harm to competition that it may
12 be found that there is no need to examine their effects.
13 That case law arises from the fact that certain types of
14 coordination between undertakings can be regarded, by
15 their very nature, as being harmful to the proper
16 functioning of normal competition."

17 Now, one appreciates in a case like this, effects
18 have to be examined to know the extent of any
19 overcharge. One recognises that. But you seem to be
20 submitting that here it does not apply, that there could
21 be no effect, and I am just -- leaving aside the amount,
22 how you are reconciling your current submissions with
23 what is said in paragraph 70. Now, maybe that is an
24 unfair generalisation of the law, but ...

25 MR SCANNELL: Yes, what the commission is addressing in

1 recital 70 is part of the core definition of an
2 infringement by object. So it is put different ways in
3 different cases. This particular version of
4 the definition of a by object infringement is the kind
5 of *Carte Bancaire* type definition, where it is suggested
6 that whereas it is possible for the Commission to
7 conduct an effects analysis, they could do that. There
8 are some --

9 THE CHAIRMAN: But in these sort of cases they do not need
10 to, because --

11 MR SCANNELL: Yes. There are some that are so egregious
12 that it is not necessary to prove effects.

13 THE CHAIRMAN: Yes.

14 MR SCANNELL: That does not actually mean that there are
15 effects, it just means that these are infringements of
16 a type which are so -- which the European Union has set
17 its face against to such a degree that they deserve to
18 be, and are, deprecated in their own right. There is no
19 -- this is common ground -- effects analysis here, there
20 is no finding that --

21 THE CHAIRMAN: Yes, there is no effects analysis, but it
22 is -- but the type of coordination between undertakings
23 which the Commission says one would expect to lead to
24 a distortion of competition. So that is the starting
25 point. Now, it may be that is a rebuttal, not

1 the starting point.

2 MR SCANNELL: Yes, and one does have to read it with
3 the right glasses on. An effect on competition is not
4 necessarily an effect on the Claimants.

5 The European Commission is concerned to ensure that
6 there is effective competition on European markets --

7 THE CHAIRMAN: Sure, but at the moment your submissions seem
8 to be that, given the nature of this market, it is
9 implausible that there is going to be an effect on
10 competition.

11 MR SCANNELL: Yes.

12 THE CHAIRMAN: And the -- one could look at the case law,
13 one can look at the fact the case law is cited in this
14 decision. The Commission clearly has not formed a view
15 it is implausible --

16 MR SCANNELL: Yes.

17 THE CHAIRMAN: -- because they investigated it and all
18 the hoops they jumped through and they cite the sort of
19 standard case law at paragraph 70, and of course we have
20 to look at the evidence, and of course there may well be
21 no effect in this case and that is an evidential matter,
22 but you seem to be putting your case quite high.

23 MR SCANNELL: If I could just clarify one point arising from
24 that --

25 THE CHAIRMAN: Yes.

1 MR SCANNELL: -- summary. It is not my submission that
2 the infringements that were caused -- that were
3 discovered by the Commission had no effect on
4 competition, which is, I believe, how you put it,
5 Mr Chairman. It is my submission that it did not have
6 an effect on these Claimants.

7 THE CHAIRMAN: That I understand.

8 MR SCANNELL: Now we have evidence --

9 THE CHAIRMAN: But that is getting into the weeds of this
10 particular case.

11 MR SCANNELL: It is.

12 THE CHAIRMAN: At the moment we are talking about
13 the general market structure and --

14 MR SCANNELL: I am not making a submission at that level.

15 THE CHAIRMAN: Okay. So I would have thought that your
16 submissions would have applied equally to the BMW or
17 to --

18 MR SCANNELL: I do not know what their procurement
19 strategies were, sir. We do not have evidence from
20 them, but we do have evidence from these Claimants and
21 we can see the way that their procurement worked and we
22 can see how they drove down prices way beyond the bid
23 price, and that is why we say it is implausible that it
24 had an effect.

25 THE CHAIRMAN: I understand.

1 MR SCANNELL: Now, I want to go next to some of
2 the documents, and the context of this review is to show
3 you, first, that we are dealing with a smattering of
4 documents and that is going to be the punchline that
5 I ultimately reach. I am going to show you just how
6 thin the documentary evidence is, quantitatively, that
7 the Tribunal has before it and I am going to get to that
8 hand-up that I mentioned earlier this morning. But
9 I also want to show you some of the documents just so
10 that you can see them and form, perhaps, a more rounded
11 view of what they are actually saying than
12 the impression given by Mr West yesterday.

13 Now, the starting point in relation to all of this
14 is that I believe it is common ground that all of
15 the documentation the Tribunal has before it has come
16 from extensive disclosure the Defendants have given.
17 That includes the Commission files from 2017 and 2019,
18 it includes the DoJ files that were given to
19 the Department of Justice and other relevant documents
20 pursuant to a disclosure process, and we understand it
21 to be common ground that the disclosure the Defendants
22 have given is full.

23 So can we begin -- I want to begin by showing
24 the context of some of the remarks I made earlier today.
25 It is important -- one of the points that it is

1 important for the Tribunal to bear in mind when it is
2 considering how these negotiations worked is that when
3 the Tribunal sees an email which makes it pretty clear
4 that an OSS supplier has someone else's bid, is it safe
5 for the Tribunal to conclude that that must have come
6 from another OSS supplier, and the clear suggestion --

7 THE CHAIRMAN: It could have come from the customer in some
8 circumstances.

9 MR SCANNELL: Yes, and that was your point, Mr Chairman.

10 But of course, you will want to see a document or two
11 that actually establishes conclusively that it must have
12 come from the customer and it could not have come from
13 the supplier.

14 So can we look first at a document which will show
15 that, and this is -- I say this with great
16 trepidation --

17 THE CHAIRMAN: Give me a tab number, let us have a go.

18 MR SCANNELL: -- J2, tab 3 {J2/3/1}.

19 THE CHAIRMAN: Okay. Not a document we looked at before.

20 How does it start?

21 MR SCANNELL: It is an email -- an Autoliv email from
22 Burkhard Karczewski.

23 THE CHAIRMAN: Okay, this is going to cause problems for me
24 if -- because, obviously, having listened to Mr West,
25 I have got notes, so I think we need probably to get

1 that sorted out --

2 MR SCANNELL: Okay.

3 THE CHAIRMAN: -- over the adjournment. I am sure somebody
4 can explain --

5 MR SCANNELL: Would you like me to return to this after we
6 have solved the problem?

7 THE CHAIRMAN: I think, yes.

8 MR SCANNELL: Would you prefer that?

9 THE CHAIRMAN: Yes, I would prefer that, yes.

10 MR SCANNELL: Okay.

11 Well, in that case, there is just time to do this
12 before 1 --

13 THE CHAIRMAN: Yes. How are you doing on time, generally,
14 because we have intervened a fair bit, so I do not know?
15 We have slowed you up, I am sure.

16 MR SCANNELL: You have. It has been fun, though! I think
17 I am all right.

18 THE CHAIRMAN: You think you are all right.

19 MR SCANNELL: Yes.

20 THE CHAIRMAN: I was going to say, if you --

21 MR SCANNELL: I am looking at my learned --

22 THE CHAIRMAN: -- need an extra ten minutes ...

23 MR SCANNELL: -- friend. I did say that there was a risk
24 that I would go over past lunchtime. That is
25 understood. On Friday, I only need a very little chunk

1 of time.

2 THE CHAIRMAN: Okay, so we have got Friday. I cannot sit
3 late tonight, I have to leave at 4.15.

4 MR SCANNELL: I fully understand that. I fully understand
5 that.

6 THE CHAIRMAN: Fine. Let us crack on and get this next
7 thing done.

8 MR SCANNELL: So I am going to skip over the documents I was
9 going to show you.

10 THE CHAIRMAN: We will come back to that.

11 MR SCANNELL: We will come back to that. But I can just
12 summarise what I was going to say. I was going to show
13 you documents showing that prices come from customers.

14 THE CHAIRMAN: Customers, yes.

15 MR SCANNELL: They do not necessarily come -- so it is not
16 safe to assume that it is always coming from a customer.

17 I was going to show you documents also which show
18 that just because supplier 1 meets with supplier 2 does
19 not mean that anything untoward is going on. Suppliers
20 occasionally entered into perfectly legitimate
21 co-manufacturing arrangements where they had to meet and
22 speak, there were legitimate reasons for them to meet
23 and so that, too, is not a safe assumption. My learned
24 friend, for example, showed you an email yesterday where
25 Mr Carlson said that he was having a meeting with

1 Mr Lake and he got very excited about that. That proves
2 nothing, in our submission.

3 Okay, so I am just going to get to the punchline
4 about the balance of the documents, and we make three
5 points in relation to those.

6 The first is that when you are interpreting
7 the documents the overall plausibility of
8 the allegations has to be borne in mind in
9 the background, and I have already canvassed with you
10 how implausible the allegations actually are.

11 The second is that the Tribunal was taken to
12 a smattering of documents yesterday by my learned
13 friend.

14 THE CHAIRMAN: I do not recall it being a mere smattering,
15 it seemed to go on for a very long time, but ... yes.

16 MR SCANNELL: Happy to call it anything else: a smorgasbord,
17 a guacamole into which you can dip the tortilla chips of
18 your curiosity. In any event, a collection of documents
19 in no particular order -- I think we can probably agree
20 that -- and in many cases for no obvious reason other
21 than to say out loud that Autoliv and ZF look bad, and
22 a significant volume of them did not even relate to
23 Autoliv or ZF; some of them did not even relate to OSS
24 components, you may recall.

25 Now, I want to hand up at this point a document

1 which tabulates the documents that were referred to by
2 my learned friend.

3 (Handed).

4 As I say, this is not all of the documents in
5 the case by any means.

6 THE CHAIRMAN: Does this pick up all the ones referred to
7 by...?

8 MR SCANNELL: Yes. Yes, it does. So it shows all of
9 the documents referred to by him and it shows which of
10 them formed part of the Commission file. They are
11 the yellow highlights.

12 THE CHAIRMAN: So they are Commission file. So just as
13 a preliminary matter, are these tabs going to be
14 the tabs I have got and the tabs that Mr West seems to
15 have, or are they going to be the tabs that you have?

16 MR SCANNELL: Yes.

17 THE CHAIRMAN: Let me just test that.

18 (Pause).

19 Okay, that seems to ...

20 MR SCANNELL: I was having a word with my learned friend
21 about the proper home for this document. So bundle
22 S will do for now, subject to any further thoughts.

23 THE CHAIRMAN: Sorry, the documents we have added to bundle
24 S so far are, can you just remind me, because few have
25 gone in?

1 MR SCANNELL: You have a dramatis personae document which
2 was handed to you this morning.

3 THE CHAIRMAN: Yes.

4 MR SCANNELL: You have this document, and I believe Mr West
5 referred to another document yesterday.

6 THE CHAIRMAN: Yes, I think I know what that is. Okay.

7 MR SCANNELL: Just so that you are aware, this document also
8 shows which of the documents my learned friend took you
9 to relate to price amendments. You see the "PA" column,
10 "PA?"

11 THE CHAIRMAN: Sorry, Mr Scannell, if we could sort out
12 the tabs for these extra S bundles in due course.

13 So just walk me through the columns so that we have.

14 MR SCANNELL: Yes, so this table shows you which are in
15 the Commission file. You can see the date of
16 the document. You can see "PA", which is: is this
17 a price amendment document or is this a --

18 THE CHAIRMAN: Sorry, I was just looking for where "PA" is.

19 MR SCANNELL: It is in the blue banner at the very top.

20 THE CHAIRMAN: Oh, yes. Yes, I beg your pardon, yes.

21 MR SCANNELL: So it is telling you whether it is a price
22 amendment document or an RFQ document.

23 THE CHAIRMAN: The claimant is identified and then --

24 MR SCANNELL: Yes.

25 THE CHAIRMAN: -- who is referenced. Okay, that is helpful.

1 MR SCANNELL: It is pretty self-explanatory.

2 THE CHAIRMAN: Yes.

3 MR SCANNELL: Then the final point I would make -- I just
4 said I would quickly wrap up before lunch.

5 THE CHAIRMAN: Sure.

6 MR SCANNELL: So the final point I was going to make on
7 the documents is that we have gone through the exercise
8 of splitting out the totality of the documentary
9 evidence the Claimants rely on in support of their
10 direct case. So that is all of the documents cited in
11 the 4APOC, in the Re-Amended Reply and the further
12 documents Mr Hughes refers to in his expert evidence,
13 with a view to working out just how complete or
14 incomplete the evidential picture is that they rely on,
15 in fact, and we say that the results of that analysis
16 are really quite striking.

17 So looking first at Peugeot, the Claimants do not
18 identify a single document in support of the claim that
19 there was a cartel affecting Peugeot in the period
20 between 2002 to 2007. Not one. So that accounts for
21 more than half of the claim period.

22 They then cite two documents from 2008, four from
23 2009, two from 2010 and a single document from 2011,
24 none of which are inculpatory in the way which the
25 Claimants allege. When those documents are divided

1 between the different OSS components, the claim can be
2 seen to be even more tenuous. So, for seatbelts, five
3 documents in total for the nine-year period, and for six
4 of the nine years, not a single document.

5 THE CHAIRMAN: I am not sure how helpful that is. I mean,
6 the -- as I think is widely accepted, documentary
7 evidence may be sparse in any cartel case because a lot
8 of communications can take place over the telephone and
9 so forth. I mean, if there is one document which
10 evidences cartel activity, say against Peugeot, by
11 the Defendants in the room, which clearly evidences by
12 object cartel activity, does it not then swing back to
13 you to say, well, it may have been happening in 2008 but
14 it was not happening in 2004, if you want to take that
15 point? If there is nothing there, that is fine, but if
16 you have got --

17 MR SCANNELL: Well, we do say that there is essentially
18 nothing there. It must be recalled that, as I sought to
19 emphasise throughout my submissions in the course of
20 this morning, in order for this cartel on the primary
21 and first alternative case to have any remote
22 plausibility, in order for it to work there would have
23 to be deep and regular concertation between these
24 suppliers, and this comes back to Professor Neuberger's
25 point that the only way that you are going to be able to

1 rationalise what is actually going on is: well, I can
2 see that for a particular RFI there might have been
3 a problem. But what you cannot do is say there is
4 a cartel affecting every single supplier over
5 a nine-year period.

6 THE CHAIRMAN: I understand that. I mean, the other side of
7 the coin is the vast majority of communications are
8 going to be undocumented, and the fact that some have
9 been found begs the question --

10 MR SCANNELL: But that is exactly --

11 THE CHAIRMAN: -- what else was going on.

12 MR SCANNELL: Yes, that is rather the point --

13 THE CHAIRMAN: That begs the question --

14 MR SCANNELL: -- that none of the documents support
15 the existence of the --

16 THE CHAIRMAN: Well, that is --

17 MR SCANNELL: -- cartel as it is pleaded. None of them are
18 actually saying, you know, "Here is a cartel between us
19 that lasts nine years and is going to affect every RFQ".

20 THE CHAIRMAN: What document would ever have -- could
21 ever --

22 MR SCANNELL: Occasionally --

23 THE CHAIRMAN: -- satisfy that --

24 MR SCANNELL: Occasionally there are smoking guns in
25 -- (overspeaking) --

1 THE CHAIRMAN: -- "(inaudible) we started our cartel on
2 25 July 2004 and we decided to end it on ...".
3 You know, that is completely unrealistic. So even if
4 the defendant is completely right and you are engaged in
5 cartel activity as alleged by Mr West, let us
6 hypothesise that, if that were the case, the documentary
7 evidence would inevitably be thin, because --

8 MR SCANNELL: But the Claimants --

9 THE CHAIRMAN: -- you would not be writing -- you would not
10 be doing it predominantly in writing, it would be
11 predominantly in meetings and telephone calls.

12 MR SCANNELL: The Claimants cannot have it both ways. They
13 cannot say, "You can't expect us to find a smoking gun,
14 this will have to do but we are going to allege
15 a nine-year cartel affecting 100% of the volume of
16 commerce ..." --

17 THE CHAIRMAN: That submission I fully understand, yes.

18 MR SCANNELL: These documents are not even close to being
19 enough. They are not --

20 THE CHAIRMAN: But if there were -- but you are saying --
21 because then I think the other, the ZF Defendants -- we
22 have diagrams of there is one here, there is one here,
23 you know --

24 MR SCANNELL: They are scattered.

25 THE CHAIRMAN: -- they are spread out here, these scatter

1 graphs, I am just not -- I will need some persuading
2 that that is a helpful way of looking at it.

3 I understand the points you make about the way
4 Mr West has pleaded his case and, you know, he has gone
5 large, he has not said, "Well, there is one cartel
6 there, I am going to do my best to quantify that", he
7 has not taken that approach and he has that burden to
8 get over. But I think to go so far as to say that,
9 merely because the documentary evidence is fragmentary,
10 there is no relevant cartel activity is a more difficult
11 submission.

12 MR SCANNELL: We say in relation to that that if what is
13 alleged is the type of cartel that is necessarily going
14 to require regular and frequent contact, that sort of
15 approach of saying, "Here's a document, here is another
16 document seven years later", simply is not good enough.

17 THE CHAIRMAN: But that regular and frequent contact will
18 not be in writing necessarily.

19 MR SCANNELL: It may be --

20 THE CHAIRMAN: Unless you are very --

21 MR SCANNELL: They have full disclosure.

22 THE CHAIRMAN: -- certain.

23 MR SCANNELL: They have had full disclosure.

24 I would also suggest that if what they are
25 suggesting, for example, is, "Well, there is a global

1 cartel that affects all OEMs; it was entered into in
2 2002, possibly in 2004; if you are not with us on that
3 there were cartels lasting the same period of time
4 affecting all of the Claimants", then why on earth would
5 the documents only show occasional contacts between
6 OSS --

7 THE CHAIRMAN: It may be --

8 MR SCANNELL: -- relating to particular RFQs? You do not
9 need that if there is a global cartel.

10 THE CHAIRMAN: But it may come down to a question of
11 shifting burdens. If they can show documents which
12 clearly evidence -- and I appreciate you say they do not
13 -- cartel activity over a relevant period within
14 Mr West's window -- no doubt there will be much debate
15 about what window is appropriate, but if they do
16 evidence cartel activity, at some point there becomes,
17 one might submit, a shifting burden for you to say,
18 well, to explain that, or to show why it is limited ...
19 does it not come back to shifting burdens at some point,
20 because you -- all -- you have control of
21 the information; Mr West does not?

22 MR SCANNELL: Well, again, we do not accept that we do have
23 -- in inverted commas -- "control" of the information as
24 if there has been a finding by a regulator that there is
25 a cartel. There is not a finding by a regulator that

1 any of the cartels that they are alleging on their
2 primary and first alternative case actually exist, so we
3 do not accept the premise of that point.

4 THE CHAIRMAN: Is that a convenient moment?

5 MR SCANNELL: Yes.

6 THE CHAIRMAN: Thank you.

7 (1.13 pm)

8 (The short adjournment)

9 (2.07 pm)

10 MR SCANNELL: Now, Mr Chairman, members of the Tribunal, it
11 is imperative that I finish at 2.30 so that my learned
12 friend has her three and a half hours between this
13 afternoon and Friday morning, and then I will take
14 another half hour before lunch on Friday.

15 THE CHAIRMAN: You can pick it up. Sure, of course. Of
16 course.

17 MR SCANNELL: So I am going to move on to the spillover
18 case. The documents that I was going to take you to,
19 they can be turned to in closing. But just for your
20 note and just so that you can note the documents I would
21 have taken you to and why I would have gone there, I was
22 going to take you to three documents showing
23 the information relating to bidding coming from the OEMs
24 and not coming from the suppliers, and the Opus
25 reference to those documents were {J2/14/1}, {J2/29/1}

1 and {J2/31/1}.

2 THE CHAIRMAN: You say "the Opus reference", I think
3 the bundles are going to be up --

4 MR SCANNELL: They are.

5 THE CHAIRMAN: J2, we have discovered, is the --

6 MR SCANNELL: Yes, those behind me are sorting that out for
7 you.

8 THE CHAIRMAN: I am just not sure we have got the transcript
9 going at the moment.

10 (Pause).

11 Sorry, just give us a second.

12 Yes, okay, I am fine.

13 I mean, I do not think -- obviously where it is not
14 clear from the document where the -- sorry, from an
15 email, let us say, where a document has come from, some
16 prices or something, clearly there are two -- at least
17 two options.

18 MR SCANNELL: Yes.

19 THE CHAIRMAN: So, you know, if it is not clear on the face
20 of the document, I do not think one is going to need
21 a lot of persuasion that we do not know where it has
22 come from.

23 MR SCANNELL: Yes.

24 Then I was going to take you to the Evangelista
25 email, which is the internal *Takata* email in 2002, so

1 neither sent to, nor received by either of
2 the Defendants, and I was -- that is the email that my
3 learned friend relied on because of the words "we got
4 from them" and the suggestion was that *Takata* had
5 somehow got information from Autoliv about bids. We say
6 that that is a misreading of that email and that, too,
7 is far more likely to have come from Ford, the OEM at
8 issue or being discussed in that email.

9 Then, finally, I was going to show you {J1/113/1},
10 as a helpful document which shows the -- Autoliv's at
11 least reaction to the global financial crisis that hit
12 in 2008 which resulted in a decrease in demand for cars
13 generally and difficulties all round. It is an
14 interesting email because it shows that their reaction
15 to that was: we have got to compete even harder against
16 the other OSS suppliers and win market share from those
17 distressed suppliers. Now, of course, that is flatly
18 inconsistent with the existence of a cartel at that
19 time, which is what the Claimants are suggesting.

20 So I want to turn to, very quickly, the spillover
21 case.

22 THE CHAIRMAN: I just would not mind just -- what are your
23 submissions on -- let us pick one -- J, tab 41
24 {J1/41/1}. This is an Autoliv document, I think.

25 MR SCANNELL: I do not have that document.

1 THE CHAIRMAN: {J1/41/1}. We went to this yesterday.

2 MR SCANNELL: Well, this is another of those documents --

3 I was not proposing to go to this now, but this is
4 another of these documents showing the OEM strategy, in
5 this case it is Opel's strategy, to force low bids and
6 some resistance from Autoliv to play along with that.

7 THE CHAIRMAN: But it is -- it is -- is that cartel-like
8 activity by object in relation to Opel, GM, Fiat? What
9 is your submission on that? I mean, we can come back to
10 it. Come back to it on Friday.

11 MR SCANNELL: Yes, I will come back to it.

12 THE CHAIRMAN: Yes. Yes, sure.

13 MR SCANNELL: I would rather not make an on-foot submission
14 in relation to that.

15 THE CHAIRMAN: Yes, sorry, so you were going to go to
16 spillover.

17 MR SCANNELL: I was, yes, and I am going to take it
18 reasonably briskly.

19 So their case on spillover, or "indirect effects" as
20 it is sometimes referred to by them, applies if you
21 find, as we say you should, that there was no cartel
22 affecting the Claimants, so no global, no targeted.
23 Their case is that if that is where you come out, then
24 the Commission decisions are enough, they can establish
25 everything that they need to establish in that 100% of

1 their volume of commerce was affected.

2 Now, there has been a lot of toing and froing and
3 uncertainty caused by the way that the Claimants have
4 pleaded this and referred to it at various hearings
5 before the Tribunal to date. Is it an umbrella effects
6 case? They sometimes call it that, but it certainly is
7 not an umbrella case in the traditional sense --

8 THE CHAIRMAN: You could not call it spillover, yes.

9 MR SCANNELL: There was some ventilation of those points at
10 the Tokai Rika hearing.

11 THE CHAIRMAN: Yes.

12 MR SCANNELL: Now, what the spillover case actually is, it
13 is an indirect effects case and so it is a highly
14 speculative effects case. Ultimately, that is what it
15 is, and like all effects cases, it has to be proved.
16 The Claimants have to prove on a balance of
17 probabilities a causal chain between the infringements
18 the Commission found and the harm that the Claimants
19 allege, which is that all of their seatbelts, airbags
20 and steering wheels were cartelised from 2006 to 2011.
21 Now, initially they said 2002 to 2011 on the spillover
22 case, but that made no sense at all.

23 THE CHAIRMAN: That seemed to be pared back.

24 MR SCANNELL: Yes.

25 THE CHAIRMAN: We have not got any figures, Mr West, have

1 we, if we were with you on the spillover case,
2 2006-2011, we have not got a figure for the size of
3 the claim, have we?

4 MR WEST: I think that is right, I have not got a separate
5 calculation.

6 THE CHAIRMAN: I mean, presumably, if we were to arrive at
7 that position -- and please do not suggest this is in
8 any way a hint that we might -- presumably that
9 calculation could be done fairly straightforwardly.

10 MR WEST: Yes, although in fact Mr Hughes in his report does
11 identify the losses by contract year, so it would simply
12 be a question of identifying which of those contract
13 years were in and which were out.

14 THE CHAIRMAN: Okay. I mean, I think we will need that done
15 at some stage, just so that everything is covered.

16 MR SCANNELL: The fact that ZF and --

17 THE CHAIRMAN: Sorry, one more point. The spillover case is
18 -- as I understand the spillover case, you are not
19 saying that it is inappropriate as a matter of law, you
20 just say it falls on the facts?

21 MR SCANNELL: Yes.

22 THE CHAIRMAN: Mr West has said there is no precedent for
23 this, but you are not saying that it is -- if he could
24 prove the facts, then --

25 MR SCANNELL: A claimant can always allege what the effects

1 of an infringement of competition law are. They will
2 not always be direct, they may be indirect.

3 THE CHAIRMAN: Okay.

4 MR SCANNELL: The fact that Autoliv and ZF were found to
5 have infringed competition law, and as you are well
6 aware we do not say otherwise, when they made particular
7 supplies of OEMs to particular -- of OSS components to
8 particular OEMs, is not in itself a basis for impugning
9 the supplies they made to the Claimants when they were
10 supplying different OSS components. That is precisely
11 what this tribunal deprecated in *O'Higgins v Barclays*
12 *Bank*, which is the case that we cite in our skeleton
13 argument --

14 THE CHAIRMAN: Which paragraph --

15 MR SCANNELL: -- at paragraph 30 {S/2/11-12}.

16 So we say that, at a bare minimum, the Claimants
17 have to identify a causal mechanism, something that
18 bridges the gap between the infringements in
19 the Commission's decision and the harm that they allege,
20 taking full account of the fact that on this case there
21 is no cartel affecting the Claimants' supplies.
22 Logically, we say, there are six links in that chain of
23 causation.

24 The first is that there has to be some
25 identification of a relevant infringement finding by

1 the Commission. By that, I mean an infringement finding
2 to which Autoliv was a party, and no doubt my learned
3 friend would say to which ZF was a party, that might
4 have generated information or intelligence or terms that
5 could in principle have spilled over and affected --

6 THE CHAIRMAN: We have got no --

7 MR SCANNELL: -- things.

8 THE CHAIRMAN: -- finding of effect from the Commission.

9 MR SCANNELL: No, you have the infringement findings.

10 THE CHAIRMAN: We have the infringement findings --

11 MR SCANNELL: Yes.

12 THE CHAIRMAN: -- by object, but ... yes.

13 MR SCANNELL: Yes. Now --

14 THE CHAIRMAN: So we do not know if that effect would have
15 been 1% on prices as against BMW or 0%, as you submitted
16 it might be --

17 MR SCANNELL: Yes.

18 THE CHAIRMAN: -- or 50%. We do not have any starting
19 point.

20 MR SCANNELL: All of that is correct. Yes, we do not know
21 the effects on those named OEMs --

22 THE CHAIRMAN: On those named OEMs, yes.

23 MR SCANNELL: -- in the decision, and what we are now
24 talking about is: can the Claimants prove an effect for
25 that?

1 THE CHAIRMAN: Yes. No, I understand that, but when one
2 starts looking at ratcheting and things one has to start
3 at the beginning.

4 MR SCANNELL: Yes.

5 THE CHAIRMAN: Yes.

6 MR SCANNELL: You are absolutely right that that is
7 the starting point.

8 Then the second chain -- or the second link in
9 the chain of causation is establishing how that
10 information could have become known to parts of
11 the Defendants' businesses that were responsible for
12 supplying OSS components to the Claimants.

13 The third is establishing that the information was
14 useable information in the sense that it could in
15 principle affect the behaviour of that part of
16 the Defendants' business when it was dealing with
17 the Claimants, and I will explain what I mean by that.

18 The fourth is to establish that the spillover of
19 information did in fact alter the Defendants' conduct
20 when they were dealing with the Claimants, responding to
21 an RFQ, for example.

22 The fifth is to establish how the deployment of that
23 information actually affected the prices the Claimants
24 paid, and I think the Tribunal can probably anticipate
25 what I will be saying about that.

1 Then the sixth is establishing how, if all of those
2 aspects are proven, 100% of the Claimants' volume of
3 commerce was affected.

4 Now, we had hoped, at some point before this trial
5 actually began, that the Claimants would have given some
6 explanation as to how they were going to go about
7 establishing these links in the causal chain, but that
8 has never actually materialised. So even in my learned
9 friends' skeleton argument, the indirect case begins six
10 pages from the end of the 50-page document and the only
11 link in the chain that is actually addressed is
12 the second one, the one that broaches the possibility of
13 information leaking from one part of the Defendants'
14 business to another. But each of the links is
15 important, and I want to explain that in a little bit
16 more detail.

17 So, I said first that there has to be a relevant
18 infringement in the Commission decisions. Now, I do not
19 mean that they have to identify things with enormous
20 granularity, I simply mean that if, for example, they
21 are alleging that steering wheels were affected, it has
22 to be an infringement in the Commission decision
23 relating to steering wheels, at a bare minimum. I mean,
24 we would say that that is a necessary but not
25 a sufficient step, because of course we say that just

1 because there was a sharing of information in relation
2 to steering wheels that go to Honda does not mean, at
3 all, that the same price would apply to the provision of
4 a steering wheel to Fiat, for example.

5 Now, as to how information spillovers might have
6 occurred from one business unit to another -- that is
7 the link in the chain that my learned friend does
8 address in his skeleton argument -- once the Claimants
9 establish a relevant infringement, that is the next
10 logical step. Now, the Tribunal has evidence from
11 Mr Michalik in this regard, and it will also hear from
12 Mr Corbut on behalf of Autoliv, and in fact I showed you
13 some paragraphs of Mr Corbut going to this very point.
14 They explain that different business units within
15 Autoliv dealt with different OEMs and that the business
16 units were sequestered from each other. So I do not put
17 this at the level of saying it is impossible for
18 information to leak from one part of the business to
19 another; that would obviously be going too far. But
20 I just say that it is unlikely, given the corporate
21 structure of Autoliv, that that would have happened, and
22 that can obviously be tested with the witnesses.

23 The next component then that I mentioned is that
24 the Claimants have to show that this leaked information
25 was capable of changing their behaviour in some relevant

1 respect. So, say that the Claimants managed to
2 establish that information leaked from Autoliv's BMW
3 business unit to its Peugeot business unit and say that
4 that information related to -- or revealed that the BMW
5 business unit had bid to supply airbags to BMW at
6 a certain level. The question would then be: could that
7 information have been deployed by Autoliv's Peugeot
8 business unit when it was dealing with Peugeot? There
9 are a couple of quick points in relation to that.

10 So the first is that that information obviously
11 could not affect Peugeot's -- the Peugeot business
12 unit's response to an RFQ relating to steering wheels or
13 seatbelts.

14 The second is the bespoke point, and I hope that
15 is well understood, that just because it relates to
16 a seatbelt is not good enough.

17 At paragraph 44B of the 4APOC -- and it might be
18 useful to have that up on the screen. It is bundle
19 {A/2/28}. So 44B, the Claimants suggest that there are
20 two ways that commercially sensitive information that
21 the Commission found had been exchanged by a defendant
22 in the context --

23 THE CHAIRMAN: Sorry, this (inaudible) in purple, which
24 is --

25 MR SCANNELL: Difficult to read. Perhaps bigger still?

1 THE CHAIRMAN: 44B, "sharing of" -- where were you reading?

2 MR SCANNELL: I am summarising it for the Tribunal.

3 THE CHAIRMAN: Yes, I beg your pardon.

4 MR SCANNELL: So the Claimants suggest that there are two
5 ways -- it is the first two bullet points -- that
6 commercially sensitive information that the Commission
7 found had been exchanged by a defendant in the context
8 of dealing with a named OEM might be useful to a part of
9 the business when it was responding to an RFQ issued by
10 one of the Claimants. The first point they make is that
11 the recipient of that information, whom they describe as
12 a cartelists, would know that the other cartelists are
13 generally less interested in winning an RFQ if they are
14 not already the incumbent supplier and would therefore
15 expect to face less competition in incumbency
16 situations. Now, we find that quite difficult to
17 unpack, but insofar as it is suggesting that it would
18 not be perfectly obvious to a supplier that it is likely
19 to be less interested in winning an RFQ than an
20 incumbent, then I would suggest that it goes nowhere,
21 because it is obvious that if you are the incumbent, you
22 have an additional motivation to win an RFQ compared to
23 somebody who is not the incumbent.

24 THE CHAIRMAN: Because you are tooled up --

25 MR SCANNELL: You are tooled up, exactly. So you do not

1 want to start making your employees redundant and have
2 an empty factory that is tooled up for one business and
3 it is not actually manufacturing anything, then you
4 would have to go in with a super-low bid to take up
5 factory capacity and that gets baked in --

6 THE CHAIRMAN: You are also likely to be more competitive,
7 presumably, for the same reasons. An incumbent is
8 likely to be.

9 MR SCANNELL: An incumbent may very well -- from an OEM
10 perspective, is likely -- or may make a very low bid
11 that it would not ordinarily make because it has lost
12 incumbency and needs to get capacity into the factories
13 fast.

14 Then the second point that the Claimants make, which
15 is at (ii) {A/2/28}, is that the recipient company:

16 "... would know the prices which had been successful
17 in a cartel context, and which might therefore set
18 a benchmark among the cartelists for the price to offer
19 in a similar non-cartel context."

20 That was the answer that my learned friend gave to
21 you, Professor, yesterday, when you asked
22 the question: how is it that this could actually work?
23 How is it that you could suffer an overcharge as
24 a result of the infringements that we see in
25 the Commission decision which do not relate to you at

1 all?

2 But, again, even if one assumes that commercially
3 sensitive information has leaked and that that
4 information says something about bid prices, it is
5 simply not true that the recipient would have any
6 comfort that the prices it sees, where deployed in
7 the cartel context, could safely be deployed by it.
8 Quite apart from everything else, there is no cartel,
9 that is the predicate of the second alternative case.
10 So the recipient could not possibly know that just
11 because a particular bid price had worked in that
12 context, it will also work outside that context. But,
13 again, that runs into the brick wall of bespokeness, and
14 I have taken the Tribunal through the points relating to
15 bespokeness already, but the fact that a particular
16 price was bid to Toyota does not mean that that price
17 will be successful when it comes to bidding for Opel;
18 they are different products, the volumes are different
19 and the price will be different.

20 There is then the problem of establishing that
21 the spillover of information did in fact affect
22 the Defendants' behaviour. In relation to that, for
23 the reasons I have already identified, we say it is
24 highly unlikely that any of this information would
25 actually get deployed; it is highly unlikely that it

1 could be useable information. But a further point going
2 to that unlikeliness is that if, for example,
3 the information that is leaked to another part of
4 the Defendants' business relates to an old RFQ, for
5 example, say an RFQ that is more than two years old, it
6 is highly unlikely that any OSS supplier would consider
7 it to be safe to use, so if actual deployment of
8 information is to be inferred by the Tribunal, the only
9 basis for doing that would be to establish that
10 the information was relatively recent and that it
11 related to the same OSS component, that the defendant
12 wanted to be the supplier and that there was a similar
13 RFQ coming up in which the recipient could deploy
14 the information. But the problem with the Claimants'
15 case is that they have never actually correlated
16 anything in the Commission decisions to any of the RFQs
17 that they actually issued. We have never actually seen
18 a comprehensive list of RFQs saying, "Look, here is an
19 RFQ, it is likely to have been affected by
20 the infringements that we saw in the Commission
21 decision". What they seem to do is to assume that any
22 leak of information will affect every RFQ
23 the respondents -- the Defendants respond to thereafter,
24 and we say that is simply going too far.

25 Then there is the point about whether or not, even

1 if the information got to another part of
2 the Defendants' business, it could have affected
3 the Claimants' prices. Now, in the interests of time,
4 I am not going to repeat my submissions in relation to
5 that. You have my submissions in relation to that, but
6 we do say that it is highly implausible that it could
7 have had any actual effect on the prices these Claimants
8 paid for their supplies.

9 Then the final element of causation is the extent to
10 which the OSS decisions could have caused a spillover
11 effect, in particular whether 100% of the Claimants'
12 volume of commerce could have been affected. Now,
13 neither the Claimants, nor Mr Hughes takes any account
14 of any of the limitations that I have referred to up to
15 this point, the existence of information, the usability
16 of the information, bespoke-ness, the unlikelihood of an
17 effect on prices and so on, they just quantify at 100%.
18 But we know that that cannot be right, even for
19 the named OEMs; we know that 100% of their trade could
20 not possibly have been affected because the findings
21 made by the Commission make it abundantly clear that not
22 all of their OEMs were even affected.

23 Now, Ms Ford is going to say more about the volume
24 of commerce affected by the infringements generally, and
25 so I think that is a convenient point to hand over to

1 Ms Ford.

2 Opening submissions by MS FORD

3 MS FORD: Members of the Tribunal, just to give a roadmap of
4 where I am going, I am going to start first with a few
5 words on the legal principles on burden of standard of
6 proof; secondly, the commission decisions, what they do
7 and what they do not show; thirdly, the foreign
8 regulatory materials, their admissibility and their
9 probative value, or lack thereof; fourthly,
10 the Claimants' primary case as to an alleged cartel in
11 respect of supplies to them; fifthly, the Claimants'
12 back up overspill effects case; and then, sixthly, a few
13 words about the expert economic evidence on
14 the existence and extent of any overcharge.

15 THE CHAIRMAN: Ms Ford, on -- I mean, some of that seems to
16 be a repetition of what we have already heard.

17 MS FORD: (Off microphone) Sir, I -- (inaudible) --

18 THE CHAIRMAN: Yes. I mean, going forward, it would be
19 helpful if topics were not repeated, thinking in
20 particular of closing. Obviously if they have to be
21 repeated ... if there are different interests, of
22 course, they have to be looked at twice, but the idea of
23 going to the OSS decisions twice or anything like that
24 would be unattractive, but I will let you take your
25 course.

1 Just in terms of timing, there seemed to be some --
2 I heard conflicting information on one hand, there was
3 a desire to sit down at 2.30 promptly, but then I was
4 told that there was plenty of time on Friday morning.
5 I am just trying to reconcile where we are generally.

6 MS FORD: Sir, yes, so the timetable is that for
7 the Defendants' openings collectively, we have the whole
8 of today and tomorrow morning --

9 THE CHAIRMAN: Friday morning.

10 MS FORD: Sorry, Friday morning.

11 THE CHAIRMAN: Friday morning, yes. That gives you plenty
12 of time? You are not under the --

13 MS FORD: It is relatively tight, but we will cut our cloth
14 as necessary.

15 THE CHAIRMAN: Yes.

16 MS FORD: As between Mr Scannell and I, the agreement was
17 that that will be divided equally and so Mr Scannell has
18 dealt with those matters that he has dealt with so far.
19 He also, as between us, it is agreed that he is leading
20 on pass-on and interest, finance losses, and so he will
21 address you briefly towards lunchtime tomorrow on those.
22 But certainly in terms of the sequence, because
23 the matters that I am dealing with fall within the area
24 of liability rather than those matters down the line
25 about pass-on and financing losses, it was certainly

1 felt that it was better for me to stand up now and deal
2 with those rather than essentially cover the entire
3 field --

4 THE CHAIRMAN: Yes, I do not --

5 MS FORD: -- and then go back again.

6 THE CHAIRMAN: -- think it is dovetailing at all. Right.

7 Just while you are there, I mean ... (Pause).

8 So we may be able to sit -- if it is tight, we may
9 be able to sit at 10 o'clock on Friday morning, if that
10 assists.

11 MS FORD: That would be gratefully received, certainly from
12 our side.

13 THE CHAIRMAN: But then I am going to take five minutes of
14 your time now. That is the quid pro quo.

15 In terms of the timetable for closing, there were
16 some -- some members of the Tribunal need to make plans
17 around that. Just give me a second.

18 (Pause).

19 There was some debate on closing. If I just stick
20 my oar in first, there seems to be some attraction in
21 not sitting on the 25th, because obviously then we can
22 spend more time on the written documents that you will
23 be providing. I do not know when you are going to
24 provide those. Is the current plan on the evening of
25 the 23rd or on the morning of the 24th, or have we got

1 that far?

2 MS FORD: I do not think there has been a formalised
3 agreement, partly because it is slightly up in the air
4 when the Tribunal wishes to then begin the oral
5 closings.

6 THE CHAIRMAN: Right. But anyway, as currently envisaged,
7 it is not before late on the 23rd, I assume?

8 MS FORD: If oral closings were to start on the 25th,
9 I think it is envisaged that it will be close of play on
10 the 23rd and then reviewing on the 24th and then oral
11 closings on the 25th --

12 THE CHAIRMAN: Exactly, exactly. But, I mean, having an
13 extra day to review -- unless you are telling me they
14 are going to be crisp and short, having an extra day to
15 review may be useful.

16 MS FORD: Well, indeed.

17 THE CHAIRMAN: But just on closing, how long is going to be
18 required? As -- I appreciate we are still at the early
19 stages, but because there is not going to be any
20 duplication, I am not sure that the Defendants need
21 materially more time than the Claimants. So if
22 the Claimants had a day and the Defendants had a day
23 plus an hour and then the -- I would expect a short
24 reply from the Claimants, does that seem feasible?

25 MS FORD: Sir, that seems very short --

1 THE CHAIRMAN: So we would still plan to finish on the 30th.

2 MS FORD: That seems very short given the volume of material
3 the parties are going to have to cover. This is
4 essentially going to be a month-long trial and to close
5 a month-long trial with essentially half a day each as
6 between myself and Mr Scannell seems --

7 THE CHAIRMAN: Well, you say between yourself -- it is --
8 I am assuming you are not going to be duplicating, so it
9 will be a day --

10 MS FORD: Sir, that is absolutely right, however, we each
11 have a number of factual witnesses which are specific to
12 our respective clients, they will be addressing separate
13 matters, in particular, on the overspill case, they are
14 addressing the extent to which it is conceivable that
15 one could have that extended link of causation that
16 Mr Scannell has essentially just taken you through in
17 the context of our respective clients, that is not
18 something which duplicates. Also the competitive
19 relationships vis-à-vis these Claimants is something
20 that needs to be addressed individually as -- by each
21 defendant.

22 THE CHAIRMAN: Right. Anyway, we will need some -- we are
23 not going to book anything else in for the 31st, but we
24 will need some persuasion that it needs to go into
25 a fourth day of closing. We will see where the fact

1 evidence comes out and the economic evidence.

2 MS FORD: Sir, I think the proposal originally was that if
3 one -- yes, if one had more time for written closing
4 statements, that would take them to 24 October, that
5 there will be a review on the 25th and then four days
6 for closing.

7 THE CHAIRMAN: No, the suggestion is, because you have got
8 -- effectively you have got -- for a closing, you have
9 got from at least the 18th. It is unclear even if
10 the economic experts will need to come in on the 18th,
11 but you will have the weekend, you will have then
12 three days to do written closings, because not everyone
13 is going to be involved in the German law experts, so
14 that would seem -- so including the weekend, that is at
15 least five days. You may actually end up with an extra
16 day. Then we would receive the written closings on
17 the evening of the 23rd, or if you prefer, the morning
18 of the -- early on the morning of the 24th, then we
19 would have two days to consider them. Then, having been
20 able to spend considerable time considering them, we
21 would be optimistic the case could be closed in
22 three days. But we will leave a fourth day in reserve.
23 That is where we are at the moment.

24 MS FORD: Three days would then be evenly split as between
25 the Claimants and the Defendants, so it would be a day

1 and a half for the Defendants?

2 THE CHAIRMAN: Yes, I mean, that is a little bit negotiable,
3 I think, but maybe the -- it did depend a little bit on
4 how long the reply has to be, but the Claimants -- we
5 will discuss that a little closer to time, I think after
6 the evidence, but that is the way we are currently
7 thinking, just to let you know, but ... So we will leave
8 the 31st as a buffer day, but attempt to deal with --
9 I mean, three days of closing, if we have had detailed
10 written submissions -- closing submissions, would seem
11 to be ample. The case is not that complicated, a month
12 or not. Yes, we can discuss that further when we have
13 perhaps got through the economic evidence and firm up on
14 that.

15 But there is no objection from any of the parties of
16 us not sitting on the 25th; is that right? I cannot
17 remember who is green and who is red.

18 MR SCANNELL: The not sitting day is the 24th, is it not?

19 THE CHAIRMAN: So we would be not sitting on the 24th or
20 the 25th. So we would be reading one side's on the 24th
21 and the other side's on the 25th, or something like
22 that.

23 (Pause).

24 MR SCANNELL: We are in the Tribunal's hands.

25 THE CHAIRMAN: Yes, I am grateful.

1 Mr West?

2 MR WEST: Likewise.

3 THE CHAIRMAN: Yes. (Pause). Thanks, and sorry about that.

4 Sorry.

5 MS FORD: Sir, I am starting with *Advanz Pharma*. This is
6 authorities, tab 43 -- authorities 2, tab 43, page 1.
7 The reason I go to this is that it is relevant to
8 the question of the role of inference which I hope will
9 address some of the questions that the Tribunal has been
10 raising about how one deals with inferences in
11 the context of this case. This is a recent judgment of
12 the Tribunal where it overturned a finding of
13 infringement by the Competition and Markets Authority,
14 and if we could go, please, within this document to
15 {AUTH2/43/12}. At the bottom of the page,
16 paragraph 23 --

17 THE CHAIRMAN: Just give me a second.

18 Page 12?

19 MS FORD: Page 12, at the bottom of the page, paragraph 23,
20 we can see the Tribunal reciting what are familiar
21 points on the burden of standard of proof, on
22 the balance of probabilities.

23 THE CHAIRMAN: I mean, we have spent a lot of time on burden
24 of proof. Are you -- I thought we were doing it on
25 the balance of probabilities. Is there any reason to

1 talk about this again?

2 MS FORD: No, I am drawing it to your attention essentially
3 to set up then what is said in paragraph 24, because
4 this relates to the role of inference, and I am hoping
5 that this is responsive to a point that you, sir, put to
6 my learned friend in the course of argument.

7 If we go, please, to paragraph 24 {AUTH2/43/13}, we
8 can see that the Tribunal first says:

9 "In considering whether the CMA has proved its case
10 on the balance of probabilities, it must be borne in
11 mind that Chapter I cases often concern matters
12 which 'are in some way hidden or secret; there may be
13 little or no documentary evidence; what evidence there
14 may be may be quite fragmentary; the evidence may be
15 wholly circumstantial'."

16 That essentially echoes the point that you, sir, put
17 to my learned friend in relation to the disparate nature
18 of the individual instances of alleged collusion that
19 appear on the documentary evidence, and the Tribunal in
20 this case said:

21 "We acknowledge the difficulties in proving a case
22 in such circumstances. Circumstantial evidence and
23 inferences can play an important role in proving such
24 a case."

25 But what the Tribunal goes on to say is, in my

1 submission, very important. It says:

2 "... it must be borne in mind that lack of evidence
3 of an anti-competitive agreement is not, of itself,
4 evidence that it exists. That would be mere
5 speculation. Where there is ..." --

6 THE CHAIRMAN: That applies to any case, any civil case.

7 Absence of evidence is not evidence.

8 MS FORD: Sir, that is absolutely right, and it is a point
9 that we ask the Tribunal to bear strongly in mind in
10 this case. It is saying:

11 "Where there is no evidence about a matter, any
12 inferences about it are required to be based on, and
13 properly deduced from, evidence which does exist."

14 THE CHAIRMAN: Yes.

15 MS FORD: The Tribunal will appreciate the relevance in
16 the context of this case, because the Claimants' case
17 relies heavily on inference. The Tribunal will have
18 noted the word "infer" or variations of it appear 11
19 times in the Claimants' skeleton argument, and I refer
20 to this case because we ask the Tribunal, when it hears
21 words such as "infer" or "inference" to bear well in
22 mind that sometimes a lack of evidence means that there
23 is no infringement, and that, in our submission, is
24 the circumstances of this case.

25 A recurring theme that we have heard from

1 the Claimants is that this tribunal should presume that
2 the Defendants colluded with regard to the Claimants
3 because they have admitted their participation in
4 the infringements found in the OSS 1 and OSS 2
5 decisions. We say that that is excessively simplistic,
6 it runs counter to the established principle, most
7 importantly the presumption of innocence, and it would
8 not be a safe or legitimate basis to make a finding of
9 infringement. If anything, we say the fact that
10 the Commission, having investigated these matters, made
11 findings of infringement which were carefully
12 circumscribed, and I am going to show the Tribunal
13 the relevant wording, but they were carefully
14 circumscribed, they concerned only the supply of
15 specific OSS products to identified OEMs, we say, if
16 anything, that creates a presumption that there was no
17 broader infringement.

18 THE CHAIRMAN: Yes, well, we discussed at that some length
19 this morning, yes.

20 MS FORD: I would like to take the Tribunal to a case which
21 supports our position on this.

22 THE CHAIRMAN: Yes.

23 MS FORD: It is *Bord Na Mona*, authorities bundle 2, tab 18,
24 please {AUTH2/18/1}. This --

25 THE CHAIRMAN: Hold on.

1 MS FORD: This is an application for a strike out summary
2 judgment on a competition claim.

3 If we can go, please, within this document to
4 {AUTH2/18/4}, the Tribunal will see, at the bottom of
5 the page, paragraph 4. There was a Commission decision
6 finding --

7 THE CHAIRMAN: Sorry, which page?

8 MS FORD: I am sorry?

9 THE CHAIRMAN: Paragraph 4.

10 MS FORD: Paragraph 4 on page 4. I am just showing
11 the Tribunal this to show that there was in this case
12 a commission decision finding an infringement.

13 If we go over the page to page 5 {AUTH2/18/5}, we
14 can see that the Commission found that the German,
15 French, Spanish and Benelux markets were the relevant
16 territory in which the cartel operated for the purposes
17 of its decision, and the question on the strike out was
18 whether the decision precluded the Claimants from
19 contending that there had also been anti-competitive
20 conduct in the UK and Ireland or that the cartel had
21 effects in those markets.

22 The answer the court gave to that question of
23 principle begins at paragraph 42 on {AUTH2/18/18},
24 please.

25 THE CHAIRMAN: Yes.

1 MS FORD: What it said was:

2 "Provided that in its court proceedings the injured
3 party does not, in breach of ... the Modernisation
4 Regulation, put forward a case which is contrary to
5 the decision of the Commission, the injured party may
6 advance a case which goes beyond the findings of fact of
7 the Commission and seek to prove a more extensive
8 infringement."

9 THE CHAIRMAN: Yes.

10 MS FORD: That is the position of principle.

11 But the court then goes on to make an observation at
12 42 -- 43, sorry, which is important. This is
13 Mr Justice Flaux saying:

14 "In my judgment, this must also be correct as
15 a matter of principle. Of course, where the Commission
16 has conducted a detailed inquiry into all the available
17 evidence and has concluded that there was no
18 infringement or that infringement was limited to certain
19 markets, it will be difficult for a claimant to seek to
20 contend or prove the contrary."

21 It goes on to address the other possibility. It
22 said:

23 "However, there may be cases where the evidence
24 before the Commission is limited or where its
25 investigations only encompass certain markets so that it

1 finds infringement in those markets but does not go on
2 to find infringement in other markets due to lack of
3 evidence. In principle, in the latter case, if
4 the claimant obtains further evidence which was
5 not ..." --

6 THE CHAIRMAN: Sorry, I did not mean to interrupt you.

7 I have read to the end of that paragraph.

8 MS FORD: I am grateful.

9 THE CHAIRMAN: What happened in this case?

10 MS FORD: This is an application for strike out.

11 THE CHAIRMAN: What happened in the Commission case? Was it
12 a leniency case?

13 MS FORD: I do not know whether this was a leniency case,
14 but we can go on to show that the position the judge was
15 grappling with was different to this case because they
16 did not know what was in the Commission file. I will
17 show the Tribunal that.

18 THE CHAIRMAN: Yes.

19 MS FORD: But, just to emphasise, the two points in my
20 submission that come out of this paragraph 43 that
21 we have just read.

22 THE CHAIRMAN: Yes.

23 MS FORD: First, if the Commission has already conducted
24 a detailed enquiry into all the available evidence then
25 a claimant faces an uphill struggle to prove --

1 THE CHAIRMAN: Yes, but there may -- and this may not be
2 correct, but there may be a difference between when you
3 have had proceedings brought to a halt through
4 a leniency procedure and those where the Commission has
5 gone on to make findings; there could be a distinction
6 there. That is why I was just asking you that question.

7 MS FORD: I can see -- I think we will try and establish
8 whether this is a settlement decision or a full
9 decision.

10 PROFESSOR BAILEY: (Off microphone) It is a full decision
11 and it was started by an immunity applicant.

12 MS FORD: Professor Bailey says it is a full decision, but
13 it was begun by an immunity applicant.

14 THE CHAIRMAN: So it is a full decision. So different
15 considerations may arise. I am not saying --

16 MS FORD: That is one potential different consideration and
17 I will show the Tribunal two others which we say are
18 also relevant.

19 THE CHAIRMAN: Yes.

20 MS FORD: The first point is, when you have got that
21 detailed enquiry already, the claimant faces an uphill
22 struggle to show an infringement.

23 But secondly and importantly, nothing in this
24 judgment is suggesting that it is legitimate to say
25 because these Defendants were found to have engaged in

1 an infringement in Germany, France, Spain and
2 the Benelux countries, then one can simply infer that of
3 course they were involved in a wider infringement.
4 There is nothing to that effect, no endorsement for that
5 sort of approach in this judgment, and that, in my
6 submission, is important.

7 On the facts of this case, the court was satisfied
8 that the claim that the Claimants were trying to advance
9 at the interim stage at the strike out stage was not
10 contrary to the decision of the Commission. We can see
11 that at {AUTH2/18/19}. Paragraph 44 cites recital 37 of
12 the relevant Commission decision and the Tribunal will
13 see there:

14 "The evidence in the Commission's file demonstrates
15 that the industrial bag producers concerned together
16 adopted anticompetitive practices affecting [those
17 particular] markets. Although some evidence appears to
18 show that arrangements occasionally concerned other
19 countries, the Commission does not have any evidence in
20 its possession suggesting that these were anything but
21 isolated instances."

22 That is the basis on which the Commission then
23 focused on those markets.

24 So in that case there was a crumb of comfort for
25 the Claimants that there might be something else there,

1 and there was an express mention on the face of
2 the decision that we have seen some other material here,
3 but we, the Commission, have decided to focus our
4 enquiry on these geographic markets. The Tribunal will
5 appreciate that that is not the case in
6 the circumstances of these proceedings. There is no
7 crumb of comfort as such for these Claimants that
8 the Commission considered there might have been even
9 isolated instances --

10 THE CHAIRMAN: Well, the Commission has not said it does not
11 have any evidence in its possession suggesting there are
12 any other cartel activities.

13 MS FORD: It has not given this sort of indication --

14 THE CHAIRMAN: In this case, it had stated that.

15 MS FORD: In this case, it has, yes. In our case --

16 THE CHAIRMAN: In this case, it has not.

17 MS FORD: In our case, you find no acknowledgement by
18 the Commission that it considers that there are even
19 isolated instances.

20 THE CHAIRMAN: It is silent, so we --

21 MS FORD: Yes.

22 The second point comes from paragraph 45, and what
23 we can see there is there was no information before
24 the court at that stage as to the contents of
25 the Commission's file. Now, again, the distinction with

1 this case, the present proceedings, is that
2 the Claimants have had disclosure of the Commission file
3 and so -- and they are seeking to place some emphasis on
4 documents within it. So we say that is another relevant
5 distinction with the circumstances of *Bord Na Mona*.

6 I am going to come on to show the Tribunal
7 the relevant passages in the OSS 2 decision, but in this
8 case the Commission had an immunity applicant, it was
9 *Takata* in OSS 2, and it had assistance from Autoliv and
10 TRW, who were granted leniency because the Commission
11 considered the evidence that they had provided added
12 significant added value. So this, in my submission, is
13 not a case which falls within the second of the two
14 possibilities identified by Mr Justice Flaux, as he then
15 was. This is not a case where it can be said that
16 the evidence before the Commission was limited. Indeed,
17 in the context of the German law limitation issue,
18 the Claimants' position is that the Commission's enquiry
19 was not limited to named OEMs, it extended to
20 non-named OEMs.

21 THE CHAIRMAN: Sorry, say that again. In the ...?

22 MS FORD: In the context of the German law issue --

23 THE CHAIRMAN: Yes, yes, I have got that now.

24 MS FORD: So I am talking about paragraph 85 of

25 the Claimants' skeleton argument, it is {S/1/27}. At

1 the bottom of the page, paragraph 85 --

2 THE CHAIRMAN: Are you disagreeing that there are two ways
3 of taking the Commission decisions, one is to say, look,
4 they are finding evidence of cartel activity and that
5 means cartel activity is more likely? The other way of
6 looking at it is they found -- they looked thoroughly at
7 cartel activity and only found those particular cartels.
8 Does that not leave it as a "no score draw"? I mean,
9 are you saying, no, the preferred approach is it is
10 positive evidence of a lack of cartel activity -- taken
11 in the round, it is positive evidence of a lack of
12 cartel activity against these Claimants, or are you
13 saying, look, do not be tempted by Mr West's glib
14 analysis? What is your final position on this? I mean,
15 it seems the argument is a "no score draw" and we have
16 to make our own mind up, it would seem to be a powerful
17 one.

18 MS FORD: I certainly do go that far. At the very least,
19 I say that any attempt the Claimants make to draw some
20 sort of inference based on the existence of the admitted
21 conduct in these decisions simply does not assist this
22 Tribunal. I would go further, based on the approach
23 that was outlined by Mr Justice Flaux, as he then was,
24 in *Bord Na Mona* {AUTH2/18/1}. He says where you have
25 a situation where --

1 THE CHAIRMAN: We have looked at that, yes. So you do go
2 further.

3 MS FORD: I do go further based on his approach. It would
4 be difficult, he says, for a claimant to establish any
5 further infringement in circumstances where
6 the Commission has already looked carefully at these
7 matters.

8 In support of that, I am now referring to what the
9 Claimants themselves say is the position on the basis of
10 this investigation and they have set it out in
11 paragraph 85 of their skeleton argument {S/1/27}. What
12 they do is, first of all, they refer to the Defendants'
13 position that the formal scope of the Commission's
14 investigation based on its formal documents was limited
15 to the named OEMs.

16 Then, over the page {S/1/28}, they say that is
17 "implausible". They describe our position as
18 "implausible".

19 THE CHAIRMAN: Sorry, just -- where are you reading? Sorry.

20 MS FORD: I am reading paragraph 85 of the Claimants'
21 skeleton. I have just moved over the page to paragraph
22 -- to page 28.

23 THE CHAIRMAN: Yes, which paragraph?

24 MS FORD: Still paragraph 85, part way through.

25 THE CHAIRMAN: Sorry, I have obviously picked up the wrong

1 skeleton argument. Sorry. That explains it. Yes,
2 paragraph 85. I beg your pardon, yes.

3 MS FORD: So the first part of paragraph 85 on {S/1/27} is
4 defining our position. They then, over the page
5 {S/1/28}, say that that is:

6 "... implausible, given the documentary evidence
7 that has been disclosed in these proceedings (including
8 evidence from the Commission file relating to supplies
9 to non-named OEMs)."

10 So their position is that the Commission's enquiry
11 was not limited to the named OEMs, it did extend to
12 non-named OEMs. So if we ask which of the two scenarios
13 identified by Mr Justice Flaux, as he then was, in Bord
14 Na Mona we are in, the scenario is that the Commission
15 has had detailed evidence before it and so it is going
16 to be very difficult for these Claimants to suggest that
17 the infringing conduct went any further than that that
18 has been found after careful consideration by
19 the Commission. We say it is particularly telling, if
20 the Claimants' position on the scope of this
21 investigation was correct, that it still only found an
22 infringement in relation to named OEMs and it did not
23 reach that finding in favour of the Claimants.

24 So that takes me to the contents of the Commission
25 decisions and I have well in mind the indication

1 the Tribunal has given not to duplicate.

2 THE CHAIRMAN: Yes, just go to the key passages, we have
3 read them.

4 MS FORD: I am focusing on OSS 2 because that is
5 the decision that is relevant to my client and also
6 because that was the decision that was dealt with
7 relatively briefly by Mr West, and there are, in our
8 submission, some relevant differences to have in mind.

9 If we start, please, at {A/11/1}.

10 THE CHAIRMAN: I mean, the findings are -- as I understand,
11 the main difference is that the findings seem to be
12 a bit more sporadic in OSS 2, but that does not apply to
13 OSS 1, so we are going to the decision that is most
14 favourable to your position.

15 MS FORD: Well, this is the only decision that is relevant
16 to my position because this is the only decision to
17 which my client is an addressee.

18 THE CHAIRMAN: Well, I appreciate that.

19 MS FORD: So that is the prime reason why I focus --

20 THE CHAIRMAN: Okay. All right. Well, no, that is fine,
21 you can go to what you want. Yes.

22 MS FORD: One thing that, in our submission, comes through
23 very clearly is that the Commission is very careful with
24 the words that it chooses to describe the infringement.
25 So it is not describing broad market-wide practices on

1 the part of the addressees, it is describing --

2 THE CHAIRMAN: We have got that in mind, yes.

3 MS FORD: It is important that the Commission delineates
4 the scope of the conduct that it is finding. Recital 1
5 on page 7 {A/11/7}.

6 THE CHAIRMAN: In some cases it seems that the parties could
7 not reach agreement even when they tried to engage in
8 cartel --

9 MS FORD: So it certainly says that and we do rely on that
10 and we come to that in the context of the overspill
11 allegation.

12 THE CHAIRMAN: Yes.

13 MS FORD: But even before that, what is important is that
14 this conduct is very carefully delineated and we see it
15 right from the outset, so recital 1:

16 "The infringements consisted of exchanging
17 commercially sensitive information and, in some
18 instances price coordination, in respect of supplies of
19 occupants safety systems products for certain passenger
20 cars to companies belonging to the... VW Group... and
21 ... the BMW ... Group ..."

22 Recital 3, which is defining the products, also has
23 this careful language, so it is:

24 "... seatbelts, airbags and/or steering wheels ...
25 for certain passenger cars supplied to companies

1 belonging to the VW Group and to the BMW Group."

2 Recital 7, in my submission, is important, on
3 {A/11/8}. There, the Commission is recording that:

4 "The main customers of OSS are car manufacturers,
5 also called ... ('OEM's)."

6 They say:

7 "OEMs typically source OSS by way of tenders, that
8 is to say requests for quotations ... OEMs can tender
9 for different brands, single models or specific types of
10 products."

11 I ask the Tribunal to take note of the fact that
12 the Commission has described this dynamic in this way,
13 the way in which OSS products are sourced, because in my
14 submission it feeds into why the Commission finds
15 separate infringements, which is a question that
16 the Tribunal has asked.

17 Just going on to recital 15 on {A/11/9}, we can see
18 the Commission summarising the "Procedure" and it
19 records the fact that *Takata* made an application for
20 immunity, that was on 24 March 2011. This decision is
21 dated 5 March 2019, so this investigation lasted
22 eight years. This is, in my submission, a detailed and
23 careful investigation. It puts us in box 1 of
24 Mr Justice Flaux's --

25 THE CHAIRMAN: Sorry, so it lasted -- sorry, just, how did

1 you get that? Sorry, you are going a bit too quick for
2 me.

3 MS FORD: I am looking at recital 15, it records Takata's
4 immunity application on 24 March 2011. Then
5 the decision itself --

6 THE CHAIRMAN: That kicked off the investigation.

7 MS FORD: Sir, yes. The decision itself is then dated
8 5 March 2019. So the Commission has been investigating
9 this matter for eight years.

10 THE CHAIRMAN: Sorry, I am being really slow. We just know
11 this decision is dated, it is not in that paragraph?

12 MS FORD: Yes.

13 THE CHAIRMAN: Yes, I understand. Yes, yes, I am with you.

14 MS FORD: I think you will, if we go to the first page
15 again, you will see the date.

16 THE CHAIRMAN: Yes, I beg your pardon. Yes, yes.

17 MS FORD: It also records the applications for immunity or
18 leniency of both TRW and Autoliv in recitals 17 and 18
19 on {A/11/10}.

20 Then if we go to recital 28 on {A/11/11}, please.

21 THE CHAIRMAN: Yes, we looked at that already, yes.

22 MS FORD: Yes, and the Tribunal will recognise the reference
23 there to "the supply of certain types of OSS", "certain
24 seatbelts, airbags and/or steering wheels", so once
25 again this very careful, very delineated language about

1 what conduct it is finding.

2 Now, the Tribunal has asked why it is that
3 the Commission finds separate infringements rather than
4 some sort of global infringements, and my submission on
5 that is that the Commission's findings reflect
6 the particular nature of the products and
7 the competition in this market. So, as the Claimants
8 have pleaded in paragraph --

9 THE CHAIRMAN: They are bespoke products and so they took
10 them --

11 MS FORD: They are bespoke products, they are
12 customer-specific products and the Commission has
13 recorded in recital 7 {A/11/8} that the customers for
14 OSS products are OEMs who procure them by issuing RFQs.

15 THE CHAIRMAN: Yes, I mean, that is a plausible explanation,
16 but we do not actually know, do we?

17 MS FORD: Well, it is consistent with what the Commission
18 has put in in recital 7, and it does, in my submission,
19 provide an answer to the query that the Tribunal itself
20 has raised about why do we see two distinct
21 infringements here --

22 THE CHAIRMAN: Did it matter, from the Commission's point of
23 view?

24 MS FORD: Sir, yes, in my submission, the Commission does
25 not make findings of infringement lightly and it will

1 have carefully considered the scope of the findings that
2 it is making, and what it has found, consistent with
3 the dynamic of competition in this market, is that there
4 are bilateral relationships and the infringements it has
5 identified is in relation to particular products to
6 particular OEMs.

7 THE CHAIRMAN: Yes. But it did not make any difference to
8 the fine?

9 MS FORD: I could not say whether it did or did not make any
10 difference to the fine, but what it does make
11 a difference to is the task that these Claimants face in
12 showing that actually there was any broader conduct,
13 because here we have carefully delineated --

14 THE CHAIRMAN: Well, taking -- I understand the position of
15 your clients, but taking Autoliv's name, it keeps
16 popping up on all but one, I think Mr Scannell said, all
17 but one of the cartels, and why they are individual
18 cartels and not a general cartel is still not entirely
19 clear to me. I appreciate it is a bespoke product, but
20 I am not sure that cartel activity cannot stretch
21 beyond, you know -- encompass numerous bespoke products.

22 MS FORD: Well, sir, the point you have just made to me is
23 quite an important one for two reasons. One, that point
24 does not work vis-á-vis my client, because if it has
25 only been found to be a party to two of those

1 infringements ...

2 THE CHAIRMAN: Yes.

3 MS FORD: But, secondly, it focuses the mind on what these
4 Claimants would have to establish in order to get home
5 in this case. It is not just that one or other of these
6 parties was involved in an infringement, their pleaded
7 case and what they have to establish is that both
8 Autoliv and ZF were involved in an infringement
9 vis-à-vis them. That is a very different thing than
10 simply saying there are a number of infringements found
11 in OSS 1, there are some found in OSS 2, and there is no
12 support in either of these decisions for that case. To
13 the contrary, there are very carefully delineated
14 findings of infringement which relate to --

15 THE CHAIRMAN: But is that not a causation question? Sorry,
16 I may be misunderstanding, but if you have got, let us
17 say, a big cartel or numerous cartels that Autoliv is
18 involved in and some -- a subset which you are involved
19 in, and let us assume we were against you on
20 the economic evidence and we found that that caused an
21 increase in prices paid by the Claimants, then where
22 does that leave us?

23 MS FORD: It certainly comes up at that stage and I will
24 address the Tribunal on what is the relevant test for
25 causation as a matter of law. So we do say it comes up

1 at that stage. In our submission, it comes up at an
2 earlier stage and that is the stage of liability,
3 because the Claimants bear the burden of proof to make
4 good the allegation that there was a cartel involving
5 both Autoliv and ZF that targeted them.

6 THE CHAIRMAN: Yes.

7 MS FORD: To the extent that they rely on --

8 THE CHAIRMAN: Let us assume they succeed on that. I mean,
9 they point to some documents and they say, "Look, you
10 were communicating with respect to Fiat and Opel and we
11 have documents that show that", where does that leave us
12 on your liability point?

13 MS FORD: Well, the Tribunal is essentially asking me to
14 assume that they have established their case on
15 liability. That is a really quite enormous assumption
16 to make.

17 THE CHAIRMAN: Well, assuming -- yes, so I am not quite sure
18 what the point you are making then is.

19 MS FORD: The point I am responding to, sir, is you put to
20 me: well, we know that Autoliv was party to four
21 infringements. The point I make in response is simply
22 that that does not help to establish that both Autoliv
23 and ZF were party to an infringement that has not been
24 identified by the Commission in relation to these
25 Claimants.

1 THE CHAIRMAN: Right, okay, I understand that point, yes.

2 MS FORD: So recital 29, we were just looking at
3 the relevant recitals {A/11/12}, page 12. This is where
4 you start to get divergence in the relevant conduct
5 identified. The Commission finds:

6 "The overall aim of Infringement I was to maintain
7 the status quo for some of the parties' existing
8 business with the VW Group ..."

9 So there is no mention here of some broader blanket
10 adherence to the incumbency principle, which is a word
11 that comes up a lot in the Claimants' submissions. What
12 we have here is a finding in relation to some of
13 the parties' existing business, vis-à-vis VW, there was
14 an infringement.

15 Then it says:

16 "... at times, to resist the VW Group's requests to
17 reduce prices, for example when the VW Group asked for
18 quotes for the re-sourcing of previously awarded
19 business regarding specific OSS."

20 So, again, that very focused finding in terms of
21 the scope of this infringement that is being found.

22 Recital 30 concerns infringement 2 and there is no
23 mention there either of the incumbency principle. There
24 it is said:

25 "The overall aim of Infringement II was to reduce

1 uncertainty as to the parties' individual strategies in
2 their negotiations with the BMW Group and, at times, to
3 resist the BMW Group's requests to reduce prices, in
4 particular during annual price negotiations."

5 Recital 31 finds that in relation to these
6 infringements:

7 "The aims of the infringements were mainly pursued
8 by exchanging commercially sensitive information ..."

9 That is an important point to note because
10 the Tribunal will have seen we have cited some
11 authorities at 93 of our skeleton {S/3/24} for
12 the proposition that:

13 "... information exchange is not presumptively
14 harmful. It is capable of being pro-competitive and
15 giving rise to efficiency benefits."

16 The reason I emphasise that is that there can be no
17 presumption that information exchange in the context of
18 these infringements would have inflated prices even to
19 these named OEMs, let alone by some indirect route to
20 the Claimants who are not the targets of the relevant
21 infringing conduct.

22 Recital 32 {A/11/12} is the one which you, sir,
23 alluded to earlier, which is a finding that:

24 "On some occasions there was a discussion between or
25 among the parties to try to find an agreed outcome.

1 Although in many cases ..."

2 "Many cases":

3 "... the parties were unable to reach a specific
4 agreement or did not respect the arrangements
5 reached ..."

6 That, again, we say, is a further reason why it
7 cannot be assumed that this conduct would have generated
8 effects vis-à-vis the named OEMs, let alone these
9 Claimants.

10 Recital 33 concerns the timing of the contacts and
11 it says:

12 "The timing of the collusive contacts had
13 a connection to the relevant business cycles.
14 The contacts had a varied frequency in the course of
15 the overall duration of the conduct, and generally
16 intensified when specific RFQs and/or other requests for
17 price reductions were launched by the VW or BMW Group."

18 That recital is relevant to the Claimants' spillover
19 case because the Commission is not here finding that
20 there was some consistent volume of contacts or some
21 constant flow of information in the contacts of this
22 infringement and that then feeds into the very
23 attenuated chain of causation that Mr Scannell has
24 already addressed you on. At step one, there is not
25 this consistent flow of information, there is varied

1 contacts at different times.

2 Recitals 34 to 36 {A/11/12-13} are concerned with
3 infringement 1, and, again, you see this carefully
4 chosen language, "certain OSS to the VW Group", "certain
5 RFQs", "certain car models or vehicle platforms".

6 I also ask the Tribunal to note the finding
7 the Commission made about contacts and the way in which
8 they took place. It says:

9 "... e-mail exchanges, face to face meetings or
10 telephone conversations."

11 The reason I emphasise that is because the Claimants
12 have recently suggested in their skeleton argument that
13 their primary case also encompasses an unpleaded
14 allegation of tacit collusion. I simply ask
15 the Tribunal to note that is not the basis of
16 the Commission's finding here; there is no mention of
17 tacit collusion.

18 Recitals 37 to 39 {A/11/13} are concerned with
19 infringement 2. Again, you see this careful wording,
20 "certain OSS", "certain RFQs", "certain car models or
21 vehicle platforms". Again, the Commission is finding
22 express contacts, it is not seeking to rely on tacit
23 collusion.

24 Recital 48 {A/11/15}, the Tribunal will be aware of
25 already. This is the by object infringement and no

1 findings of actual facts, and once again, the careful
2 language:

3 "... supply of OSS products for certain passenger
4 cars ..."

5 Just for completeness to show the Tribunal what was
6 said about the applications for immunity, if we can go,
7 please, to recital 116 on {A/11/28}. So 116 is
8 recording the fact that *Takata* was granted conditional
9 immunity from fines, and the Commission makes
10 the finding:

11 "TAKATA's cooperation fulfilled the requirements of
12 the Leniency Notice throughout the procedure ...
13 therefore [it is] granted immunity ..."

14 Then there were two findings of partial immunity.
15 Autoliv, 117:

16 "AUTOLIV was the first was the first party to submit
17 compelling evidence, in accordance with ... the Leniency
18 Notice ..."

19 Then over the page at 118 {A/11/29}, please:

20 "TRW was the first undertaking to meet
21 the requirements of points (24) and (25) of the Leniency
22 Notice ..."

23 There is a finding, in the middle of that paragraph,
24 that it provided evidence:

25 "... which represents significant added value with

1 respect to the evidence which was already in
2 the Commission's possession."

3 There are similar findings at 124 and 125 {A/11/30}.
4 So the Tribunal already has my submission on this, that
5 it cannot be said that this is a situation where
6 the information before the Tribunal was limited --
7 before the Commission, I am sorry.

8 The Claimants have sought to suggest --

9 THE CHAIRMAN: Sorry, why do you say that? I mean, you have
10 talked about the date. Just the mere fact that there
11 was a leniency notice?

12 MS FORD: No, there was a -- the Commission has confirmed
13 the requirements of its leniency notice have been
14 satisfied --

15 THE CHAIRMAN: Yes, yes.

16 MS FORD: -- in relation to the immunity applicant and
17 the leniency applicants.

18 THE CHAIRMAN: No, I understand, thank you.

19 MS FORD: So when we look at that taxonomy that
20 Mr Justice Flaux set out, is this a case where
21 the Commission did not have the requisite information?
22 In our submission, clearly not.

23 THE CHAIRMAN: So how long from the leniency -- sorry, just
24 the dates, so when Autoliv or TRW --

25 MS FORD: So the dates of the application were back at

1 the beginning of the decision. So 17 and 18, {A/11/10}.

2 THE CHAIRMAN: So, page 10 ...

3 MS FORD: So this information was providing at
4 the beginning, 2011, and then the Tribunal obviously has
5 the date 5 March 2019, which is the --

6 THE CHAIRMAN: Yes, but it says the leniency -- so
7 the intention to grant leniency was on 7 July 2017?

8 MS FORD: No, I do not think that quite follows. That is
9 when it initiated proceedings.

10 THE CHAIRMAN: Paragraph 118 {A/11/29}?

11 MS FORD: So it has reached a preliminary conclusion at that
12 stage, 7 July 2017 {A/11/10}:

13 "... preliminarily concluded that Autoliv and TRW
14 had met the conditions of point 27 ..." --

15 THE CHAIRMAN: Sorry, slow down, you are going just too
16 quickly at the moment. It is my fault.

17 So I am looking at 118 {A/11/29}.

18 MS FORD: Ah. No, sir, I am looking at the dates in
19 recital 19 {A/11/10}.

20 THE CHAIRMAN: Okay, let us go to 19 first then. Yes.

21 MS FORD: So it may be the same point. So you have got
22 the initiation of proceedings on 7 July 2017. You have
23 then got the Commission reaching --

24 THE CHAIRMAN: So the investigation started -- so
25 the application for immunity from fines was

1 10 June 2011. Sorry, I am catching up. That is
2 recital 17, yes?

3 MS FORD: Yes. So *Takata* is first.

4 THE CHAIRMAN: Yes. Then Autoliv is 4 July. You were
5 a little earlier, 20 June.

6 MS FORD: Sir, yes.

7 THE CHAIRMAN: So what are the proceedings being initiated
8 on 7 July 2017.

9 MS FORD: So halfway down recital 19, you can see:

10 "... the Commission adopted decisions in which it
11 preliminarily concluded that Autoliv and TRW had met the
12 conditions of point 27... and [so it] established
13 the applicable range ... of fines ..."

14 That is essentially it can then engage in settlement
15 discussions which it records at recital 20:

16 "After each party had confirmed its willingness to
17 engage in settlement discussions ..."

18 Based on essentially the preliminary decision that
19 is referred to in 19, you then see the settlement
20 procedure in 21.

21 THE CHAIRMAN: And the raid was when?

22 MS FORD: The raid is recital 17 -- 16, sorry:

23 "Between 7 and 9 June ..."

24 THE CHAIRMAN: Oh, yes. So you fessed up pretty quickly.

25 Then following that, so when would you have supplied

1 your -- when do you file your leniency documents?

2 MS FORD: Sir, the application themselves, 17 --

3 recitals 17 and 18, so June 2011/July 2011.

4 THE CHAIRMAN: You cannot have provided them with all of

5 the documents. You cannot have even have -- in 24 hours

6 ... so you then have an ongoing duty.

7 MS FORD: There is an ongoing obligation, yes.

8 (Off microphone discussion).

9 Professor Bailey has pointed out if the Tribunal

10 goes to 118 on {A/11/29}, there is a --

11 THE CHAIRMAN: Yes, that is what I was looking at.

12 MS FORD: -- more detailed description of the nature of

13 the evidence that was received that was considered to be

14 significant added value. So the second half of 118:

15 "In particular, TRW described the recollection of
16 some of its employees regarding certain contacts with
17 competitors, thus providing further explanations and
18 details of the conduct with respect to the facts already
19 revealed by TAKATA. [It] supported this recollection by
20 providing contemporaneous evidence (internal e-mails,
21 calendar entries, handwritten notes and direct e-mail
22 exchanges) corroborating its participation in
23 the infringement ..."

24 As a consequence it is granted a reduction of 50% of
25 the fine.

1 THE CHAIRMAN: We do not know when those materials were
2 supplied? It does not ...

3 MS FORD: I --

4 THE CHAIRMAN: But it was quite a long enquiry.

5 MS FORD: It was certainly a lengthy one.

6 THE CHAIRMAN: I mean even after the leniency was ... that
7 preliminary view was quite a long enquiry.

8 MS FORD: Yes. Yes, and we do rely on that. We say that
9 that is indicative of the detailed nature of
10 the Commission's investigation at this point.

11 THE CHAIRMAN: So it went from 10 June until -- so that date
12 of 7 July 2017, is that the relevant date?

13 MS FORD: That is when -- yes. If the Tribunal looks at
14 the second line at 118, what happens then is that
15 the Commission tells TRW of its intention to grant
16 a leniency reduction within that scope and then
17 the process of settlement on that basis --

18 THE CHAIRMAN: So then presumably they -- so they have --
19 sorry, this is a very basic question, but on the -- so
20 you fess up on it 10 June 2011, there is then six years
21 -- a little over six years, during which there is an
22 exchange of materials and documents and the things
23 detailed in paragraph 118, and then from 7 July 2017
24 until this decision is handed down, presumably there are
25 discussions about the fine and that of the sort of

1 thing; is that how it works essentially?

2 MS FORD: The settlement process, yes.

3 THE CHAIRMAN: The settlement process.

4 MS FORD: The procedural background is back in -- from 118
5 onwards.

6 THE CHAIRMAN: Yes, okay, I understand. Thank you very
7 much.

8 MS FORD: Just to complete this, the Claimants have made
9 a submission that the entirety of the OSS 2 decision is
10 binding and we have addressed that in our skeleton
11 argument. We say that is not correct as a matter of law
12 and we have cited the relevant authorities, but it is
13 not something that the Tribunal needs to worry itself
14 about because certainly we are not saying anything that
15 is inconsistent with the contents of the Commission
16 decision.

17 THE CHAIRMAN: Just remind -- yes, I appreciate that, but
18 just so I understand the point, where is it in your
19 skeleton?

20 MS FORD: It is paragraphs 23 and 41, so skeleton {S/3/6}.

21 THE CHAIRMAN: Paragraph 23. I have got my page numbers
22 a little different.

23 MS FORD: It is citing one of the *Trucks* decisions which was
24 first in the CAT and then in the Court of Appeal about
25 the circumstances in which it is permissible for an

1 addressee to put forward a positive case which is not
2 consistent with a non-essential finding of fact.

3 THE CHAIRMAN: Okay. You do not say what those are?

4 MS FORD: Well, I can show the Tribunal if it assists.

5 THE CHAIRMAN: Well, just tell me, just summarise in
6 a couple of sentences just to satisfy my curiosity.

7 MS FORD: It is things such as "further information comes to
8 light", and so, in those circumstances, if an addressee
9 were to say, "Actually this non-essential finding in
10 a Commission decision is not correct and we have
11 subsequently acquired this information", then in that
12 circumstance it would not be abusive.

13 THE CHAIRMAN: I see. But then, it does not arise in this
14 case so --

15 MS FORD: Yes, it does not arise because --

16 THE CHAIRMAN: -- we can treat it as no one is suggesting it
17 is not --

18 MS FORD: We are not suggesting anything which is
19 inconsistent with this decision. But for the Tribunal's
20 reference, the relevant test is in *Ryder*, {AUTH2/23/56}
21 at paragraph 141, and it was approved by the Court of
22 Appeal, {AUTH2/26/39} at paragraph 146.

23 THE CHAIRMAN: So it is binding because you do not fall
24 within the *Ryder* exceptions; is that right?

25 MS FORD: If we were -- in so far -- if we were to seek to

1 Now, in relation to the inadmissibility point, we
2 have set out the relevant authorities in our skeleton
3 and, given the time, I was not proposing to go over that
4 any further, but the Tribunal will have seen from
5 paragraph --

6 THE CHAIRMAN: So when you say the foreign regulatory
7 materials, you are talking about the Brazilian
8 investigation?

9 MS FORD: There are three --

10 THE CHAIRMAN: Just tell me which ones they are again.

11 MS FORD: There is the DoJ investigation, there is
12 the Brazilian Competition Authority and there is
13 the South African Competition Commission.

14 THE CHAIRMAN: You say it is straightforward, *Hollington v*
15 Hewthorn might have helped at the early stages, but now
16 we have got to make a decision, we have to make our own
17 decision.

18 MS FORD: Sir, that is --

19 THE CHAIRMAN: What do you say about the Commission
20 decisions we were looking at that I was giving
21 Mr Scannell a hard time about? Am I allowed to look at
22 those or do we have to make our own mind up?

23 MS FORD: Well, sir, certainly, in our submission, insofar
24 as they -- I did not understand Mr Scannell to be
25 putting them forward as evidence of their facts, rather

1 essentially a helpful summary of the matters that will
2 be traversed in the evidence in these proceedings.

3 THE CHAIRMAN: Right.

4 MS FORD: We do say that the Tribunal has to resolve these
5 proceedings on the basis of the evidence before it in
6 these proceedings consistent with that.

7 THE CHAIRMAN: I do not think Mr West opened on this, did
8 he, on the foreign proceedings?

9 MS FORD: He did make glancing reference --

10 THE CHAIRMAN: He mentioned them, he did not really deal --
11 grapple with your *Hollington v Hewthorn* point.

12 MS FORD: He did not, no.

13 THE CHAIRMAN: So let us not waste time on it now.

14 MS FORD: I am grateful.

15 What I do need to address is the reference that was
16 made that suggested that these were matters that were of
17 assistance to the case the Claimants are trying to make
18 out, because our submission is that they simply are not
19 of any assistance whatsoever and I am going to take them
20 in turn.

21 The first is the US Department of Justice --

22 THE CHAIRMAN: Well, I mean, at the moment -- I mean, you
23 can spend time on this, if you want, but at the moment
24 we are not attaching any weight to these materials,
25 subject to Mr West persuading us that we should do, and

1 so I do not know if you want to deal with them now or
2 after we have heard Mr West in closing.

3 MS FORD: Well, if the Tribunal's position is it is not
4 going to attach weight to them, then I am content to
5 leave it there. The simple --

6 THE CHAIRMAN: That is our provisional view so ... and
7 Mr West has not grappled with this yet, so ...

8 MS FORD: The simple point that we make in relation to each
9 of these, the Department of Justice, the Brazilian
10 Competition Authority and the South African Competition
11 Commission, is that they were not concerned with
12 supplies to these Claimants and I can elaborate on that,
13 insofar as is necessary, but we simply say it takes
14 the Claimants no further forward in relation to the case
15 they have to make out in this claim in these
16 proceedings.

17 THE CHAIRMAN: Right.

18 MS FORD: I am moving on to address the Claimants' primary
19 case, so the allegation that there was a cartel directed
20 at supplies to these Claimants. In our submission,
21 the Claimants face exactly the task which
22 Mr Justice Flaux thought would be an uphill struggle, to
23 try and prove an infringement which goes beyond that
24 found by the Commission.

25 In terms of the contemporaneous documents that

1 the Claimants are bringing forward to try and do that,
2 the Tribunal will have seen in our skeleton that what we
3 have done is try and get to grips with that by plotting
4 them on a number of scatter diagrams.

5 THE CHAIRMAN: Yes, I did not find that particularly helpful
6 or persuasive.

7 MS FORD: Well, sir, perhaps you will permit me to explain
8 exactly what we do get out of it, because in my
9 submission, it is not just about this is the volume of
10 contacts, although there is quite an important point
11 about the limited number of such contacts over an
12 eight-year period and the authorities that I showed you,
13 sir, at the beginning about the role of inference and
14 the fact that inference requires to have some evidence.
15 There is that point and I --

16 THE CHAIRMAN: Yes, I understand that point.

17 MS FORD: But there is another point, which is that what
18 the Claimants have not done is be analytical about
19 the extent to which any particular document actually
20 assists to discharge the case that they have to show in
21 these proceedings, so a cartel between ZF and Autoliv
22 targeting the Claimants in respect of supplies in
23 the EEA.

24 THE CHAIRMAN: We have got that point in mind.

25 Just remind me -- sorry, there is a helpful chart

1 that somebody produced. I think Mr Scannell handed it
2 up. But how many were actually ZF documents?

3 MS FORD: Would the Tribunal permit me to go through
4 the cascade, because I do say it is relevant at each
5 level to understand what --

6 THE CHAIRMAN: Yes, of course.

7 MS FORD: -- does this show and what does it not show?

8 THE CHAIRMAN: Yes.

9 MS FORD: So if we start with the first scatter diagram, it
10 is on page 18 of our skeleton {S/3/18}. This is to
11 be --

12 THE CHAIRMAN: Sorry, just, again, to satisfy my curiosity,
13 how many documents originating from your clients did we
14 look at during Mr West's opening?

15 MS FORD: I am afraid I have not totaled up the number that
16 originate from us. I can tell you the number that we
17 say indicates actual -- any alleged contact between ZF
18 and Autoliv, and I will come to that. I can
19 certainly -- I can let the Tribunal know how many are --

20 THE CHAIRMAN: So what I have got on this -- on this is
21 I have got -- I mean, we can probably work it out -- but
22 who is referenced --

23 MS FORD: Yes, although --

24 THE CHAIRMAN: -- but I have not necessarily -- sometimes
25 they were replies. It has not necessarily got who they

1 originate, because sometimes they are email chains,
2 I suppose.

3 Anyway, sorry, take your own course. I am probably
4 not helping things.

5 MS FORD: So, as the Tribunal will appreciate, each scatter
6 diagram shows the full alleged period of the cartel, so
7 starting at 6 November 2002 to 30 March 2011, and
8 the first one essentially shows all of the 29
9 contemporaneous documents which were pleaded which were
10 alleged to contain evidence of unlawful competitive
11 conduct.

12 THE CHAIRMAN: Sorry, which one? Which paragraph again?

13 MS FORD: This is page 18 of our skeleton, the first scatter
14 diagram. I should be very clear, we do not for a moment
15 accept that these documents do actually evidence
16 unlawful competitor contact. That is not why we have
17 included them. What we have sought to do is to
18 represent the Claimants' case put at its highest.

19 THE CHAIRMAN: But, I mean, what does one begin to get out
20 of this? I mean, if two of those documents said, "We
21 are operating a cartel with Autoliv to try and increase
22 the prices with respect to the Claimants", I mean, how
23 would the fact that there were only two of them have any
24 bearing on this whatsoever?

25 MS FORD: Well, that is essentially --

1 THE CHAIRMAN: I mean, the fact that they were six months
2 apart or five years apart may not be -- I mean, if they
3 say that, you know ...

4 MS FORD: Sir, that is essentially leaping to the end of
5 the process. One purpose of doing this forensic
6 exercise is to work out exactly what volume of this
7 large volume of material --

8 THE CHAIRMAN: It has got nothing to do with volume.
9 A single document could win Mr West's case. Of course
10 it could --

11 MS FORD: In my submission --

12 THE CHAIRMAN: -- if it had the right dates in and the right
13 statements, something like that. I mean, looking at
14 the number of documents, I just do not see how that can
15 possibly help.

16 MS FORD: The reason for that is that what the Claimants
17 have to show is a single and continuous infringement --

18 THE CHAIRMAN: Right.

19 MS FORD: -- and that requires -- I can show the Tribunal
20 the authority for what they have to show. It is
21 authorities bundle 3, tab 11, page 45 {AUTH3/11/45}. If
22 we go, please, to --

23 THE CHAIRMAN: Hold on. Authorities bundle 3, tab 11.

24 MS FORD: Now, this entire section would, in my submission,
25 repay reading, because what it does is to set out

1 the test to establish a single and continuous
2 infringement extending over a particular period of time.
3 The alternative is that one might find isolated
4 instances of infringement, but one would not then assume
5 that those isolated instances of infringement are
6 sufficient to evidence an infringement which covers
7 the entire period.

8 THE CHAIRMAN: Yes, I understand.

9 MS FORD: So one factor this Tribunal will have to decide
10 is, insofar as you took the view that certain documents
11 did evidence contacts, and you have my submission that
12 we do not accept that at all, but if you were to take
13 that view, you still then have to ask yourself: does
14 that establish the case for the entire period, or
15 does it --

16 THE CHAIRMAN: Show me the relevant bit of this, because
17 that would be helpful. So which paragraph?

18 MS FORD: Paragraph 219. This is where they are saying:

19 "... the principle of legal certainty requires that,
20 if there is no evidence directly establishing
21 the duration of an infringement, the Commission should
22 adduce at least evidence of facts sufficiently proximate
23 in time for it to be reasonable to accept that that
24 infringement continued uninterruptedly between two
25 specific dates ..."

1 Now, that is one of the reasons why, in our
2 submission, this exercise is a completely valid one,
3 because if the Claimants were to come out at the end of
4 it with --

5 THE CHAIRMAN: It depends what the documents say. If you
6 have one document that says, "We have been operating
7 a cartel from this date to this date and we have made
8 tons of money about it; let's all go out and have
9 a celebratory dinner", I do not see why a single
10 document could not do that. It just depends what is in
11 the documents, surely?

12 MS FORD: Sir, at the highest level, I do not disagree with
13 that as a proposition, but we absolutely do not have any
14 documents like that.

15 THE CHAIRMAN: But, you know, plotting them on a graph is
16 not beginning to address what we need to decide.

17 MS FORD: Sir, I do not for the moment disagree that one has
18 to consider the content of the documents as well as
19 the extent of their frequency, but that does not mean
20 one does not consider the extent of their frequency. It
21 is important that the Claimants must discharge
22 the burden to show something other than isolated
23 instances of infringement.

24 THE CHAIRMAN: I fully understand that submission. What
25 I am just bridling against is the just looking at

1 a scatter graph and drawing conclusions from that.

2 MS FORD: Well, let me then proceed to address the other
3 function that this performs, which is to enable
4 the Tribunal to get forensic about the volume of
5 material that goes to each individual aspect of
6 the Claimants' case. So this is the second exercise.

7 First of all, the Claimants have to show that there
8 was an infringement involving both Defendants in respect
9 of supplies to these Claimants, and a lot of
10 the documents that the Tribunal were shown yesterday and
11 many of the documents that have been pleaded are not
12 concerned with supplies to these Claimants at all, they
13 are concerned with supplies to other OEMs, and so --

14 THE CHAIRMAN: So you say: so what? The --

15 MS FORD: So we say -- (overspeaking) --

16 THE CHAIRMAN: -- (inaudible).

17 MS FORD: -- let's look at -- let's narrow down the volume
18 of material that you have been provided and look at how
19 many of these are relevant because they actually concern
20 the Claimants, and that is --

21 THE CHAIRMAN: I understand Mr West shows us those to try
22 and persuade us that the Commission, for whatever
23 reason, had not decided everything. So he says, "Look,
24 here is one that might not involve the Defendants in
25 this case, or any one of the Defendants in this case,

1 but it shows that you are wrong to say the Commission
2 had turned every stone over, looked under every rock".
3 That is why he relies on these other documents. That is
4 my understanding.

5 MS FORD: Well, in my submission, it is important then to
6 see what universe of documents actually establishes
7 the Claimants' case in relation to supplies to them and
8 that is what the second scatter diagram does.

9 THE CHAIRMAN: Absolutely.

10 MS FORD: So page {S/3/19}. This is my skeleton, and it is
11 the second scatter diagram, and what we have done here
12 is to strip out the ten pleaded contacts which were
13 concerned with OEMs other than the Claimants.

14 THE CHAIRMAN: You have heard our observations on
15 the usefulness of the scatter diagrams. You can keep
16 plugging away at it if you like, but I think there are
17 much better points to make on this point.

18 MS FORD: I am going to try, briefly, and the reason for
19 this is I would like to explain the various hurdles that
20 these scatter diagrams represent. It is not simply
21 a case of plotting a dot on a graph, it is do these
22 documents actually get the Claimants home on the case
23 they have to prove, and our submission is that the vast
24 majority of them simply do not.

25 So the next one is that they have to show that

1 the documents they rely on are concerned with supplies
2 of products inside the EEA, and so those documents that
3 are concerned with supplies outside of the EEA do not
4 establish the Claimants' case and so that is the purpose
5 of the next scatter diagram on {S/3/20}. What we have
6 done take out is the two documents that are concerned
7 with supplies to Brazil.

8 That does have immediate consequences, in particular
9 for the start date of the alleged cartel, because, as
10 the Tribunal will appreciate, the pleaded start date of
11 6 November 2002 comes from an internal *Takata* email and
12 it attached pricing information that is alleged to have
13 been obtained by *Takata* from Autoliv, but not only was
14 that email concerned with supplies to Brazil, not into
15 the EEA, but it had nothing to do with ZF/TRW
16 whatsoever.

17 THE CHAIRMAN: I fully understand that submission.

18 MS FORD: So that does have relevance because it narrows, in
19 our submission, the time period over which, on any view,
20 one can treat there being even a prima facie case.

21 They then have to show that there was a cartel which
22 at all times included Autoliv and ZF/TRW. That is their
23 pleaded case. So, to look at the extent to which they
24 are able to evidence that, we then take out
25 the contemporaneous documents that only concern either

1 one or other of Autoliv or ZF/TRW. That is essentially
2 what we have done in the next scatter diagram. But --

3 THE CHAIRMAN: So just help me with your position. Are you
4 saying that none of the documents evidencing cartel
5 activity by object, none of the documents relating to
6 ZF, are you accepting that there is evidence of cartel
7 activity --

8 MS FORD: No.

9 THE CHAIRMAN: -- as against any members of the claimant?

10 MS FORD: No.

11 THE CHAIRMAN: Sorry, you said "no" to two alternatives.

12 MS FORD: This is not about infringement by object, this is
13 about the extent to which the many documents that
14 the Claimants seek to rely on actually are capable of
15 establishing the case they have to meet.

16 THE CHAIRMAN: No, I understand that. I have got that
17 submission. But I am asking you about what your
18 position is on -- are you saying that none of
19 the documents evidence cartel activity by object --

20 MS FORD: Yes.

21 THE CHAIRMAN: -- as against the Claimants?

22 MS FORD: Yes. We are saying that the only cartel activity
23 is that which has been found by the Commission decision
24 in the OSS 2 decision insofar as it concerns my clients.

25 THE CHAIRMAN: So you say none of the documents evidence

1 sporadic cartel activity against the --

2 MS FORD: Well, the Tribunal will have seen our submissions
3 in our annex to our skeleton. What we have done is we
4 have worked through each individual document that was
5 pleaded and we have made substantive submissions about
6 what we say one can derive from those documents. So
7 I hope that will be of assistance to the Tribunal in
8 seeing what we say about each one individually.

9 THE CHAIRMAN: Right, you are not going to turn them up. I
10 mean, Mr West spent two-thirds of the day, it seemed, at
11 least, going through these documents one by one. Some
12 can be pushed away, as you say, because they are
13 concerned with Brazil, some were concerned with Takata,
14 perhaps (inaudible), but some did involve your clients
15 and you do not want to make any submissions on these at
16 this stage?

17 MS FORD: At the present time, I am going to rely on
18 the submissions that are contained in the annex to our
19 skeleton, but I do want to continue this exercise of
20 narrowing down this -- what did take a long time and
21 what, in our submission, was largely noise and does not
22 even focus down on contacts which one, on any view,
23 might consider to be relevant to the pleaded case.

24 We are talking about the extent to which these
25 documents actually evidence any sort of contact alleged

1 between Autoliv and ZF/TRW, and there is a particularly
2 striking example of that that I would like to draw
3 the Tribunal's attention. That is, the documents that
4 the Claimants rely on concerning a joint venture between
5 PSA and Toyota. This is the TPCA joint venture, and
6 Mr West spent --

7 THE CHAIRMAN: This is the B0?

8 MS FORD: Yes.

9 THE CHAIRMAN: Yes.

10 MS FORD: So Mr West spent some time yesterday addressing
11 these documents. It is the documents addressed at
12 paragraphs 124 to 132 of their skeleton argument
13 {S/1/38}.

14 Now, these documents do not concern ZF/TRW at all,
15 and if we look at this skeleton argument, in one respect
16 there is a concession so that effect. So if we look at
17 the Claimants' skeleton argument {S/1/40},
18 paragraph 131, halfway down, towards the bottom,
19 the Tribunal will see:

20 "ZF/TRW does not appear to have participated in this
21 tender ..."

22 THE CHAIRMAN: Right.

23 MS FORD: Well, that is absolutely correct, it did not, so
24 far so good, and so our submission in relation to this
25 entire body of documents is none of this evidences any

1 infringement as between ZF and Autoliv.

2 But then this in the skeleton. They say they accept
3 that ZF --

4 THE CHAIRMAN: Where are you reading now?

5 MS FORD: We are still in the Claimants' skeleton
6 argument --

7 THE CHAIRMAN: The same paragraph?

8 MS FORD: -- paragraph 131.

9 THE CHAIRMAN: Yes.

10 MS FORD: "ZF/TRW does not appear to have participated in
11 this tender, but that does not show that it was not
12 involved in the attempts to cartelise it; instead
13 ZF/TRW's non-participation may instead have represented
14 its involvement in such attempted cartelisation (because
15 its non-participation reflected an agreement to allocate
16 supplies to TPCA to the other cartelists, in accordance
17 with the incumbency principle)."

18 Now, in our submission, it is difficult to imagine
19 a more tenuous and more speculative case than that.

20 They are saying that the very fact that ZF was not
21 involved in fact demonstrates that it was involved, and
22 in our submission, that is just completely baseless.

23 THE CHAIRMAN: You say that is a stretch.

24 MS FORD: It is an enormous stretch. How, one asks
25 rhetorically, should one go about demonstrating that one

1 was not involved in collusion in respect of an RFQ.

2 THE CHAIRMAN: We have got the point.

3 MS FORD: It is just enormously speculative.

4 So taking out those documents that do not involve
5 both Autoliv and ZF, we get the scatter diagram at
6 the top of page {S/3/21}. This is the one at the top of
7 the page and this may assist to answer the Tribunal's
8 question.

9 THE CHAIRMAN: Which paragraph, because my page numbering is
10 different?

11 MS FORD: It is the one under paragraph 80.

12 THE CHAIRMAN: Right.

13 MS FORD: So the Tribunal asks how many of these instances
14 actually involve Autoliv and ZF and the answer here is
15 that there are eight pleaded instances of alleged
16 competitor contacts over an eight-year period.

17 THE CHAIRMAN: Right.

18 MS FORD: But then there is a final exercise in breaking
19 down these documents, because it is accepted that
20 the Claimants were three entirely separate undertakings
21 during the cartel period. So if one has an allegation
22 of an alleged competitor contact in relation to, for
23 example, PSA, that does not make out the Claimants' case
24 that there was any collusion in relation to either of
25 the other two entirely separate claimant undertakings,

1 and so that is what the three final scatter diagrams
2 have done. So the first, at the bottom of 21 --
3 THE CHAIRMAN: Give me paragraph numbers, please.
4 MS FORD: 82.
5 THE CHAIRMAN: Yes.
6 MS FORD: So {S/3/21}, 82.
7 THE CHAIRMAN: Yes.
8 MS FORD: It is the bottom one, I think. So we have four
9 pleaded instances of alleged competitor contacts between
10 Autoliv and ZF which are claimed to pertain to supplies
11 of OSS products within the EEA --
12 THE CHAIRMAN: So these are documents specifically referred
13 to in the pleading?
14 MS FORD: These are the pleaded documents, yes.
15 THE CHAIRMAN: I mean, I do not know, the documents Mr West
16 opened on yesterday, were they all pleaded documents?
17 MS FORD: He has, to some extent, in his skeleton and again
18 yesterday, expanded universe of documents on which he
19 relies.
20 THE CHAIRMAN: Yes.
21 MS FORD: So we have, in his skeleton, identified an
22 additional 17 documents.
23 THE CHAIRMAN: 17?
24 MS FORD: 17 documents which were not originally pleaded.
25 Not all of them are relied on to suggest cartel --

1 individual cartel contacts as such, and some of them are
2 elaborations on alleged contacts that have previously
3 been pleaded, and some of them, many of them, are
4 concerned with the infringement which was found in
5 respect of VW and BMW, and that, in our submission, is
6 quite important, because of course we have indicated
7 that we do not contest that conduct and so, in our
8 submission, introducing documents that demonstrate
9 the infringement that the Commission has already found
10 in relation to VW and BMW --

11 THE CHAIRMAN: We understand this, yes.

12 MS FORD: -- does not make out the Claimants' case.

13 THE CHAIRMAN: But the fact is, there are -- you are not
14 taking a point that he is not entitled to rely on
15 unpleaded documents? I think his pleading make clear he
16 is going to rely on the documents at trial.

17 MS FORD: The point where it may come up is this.

18 Insofar as he seeks to suggest, "You should have brought
19 people in to talk to these documents", in our
20 submission, that simply cannot be made insofar as he has
21 only raised these documents for the first time extremely
22 late in the day. So it does feed in at that point in
23 the process, because there is a lot of attempted
24 reliance, in a fairly non-specific way, on, "You have
25 not brought people in to talk to these things", but

1 insofar as he is introducing new documents --

2 THE CHAIRMAN: Yes, I mean, there are two separate matters.

3 First of all: you have not brought people in to explain
4 why your cartel activities are limited to the Commission
5 findings. Then a separate point: you have not brought
6 people in to deal with some of the emails. I think both
7 those points are live and (inaudible) he addresses
8 the -- potentially addresses the second one,
9 I understand that.

10 MS FORD: Yes, so let me take those two in turn.

11 In relation to the existing infringement as found in
12 OSS 2, in our submission, we are under no obligation to
13 bring in somebody who is involved in that infringement
14 to give evidence that they did not engage in an entirely
15 separate infringement. In our submission, that is not
16 a legitimate inference to draw.

17 In relation to the extent to which individuals might
18 be identified on the documents that the Claimants rely
19 on to seek to discharge their burden to show that there
20 was some separate infringement, we have engaged in
21 correspondence with Hausfeld about this and the Tribunal
22 might be assisted by seeing the key letter. It is
23 {K/665/1}.

24 THE CHAIRMAN: I am not sure I have a K. Bring it up on
25 the screen.

1 MS FORD: Yes, if it could come up on the screen, please.

2 So what happened is that the Claimants wrote to us
3 and identified various individuals who they had seen on
4 documents and said, "Well, why aren't any of these
5 people coming"? So what we did is --

6 THE CHAIRMAN: Sorry, "Why any of these people ..."?

7 MS FORD: "Why aren't any of these people in your list of
8 witnesses"?

9 THE CHAIRMAN: Ah, right, okay.

10 MS FORD: So what we did is we provided a table, and
11 the table begins at {K/665/6} of this document,
12 hopefully. So the table does two things. First of all,
13 it identifies -- it addresses the individuals that
14 the Claimants identified as potential witnesses, and
15 secondly, it identifies individuals who, on the pleaded
16 case, allegedly engaged in anti-competitive
17 communications.

18 THE CHAIRMAN: This table has been drawn by who?

19 MS FORD: This is our table that we have produced in
20 response to the Claimants' enquiry about those people
21 that we have identified to be witnesses.

22 THE CHAIRMAN: Yes.

23 MS FORD: In each case we have explained why it is that
24 those persons are not called to be witnesses. So
25 essentially what the table does is it sets out their

1 name, it sets out whether they are still available, it
2 sets out the relevant document that their name comes
3 from, insofar as that is where it has been derived, and
4 what their role was. In summary, these individuals are
5 either no longer employed by ZF at the time that witness
6 statements were filed in the proceedings --

7 THE CHAIRMAN: I mean, what has that got to do with it?

8 MS FORD: Well, it goes to the overall assessment of
9 the extent to which it is appropriate to draw any sort
10 of inference from the fact that they were not --

11 THE CHAIRMAN: There is no rule that you can only call
12 people who are employed by you, is there?

13 MS FORD: No, but it is a balancing exercise. The Tribunal
14 will be familiar with the Supreme Court's approach
15 position in Efobi about this, its overall --

16 THE CHAIRMAN: Remind me, yes.

17 MS FORD: Well, we can certainly provide the relevant
18 authorities.

19 THE CHAIRMAN: Yes.

20 MR SCANNELL: But it is an "in all the circumstances"
21 assessment as to the extent to which one should draw any
22 sort of inference from the presence or absence of
23 a particular witness.

24 THE CHAIRMAN: Right, okay.

25 MS FORD: So one of the factors which, in our submission,

1 the Tribunal is able to take into account is that these
2 people simply were not available to ZF at the time.

3 THE CHAIRMAN: Yes, absolutely, I am fully on board with
4 that. But not being employed is not the same as not
5 being available.

6 MS FORD: Well, what we have identified is the fact that
7 they have left ZF.

8 THE CHAIRMAN: Yes.

9 MS FORD: What one then factors in --

10 THE CHAIRMAN: But in some cases one sees evidence, often
11 put in by solicitors, saying, "Look, we have tried to
12 get hold of this person, they will not answer our calls,
13 refuses to cooperate, now working for a competitor",
14 those sorts of things one sees.

15 MS FORD: So if -- and this is not, in my submission, this
16 case at all -- one had a situation where there were
17 a key individual whose name appeared on many, many, many
18 of the documents and whose evidence was clearly going to
19 be of great assistance, then in those circumstances it
20 might weigh quite heavily, the extent to which that
21 person was available or not available. But in our
22 submission, we are simply not in that situation. There
23 is a -- no individuals have been identified, in relation
24 to the ZF witnesses, who would be particularly in
25 a position to assist the Tribunal in relation to

1 the allegations that we are facing.

2 THE CHAIRMAN: That is a different matter, yes.

3 MS FORD: Well, and in particular in relation to
4 the spillover case what we have done is produced five
5 witnesses who, in our submission, are very well placed
6 to address the allegations that are being made in that
7 context. So, in our submission, there is simply nothing
8 that can be said as against us, that there are relevant
9 individuals that should have been brought here.

10 (Pause)

11 Yes, and Professor Bailey points out that, if
12 the Tribunal takes a look at the table, some of these
13 individuals have left over a decade ago.

14 So this resource is available -- insofar as one
15 identifies a particular individual, this resource
16 explains the situation in relation to them. But we do
17 say there is simply no situation here where one can
18 point to any particular individual and say --

19 THE CHAIRMAN: That is a separate matter, but, yes.

20 MS FORD: It is an important matter.

21 THE CHAIRMAN: Would it be possible to have a hard copy of
22 this annex? I would be grateful.

23 MS FORD: Sir, yes, we can certainly arrange that.

24 So I was dealing with the ways in which
25 the Claimants seek to establish their primary case. We

1 have already mentioned that, in addition to
2 the contemporaneous documents, the Claimants have for
3 the first time sought to suggest that they can rely on
4 the possibility of tacit collusion. That is
5 a possibility which arises for the first time in their
6 skeleton, paragraphs 8 {S/1/5} and 153 {S/1/46}.

7 The Tribunal can --

8 THE CHAIRMAN: That is not pleaded, tacit collusion?

9 MS FORD: No, it is a new -- and, actually, it is
10 a departure from the pleaded case, because the pleaded
11 case identifies particular contacts which the Claimants
12 allege evidence collusion and so it is a departure to
13 say, "A-ha, but actually we can rely on tacit
14 collusion".

15 We have heard a lot about the fact that
16 the collusive conduct that the Claimants allege took
17 place is somehow of the same kind as that found in
18 the Commission decisions, and I say "of the same kind"
19 because that is the words that are used in paragraph 8
20 of the Claimants' skeleton {S/1/5}. But I have shown
21 the Tribunal that the Commission did not rest its case
22 on findings of tacit collusion, it identified express
23 communications.

24 THE CHAIRMAN: Yes.

25 MS FORD: So where has this belated allegation of tacit

1 collusion come from? The clue, in our submission, is in
2 paragraph 153 of the Claimants' skeleton, if we would
3 bring that up {S/1/46}. It is paragraph 153, and there
4 you see the Claimants observing hopefully that:

5 "Such tacit collusion would by its very nature leave
6 no evidence of express cartel discussions."

7 So, in my submission, what is going on here is that
8 the Claimants think this will get them out of a hole,
9 because they think if there is no evidence of express
10 discussions, then, they say, "Ah, well, it must have
11 been tacit collusion". In our submission, an allegation
12 of tacit collusion is not the shortcut to proving a case
13 that the Claimants hope it will be, and the relevant
14 test was confirmed by the Court of Appeal recently in
15 *Allergan*, and can I show the Tribunal that. It is
16 authorities bundle 2, tab 44 at page 12 {AUTH2/44/12}.

17 THE CHAIRMAN: I beg your pardon, give me the reference
18 again. Which tab?

19 MS FORD: It is authorities bundle 2, tab 44.

20 THE CHAIRMAN: Are you taking a pleading point on this?

21 MS FORD: In relation to this one, I do think it is
22 a legitimate point to take a pleading point, yes, in my
23 submission. We have had, throughout these proceedings,
24 a pleaded case which relies on what in our submission is
25 extremely tenuous and limited documentary evidence of

1 alleged direct contacts and a case which consistently
2 relies on supposed parallels between this conduct and
3 the conduct found in the Commission decision, and for
4 the first time in their skeleton argument one sees an
5 allegation of a different form of collusion and one
6 which is not in any way supported by the Commission
7 decision.

8 But in any event, I make a separate submission,
9 which is it is just not -- it does not help
10 the Claimants at all, and that is the point that I am
11 making by reference to this authority, which is what one
12 has to demonstrate in order to establish tacit
13 collusion. This is the Court of Appeal citing European
14 authority, starting at 36. You can see the authority it
15 is citing is *Bayer*. They say:

16 "... the CJEU explained how a tacit acceptance,
17 beyond simply unilateral conduct, could be sufficient to
18 support an anti-competitive agreement ..."

19 Then it quotes from *Bayer*, if we could go over
20 the page, please {AUTH2/44/13}. They are saying -- this
21 is at the bottom of that paragraph:

22 "... it is true that the existence of an agreement
23 within the meaning of that provision can be deduced from
24 the conduct of the parties concerned."

25 So just pausing there, what we mean when we

1 say "tacit collusion" is collusion which is deduced from
2 conduct.

3 Then:

4 "However, such an agreement cannot be based on what
5 is only the expression of a unilateral policy of one of
6 the contracting parties, which can be put into effect
7 without the assistance of others. To hold that an
8 agreement prohibited by Article 85(1) of the Treaty may
9 be established simply on the basis of the expression of
10 a unilateral policy aimed at preventing parallel imports
11 would have the effect of confusing the scope of that
12 provision with that of Article 86 of the Treaty."

13 Which is the abuse of dominance:

14 "For an agreement within the meaning of
15 Article 85(1) the Treaty to be capable of being regarded
16 as having been concluded by tacit acceptance, it is
17 necessary that the manifestation of the wish of one of
18 the contracting parties to achieve an anti-competitive
19 goal constitute an invitation to the other party,
20 whether express or implied, to fulfil that goal jointly,
21 and that applies all the more where, as in this case,
22 such an agreement is not at first sight in the interests
23 of the other party, namely the wholesalers."

24 So that is essentially what one must establish in
25 order to make good an allegation of tacit collusion, and

1 so the simple point we make is that saying --

2 THE CHAIRMAN: All I am getting out of that is that in order

3 for it to be tacit collusion there has to be collusion

4 tacitly --

5 MR SCANNELL: One must prove --

6 THE CHAIRMAN: -- and the example they give is that there is

7 only one person and obviously that is not collusion.

8 MS FORD: Well, it is talking about implied by conduct

9 rather than express. That is the distinction that is

10 being made here. So the first paragraph says --

11 THE CHAIRMAN: It was a unilateral policy, so one person,

12 yes. One person cannot collude.

13 MS FORD: Well, one of the things that is coming out here is

14 unilateral conduct is not enough. But the other is, if

15 you are saying that tacit conduct is enough, you still

16 have to show that the conduct -- essentially that that

17 collusion can be deduced from the conduct of the parties

18 concerned. It is not -- the short answer is, it is

19 not --

20 THE CHAIRMAN: Okay.

21 MS FORD: -- enough to say, "Ah, well, there is no evidence

22 and therefore it must be tacit". One still has to

23 show --

24 THE CHAIRMAN: Of course.

25 MS FORD: -- if that meeting requires, that goes beyond

1 unilateral.

2 THE CHAIRMAN: Of course.

3 MS FORD: It is not a get-out-of-jail-free card, is
4 the simple point we make.

5 THE CHAIRMAN: No.

6 MS FORD: The next thread that the Claimants try to rely on
7 is their expert's finding of an overcharge, and so they
8 are essentially saying that because their model has
9 found an overcharge there must have been something to
10 cause it. That sort of bootstrapping, in our
11 submission, is not a legitimate or robust means of
12 establishing an infringement. The reason I say that is
13 because it is common ground that a finding of higher
14 prices is capable of being consistent both with
15 the existence of, or with the absence of, an
16 infringement. To show the Tribunal that, this is in
17 the joint experts' statement, so {E1/13/18}.

18 THE CHAIRMAN: Yes, we have that in mind, I think. It is
19 probably not necessary to turn it up, unless you
20 particularly want to.

21 MS FORD: Well, I would like to make a brief point on it,
22 because it really --

23 THE CHAIRMAN: Sure. We can look at it, yes.

24 THE EPE OPERATOR: Sorry, can I have the reference again,
25 please.

1 MS FORD: It is {E1/13/18}. Starting with proposition 25,
2 the proposition that the experts are commenting on is:

3 "Early Period effects may be attributed to reasons
4 otherwise not explained by the Hughes 1 model ..."

5 THE CHAIRMAN: Hold on, I have not turned it up yet.

6 MS FORD: I am sorry, sir.

7 THE CHAIRMAN: Yes, okay, I have it now.

8 MS FORD: I was just reading the relevant proposition that
9 the experts are commenting on. So:

10 "Early Period effects may be attributed to reasons
11 otherwise not explained by the Hughes 1 model, unrelated
12 to the infringement."

13 Mr Hughes' position on that is:

14 "Agree (qualified) ..."

15 He offers essentially two qualifications. The first
16 is that one could say that about any econometric model,
17 and of course that is true, but it does not detract from
18 the force of the point. Then, predictably, he says,
19 "But of course my model is robust", and the Tribunal
20 will appreciate that is very much in dispute.

21 I wonder if we could have that document back again.

22 So moving on to proposition 26, over the page,
23 please {E1/13/19}, this is essentially the same
24 proposition in relation to the main period. So:

25 "Main Period effects may be attributed to reasons

1 otherwise not explained by the Hughes 1 model, unrelated
2 to the infringement."

3 Mr Hughes' position:

4 "Agree (qualified) ..."

5 And he is offering the same qualifications as
6 previously.

7 Then proposition 27:

8 "Depending on whether the econometric model is
9 correctly specified, identifying a positive and
10 statistically significant overcharge for the Main Period
11 is consistent with both (i) the absence and (ii)
12 the existence of an infringement."

13 Mr Hughes' position is he agrees with that.

14 In our submission, this is absolutely crucial,
15 because we say the econometrics cannot be allowed to
16 drive the Tribunal's approach to the facts and
17 the evidence, the facts have to come first, because it
18 is common ground that a finding of higher prices is
19 capable of being equally consistent with the absence of
20 an infringement. One cannot simply point to Mr Hughes'
21 model and say, "Look, we have found higher prices, ergo
22 there must have been either an infringement or indeed
23 overspill effects".

24 THE CHAIRMAN: I understand that submission. I just was not
25 quite sure -- there seems -- insofar as that is

1 conceded, it seems to me to be dependent on whether
2 the econometric model is -- so if the econometric model
3 is correctly specified.

4 MS FORD: Sir, yes, absolutely, and that is the reason why
5 these things are so intertwined, because it works
6 the other way as well.

7 THE CHAIRMAN: I find a slightly ambiguity in that
8 proposition, just reading it at the moment. So he goes
9 to say:

10 "... a misspecified econometric model may lead to
11 the wrong conclusion ..."

12 MS FORD: Yes.

13 THE CHAIRMAN: But, I mean, we will be hearing from
14 Mr Hughes in due course, but he will be no doubt
15 contending his econometric model is properly
16 specified --

17 MS FORD: He will indeed.

18 THE CHAIRMAN: -- and therefore you can draw conclusions for
19 it.

20 MS FORD: He will absolutely say that.

21 THE CHAIRMAN: Yes.

22 MS FORD: But these matters are interrelated, because if
23 the Tribunal were to take the view, on the facts, that
24 the factual evidence in support of any broader
25 infringement is weak, then that makes it all the more

1 likely that Mr Hughes' model, which has found a stonking
2 overcharge, might well be misspecified. So these
3 matters are very much interrelated, and the point we say
4 is, it is not open to these Claimants to bootstrap their
5 case on liability --

6 THE CHAIRMAN: We understand that.

7 MS FORD: -- by pointing to Mr Hughes' analysis.

8 Sir, I am reaching the point where I am going to
9 address overspill effects, so that might be a convenient
10 moment.

11 THE CHAIRMAN: A good place to stop.

12 So how are you doing in terms of time?

13 Housekeeping

14 MS FORD: I am actually going reasonably well. I want to
15 address overspill effects and then some short
16 observations about the overcharge model.
17 Professor Bailey was going to make some brief
18 observations on the German law. The only point that may
19 take some time on overspill is that I would like to
20 address the Tribunal's concerns about how one approaches
21 causation as a matter of law and that does involve going
22 to some of the authorities.

23 THE CHAIRMAN: I just wonder, hearing about the German law,
24 it might be quite attractive to hear that closer to
25 the time before the German experts, otherwise it will be

1 in one ear and out the other, sorry. I do not know if
2 we can find time to do that closer to when the German --
3 we only got have them for, what did we say?

4 MS FORD: Is it 45 minutes?

5 THE CHAIRMAN: 45 minutes each, yes. So can we discuss an
6 appropriate time, whether we sit early and hear
7 the openings on it and then go straight in to hear
8 the witnesses, that might be quite attractive, from
9 the Tribunal's perspective, or else we can find another
10 time.

11 Professor Bailey, does that inconvenience you, or is
12 that workable, do we think?

13 PROFESSOR BAILEY: I am at the Tribunal's convenience.

14 THE CHAIRMAN: Thank you very much. So you have got that.

15 Mr Scannell, how long do you need tomorrow?

16 MR SCANNELL: On Friday.

17 THE CHAIRMAN: Friday, sorry.

18 MR SCANNELL: I am assuming that I would have at least half
19 an hour.

20 THE CHAIRMAN: Well, it looks like we have got plenty of
21 time; is that right?

22 MR SCANNELL: I would hope so.

23 THE CHAIRMAN: So we do not need to sit early, or do you
24 still want to sit early?

25 MS FORD: The only thing that I am mindful may take some

1 time is the question of -- the legal question of how one
2 approaches causation, in particular in relation to ZF
3 being the addressee of only OSS 2.

4 THE CHAIRMAN: You need to address that, yes.

5 MS FORD: In those circumstances, I hesitate to say that
6 there is plenty of time, because sometimes these things
7 can spread out.

8 THE CHAIRMAN: Right. So are you saying you would like to
9 sit at 10?

10 MS FORD: If the Tribunal is prepared to do so, we would be
11 very grateful.

12 THE CHAIRMAN: Sure, of course. We can always have a long
13 lunch if it goes swiftly.

14 MR WEST: Just before the Tribunal rises, can I just give
15 you one or two references on the pleading point. So it
16 was said that tacit collusion was raised for the first
17 time in my skeleton. It is actually in Mr Hughes'
18 report, for example, at paragraph 2.1.1(d) {E1/2/22},
19 2.4.4 {E1/2/36}, 2.5.2 {E1/2/37}, 2.5.5 {E1/2/38}. It
20 is also in his reply report {E1/4/1} and the joint
21 expert statement {E1/13/1}.

22 THE CHAIRMAN: Perhaps you can ensure they are included in
23 your closing, those references.

24 MR WEST: Certainly.

25 MS FORD: Sir, I hardly need to make the point that one does

1 not plead something by including it in the expert
2 report.

3 THE CHAIRMAN: Give me a second, sorry.

4 (Pause)

5 One thing that would help me is, every time you give
6 me a reference it is not the same as my bundles, and it
7 probably does not matter too much at the moment but at
8 some points I may have trouble keeping up. So I do not
9 know if it is possible to make sure that there is just
10 something -- some way we can communicate. So,
11 authorities, for example, I have four volumes and they
12 bear no resemblance to the volume that you call out, and
13 then there are other ones as well that are not entirely
14 clear. So at some point, perhaps during our day off,
15 which is tomorrow, is it not -- yes -- although I may
16 take some of the bundles with me -- it would be useful
17 just to have a look at that.

18 MS FORD: Yes, so on the authorities bundles, perhaps to
19 demystify that, on the Opus system they are split into
20 three, there is legislation, domestic authorities and
21 foreign authorities, and so insofar as one is giving
22 authorities bundle 1, 2 or 3 for the purposes of
23 the Opus operator --

24 THE CHAIRMAN: Yes, but then when you say "bundle 2", I have
25 got four bundle 2s, so I do not know which one to go to,

1 so I pick up one and then put it back, and then pick up
2 another one and put it back, and then you are already on
3 the authority and then I am trying to catch up.

4 MS FORD: I see. So it may be that we need a crib sheet of
5 where in your bundles --

6 THE CHAIRMAN: It would just be helpful, yes.

7 MS FORD: Yes.

8 THE CHAIRMAN: It would just make things easier,
9 particularly when we are closing, or if we get short of
10 time at any point.

11 (4.21 pm)

12 (The Court adjourned until 10.00 am on Friday,
13 4 October 2024)

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