Neutral citation 2024 CAT 77

Case No: 1339/7/7/20

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

18 December 2024

Before:

BRIDGET LUCAS KC
(Chair)
CAROLE BEGENT
DR MARIA MAHER

Sitting as a Tribunal in England and Wales

BETWEEN:

MARK MCLAREN CLASS REPRESENTATIVE LIMITED

Class Representative

- v -

(1) MOL (EUROPE) AFRICA LTD
(2) MITSUI O.S.K. LINES LTD
(3) NISSAN MOTOR CAR CARRIER CO. LTD
(4) KAWASAKI KISEN KAISHA LTD
(5) NIPPON YUSEN KABUSHIKI KAISHA
(6) WALLENIUS WILHELMSEN OCEAN AS
(7) EUKOR CAR CARRIERS INC
(8) WALLENIUS LOGISTICS AB
(9) WILHELMSEN SHIPS HOLDING MALTA LIMITED
(10) WALLENIUS LINES AB
(11) WALLENIUS WILHELMSEN ASA
~~(12) COMPANIA SUD AMERICANA DE VAPORES S.A.~~

Defendants

Heard at Salisbury Square House on 4 December 2024

RULING (PTR)

APPEARANCES

Sarah Ford KC, Nicholas Gibson and Sarah O'Keefe (instructed by Scott + Scott (UK) LLP) appeared on behalf of the Class Representative.

Brendan McGurk KC, Michael Quayle and Nathalie Nguyen (instructed by Arnold & Porter Kaye Scholer (UK) LLP and Steptoe International (UK) LLP) appeared on behalf of the First to Third and Fifth Defendant.

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A. INTRODUCTION

1. This ruling arises from the Pre-Trial Review ("PTR") in these proceedings which took place on 4 December 2024, and which followed the news that the Fourth Defendant ("K Line") and the Sixth to Eleventh Defendants ("WWL/EUKOR") had reached proposed settlements with the Class Representative ("CR") such that they would likely no longer be participating in the trial. Five matters arose for determination:

   (1) whether the Class Representative's joint industry experts, Mr Goss and Mr Whitehorn, should give their oral evidence separately, and whether they should be prevented from hearing each other's testimony;

   (2) whether the First to Third and Fifth Defendants (the "MN Defendants") could rely on K Line's industry expert evidence, and the evidence of Mr Cunningham and Mr Dent, and whether the MN Defendants could call those witnesses as their own;

   (3) the timetable for trial;

   (4) the hot tub protocol; and

   (5) whether the First to Third Defendants ("the MOL Defendants") should be allowed to introduce new evidence in the form of five witness statements adduced in *PSA Automobiles SA & Ors v Autoliv AB & Or*s 1535/5/7/22(T) ("the PSA Statements").

2. Issue (1) was decided during the hearing. We decided that Mr Goss and Mr Whitehorn should give their oral evidence separately, but that neither should be excluded during the course of the evidence of the other. Issue (2) was partially decided in that we ordered that the MOL Defendants have permission - insofar as permission was required - to rely on the industry expert evidence of Messrs Chaisty, Good and Finn as well as the evidence of Mr Cunningham and Mr Dent. Permission was also given for the MOL Defendants to call these witnesses at trial. We found the position in relation to the Fifth Defendant ("NYKK") to

be more complex and therefore reserved our judgment as regards NYKK. We indicated that we would provide reasons for the decisions we had reached on issues (1) and (2), and our decision in relation to NYKK on issue (2) after the hearing. This Ruling addresses issues (1), (2) and (5).

3. At the PTR we proceeded to deal with the trial timetable (Issue (3)), and the breakdown of the hot-tub issues (Issue (4)), although the precise terms of the hot tub protocol have not yet been determined. We do not propose to deal with either of these issues in this Ruling, and will finalise the hot tub protocol in correspondence with the parties.

B. THE CR's INDUSTRY EXPERT EVIDENCE

(1) Background

4. The industry expert evidence in this case relates to new vehicle pricing, and in particular the treatment of the deep-sea shipping delivery charge and whether it can be seen as being treated separately and in a form of silo (which is the CR's case) or whether, as the Defendants contend, the approach is one of "overall pricing". The CR's industry experts, Mr Goss and Mr Whitehorn, have jointly given four reports in these proceedings. The earliest of these was filed on 18 February 2020 in support of the CR's application for a Collective Proceedings Order ("CPO"). A supplementary joint report was filed on 1 October 2021 in relation to the CPO application. Certification was granted on 22 February 2022, and since then the CR has served a third joint report in support of its Positive Position Statement ("PPS"), and a fourth in support of its Negative Position Statement ("NPS").

5. Taking the first joint report by way of example, Mr Goss and Mr Whitehorn confirm that "we have carried out all the work set out in this report on a joint basis, and we both take responsibility for the entire report save for specific points where explicitly stated in circumstance where only one of us has the relevant knowledge or expertise". They also confirm that they understand that their duty is to the Tribunal, and that they have complied with that duty. Over a year after the first joint report was served and prior to the CPO application being

determined, the Defendants wrote to the CR's solicitors by letter dated 13 April 2021 raising various issues arising from the joint authorship of the report. In summary, these related to an alleged failure to identify whether facts are within a witness's own knowledge and the sources of facts outside a witness's own knowledge; and an alleged lack of clarity in relation to the contents. That letter concluded with a request for a corrected version of the statement. The Defendants stated that they had no objection to the joint report being restructured as two separate statements – one for each expert. The Defendants sought, amongst other things, clarity as to which matters are said to be within the knowledge of Mr Whitehorn, which within the knowledge of Mr Goss, and which matters are outside their knowledge. The Defendants reserved the right to apply to the Tribunal for "an appropriate order, including that the Statement be clarified or struck out".

6. The CR responded on 20 April 2021, pointing out the delay in raising these issues, and indicated that they would provide a substantive response before the date for the Defendants to file their responses to the CPO application so that they could consider their position. That substantive response was provided on 7 May 2021. In relation to the fact that the report was prepared jointly, the CR stated that this was to avoid the need to provide "swathes of duplicitous evidence" (a typographical error, we assume, for "duplicative"). The CR, in summary, refuted the suggestion that there was any real basis for concern as to which matters were within the knowledge of one or the other, but stated that "even if there was any doubt as to the delineation of the Industry Experts' Testimony" it was not a matter for certification but "could be addressed in greater detail when our client files its expert evidence in the main proceedings following certification". By letter dated 10 June 2021, the Defendants repeated their concerns and asked for a reply by 18 June 2021, being a date prior to the date for filing responses on the CPO application.

7. Apart from the MOL Defendants repeating their various concerns in their NPS, there the matter rested until shortly before the PTR. On 2 October 2024, the Defendants wrote to the CR to confirm *"certain practical matters in relation to how they will give their evidence"*. In short, the Defendants proposed that Mr Goss and Mr Whitehorn be cross-examined separately, and that each should

leave the court room (and not view the Tribunal's livestream) during the cross-examination of the other.

(2) The parties' arguments

8. The CR's position is that Mr Goss and Mr Whitehorn should give evidence jointly. The CR submits that where written evidence is provided and adopted jointly it falls to be tested jointly. The CR also submitted that "as a practical matter, the experts who jointly produced their expert report can better answer any questions that the MN Defendants or the Tribunal may have about it jointly. While each of them has sufficient knowledge and expertise to attest to the veracity of the whole of each report, it is inevitable – given the differences in the emphasis of their expertise and experience – that one or other of them is likely to be better placed to be of greatest assistance to the Tribunal in answering a question on the points most relevant to their specific experience." The CR submits that hearing oral evidence is more likely to get "the witnesses' best evidence (furthering the interests of justice), and likely be more efficient."

9. Neither side identified to us any case in which joint cross-examination has been considered by either this Tribunal or the High Court. The CR relied on one case in which it was understood to have taken place: the case of *Charman v Charman* [2007] 1 FLR 593. That was a high value divorce case, in which it appears that there was a joint expert report on valuation. We were told in the course of submissions by Ms Ford KC, on instructions from her client based on information obtained from someone on her team who worked with one of the experts involved in that case, that there was joint cross-examination on that report. In the absence of any information as to, for example, the basis upon which the joint report was prepared; whether there was a clear division of issues, or a clear separation in the areas of knowledge and expertise on the part of the authors; or whether there was any objection to joint cross-examination, we do not think this anecdotal submission takes us any further.

10. The CR also relied on the fact that concurrent evidence is used in the Tribunal when it conducts "hot tubs".

11. The CR considers that the MN Defendants seek to obtain an *"unfair litigation advantage"* by seeking to undermine the coherence and unity of the industry experts' joint reports, and target their cross-examination questions at one or the other based on the MN Defendants' tactical assessment as to which of the two might offer the response most favourable to the MN Defendants' case. That, the CR says, will not assist the Tribunal because "the Ds' case may be put to the expert who is not best placed to speak to the point." The CR suggests that the proposal to cross-examine separately will give rise to procedural inefficiencies, and may lead to duplication should one expert feel it would assist if he covered the same ground as the other, and result in evidence that is harder for the Tribunal to follow than if the experts could give evidence at the same time.

12. The CR also pointed to the delay in raising this point, noting that it could and should have been done much earlier. It was not raised in relation to the CPO application, or at any CMC since then.

13. The MN Defendants point to the difficulties that they maintain arise as a result of the CR having chosen to submit joint expert reports rather than separate, and the way in which those reports are drafted. These points are essentially a repeat of what was said in correspondence, and in the NPS. Mr McGurk KC for the MN Defendants submitted that the proposal that the joint experts be cross-examined jointly risks further prejudice to that already caused by the way in which the joint reports have been prepared. The MN Defendants say that, given the failure to delineate the experts' respective areas of knowledge and expertise sufficiently, they do not know what either Mr Goss or Mr Whitehorn will say at trial. That problem will be compounded at trial: if both are in the box at the same time, the witness "better placed" to answer the question will do so, and it will never be known what the other really knows or thinks about the issue because the answer of the first will tip off the second. The answer of the first may then be added to or fortified by the second such that the evidence of one effectively corroborates and builds on that of the first. If, on the other hand, we were to require separate cross-examination the MN Defendants will be better able to test the expertise, knowledge and opinions of each.

14. The MN Defendants say that they gave the CR ample opportunity to address these points and it has not done so. The MN Defendants point to the dearth of authority to support the use of joint reports, or joint cross-examination in the English Courts, and referred us to Australian authorities (*BrisConnections Finance Pty Limited (Receivers and Managers Appointed) v Arup Pty Limited* [2017] FCA 1268; *Ray Fitzpatrick Pty Ltd v Minister for Planning* [2007] NSWLEC 791) which have deprecated the use of joint reports. At [45] of *BrisConnections*, Mr Justice Lee noted that joint expert opinions are not uncommon in the United States, although he did not derive much assistance from the authorities to which he was referred given the lack of detailed analysis and their failure to address the problem of potentially compromised opinions. At [48], he described the problem in the following terms:

> "It is evident that there is a need to work out where licit delegation, consultation and testing ends, and where inappropriate compromise of opinions begins. There is a danger in generalising and using labels, but I will use the term 'compromised opinions' to mean opinions reached as a result of a decision to 'adopt' an opinion, which opinion is not the result of an application of the specialised knowledge of a proposed witness, but as a result of a compromise between the proposed witness and another. This is to be contrasted with an opinion which is the result of an application of the specialised knowledge of a proposed witness, but is reached following discussion and debate between the expert and another (even if the tentative or preliminary view of the expert is refined or changed by that discussion and debate, and involves, as a matter of fact, a consensus emerging, by reason of that process, between the initial view of the expert and the view of another). The former is an abdication of the expert's responsibility to form an opinion by reason of the application of the expert's specialised knowledge; the latter is a faithful discharge of the expert's responsibility to test and refine the expert's views and come to a considered opinion based on the expert's specialised knowledge, even though it may involve embracing a final view which may not have been initially evident. Subject to how the opinion is expressed, the latter is admissible while the former is not."

15. On the issue of delay, the MN Defendants say that they did not raise this earlier because the Tribunal has a broad discretion to admit evidence and would be unlikely to strike out the joint reports. They insist that they have raised the issues (not just in pre CPO correspondence, but also in their NPS) and the CR has not taken steps to address the problems that the joint reports give rise to.

(3) Analysis

16. The Australian cases we were referred to each turned on their own particular facts. We did, however, find the elucidation by Mr Justice Lee of the potential danger of compromised opinions instructive. Whilst we are not saying that it will never be appropriate for a party to adduce a joint expert report, it seems to us that the party doing so must be prepared to explain why a joint report is necessary, and identify why separate reports are inappropriate or ineffective in the particular circumstances of the case. Further, it is plainly important in the preparation of any joint report to pay close regard to the potential problem of compromised opinions. In our view, this means that a joint report must state clearly each of the authors' area of specialist knowledge and experience identifying any limitations in terms of scope or areas of particular focus for the purposes of the opinions expressed. The joint report must explain the methodology that has been used in its preparation, which may include any steps taken to ensure that each expert's opinions remain their own and are not compromised. The opinion ultimately reached must be expressed clearly, identifying any limitations or qualifications that may apply to the views adopted by any of the authors.

17. We are extremely concerned about the delay in bringing this matter to the Tribunal's attention. A PTR is very late in the day to be drawing the perceived difficulties presented by the use of a joint report to our attention given the trial management issues that are said to arise.

18. In future, if any party instructs experts to produce a joint report, that must be raised at the first possible opportunity and the reason it is necessary explained. That will give the opposing parties an opportunity to raise any concerns with that approach (such as those the MN Defendants raised 3 years ago in correspondence) with the Tribunal. It will also enable the parties and the Tribunal to ventilate any potential issues and problems likely to arise further down the line, including at trial and consider what might need to be done to address them. So, for example, if there are issues in relation to the way in which the experts' respective expertise or knowledge is expressed or delineated, or whether a joint report is appropriate in the circumstances at all, the Tribunal will

be in a position to consider at an early stage whether or not any clarificatory supplemental report is required, or whether separate reports are in fact necessary and provide appropriate directions.

19. Here, we are too far down the line to consider requiring the CR to reframe the joint reports now, and we are not asked by either side to pursue that course. The MN Defendants do not object to the admissibility of the joint reports. However, we consider that the CR ought to have considered and explained at a much earlier stage why it was necessary in this case to file a joint report, rather than separate reports – and not treated the MN Defendants' complaints as only drafting points that it considered to be ill-founded. We also consider that it was incumbent on the MN Defendants to draw the issues that they had with the use of joint reports specifically to the Tribunal's attention at the first CMC post-certification.

20. We are now in the position of having to resolve the practical issue of how this evidence should be dealt with at trial, and where the balance of prejudice lies. The CR submitted that, although both have sufficient knowledge and expertise to attest to the veracity of the whole of the report, inevitably one "is likely to be better placed to be of greatest assistance to the Tribunal in answering a question on the points most relevant to their specific experience". In our view, that underlines the problem that joint cross-examination may give rise to. The MN Defendants are entitled in our view to test who that is, the limits and specific expertise of the other (and each of them), and what the consequences of the answers are as regards the contents of the reports and the weight that we should attach to their evidence.

21. Ms Ford KC fairly conceded that it would not be impossible to cross-examine Mr Goss and Mr Whitehorn separately. It will be a more difficult task in light of the way in which the joint reports have now been prepared, and it may be more disjointed, but we do not consider that is a reason to permit two experts to sit side by side, and in effect choose between them who should answer. They have both signed up to the report in full, and can be expected to be in a position to answer questions in their own words, not in effect adopt the words of the person sitting next to them.

22. The CR's analogy with a hot tub is a false one. There the Tribunal is testing two (or more) opposing opinions, in circumstances where in the ordinary course each expert will have provided their own report and will answer the questions from the Tribunal in their own words. What the CR is proposing is completely different and would entail two experts who have confirmed that they share exactly the same views giving their evidence, in effect, collaboratively.

23. We are therefore satisfied that the balance lies in favour of separate cross-examination. We will not, however, order that each of Mr Goss and Mr Whitehorn be absent for the cross-examination of the other. Both have confirmed that they are aware that their duty is to the Tribunal, and that they have complied with those duties. We note that it has not previously been suggested that any of the Defendants' industry experts should absent themselves from the courtroom for the cross-examination of the others. Whilst it may be that their areas of expertise are more effectively delineated in their separate reports, there will inevitably be an area of overlap given that they are giving expert evidence directed at the same or similar issues. We do not, therefore, consider it appropriate to single Mr Goss and Mr Whitehorn out and treat them differently.

24. It is for the MN Defendants to decide what issues to put to which of the CR's industry experts, and to consider the extent to which they need to put their case to both or only one of them. We make no finding in this Ruling as to what the position should be if, for example, the first expert to be cross-examined concedes a point and the other not be asked the question at all. That will be a matter for submissions at trial.

C. THE K LINE INDUSTRY EXPERT EVIDENCE

(1) Background

25. At the second case management conference in these proceedings in February 2023 ("CMC2"), the Tribunal set out a clear blueprint as to how these proceedings were to be managed to trial:

> "Each party grouping, we are going to say the Class Representative on the one hand and the Defendants on the other, but if the Defendants want to fragment, no problem at all. Each party grouping will produce their entire positive case on loss and damage by no later than 4.00pm on Friday 14 July 2023. By "entire positive case" we mean this: we want all the factual, expert and documentary evidence filed by each party grouping on this date. There will be no non-responsive cases. These filings will be done in parallel, and they will be accompanied by a position statement that draws together the threads of the primary material filed.
>
> We should make clear that there is no obligation under this process for the Defendants to run any kind of positive case unless they wish to do so. They can, if so advised, await the Class Representative's case and respond – and I will be coming to this – entirely negatively.
>
> …The parties will produce a negative responsive case, by which I mean something attacking the positive case produced by the other side or sides, by no later than 4.00pm on 15 December 2023.
>
> Those negative cases will comprise all material to be relied on at trial, factual, expert, documentary, plus again a position statement that draws the threads together.
>
> No positive case can be advanced at this stage. It would entirely be carving chunks out of the positive cases that had been advanced… Pleadings may or may not be amended in the light of the positive and negative cases advanced, but our preference would be for the position statements and the underlying evidence to do the heavy lifting.
>
> …All parties should be under no illusions as to how the trial of these matters will go. Each party will be entitled to identify well in advance of trial exactly who it needs to cross-examine in order to make good its negative case. The party advancing a positive case is going to be required to produce the relevant witnesses for cross-examination, so that the attack intended by the responding party can be made good.
>
> …From this it follows there will be no rabbits from hats at trial. If you have not articulated your attack in your negative case, then things are going to go pretty badly for you at trial.
>
> …The parties, when framing their positive case and their attacks on those cases, will have close regard to the question of triability… If the issues cannot be unpacked and explored in that time, then the party whose approach has prevented this by not focusing will suffer the consequences."
>
> (CMC2 Transcript, 5:8-9:7)

26. In its ruling [2023] CAT 25, the Tribunal explained what was expected in relation to positive and negative cases. As regards the former, the CR "and any defendant electing to do so, would file and serve signed witness statements of fact, signed expert reports and all documentary evidence that they intend to rely upon in support of their own positive case on the Overcharge and Pass-on Issues, together with a position statement explaining how, by reference to that evidence,

they intend to establish their case" (paragraph 11(1)). As regards negative cases, "each party minded to do so would file and serve signed witness statements of fact, signed expert reports and all documentary evidence that they intend to rely upon in response to the other party's Positive Case, together with a position statement explaining their response, by reference to that evidence" (paragraph 11(3))." The process to be adopted, therefore, was one where parties would produce positive and negative position statements which set out their case in full accompanied by all evidence relied upon. Those statements would be filed in parallel and not (as is usually the case) in sequence, so as to ensure that the parties focused on articulating their own positive case before critiquing that of any opposing party.

27. Pursuant to those directions, on 22 March 2024, the CR filed and served its PPS and supporting factual and expert evidence, as did the MOL Defendants, K Line and WWL/EUKOR. NYKK chose not to advance a positive case, instead writing to the Tribunal and the parties stating that "[i]t is for the [CR] to prove its case." The letter included a general caveat that "…the Fifth Defendant's position remains as pleaded in its Defence, and it reserves the right to rely (in its negative position statement and at trial) on any evidence filed and served at any time by any of the other parties in these proceedings".

28. The Twelfth Defendant ("CSAV") entered into a collective settlement agreement with the CR before the deadline for positive cases fell due, meaning no position statement was ever filed on its behalf.

29. NPS were exchanged by all remaining parties (including NYKK) on 26 July 2024. Although the CR, MOL Defendants, K Line and WWL/EUKOR filed supporting evidence to accompany their NPS, NYKK did not, and K Line was the only defendant to instruct and produce industry expert evidence.

30. K Line has now reached a settlement with the CR which was approved by the Tribunal on 5 December 2024. The significance is that K Line will no longer participate in the trial of these proceedings and the evidence filed on its behalf will formally cease to be the evidence of any party to these proceedings. It is against that background that the MN Defendants seek to rely on the industry

expert evidence filed by K Line in addition to seeking permission to call the relevant witnesses, being Messrs Chaisty, Good and Finn (the "K Line Industry Experts"). We refer briefly to Mr Cunningham and Mr Dent in paragraph 65 below.

(2) The parties' arguments

31. Mr McGurk KC, on behalf of the MN Defendants, argued that no permission was needed to rely on the evidence of the K Line Industry Experts, as they could rely on it as of right as a matter of law. He argued it logically follows from this that he could also call those witnesses to give oral evidence at trial, in particular given that they had now been formally instructed by the MN Defendants and were willing to appear at the trial and be cross-examined on their reports. If, however, he was wrong on that, and we considered that permission was required, he made a narrow application seeking an order that the Tribunal exercise its general case management powers to permit the MN Defendants to call the Industry Experts to give oral evidence at trial.

32. At the PTR we granted the MOL Defendants permission, insofar as permission is required, to rely on the evidence of the K Line Industry Experts and to call those witnesses to give evidence at trial. It remains for us to determine whether permission is generally required in this Tribunal before a non-settling party can rely on expert evidence filed by a settling party and call such witness for cross-examination, and if so, whether NYKK should be afforded the same permission as the MOL Defendants.

33. The MN Defendants submitted that all of the Defendants adopted and relied upon the K Line Industry Experts, although it is right to say that only K Line formally instructed them. That evidence goes to a critical and central issue in the case, which is how shipping delivery charges are treated and whether or not the CR is correct and it is a form of silo-pricing, or whether the Defendants are right and it is overall pricing. If we were to refuse permission then that may effectively determine the outcome of the trial. It would cause irremediable unfairness, and deprive the Tribunal of important evidence relevant to the central issue in the case.

34. Mr McGurk took us to various passages in the PPS and NPS to demonstrate the extent to which the MN Defendants had relied on K Line's Industry Expert Evidence. The MOL Defendants expressly made clear at paragraph 3 of their PPS that they adopt and rely upon the K Line Industry Expert Reports. Mr McGurk drew to our attention the dates of the reports and PPS, which were only a matter of days apart, and of course it goes without saying that the MOL Defendants must have been provided with those reports before stating their reliance on them. The MOL Defendants' economic expert also refers to the Defendants' Industry Evidence. The PPS is replete with other references to passages from the Defendants' Industry Expert reports, in particular in relation to upstream pass-on.

35. NYKK did not file a PPS, but stated in its letter of 22 March 2024 that it is for the CR to prove its case. In that letter, NYKK made clear that it reserved the right to rely in its NPS and at trial on "any evidence filed and served at any time by any of the other parties in these proceedings".

36. Mr McGurk also referred to the CR's NPS, in which the CR treated Mr Chaisty, Mr Finn and Mr Good as having provided "the Defendants'" industry expert evidence, and not just that of K Line. The MOL Defendants' NPS again included a statement that they relied on the Industry Expert reports filed by K Line. Similarly, Dr Bagci also referred to that evidence. NYKK's NPS also referred to the Industry Experts' reports filed in support of K Line's PPS and NPS. This was, Mr McGurk submitted, consistent with what NYKK had foreshadowed in the 24 March 2024 letter.

37. As to the first question, Mr McGurk KC argued that permission was not needed because it followed from the principle set out in CPR 35.11 that a non-settling party could rely on the evidence of a settling party so long as permission has already been given for that evidence and it has already been filed. CPR 35.11 provides that:

> "Where a party has disclosed an expert's report, any party may use that expert's report as evidence at the trial."

38. CPR 35.11 is not binding on this Tribunal but was relied on by Mr McGurk on the basis that the Tribunal's Guide to Proceedings 2015 (the "Guide") makes express reference to Part 35. Paragraph 7.65 of the Guide, in particular, provides that:

> "As regards expert evidence, the Tribunal will take into account the principles and procedures envisaged by Part 35 of the CPR, notably that expert evidence should be restricted to that which is reasonably required to resolve the proceedings. It is for the party seeking to call expert evidence to satisfy the Tribunal that expert evidence is properly admissible and relevant to the issues which the Tribunal has to decide and would be helpful to the Tribunal in reaching a conclusion on those issues."

39. In support of their argument, the MN Defendants relied on the case of *Gurney Consulting Engineers v Gleeds Health and Safety Ltd* [2006] EWHC 43 (TCC) ("Gurney"). In that case, Gurney Consulting Engineers brought Part 20 Proceedings against various other parties, all of whom had since settled, except for Gleeds Health & Safety Limited ("Gleeds"). Gleeds sought to rely on the expert evidence of the settling parties, but Gurney objected on the basis that those entities were no longer parties to the proceedings and therefore argued that CPR 35.11 could not apply. For that reason, Gurney submitted that Gleeds required the court's permission to reintroduce the reports into evidence.

40. HHJ Coulson decided that CPR 35.11 applied, and that it was therefore not necessary for a party to seek the permission of the court to rely on an expert's report which had already been disclosed in the proceedings, and for which permission had already been given:

> "[6] In my judgment, the answer to Mr Sutherland's two points can be found in CPR 35.11 itself. It only applies where party A has already disclosed an expert's report and party B wants to rely on it as evidence at the trial. The disclosure of party A's report could only have occurred in accordance with CPR 35.4. In other words, it is a fundamental assumption within CPR 35.11 that there has already been compliance with CPR 35.4, and the report which party B now wishes to use is one for which the court has already given permission. In such circumstances, it is not necessary for party B to seek permission all over again; party B merely wishes to use a report for which permission has already been given.
>
> [7] Similarly, because CPR 35.11 assumes that party A's report has been disclosed in accordance with CPR 35.4, it does not matter whether, sometime after disclosure of that report, party A ceased to be a party to the proceedings. The reference to "a party [that] has disclosed an expert's report" in CPR 35.11 cannot be limited to those who happen to be parties to

> the proceedings at the time that that report is sought to be used by another: there is nothing in the rule which could limit its scope in that way. The reference in r.35.11 is to any party who has disclosed a report in accordance with r.35.4, whether they subsequently remain a party to the proceedings or not."

41. Mr McGurk argues that the same principle must apply to expert evidence filed in this Tribunal, particularly in circumstances where the MN Defendants have expressly relied, to date, on the evidence of the K Line Industry Experts. He submitted that the CR's opposition at this stage was an "opportunistic attempt to generate litigation windfall" and nothing more than an attempt to force MOL and NYKK to fight the case at trial with one hand tied behind their back.

42. As a more general point, the MN Defendants argued that the Tribunal would be assisted by the inclusion of the evidence of the Industry Experts at trial and, for that reason, its omission would hinder the Tribunal's understanding of the case as a whole.

43. In seeking to persuade the Tribunal that the MN Defendants should be given permission to call the K Line Industry Experts to give oral evidence at trial, Mr McGurk relied on the case of *Shepherd & Neame v EDF Energy Networks (SPN) Plc* [2008] EWHC 123 (TCC) ("Shepherd"). The primary question in that case was whether CPR 35.11 applied so as to allow a non-settling party to rely on the expert evidence of a settling party in circumstances where the non-settling party had already adduced its own. Mr Justice Akenhead decided (applying *Gurney*) that it did. Mr McGurk pointed, in particular, to the Court's reasoning at [14], which he argued supports the proposition that an expert of a settling party can be called to be cross-examined at trial:

> "[14] I am of the view that in the circumstances of this case the claimants are entitled to rely upon the reports of Mr Bourdillon and MR Coates pursuant to CPR r 35.11; my reasons are as follows; (a) CPR r 35.11 gives them an unqualified right to do so. (b) It is logical that, if the parties have complied with and relied upon court orders, as here, with regard to the service of expert reports and to the production of joint statements setting out what the experts agree and disagree about, any party remaining in the proceedings can rely, as evidence, upon the reports of experts whose clients were, but are no longer, active parties to the proceedings. They will have conducted themselves on the basis that all the experts will be giving evidence at trial. (c) Even if CPR r. 35.11 gave me a discretion, and in any event, pursuant to case management powers, I would allow the claimants to rely upon these other reports. The five experts undoubtedly spent a

> considerable time talking together and producing four joint statements (albeit Mr Bourdillon did not contribute to the fourth). Those statements are before me in any event and contain the views of Mr Bourdillon and Mr Coates. To understand them in context, it is likely to be necessary to understand what their reports say. (d) It is not disproportionate to permit the claimants to rely upon these reports as evidence. If the case against the second and third defendants had proceeded, they would have been able to do so and EDF must have prepared for trial upon the basis that Mr Bourdillon and Mr Coates would have given evidence. There is no prejudice particularly to EDF who can either call the two experts or rely upon the factors set out in para 11 of the *Gurney* judgment. I have made it clear in argument that I would permit EDF's counsel to cross-examine them if called pursuant to any witness summons issued by EDF…"

44. Again, as a more general point, Mr McGurk submitted that the Tribunal should grant permission to call the K Line Industry Experts on the basis that it would assist the Tribunal in reaching its decision. Further, he asked rhetorically, as a practical matter how were their reports to be dealt with given that they have now been extensively cross-referred to by all parties.

45. The CR submitted that the MN Defendants could not rely on the evidence of the K Line Industry Experts as of right and submitted that a formal application was required. The CR also asked the Tribunal to refuse the application to call the K Line Industry Experts on the basis that it would cause the CR substantial prejudice were this evidence to be reintroduced this close to trial. That prejudice is said to arise in two ways. First, it circumvents and is inconsistent with the directions given by the Tribunal relating to PPS and NPS and procedurally unfair for the MN Defendants to be able to benefit from the K Line Industry Expert evidence in circumstances where they chose not to instruct experts themselves or jointly with K Line. Secondly, it is said to be prejudicial in the context in which the class representative has reached a settlement with K-Line and it would deprive the CR of at least part of the perceived benefit of having settled with K Line. To permit the MN Defendants to rely on the Defendants Industry Experts is a procedural rabbit out of the hat, and unexpected.

46. Ms Ford KC submitted on behalf of the CR that these arguments carried even more weight in the context of NYKK which had not only chosen not to instruct any experts but had also opted not to present a positive case. Permitting reliance on K Line's expert evidence at this stage would, she said, be akin to permitting

NYKK to change course and advance a positive case, with the perverse effect of granting them an unfair advantage at trial.

47. We were referred to a letter from the CR's solicitors to the Defendants dated 27 March 2024 which specifically referred to the position of NYKK, expressed surprise at the lack of a PPS and stated that:

> "2.2 For the avoidance of any doubt, our client's position is that – as the Fifth Defendant has elected not to lead any evidence or position statement in support of the "overall pricing" theory … the Fifth Defendant is now precluded from arguing that an "overall pricing" methodology is the correct approach and/ or that it would produce a different result from the application of the Class Representative's "silo pricing" approach.
>
> 2.3 In addition, to the extent that the Fifth Defendant attempts to raise issues as part of its Negative Position Statement which ought properly to have been addressed as part of a Positive Position Statement (including but not limited to any suggestion or reliance on an overall pricing theory being more appropriate than the approach taken by the Class Representative and/ or leading to a more favourable result for any or all of the Defendants) our client will forcefully object to this as an abuse of process."

48. In response, by letter dated 9 April 2024, NYKK referred to its letter of 22 March 2024 and continued:

> "NYKK considers that it is not precluded from arguing at trial, consistent with its Defence by reference to any evidence served by any party in the proceedings, that the *"overall pricing"* methodology is the correct approach and/ or that it would produce a different result from the application of the *"silo pricing"* approach. Indeed the proposition that the Class Representative's approach is flawed as a matter of law and incapable of establishing loss is, fundamentally, a negative or responsive position rather than a positive case."

49. The CR then responded on 7 May 2024, prior to submission of NPS, to the effect that it was open to NYKK to argue that the CR's approach has failed to establish loss, but was not open to NYKK to argue as a matter of pure assertion and without any factual or expert evidence that had the CR taken an alternative approach to seeking to prove its case, the alternative method would have shown that there was no loss to the class. That letter went on to state that the NPS could attempt to criticise the work of Mr Robinson (the CR's expert economist), but could not argue that there is an alternative methodology which would have demonstrated that the class suffered no loss. A positive case would be required to do that. That letter reiterated that it was no longer open to NYKK to argue

that the proper approach is the overall pricing approach, and that using that approach, the outcome would be different to that found by Mr Robinson.

50. Ms Ford drew our attention to paragraph 11 of HHJ Coulson's judgment in *Gurney* (cross-referred to in the passage to which were referred by Mr McGurk):

> "[11] …Although I consider that, in general terms, it would be artificial for me to ignore entirely the views of the other engineering experts, it should not be thought that any great weight can be attached to the views of any expert who will not give oral evidence at the trial. Moreover, the fact that the majority of the engineering reports reach broadly similar conclusions on causation is also, of itself, of little account: cases of this kind are decided by reference to the quality of the expert evidence adduced at trial, and in particular the oral evidence. They are not determined by weight of numbers."

51. In the course of argument, she submitted that the position relating to K Line's Industry Expert reports, which are already filed and to which various other reports and documents now cross refer, is now one of the weight to be attached to them. She submitted that the decision in *Shepherd* is to the same effect. She sought to draw a distinction between the latter and the present situation on the basis that *Shepherd* concerned a party (EDF) resisting the application of a non-settling party which sought to rely on the expert report of a settling party. The Court gave EDF the option of issuing a witness summons so that the witness could be cross-examined. It was not a case in which the Court gave permission to the person seeking to rely on that report to call that witness itself.

52. In the course of argument, Ms Ford submitted that it was open to the MN Defendants to have applied at the time of the PPS or NPS for permission to adduce the K Line Industry Expert evidence but that it is too late now.

53. On the issue of prejudice, Ms Ford fairly accepted that her client was well aware of the contents of the K Line Industry Expert reports, but reiterated her position that it was incumbent on the MN Defendants to produce their position statements supported by all of the evidence on which they intended to rely, and that if they cross-referred to that adduced by others it was at their own risk if those parties happened to settle. If the MN Defendants had wished to adduce that evidence at trial they ought to have ensured that the experts were jointly instructed.

(3) Analysis

54. The starting point is the Tribunal's general case management powers as set out in Rule 19 of the Tribunal Rules 2015. The relevant provisions are:

> 19. – (1) The Tribunal may at any time, on the request of a party or of its own initiative, at a case management conference, pre-hearing review or otherwise, give such directions as are provided for in paragraph (2) or other directions as it thinks fit to secure that the proceedings are dealt with justly and at proportionate cost.
>
> (2) The Tribunal may give directions –
>
> …
>
> (f) as to the evidence which may be required or admitted in proceedings before the Tribunal and the extent to which it must be oral or written;
>
> (g) as to the submission in advance of a hearing of any witness statements or expert reports."

55. When it comes to expert evidence, as paragraph 7.65 of the Guide makes clear, we will take into account the principles and procedures envisaged by Part 35 of the CPR. However, there is no equivalent rule to CPR 35.11 in this Tribunal. We therefore consider that it is necessary for the MN Defendants to apply for permission to rely on the K Line Industry Expert Evidence, in addition to applying for permission to call those witnesses. It was a little unclear in the course of the hearing whether the MN Defendants were, in fact, applying for both. Initially it appeared the application related only to the latter, and not to the former (on the basis permission was not required), but there was a suggestion in later submissions that if permission was required to rely on the evidence, then Mr McGurk was making that application. In any event, it is open to us to make an order of our own motion if we see fit.

56. When considering whether or not we should make such an order it is necessary to consider the position in light of the specific directions given in this case in relation in particular to the provision of PPS and NPS.

57. We do not accept the CR's submission that the effect of the Tribunal's Ruling at CMC2 is that the Defendants were required to adopt one of two procedural routes: either agree to act jointly - as one - in relation to their position statements,

or alternatively to act entirely separately, instructing their own experts to opine on the points that they wished to run even though that may, for example, prove duplicative of the work undertaken by other Defendants. There is nothing in the Ruling or the Directions Order to prevent the Defendants from adopting a more flexible approach and dividing their efforts, or relying on evidence produced by others as long as their respective positions are clear.

58. In the case of the MOL Defendants they have clearly identified the areas of K Line Industry Expert evidence on which they place reliance for the purposes of both their PPS and NPS.

59. The position in relation to NYKK is more complicated given that it has not submitted a PPS. On one analysis, to assert a position that it is overall pricing that applies and not silo-pricing can be seen as putting forward a positive case. On another, it is a negative case because it is used to attack the CR's positive assertion that it is silo-pricing that applies. NYKK still does not assert a positive case on the basis of economic expert evidence, in contrast to the case put forward by the MOL Defendants. There is plainly a disagreement between the CR and NYKK as to which side of the line this falls – positive or negative – and that is writ large in the correspondence between them. However, what is clear is that the CR is well aware that NYKK challenges the CR's silo-pricing approach, and that NYKK has considered it appropriate to set out its position in its NPS – including by reference to the K Line Industry Expert reports. For that reason, we have concluded that there is no reason to treat NYKK differently to the MOL Defendants.

60. We do not accept the argument that the CR will be prejudiced should we grant permission because it will be deprived of a benefit it assumed it would get from settling with K Line, namely the removal of the K Line Industry Expert evidence from the trial. That was a legal and commercial assessment on the part of the CR and cannot bind this Tribunal's exercise of its case management power.

61. We note that the CR accepted that it was open to the MN Defendants to have applied sooner to adduce this evidence, and simply asserts that it is too late now. In circumstances where the CR is well aware of the contents of the evidence,

and has been preparing for trial on the basis that it will be adduced, and the experts cross-examined, there is no rabbit being pulled from a hat.

62. The balance of prejudice is plainly in favour of permitting the MN Defendants to rely on it. The Tribunal will be assisted by it, and the prejudice to the MN Defendants in refusing permission is plainly significant as it will pull the rug from under what has been understood by all parties to be a central issue in this case. In particular, were we to exclude NYKK from relying on K Line's evidence it would be a decision that essentially turned on a decision to articulate its argument (by reference to the evidence) in its NPS rather than file a PPS. This is not a case where NYKK has failed, until now, to articulate its argument at all. We note in that regard that it is not suggested by the CR that to put forward an overall pricing argument is inconsistent with NYKK's Defence.

63. Our conclusion is consistent with the application of the principle set out in CPR 35.11 as articulated in *Gurney* and *Shepherd*: First, the K Line Industry Expert Reports were disclosed by a party to these proceedings, in circumstances where this Tribunal has given permission for that report to be used by K Line in the way that the MN Defendants seek to use it, and have to date used it by expressing their reliance on it. Secondly, the parties have prepared themselves up until this PTR on the basis that these experts will be giving evidence at trial. Thirdly, other documents and expert reports in this case are underpinned by, and cross refer to the K Line Industry Expert Reports, and it is important that we understand that evidence in its proper context when reaching our Decision.

64. We also consider that the MN Defendants should have permission to call the K Line Industry Experts. The parties have up to this point prepared on the basis that those witnesses would be called, and their evidence has been relied upon by all of the Defendants. The evidence goes to a critical issue in the case and underpins the evidence of the economic expert reports (including that given by Dr Bagci on behalf of the MOL Defendants). The K Line Industry Experts are now instructed by the MN Defendants to provide the same evidence in the same terms: a step that the CR accepts would have been appropriate at an earlier point in these proceedings. It is unsatisfactory and inappropriate for it to be suggested that there should now be no cross-examination of those witnesses and the

argument be reduced to a question of the weight to be attached to it. If the CR does not wish to cross-examine, then that is obviously a different matter, but given the permission we have granted for the MN Defendants to rely on the Industry Expert Reports, the CR should have the opportunity to do so. We accept that the practical solution is for the MN Defendants to call the K Line Industry Experts to give evidence at trial.

65. Finally, we also grant permission for Mr Cunningham and Mr Dent, who are factual witnesses, to be called and give evidence on behalf of the MN Defendants. The position as regards Mr Cunningham is unusual. He has provided two witness statements, one in support of K Line in relation to upstream pass-on, and another statement in support of the CR's case on downstream pass-on. As such, he would be attending trial anyway. We do not see any sense in not hearing all of his evidence, and again we do not consider that the CR will be prejudiced by this. We heard no real objection from the CR in relation to the evidence of Mr Dent.

D. THE PSA STATEMENTS

66. The remaining contentious issue from the PTR on which we indicated we would reserve our decision is the MN Defendants' application for a direction that three witness statements (the PSA Statements) produced for the purposes of other litigation, namely case 1435/5/7/22(T) *PSA Automobiles SA & Ors v Autoliv AB & Ors* (the "PSA Litigation") and any transcripts of the relevant cross-examination at trial be added to the trial bundle and relied upon by the MN Defendants.

67. The PSA Litigation concerns overcharges said to have been suffered by PSA Automobiles SA and certain of its affiliates (together "PSA") as a result of alleged anti-competitive conduct among suppliers of vehicle occupant safety systems. The MN Defendants submit that the statements of three of the PSA witnesses are relevant to the issues in these proceedings: Mr Couturier; Mr Gautier; and Ms Biancheri. The relevance of their evidence is said to be that it addresses new vehicle price-setting as well as the relationship between costs

and price at several of the brands referred to as "Included Brands" in these proceedings. In particular:

(1) Mr Couturier provided a statement dated 1 February 2024 in relation to Opel/Vauxhall which addresses the benchmarking of recommended retail prices for new vehicles against competitor pricing; costs management; the role of profitability targets and price -setting.

(2) Mr Gautier provided two statements, the first dated 15 September 2017 in relation to Peugeot/Citroen which addresses the determination of list prices; the role of profitability; and retail sales in the 2010-2011 period; and the second dated 30 January 2024 which confirms his earlier evidence and also addresses price benchmarking.

(3) Ms Biancheri provided two statements in relation to Fiat/Chrysler, the first of which addresses new vehicle pricing generally; the role of costs; the pricing of new Fiat Chrysler vehicles; price changes after launch; and the relationship between margins and sales, and the second of which confirms the contents of the first.

68. The MN Defendants say that this evidence is "squarely relevant" to the present proceedings because it supports their claim that "Included Brands" typically sought to manage and recover deep-sea shipping costs alongside the other costs involved in producing vehicles as part of the general costs management and price-setting processes described in the PSA Statements, and did not seek to recover delivery shipping costs in a form of silo such as that contended for by the CR.

69. In the course of argument, Mr Quayle for the MN Defendants submitted that the PSA Statements were needed despite us having granted permission to the MN Defendants (or more accurately, at that stage the MOL Defendants) to rely on and call evidence from K Line's Industry Expert Evidence in support of their theory of overall pricing. This is said to be because the PSA Statements are likely to be of value in testing the evidence of the CR's industry experts by providing first hand evidence of how the OEMs dealt with new vehicle costs

and prices. The MN Defendants do not intend to call any of the PSA witnesses for cross-examination, but intend to rely on the statements as hearsay evidence of the truth of their contents.

70. The MN Defendants accept that the process is one-sided in the sense that, whereas they intend to use this evidence to test the CR's witnesses, the CR will be unable to cross-examine the PSA witnesses, but ultimately say that it is open to the CR to make submissions on weight.

71. Mr Quayle referred us to the decision in *Agents' Mutual Limited v Gascoigne Halman Limited* [2017] CAT 5, at [8] to [9] where the Tribunal reiterates the fact that strict rules of evidence do not apply before the Tribunal; that the Tribunal will be guided by circumstances of overall fairness, rather than technical rules of evidence; and that the consequence of this, at least as regards disclosed documents, is that there is rarely an argument as to whether a document is admissible, and the argument is generally as to the weight to be attached to the document in issue.

72. The governing principles that we must apply in determining the MN Defendants' application are set out in Rule 4 of the Tribunal Rules, and include the obligation to ensure that each case is dealt with justly and at proportionate cost.

73. The CR objects to the PSA Statements and any relevant transcripts being admitted on three grounds. First, it is said that the extent to which the Tribunal can place any weight on them is unclear. These statements were given in the context of proceedings concerning specific car components (such as seatbelts, airbags and steering wheels), and the evidence relates to those types of input cost: not delivery charges. As such they have no application to the present proceedings which are concerned with whether deep-sea shipping costs were treated differently from other variable input costs in OEM's pricing strategies and costs recovery processes.

74. Our attention was drawn to the fact that the first statements of Mr Gautier and Ms Biancheri were in fact prepared for the purposes of proceedings relating to

another car part – automotive bearings – and their second statements were simply confirming that the evidence they gave in that context applied equally to Occupant Safety Systems. The CR submits that the Tribunal lacks the information to assess whether the evidence is material to the issues in this case at all.

75. Second, the CR submits that the fact that the witnesses have been cross-examined in the PSA litigation is irrelevant where that cross-examination in those proceedings was not on the relevant issue in dispute here, which is the cartel relating to deep sea shipping costs – not safety systems in cars. In the absence of cross-examination in these proceedings, there is no opportunity to test the credibility of those statements in the context relevant to these proceedings.

76. Thirdly, it would amount to procedural unfairness to admit the PSA Statements at this stage given that all evidence relied upon ought to have been adduced together with the Positive or Negative Position Statements in March or July 2024 respectively.

77. In answer to the CR's objections, the MN Defendants submit that the evidence is important because it is provided by OEMs, and is not limited to the specific kinds of costs at issue in the PSA litigation (namely safety systems). The MN Defendants wish to use the PSA Statements for the purposes of testing the CR's evidence that deep-sea shipping costs are treated differently from other components of the overall vehicle-cost, and in particular the evidence of Mr Tozer, who gives evidence as to cost management by Vauxhall (as does Mr Couturier).

78. As regards procedural unfairness, the MN Defendants submit that they were unable to put this evidence in as part of their positive case (a comment that must relate only to the MOL Defendants, given NYKK did not submit a positive case). This evidence only came to light once the PSA witnesses had given evidence at the recent PSA trial. In any event, the MN Defendants are not seeking to call the PSA witnesses at trial, but only to use the statements for the purposes of cross-examination. The CR's industry experts and witnesses will

have the opportunity to respond to what the PSA Statements say in cross-examination. Further, the CR will be able to make submissions as to the weight that should be attributed to them.

79. In any event, the MN Defendants identified the PSA Statements to the CR approximately two months prior to trial, as well as identifying the particular passages they consider to be relevant to these proceedings. In those circumstances, there is no material prejudice to the CR.

80. A number of difficulties arise in relation to the use of the PSA Statements, at least in the way that the MN Defendants propose to use them:

(1) None of the PSA witnesses were actually asked to consider the position relating to shipping costs, or whether they were treated in the same way as the other costs that the PSA witnesses give evidence about. It follows that they were not cross-examined about them either. There is no statement from any of the PSA witnesses to the effect that they confirm that what is said in relation to Occupant Safety Systems applies equally to delivery charges, and nor are they available to be tested on that proposition.

(2) The PSA witnesses only recently gave evidence in the course of the PSA proceedings and we do not yet know what findings the Tribunal will make in relation to their evidence, that Tribunal having had the benefit of hearing cross-examination. The MN Defendants say that the possibility that the Tribunal may hand down judgment in the meantime is not a reason to exclude the evidence now. If judgment is handed down, and it was favourable to the CR, the CR would be able to make submissions in relation to that. However, it is an unusual situation to find two Tribunals referring almost concurrently to the same evidence, for different purposes, one of which will see cross-examination and the other of which will not.

81. The MN Defendants posited a scenario where, instead of being contained in a witness statement, they sought to use an article in a magazine or journal on

vehicle pricing in the course of cross-examination, and sought the CR's industry expert's views on it. It was submitted that it would not be suggested in that instance that it could not be done. It would be treated as a matter of the weight that could be given to that article in circumstances where it was not known whether the author had delivery charges in mind when he wrote it.

82. It is not immediately obvious to us that the evidence will necessarily be probative of the issues that we will be required to determine in this case given that it was prepared without those issues in mind. However, we note that the CR has been able to address and articulate in its submissions the difficulties in placing any reliance on the PSA Statements. The CR's submission that it is "unclear" what weight should be accorded to these statements leaves open the possibility that it may transpire that we should give them some weight. We are satisfied that the Tribunal will be able to assess matters of weight, bearing in mind the hearsay nature of the PSA Statements and the lack of cross-examination of the deponents.

83. We are also satisfied that the CR will not suffer prejudice if the PSA Statements and relevant transcripts are admitted for the purposes of cross-examination. It is late in the day, but we are also satisfied that the MN Defendants could not have adduced this evidence sooner.

84. We do not consider that the PSA Statements and transcripts constitute "rabbits from hats" as warned against at CMC2 (extracted above at paragraph 25). That statement, and the Tribunal's approach to case management in these proceedings, should be read in light of the judgment of the Court of Appeal ([2022] EWCA Civ 1701), which warned against the possibility that the Tribunal would be faced at trial with two independent and competing methodologies of loss which did not interrelate but could not both be right – "ships passing in the night". In seeking to rely on the PSA Statements and transcripts, we do not understand the MN Defendants to be departing from the cases set out in their position statements, or seeking to articulate a new line of attack.

85. It is not clear to us at this stage whether the PSA Statements will add anything to the industry expert evidence which we will be hearing, but we have borne in mind that the MN Defendants are not OEMs, and have no direct knowledge of issues of vehicle-pricing, and that the PSA Statements do emanate from OEMs and relate to vehicle-pricing: an issue that is plainly relevant in this case.

86. We are, therefore, satisfied that on balance the MN Defendants should have permission to rely on the PSA Statements and transcripts. Should the CR have concerns as to how they are deployed at trial, including in cross-examination, then we will obviously hear submissions at the relevant time. We lay down the marker that it will be incumbent on the MN Defendants to ensure that questions derived from the PSA Statements and transcripts are presented fairly and in their proper context. If the Tribunal has not ruled in the PSA proceedings at the conclusion of this trial, we will address that position at that time.

87. This Ruling is unanimous.

Bridget Lucas KC
Chair

Carole Begent

Dr Maria Maher

Charles Dhanowa O.B.E., K.C. (*Hon*)
Registrar

Date: 18 December 2024