IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Folio Nos. 267 of 2008 and 329 of 2008

BETWEEN

SOCIÉTÉ GÉNÉRALE

Claimant

and

(1) GOLDAS KUYUMCULUK SANAYI ITHALAT IHRACAT A.S.
(2) GOLDAS KIYMETLI MADENLER TICARETI A.S.
(3) MEYDAN DOVIZ VE KIYMETLI MADEN TICARET A.S.
(4) GOLDAS LLC

Folio 267 Defendants

AND BETWEEN

SOCIÉTÉ GÉNÉRALE

Claimant

and

(1) GOLDAS KUYUMCULUK SANAYI ITHALAT IHRACAT A.S.
(2) GOLDART HOLDING A.S.

Folio 329 Defendants

EXHIBIT SPTR1 - BUNDLE B

This is the Exhibit SPTR1 referred to in the Witness Statement of Simon Paul Timothy Rose dated 8th February 2016.

Morgan Rose Solicitors
Chancery House
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WC2A 1QU
Solicitors for the Defendants

No.	DOCUMENT DESCRIPTION	DATE	PAGE
1.	Re-Re-Amended Defence and Counterclaim	Undated	B1
2.	Order	2 July 2010	B46
3.	Order	8 October 2010	B53
4.	Hearing transcripts	2 July 2010	B56
5.	Hearing transcripts	8 October 2010	B162

Claim No. 2009 Folio 307
and 2009 Folio 1492

IN THE HIGH COURT OF JUSTICE

QUEENS BENCH DIVISION

COMMERCIAL COURT

BETWEEN

SOCIÉTÉ GÉNÉRALE

Claimants

-and-

(1) WÜRTTEMBERGISCHE VERSICHERUNG A.G.
(2) ROYAL & SUN ALLIANCE INSURANCE PLC
(3) NAVIGATORS INSURANCE COMPANY
(4) SWISS RE EUROPE S.A., UK BRANCH
(5) GREAT LAKES REINSURANCE (UK) PLC
(6) CAP MARINE ASSURANCE ET REASSURANCES SAS
(7) COOPER GAY & CO LIMITED

Defendants

RE[1]-RE-AMENDED DEFENCE AND COUNTERCLAIM

DEFENCE

1. Paragraphs 1-6 of the Re[1]-Re-Re-Amended Particulars of Claim are admitted, save that the proper title of the Second Defendant is Royal & Sun Alliance Insurance plc.

2. As to paragraph 7 of the Re[1]-Re-Re-Amended Particulars of Claim:

   (a) The contract of insurance is admitted but (for the reasons pleaded below) it (and each of the endorsements thereto) was voidable *ab initio* for material misrepresentation and/or non-disclosure and has been validly avoided.[1]

(b) The pleading of the material terms of the insurance from which the claim is said to arise is so sparse that the Claimants' case is not properly articulated. In particular the Claimants ~~have~~ failed to make clear in the Particulars of Claim whether their claim arises under the main terms of the insurance as placed at inception, or under a subsequent endorsement. In their Reply, the Claimants have subsequently pleaded that their '*case is under the Insurance only and not under any subsequent contracts between the parties*' (paragraph 5) and, in particular, have averred that they make no claim under Endorsement No. 0001 to the insurance contract which '*should be treated as a nullity ab initio*' (in response to, if not acceptance of the Underwriter Defendants' case on avoidance of the said endorsement, as set out at paragraphs 26 to 32 below).

(c) Prior to the commencement of this action, the Underwriter Defendants wrote a detailed letter to the Claimants dated 8th July 2008 setting out the Underwriter Defendants' position and requesting information and an explanation of the Claimants' case. No substantive response was ever received. Accordingly basic information relevant to the Claimants' case on coverage and on quantum is lacking.

(d) It is admitted that the obligations of the Underwriter Defendants are several, not joint, and are confined to the percentages appearing in the insurance. The quotations from the insurance are admitted. The Underwriter Defendants will refer to the full terms at trial.

(e) The Underwriter Defendants set out material terms of the insurance below but reserve the right to refer to all other terms of the insurance for their full terms and effect once the Claimants' case is more fully pleaded.

Avoidance of the Insurance Contract for Misrepresentation / Non-Disclosure

2A. For the reasons set out below, in the case of each Underwriter Defendant, the insurance contract (and each of the endorsements thereto) was voidable *ab initio* and each Underwriter Defendant is entitled to and hereby avoids the same.

2B. The insurance contract and/or each of the endorsements thereto was a contract of the utmost good faith. In particular:

(a) The Claimants, acting through their agents to insure, were obliged to disclose to each of the Underwriter Defendants every material circumstance which was known to the Claimants or which in the ordinary course of business ought to have been known to them, and, insofar as the Claimants failed to make such disclosure, the Underwriter Defendants (and each of them) were and are entitled to avoid the insurance contract and/or each of the endorsements thereto.

(b) Further, the Claimants, acting through their agents to insure, were under a duty not to make material misrepresentations to the Underwriter Defendants (or any of them) and, insofar as material misrepresentations were made, the Underwriter Defendants (and each of them) were and are entitled to avoid the insurance contract and/or each of the endorsements thereto.

2C. Each of the said duties arose at the following times:

(a) before and at the time of placement of the insurance contract with each of the Underwriter Defendants;

(b) before and at the time of the agreement of the endorsements thereto.

2D. Prior to the conclusion of the insurance contract, the Claimants, acting through their agents to insure, failed to disclose all material facts and circumstances and/or made material misrepresentations and/or failed to observe the utmost good faith, as follows.

2E. The Claimants represented to each of the Underwriter Defendants, by the terms of the presentation documents which were shown to them during placement, (i) that, in 2006, there had been no storage of precious metals at the premises of customers and/or (ii) that no such storage had taken place in 2007 (up to the date that the insurance contract was concluded) and/or (iii) that no such storage was intended by the Claimants to take place during the period of the insurance contract. In

particular, the document which was headed '*LME Policy ... Precious metals-exposure 2006*' stated (amongst other things) as follows.

	Gold	*ozs*	*Average Value*
Storage at:	*Refiners*		
	South Africa No1	*1,773,849*	*$1,082,048,165*
	Switzerland	*2,001,854*	*$1,221,130,940*
Total storage of Gold		*3,775,703*	*$2,303,179,105*
Shipment:	*From mines to refineries*		
	Mine 1	*267,634*	*$163,256,740*
	Mine 2	*47,924*	*$29,233,890*
	Mine 3	*1,564,100*	*$954,101,000*
	To customers		
	Turkey (Istanbul)	*3,329,359*	*$2,030,909,143*
	U.A.E. (Dubai)	*287,910*	*$175,625,100*
	UK (London)	*353,886*	*$215,870,581*
	India (Bangalore)	*74,377*	*$45,369,818*
	India (Chennai)	*9,597*	*$5,854,170*
	India (New Delhi)	*15,995*	*$9,756,950*
Total shipment of Gold		***5,950,783***	***$3,629,977,391***

By this document the Claimant purported to give the underwriters a fair presentation of the magnitude, distribution and location of the insured risk in the previous year, and an indication of the type of storage and transit risks to be expected in the insured year. Each of the said representations was material, but was also false. In fact, the Claimants knew that (i) very substantial quantities of gold (in particular) had been stored by the Goldas companies in 2006 and in January to March 2007; (ii) that such storage would continue (on an even greater scale) during the period of the insurance contract; and (iii) that the Claimants intended that such gold should be insured under the insurance contract. Further or alternatively, if and insofar as necessary, the Underwriter Defendants will say that the said representations were not made on reasonable grounds. In support of the foregoing allegations, the Underwriter Defendants will rely upon the matters set out hereunder.

2F. Further or alternatively, the Claimants failed to disclose the material facts and matters set out hereunder (each of which was known and/or deemed to be known to them), prior to the conclusion of the insurance contract. In particular (and without prejudice to the generality of the plea of materiality), these matters were material to any fair presentation of the risk which the Claimants allege that they intended to and did insure because of: (i) the scale of the Claimants' business with the Goldas group of companies; and/or (ii) the Claimants' intention to concentrate gold dealing in Turkey with this one group; and/or (iii) the absence of any check on the physical custody of the gold upon its arrival in Turkey or Dubai; and/or (iv) the absence of any steps to protect title or secure payment in Turkey or Dubai; and/or (v) the ignorance of the location(s) where gold was stored or the security of that location; and/or (vi) the moral hazard in entrusting gold in the above circumstances to the Goldas group of companies, being companies with minuscule net profits and cash flow problems.

PARTICULARS

(a) In 2006 and 2007, very substantial quantities of gold had been and/or were being provided to customers (in particular, the Goldas group of companies) for storage either on a short term 'back to back' or longer-term consignment basis.

(b) The storage (by customers) was taking place predominantly in Turkey, where the only customer was the Goldas group of companies (which was controlled by the Yalinkaya brothers). In this connection, the Claimants had adopted a deliberate strategy of dealing exclusively with the Goldas group of companies in Turkey so as to ensure that it (and the Claimants) gained a dominant or exclusive position in the market.

(c) The Goldas companies to which the Claimants were shipping gold (for storage) in Turkey were a jewellery manufacturer (Goldas Kuyumculuk) and two precious metals trading companies which were members of the Istanbul Gold Exchange (Goldas Kiymetli and Meydan Foreign Exchange). Most of the balance of the Claimants' precious metals storage business was

taking place in Dubai with another Goldas precious metals trading company, Goldas LLC.

(d) At all material times, the Goldas consignment business was (and was intended to remain) the key component and the predominant component of the Claimants' precious metals operations. Pending completion of the Claimants' disclosure exercise (and the assimilation of the disclosure), the Underwriter Defendants are able to give the following particulars of the foregoing allegation.

(i) In 2005, the Claimants shipped approximately 113,000 kg of gold to customers. Some 98% (approximately 111,800 kg) was shipped on consignment to the Goldas companies.

(ii) In 2006, the Claimants shipped approximately 126,626 kg of gold to customers. Some 89% (approximately 113,075 kg) was shipped on consignment to the Goldas companies. More particularly, the following quantities of gold were shipped on consignment to the Goldas companies.

MONTH	GOLDAS KIYMETLI	GOLDAS KUYUMCULUK	MEYDAN	GOLDAS LLC	TOTAL IN KGS
January	4800	2000	1000	500	8300
February	4000	2000	2000	500	8500
March	2500	2825	1000	500	6825
April	4500	1200	1700	500	7900
May	6500	2000	1300	1000	10800
June	8000	1100	1000	1000	11100
July	5800	2500	1500	500	10300
August	1000	1500	6500	500	9500
September	500	2500	6300	1250	10550
October	500	1500	7250	750	10000
November	500	2500	6500	1500	11000
December	500	1500	5800	500	8300
TOTAL	**39100**	**23125**	**41850**	**9000**	**113075**

(iii) At all material times up to the conclusion of the insurance contract, the Claimants intended to increase the total annual amount of gold

which was shipped on consignment to the Goldas companies to 150 metric tonnes.

(iv) In January and February 2007, the following shipments of gold had taken place.

MONTH	GOLDAS KIYMETLI	GOLDAS KUYUMCULUK	MEYDAN	GOLDAS LLC	TOTAL IN KGS
January	500	2650	9400	1500	14050
February	500	2500	4000	500	7500

(v) The quantities of gold which were shipped to the Goldas companies in March 2007 were as follows.

MONTH	GOLDAS KIYMETLI	GOLDAS KUYUMCULUK	MEYDAN	GOLDAS LLC	TOTAL IN KGS
March	500	3155	7200	2500	13355

(e) From 1 January 2006 to 22 March 2007, the ranges of quantities and values of gold which were on consignment with the Goldas companies (on any given day) were approximately as follows.

Goldas Co.	**Quantities**	**Approx. Value**[1]
Kuyumculuk:	15,995 - 121,562 tr. oz	$9.7m – $74m
Meydan:	63,980 - 207,935 tr. oz	$39m – $127m
Kiymetli:	15,995 - 111,965 tr. oz	$9.7m – $68.3m
Goldas LLC:	15,995 - 31,990 tr. oz	$9.7m - $19.5m

(f) During the period 1 January 2006 to 31 December 2006, the average quantities of gold which were being stored by each Goldas company (on any given day) were approximately as follows.

Goldas Co.	Average Quantity	Approx. Value[2]

[1] assuming a conservative average gold price of US$610 per tr. oz.

Kuyumculuk:	88,040.91 tr. oz (2,738 kg)	$53,604,955.10
Meydan:	93,729.19 tr. oz (2,915 kg)	$57,174,805.90
Kiymetli:	38,903.50 tr. oz (1,210 kg)	$23,731,135.00
Goldas LLC:	18,200 tr. oz (566 kg)	$11,102,000.00

In the premises, the total (average) quantity of gold on consignment to the Goldas group of companies (on any given day) in 2006 was approximately 238,873.60 tr. oz (or 7,429 kg), which amounted to an average (daily) exposure of approximately US$145,712,896.

(g) As the contemporaneous credit reports produced by the Claimants themselves showed, the net profits of each of the Goldas companies to which the Claimants were consigning gold were extremely low.

(i) In the case of Kuyumculuk, an internal credit report produced by the Claimants in May 2006 stated: '***Goldas Jewellery has 1717 M$ sales and 4M$ Net Profit. 0.2% of Sales.***'

(ii) For the year to 31 December 2005, Kiymetli is reported (within the Claimants) to have achieved sales of US$714.7m, but net income of only US$1.1m (i.e. a poor 0.1% net margin).

(iii) The other precious metals trading company in Turkey, Meydan, is reported (within the Claimants) to have achieved sales of US$1.02bn, but net profit of only US$0.7m (i.e. a poor 0.1% net margin).

(iv) For the year to 31 December 2005, Goldas LLC is reported (within the Claimants) to have achieved sales of US$42m but a low net profit of US$0.2m (i.e. a poor net margin of 0.4%).

Further, the companies' revenues were largely derived from bullion trading activities.

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[2] assuming a conservative average gold price of US$610 per tr. oz.

(h) Despite (i) the nature, size and value of the business that they were doing with the Goldas companies (and the nature of the commodity in which they were dealing) (ii) the fact that they were shipping most of the gold to Turkey and (iii) the low (net) profits of the companies to which they were entrusting the gold, the Claimants did not require the provision of letters of credit and took no security over the assets of the companies (or their holding company, Goldart Holding A.S.).

(i) The Claimants took no steps, at any material time, to verify the physical location of the gold which had been consigned to any of the Goldas companies, whether in Turkey or in Dubai.

(j) Further, the Claimants took no steps to ensure that the gold was shipped to the "Location" specified in Shipment Confirmation Notices issued by them in the case of each consignment, notwithstanding the fact that the Bullion Consignment Agreements ("BCAs"):

(i) provided that the Goldas company 'shall hold all Consigned Bullion in safe custody at the Location' (clause 8(a)(i)); and

(ii) required the Goldas company to subscribe and maintain insurance in respect of the consigned bullion (clause 8(a)(ii)) and, in the event, such local insurance identified the "Location" as the premises at which the said bullion was insured.

In the case of shipments to Turkey, the "Location" which was stipulated or agreed by the Claimants (with each Goldas company) was 24 Kayalar Sokak, 34010 Merter, Istanbul, Turkey, whereas the gold was actually delivered into storage (in all or most cases) at the Istanbul Gold Exchange ("IGE") (as stated in the receipt of shipment which was provided by the shipping company to the Claimants). The Claimants had no knowledge of the whereabouts of a consignment of gold after arrival at the IGE, which the Claimants and Goldas treated as delivery in Turkey and the end of transit. As for Dubai (where the Goldas group had only a first floor office space at Al Manzar Center, Al Ittihad Road, Dubai), the Claimants did not even know where gold was actually supposed to be delivered or stored, but

left the Goldas group to resolve delivery in Dubai with the carrier and store the gold as it saw fit.

(k) The Claimants took no steps to inspect or audit the gold bullion which was on consignment physically *in situ* (whether at the Goldas companies' premises, at the Istanbul or Dubai Gold Exchange or elsewhere). Instead, they relied upon "stock confirmation notices" which merely confirmed "outstanding transaction balances" (in respect of shipped bullion), stating the quantity (by weight) of gold which was on consignment but had not yet been priced or the quantity of gold on consignment which had been priced but not yet paid for. These were merely contractual balances, not reports on physical gold bars, each of which had a unique serial number. The Claimants never sought to identify the whereabouts of any specific bar and never made any inspection of (or researched) any storage location to appraise its security.

(l) Further or in addition, the Claimants did not include any provision in the BCAs with each of the Goldas companies which gave them a contractual right to inspect or audit the gold which was on consignment.

(m) The Claimants took no steps to identify the particular bars of gold (by serial number) which were being priced or purchased at any given time by each Goldas company.

(n) Nor did the Claimants include any provision in the BCAs requiring each Goldas company to keep the gold on consignment segregated from other gold bars or products (including such bars as might actually have been purchased from the Claimants) and/or marked clearly as the property of the Claimants.

(o) The Claimants took no steps to register their title to the gold on consignment in Turkey, so as to validate the retention of title clause in the BCAs. Nor did they take any steps to store the gold on consignment in the vaults of an appropriate alternative location (such as those of a security company or secured warehouse).

(p) Further, the Goldas companies were using and/or selling gold which was sent on consignment by the Claimants before paying for it and/or in order to pay for it, particularly in the case of "back to back" consignments.

(q) Further, the Claimants required little or no adherence by the Goldas companies to the important terms of the BCAs which concerned:

(i) the "maximum consignment period" of 30 days from delivery (which was the maximum period for which a shipment of gold could be held on consignment); in fact, the Claimants permitted gold to be held on consignment for periods as long as 3 months.

(ii) the "maximum consignment quantity" which differed as between the Goldas companies (and was not permitted by the strict terms of the contract to be exceeded at any stage during the term thereof) as follows.

Goldas Co.	**Maximum Quantity**
Kuyumculuk	64,000 oz (2000 Kgs)
Meydan	64,000 oz (2000 Kgs)
Kiymetli	16,000 oz (500 Kgs)
Goldas LLC	16,000 oz (500 kgs)

In fact (as is pleaded at sub-paragraphs (e) and (f) above), the Claimants frequently permitted quantities to be held on consignment which were vastly in excess of the stipulated maximum quantities. In addition, notwithstanding the strict terms of the BCAs, the Claimants had (as at June 2006) internally authorised the following limits:

Goldas Co.	**Maximum Quantity**
Kuyumculuk	160,000 oz (5000 Kgs)
Meydan	64,000 oz (2000 Kgs)

Kiymetli	16,000 oz (500 Kgs)
Goldas LLC	32,000 oz (1000 kgs)

(iii) the "location" at which consigned gold was to be held (as aforesaid).

(r) A CIF "Customs Invoice" and CIF "Invoice" were sent by the Claimants to the Goldas companies upon shipment of the gold (but prior to pricing or payment) which did not refer to the BCA (as required by the BCA itself) and did not state that title remained with the Claimants until receipt of payment, thereby enabling or facilitating the Goldas companies' trading, use or other dealings with the gold (prior to any payment of the price for such gold to the Claimants).

(s) The Goldas companies were well aware of the above course of dealings, including, in particular, the absence of any checks or interest by the Claimants in the physical whereabouts of the gold bars after consignment to the Goldas group.

(t) From about April 2006, due to cash flow problems in the Goldas group, the Claimants allowed Goldas Kuyumculuk to defer payment for certain consignments of gold and silver by granting it 'short-term' loans for the principal. However, since cash flow problems continued, the loans were not repaid, but were, in the event, rolled over and remained outstanding at the time when the insurance contract was concluded in March 2007. The said loans were provided pursuant to an unsecured credit/loan facility of US$10m which had been granted by the Claimants to Goldas Kuyumculuk which (it is to be inferred) was unable to pay for gold that it was taking out of consignment due to cash flow problems. More particularly, the following loans were extant as at the date of placement of the insurance contract.

(i) A 2 month loan of US$3,774,820 which had been rolled over 5 times since it was made on 3 April 2006. The loan was in respect

of 200 kg of gold (which had been delivered to Goldas Kuyumculuk on 3 March 2006 on a 1-month consignment basis).

(ii) A 3 month loan of US$3,770,021 which had been rolled over twice since it was made on 25 September 2006. The loan was in respect of 200 kg of gold (which had been delivered to Goldas Kuyumculuk on 24 July 2006 on a 2-month consignment basis).

(iii) A 6 month loan of US$1,265,935 which was granted on 7 March 2007. The loan was in respect of 3000 kg of silver (which had been delivered to Kuyumculuk on 29 January 2007 on a 2-month consignment basis).

The Underwriter Defendants reserve the right to plead further hereunder following the completion of disclosure.

2G. Each of the foregoing misrepresentations and/or non-disclosures, which were made by the Claimants and/or Cooper Gay (as set out in paragraphs 2E and 2F above) and were material, were made in order to induce each of the Underwriter Defendants to write the insurance contract and each of the underwriters was so induced; namely, Mr Morris of the First Defendant; Mr Quinn and/or Ms Ramsden of the Second Defendant; Mr Mummery and/or Mr Milner of the Third Defendant; Mr Pavis of the Fourth Defendant; and Mr Garrido of the Fifth Defendant. Without prejudice to the foregoing, had a fair presentation been made, each of the Underwriter Defendants would have declined the risk, alternatively would have only agreed to insure provided (in particular): a) the precise locations in which gold were to be stored were declared and surveyed and their security approved by independent surveyors; b) the terms of the insurance excluded infidelity and taking absolutely by the Goldas group or any director or officer thereof and c) additional premium was paid.

2H. Further, at the time of placement, it was represented orally to Mr Mummery by Mr Glover of Cooper Gay that all storage of precious and non-precious metals was and would continue to be at LME or COMEX warehouses. The said representation was false as none of the storage of gold which had taken place in 2005, 2006 or 2007 and/or which was intended and expected to take place after placement in

2007 or 2008 was at LME or COMEX warehouses. The said misrepresentation was material and induced Mr Mummery to write the risk.

2I. In the premises, each of the Underwriter Defendants was and is entitled to avoid the insurance contract and hereby does avoid the same.

2J. Further, the Claimants and/or Cooper Gay failed to disclose, prior to the First and/or Second Defendants agreeing to write endorsements 0001 and/or 0002 and/or 0003 and/or 0004 to the insurance contract, that the writing of the insurance contract had been induced by the material misrepresentations and/or non-disclosures which are set out at paragraphs 2E to 2F above. This was a material non-disclosure and/or an implied (mis)representation (to the effect that the Claimants and/or their agents to insure had complied with the duty of utmost good faith in the placement of the insurance contract) which induced Mr Harding and/or Ms Jennett and/or Mr Williams of the First Defendant and/or Mr Quinn and/or Ms Marsh and/or Mr Beattie of the Second Defendant to write endorsement 0001 and/or 0002 and/or 0003 and/or 0004. In the premises, each of the Underwriter Defendants was and is entitled to avoid endorsement 0001 and/or 0002 and/or 0003 and/or 0004 to the insurance contract and hereby does avoid the same.

2K. By a letter dated 25th January 2011, the Underwriter Defendants have tendered the return of premium paid in respect of the insurance contract and endorsements 0002, 0003 and 0004 thereto.

2L. The following paragraphs of the Re-Amended Defence are pleaded without prejudice to the Underwriter Defendants' case that there is no valid and subsisting insurance contract and/or endorsement thereto.

The Storage Warranties

3. The insurance provided, inter alia,

'*Warranted all storage at LME and/or COMEX approved warehouses.*
Warranted storage of precious metals is insured on a pure contingency basis.'

4. In or about August 2007 the Underwriter Defendants were approached by the Claimant's placing broker, Mr Glover of Cooper Gay, with a draft ~~agreed to~~ Endorsement 0001 which stated as follows:

'*Contingency coverage as per the general policy conditions*
Excluding Directors and Officers liability
Excluding Infidelity absolutely.

Location: Yalinka Holding AS Kayalar Sokak
No 24 Keresrteciler Sitesi Merter
Gungoren, Istanbul, Turkey

Premium: $5,000 in full....

Noted location is not LME or COMEX but agreed hereunder.

Information given to Insurer: Turkey single location up to USD 200,000,000 expected.'

5. In or about October 2007, the Underwriter Defendants agreed to write ~~a further~~ endorsement 0001 ~~was issued~~ which stated:

'*It is hereby noted and agreed to include the following hereunder:*

1) First Loss, Contingency coverage as per the general policy Conditions.
Excluding Directors and Officers liability.
Excluding Infidelity absolutely.

Locations:
1) Mehmet Nesihi Ozmen Mh, Ihlamur Sokak No 4 and NO 6, Gungoren, 34010
2) Yalnika Holdings AS, Kayalar Sk, Keresteciler Sitesi Bina No 24, Yaliknka Han, 34010 Merter, Istanbul, Turkey.
...

Premium USD5,000 in full.

Noted locations are not LME or COMEX approved, but agreed hereunder.

All other terms, clauses and conditions remain unaltered.'

Information: ... It is understood that USD180 million will be maximum exposure in total and at any one location.'

5A. Paragraph 7A of the Re[1]-Re-Re-Amended Particulars of Claim is admitted. ~~The new paragraph 8 of the Particulars of Claim is admitted.~~

5B. As to paragraphs 7B and 7C of the Re[1]-Re-Re-Amended Particulars of Claim ~~the new paragraph 9~~, the warranty is not to be construed as applying only to non-precious metals. The Underwriter Defendants rely, inter alia, upon the facts that:

(a) the natural meaning of '*All storage*' is *all* storage;

(b) where the parties intended to confine a warranty to one type of storage, they said so: see the following line in the policy, '*Warranted storage of precious metals is insured on a pure contingency basis*' (underlining added);

(c) Endorsements 0001 to 0004 inclusive extended cover to storage of gold alone in Turkey and in India. In each case there was a survey by Cunningham and Lindsey of the premises intended for storage and then an endorsement was prepared by the brokers and scratched by the Underwriter Defendants, which stated: '*Noted locations are not LME or COMEX approved but agreed hereunder. All other terms, clauses and conditions remain unaltered.*' This wording is only explicable on the basis that the '*All storage*' warranty would have applied but for the special agreement. In the premises, if which is denied the '*All storage*' warranty had been in any way ambiguous, the parties, from the date of the first endorsement, proceeded on the mutual basis that it had an agreed meaning and applied to all storage, including in particular, storage of gold, from which the Claimants are now estopped from resiling.

5C. Save that the meetings of 13th and 16th March 2007 are admitted, paragraph 7C of the Re[1]-Re-Re-Amended ~~the new paragraph 10 of the~~ Particulars of Claim is denied. The Underwriter Defendants will rely upon the facts and matters set out in paragraph 5B above and upon the terms of the documents scratched by Mr Morris on 13th and 16th March. Further:

(a) The wording which appears in the contract of insurance reflects precisely the wording written in manuscript on 13th March 2007. There was no error in recording what was agreed.

(b) Mr Morris was aware that LME and Comex have a reputation in the insurance market for applying high standards to the approval of warehouses for storage and the warranty is commonly applied to the storage of metals.

(c) Mr Morris was not aware (if indeed it be the case, as alleged by the Claimants in the Points of Reply) i) that LME approved warehouses are used for storage of non-precious metals only, (although Comex approved warehouses are used for storage of both precious and non-precious metals) or ii) that the Claimants' earlier 2002 loss related to a storage loss of non-precious metals. He was aware only that a loss of $15 million had been recovered by the Claimants after a court case against London underwriters, and that the loss had occurred from a non-LME warehouse.

(d) Mr Morris intended the warranty to apply to all metals, precious or non-precious under the contract of insurance.

(e) It was for the Claimants to propose some other warranty if they felt that the wording of the warranty did not suit their business. This, they failed to do.

(f) Further, the warranty, when read as applying to all metals served a useful purpose, in that, if the Claimants wished gold to be stored in a warehouse which was not approved by LME or Comex, they knew that they had to get special acceptance which involved making disclosure of the specific warehouse and allowing inspection by surveyors such as Cunningham and Lindsey prior to acceptance. This duly occurred during the policy period in respect of storage of gold in both India and Turkey. In contrast, the Claimants' case is that the parties intended to agree that storage of *non-precious* metals was by warranty restricted to LME and Comex approved warehouses, but *precious* metals could be stored anywhere at all, however inadequate (or even non-existent) the security arrangements were. The Claimants' alleged agreement, for which they seek rectification, makes no commercial sense.

5D. Further or alternatively, Mr Morris was the underwriter for the First Defendant alone, and even if (which is specifically denied) there were an agreement between Mr Morris and Mr Glover as alleged, this would not entitle the Claimants to seek rectification as against the remaining Underwriter Defendants whose underwriters intended to and did agree to the wording on the slip, and no other wording.

The Alleged Loss

6. As to paragraph 8 of the Re[1]-Re-Re-Amended Particulars of Claim, it is admitted that from at least 2003 the Claimant was selling gold bullion to companies within the Goldas group as part of a significant pattern of trade.

(a)[1] It is admitted that, in about September 2003, the Claimants concluded a Gold Consignment Agreement with Goldas Kuyumculuk.[1]

(b)[1] It is further admitted that, in about May or June 2004, the Claimants concluded a Gold Consignment Agreement with Meydan (a company which was a member of the IGE and which was described by Mr Binatli (of Goldas) to Mr Teboul (of the Claimants) as a "brokerage company")[1]

(c)[1] No further admissions are made.

7. As to paragraph 9 of the Re[1]-Re-Re-Amended Particulars of Claim on, the BCAs are admitted, ~~subject to production of the same~~[1]. No further admissions are made.

8. With regard to paragraph 10 of the Re[1]-Re-Re-Amended Particulars of Claim:

(a) It is admitted that the Claimants delivered gold bullion to the Goldas companies for several years prior to 2007. ~~Prior to the completion of disclosure, no further admissions are made.~~[1]

(a1)[1] It is specifically denied that the gold bullion was delivered in accordance with the BCAs or that the Goldas companies paid for the gold in accordance with the terms of the BCAs. Sub-paragraphs 2F (e), (f), (j), (p), (q), (r) and (t) above and paragraphs 8A and 21 below are repeated.[1]

(b) It is denied in any event[1] that any retention of title clause was effective in Turkey, the *lex situs* at the time of the alleged conversion by the Goldas companies.

(c)[1] Save as aforesaid, no admissions are made.[1]

8A.[1] *"Back to Back" Transactions.* Further or alternatively, a substantial part of the Claimants' business with the Goldas companies comprised what they and the Goldas companies called "back to back" transactions. As to such transactions:[1]

(a)[1] A "Back to Back" transaction was intended and understood by the Claimants (and the Goldas companies) to be one where the Goldas company in question (whether Goldas Kiymetli, Meydan or Goldas LLC) was to trade the gold promptly on the IGE (or in Dubai) and receive the sale proceeds from its buyer before making payment to the Claimants for the gold.[1]

(b)[1] Such transactions were originally intended to involve 'pricing' (i.e. agreement of the price) of the gold being done by the Claimants and the Goldas company prior to or on the same day as its delivery to the Goldas company and payment also being made to the Claimants for the gold prior to or on the same day as its delivery. However, in practice, payment was received by the Claimants after the delivery date and, accordingly, the Claimants agreed with Goldas Kiymetli and/or Meydan and/or Goldas LLC (in or about July 2005) to allow payment to be made for the gold 4 working days after its delivery. In about June 2007, the said period was increased to 10 working days from the date that the gold cleared customs.[1]

(c)[1] For such transactions, the Claimants charged the Goldas companies a lower premium than they did for monthly consignments. Further, the internal credit lines which were authorized for such business (within the Claimants' organization) were separate from those which were authorized for monthly consignment business.[1]

(d)[1] "Back to back" transactions were never the subject-matter of the BCAs at all. Alternatively, if (which is denied) "back to back" transactions did form the subject-matter of the BCAs, then the Claimants, by their conduct, deprived themselves of the right or ability (whether by way of equitable forbearance, estoppel, or waiver) to rely upon the strict terms of the BCAs (as against each of the Goldas companies) in respect of such transactions, particularly clauses 6(a) and 8(b) thereof. In support of the foregoing allegations, the Underwriter Defendants will rely upon the following facts and matters in particular:[1]

(i)[1] The gold was never (and was never intended to be) delivered or transported to or held at the "Location" (as would have been required under clauses 2 and 8(a) of the BCAs). So far as concerned "back to back" transactions with Meydan or Goldas Kiymetli, the Claimant understood and intended the gold to be delivered and stored at the IGE.[1]

(ii)[1] The gold was not (and was not intended to be) subject to any reservation of title and/or prohibition against sale, pending the receipt of payment by the Claimants. Indeed, such terms would have been contrary to the very nature of the transaction, the object of which was to enable the immediate transfer of possession and property in the gold to a third party buyer upon delivery (and to enable receipt of the purchase price from the buyer) prior to payment being made to the Claimants and/or to enable such payment to be made. In relation to "back to back" transactions, title to the gold passed to the Goldas companies upon delivery of the gold at the IGE.[1]

(iii)[1] Nor did the parties intend the provisions of clause 8(a)(ii) of the BCAs (concerning insurance) to apply to such gold. Thus, as the Claimants knew, the Turkish insurance policies (which were obtained by the Goldas companies and which named the Claimants

as loss payees) concerned only such gold as might be stored in the vaults at the premises of the Goldas companies, not at the IGE.[1]

(e)[1] In the premises, if (which is not admitted) and to the extent that the Goldas companies failed to pay the Claimants for gold shipped on a "Back to Back" basis:[1]

(i)[1] title to the gold having passed upon delivery, there will have been no 'misappropriation' of the gold (or '*Physical Loss*' within the meaning and for the purposes of the insurance); and/or[1]

(ii)[1] the gold will not have been stored at LME or COMEX approved warehouses (see paragraph 18 below); and/or[1]

(iii)[1] the gold will not have been covered by any local insurance naming the Claimants as loss payees (or co-assureds) and/or protecting the Claimants' interest therein (see paragraph 19 below);[1]

with the result that the gold and/or the alleged misappropriation or loss of the same will not have been covered by the insurance.[1]

9. The Claimants are put to proof of the alleged deliveries pleaded in paragraph 11 of the Re[1]-Re-Re-Amended Particulars of Claim, including in particular the place of delivery to the Goldas companies, as well as the date and amount of each delivery. Without prejudice to the foregoing, it appears (from Appendices 2 to 4 to the Re-Re-Re-Amended Particulars of Claim) that the transactions underlying the alleged deliveries were (in summary) as follows.[1]

Reference No.	Goldas Counterparty	Quantity	Nature of Transaction
1913	Goldas Kiymetli	500 kg	3 Month Consignment
1950	Goldas Kiymetli	500 kg	3 Month Consignment
1962	Goldas Kiymetli	1500 kg	Back to Back
1963	Goldas Kiymetli	50 kg	Back to Back
1965	Goldas Kiymetli	500 kg	Back to Back

1966	Goldas Kiymetli	25 kg	Back to Back
1968	Goldas Kiymetli	1000 kg	Back to Back
1970	Goldas Kiymetli	1500 kg	Back to Back
1971	Goldas Kiymetli	50 kg	Back to Back
1975	Goldas Kiymetli	700 kg	Back to Back
1976	Goldas Kiymetli	1000 kg	Back to Back
1977	Goldas Kiymetli	500 kg	Back to Back
1978	Goldas Kiymetli	500 kg	Back to Back
1981	Goldas Kiymetli	1000 kg	Back to Back
1984	Goldas Kiymetli	500 kg	Back to Back
1916	Goldas Kuyumculuk	300 kg	3 Month Consignment
1919	Goldas Kuyumculuk	500 kg	3 Month Consignment
1924	Goldas Kuyumculuk	1000 kg	3 Month Consignment
1931	Goldas Kuyumculuk	450 kg	3 Month Consignment
1954	Goldas Kuyumculuk	500 kg	3 Month Consignment
1960	Goldas Kuyumculuk	500 kg	3 Month Consignment
1974	Goldas Kuyumculuk	300 kg	3 Month Consignment
1980	Goldas Kuyumculuk	500 kg	3 Month Consignment
1935	Meydan	450 kg	3 Month Consignment
1938	Meydan	500 kg	3 Month Consignment
1942	Meydan	400 kg	3 Month Consignment
1964	Meydan	500 kg	3 Month Consignment
1967	Meydan	500 kg	3 Month Consignment
1944	Goldas LLC	500 kg	3 Month Consignment

10. Prior to the completion of disclosure, the Defendants do not admit the facts and matters alleged in paragraphs 12 and 13 of the Re[1]-Re-Re-Amended Particulars of Claim.

11. ~~Subject to production of the BCAs, and the written demands alleged,~~ **Paragraph 14 of the Re[1]-Re-Re-Amended Particulars of Claim is admitted.**

12. As to paragraph 15 of the Re[1]-Re-Re-Amended Particulars of Claim it is admitted that a failure to pay would constitute an Event of Default under the BCAs, unless the same had been varied in the course of dealings between the Claimants and the Goldas companies. If, following disclosure, the Defendants wish to advance any positive case of variation, due notice will be given.

13. ~~Subject to production of the BGAs,~~ pParagraph 16 of the Re[1]-Re-Re-Amended Particulars of Claim is admitted.

14. Paragraphs 17 and 18 of the Re[1]-Re-Re-Amended Particulars of Claim are admitted.

15. Paragraph 19 of the Re[1]-Re-Re-Amended Particulars of Claim is denied. Retention of title is governed by the *lex situs* of the gold bullion, namely Turkey. Under Turkish law:

(a) The general rule under article(s)[1] 763(1) and/or 985[1] of the Turkish Civil Code ("Civil Code") is that title to goods is presumed to be[1] transferred with the transfer of possession.

(i)[1] Article 763(1) of the Civil Code provides that the transfer of possession of moveable property is required in order for there to be a transfer of title[1].

(ii)[1] Pursuant to Article 985 of the Civil Code, the person to whom possession of the property is transferred will be presumed to be its owner.[1]

(b) Article 764 of the Civil Code states that a retention of title clause will only be valid if it is registered in a special registry kept at a notary public at the location of the buyer. Without registration, the retention clause will be invalid, and the ordinary rule under Articles 763(1) and/or 985 of the Civil Code[1] ~~that possession transfers property~~[1] will prevail.

(c) Article 21 of the Turkish International Private and Procedural Law (No 5718) provides that in the case of a retention of title agreement concluded in a foreign jurisdiction, the laws of the country where the moveable goods are last situated (here Turkey) will apply.

16. The Claimants did not register their alleged title in the gold the subject of their claim in Turkey. It follows that from the moment when the gold arrived in Turkey

and was in the possession of Goldas, i) Goldas had title and not the Claimants and ii) the Claimants did not lose title through any insured fortuity. Accordingly, if Goldas, in breach of contract, subsequently sold the gold before paying the Claimants, the Claimants would have, at best, merely a contractual claim in damages against Goldas. The Underwriter Defendants herein, however, are insurers against physical loss of goods and are not guarantors that Goldas will perform their contract or pay damages for breach of contract.

17. The foregoing is supported by the inferences that arise from the facts that:

(a) Although the Claimants claim to know most of the identities of the third parties to whom the Goldas companies delivered the gold, and although these include entities such as HSBC, the Claimants have taken no steps to seek the return of the gold. Had Turkish law resembled English law, and the gold had belonged to the Claimants but had been misappropriated by Goldas, Goldas could not have given good title to HSBC etc, and the gold bullion would have continued to belong to the Claimants who could have traced the gold or its proceeds. In fact, however, under the Civil Code, the Claimants did not retain title upon delivery of the gold to Goldas and Goldas was able to give good title to third parties.

(b) Although the Claimants filed a complaint in Turkey with the police authorities and the public prosecutors' office relating to misappropriation, the authorities refused to pursue it, and their refusal was upheld by the Turkish Courts. In particular (i) the Turkish Courts refused to attach the assets of the Goldas companies in response to a claim brought by the Claimants that the gold bullion had been misappropriated and (ii) the Turkish Court of Cassation (Yargitay) 11th Criminal Chamber dismissed the Claimants' appeal against the decision of the Attorney General and the Istanbul 6th High Criminal Court and held that the dispute between the Claimants and Goldas was a purely commercial dispute with no ground for criminal prosecution. This latter decision is only consistent with the Claimants having a mere claim in contract, and no claim for theft or misappropriation of property.

11.85 MT of gold bullion allegedly lost on the Istanbul Gold Exchange ("IGE")

18. *Breach of warranty.* As to paragraph 20 of the Re[1]-Re-Re-Amended Particulars of Claim, the Underwriter Defendants understand this to be a plea that 15.725 MT of gold was delivered to the Goldas Companies ~~in their allocated area in the vaults~~[1] at the Istanbul Gold Exchange, and the Goldas Companies stored the same at the IGE vaults but "wrongfully delivered" 11.85 MT to third parties and thereby misappropriated it. The alleged figures are not admitted. However:

(a) On the above basis, transit had finished, the gold had been delivered to the consignee and the gold bullion was stored at the IGE vaults to Goldas' order.

(b) Even if (which is denied) transit had not finished, storage was still taking place at the IGE vaults to Goldas' order as consignee.

(c) The insurance contains a clear warranty '*Warranted all storage at LME and/or COMEX approved warehouses.*' The IGE warehouse is not such a warehouse, and accordingly the alleged misappropriation is not covered.

(d) Further the factual matrix behind the warranty is that the Claimants had in a previous year of cover claimed successfully on London market insurers for a large loss from a non-LME or COMEX warehouse, and accordingly, the warranty was imposed that "all storage" would be at LME or COMEX warehouses.

19. *Further breach of warranty.* Further or alternatively, the insurance stated: '*Warranted storage of precious metals is insured on a pure contingency basis*'. On true construction, in the light of market practice, this warranty requires that a principal policy be in place covering the loss at the place of storage, to the intent that if this principal policy should fail to pay an insured and covered loss, (for example due to insolvency of the insurer) the Underwriter Defendants' insurance would respond, subject to its terms and conditions. In fact no principal policy

appears to have been in place covering the Claimants' alleged loss and the Underwriter Defendants' insurance was therefore not contingent upon anything. The best particulars which the Underwriter Defendants can currently give are:

(a) It appears that until November 2007, Goldas Kuyumculuk, Meydan and Kiymetli certain Goldas companies[1] were insured by Turkiye Genel Sigorta AS, Ergo Isvicre Sigorta A.S. and Finans Sigorta A.S. under a "Fire and Allied Perils Insurance Policy"[1], and the Claimants were loss payees. However, on November 19th 2007 this policy was cancelled by the Goldas companies and no new policy appears to have been taken out.

(b) In any event, any such policy, even if it existed, would not cover or respond to a claim that the assured had itself stolen the property, the subject of the insurance.

(b1)[1] Further or alternatively, there was (in any event) never any local insurance at all which named the Claimants as loss payees (or co-assureds) and/or protected the Claimants' interest in the gold which was to be stored and/or traded at the IGE, as the aforesaid policy only covered gold when stored in the vaults of the Goldas companies at 24 Kayalar Sokak, 34010 Merter, Istanbul and/or Mehmet Nesihi Ozmen Mh, Ihlamur Sokak No 4 and/or No 6. Thus, none of the gold which was sent to any of the Goldas companies in Turkey on a "back to back" basis was covered by any such insurance (as it was delivered and remained in storage at the IGE until sold by the Goldas company to a third party). Nor was any gold which was sent to any of the Goldas companies on a monthly consignment basis covered by such insurance, for such time as it remained in storage at the IGE. Further and for the avoidance of doubt, the Claimants were (at all material times) aware of the foregoing facts and matters (which were, amongst other things, the subject-matter of discussion between Mr Deshpande and Mr Binatli on 13 and 14 June 2007 [1500825; 1500830; 1500851] and 25 June 2007 [1501006] and emails between them on 15 June 2007 [10017073, 10017074, 10017076, 10017077], 25 June 2007 [10017388] and 27 June 2007 [10017521 to 10017523]).[1]

(c) Accordingly the warranty was not complied with.

20. *No title to the gold in the Claimants once the gold was in the IGE vaults.* It is denied (in any event)[1] that the alleged reservation of title was effective from the moment when the gold first arrived in the IGE vaults to Goldas' order. Paragraphs 15 to 17 above are repeated[1]. Accordingly there was no subsequent conversion or 'misappropriation' of gold (and no '*Physical Loss*' within the meaning and for the purposes of the insurance)[1], and the Claimants have only a contractual claim against Goldas for any later default, which is not insured.

21. *Consent to course of dealings.* Further or alternatively, ~~Prior to the completion of disclosure the Underwriter Defendants allege that~~[1] the Claimants knew of and consented to the trading pattern of the Goldas companies. In particular:

(a) It is an inevitable inference from the sheer quantity of gold allegedly misappropriated (the Claimants allege that the value was almost ½ Billion US$) that the Claimants who dealt with Goldas could have had no genuine belief that the Goldas companies would retain or would have any need to retain gold bullion on this scale at any one time. The inevitable inference is that Goldas would be trading the gold bullion before paying the Claimants for the same, and the Claimants knew this.

(b) The Claimants well knew that Goldas traded gold bullion and were active on the trading market and that much of the gold supplied was intended for this purpose. The Claimants also well knew that a main function of the IGE is to allow the trade of gold from its vaults.

(c) The Claimants appear to have had no system of seeking holding certificates from the IGE or of checking the vaults of either Goldas or the IGE to see that gold was physically stored there at all, or stored to their order. If retention of title had been of significance, such a system would have been in place.

(d) The Claimants, as parties who sold large quantities of gold into Turkey over several years must have known that Turkish law and practice requires delivery of all imported gold into the IGE vaults. ~~The system then required that the Turkish importer sold the gold within a few days to an IGE member~~[1] The importer was required to be an IGE member and that member was required to offer and trade the gold on the IGE (either buying the gold itself or selling it to another member). Further, the Claimants were actually aware, from as early as January 2005 (and, in any event, by March 2007), that the gold that they shipped to the Goldas companies was being sold by those companies prior to payment being made to the Claimants. In support of the foregoing allegation, the Underwriter Defendants will rely upon the following facts and matters (in particular):[1]

(i)[1] the emails dated 3 January 2005 from Mr Binatli to Mr Fernandez-Valdes (which were forwarded by Mr Fernandez-Valdes to Mr Deshpande and Mr Teboul) [10000011];[1]

(ii)[1] the exchange of emails between Mr Deshpande and Mr Binatli on 21 and 22 March 2005 [10001084 & 10001091] and the exchange of emails between Mr Deshpande and Mr Binatli on 4 October 2006 (concerning the sale by Meydan of the gold which was the subject-matter of transaction no. 1505 with the Claimants, for which the agreed payment date with the Claimants was 10 October 2006) [10011736 & 10011737];[1]

(iii)[1] the telephone conversations between Mr Teboul and Mr Binatli on 20 March 2007 [1500287 & 1500289];[1]

(iv)[1] the telephone conversations between Mr Deshpande and Mr Binatli on 2 March 2007, 6 March 2007 [1500179 & 1500181], 9 March 2007 [1500219], 14 March 2007 [1500239], 22 March 2007 [1500308], 28 March 2007 [1500353], 1 May 2007 [1500420], 13 June 2007 [1500828], 15 June 2007 [1500872], 7 September 2007

[1501688], 13 November 2007 [1502273] and 5 December 2007 [1502484];[1]

(v)[1] the meeting which took place in Paris on 17 January 2008 between Mr Binatli and Mr Teboul, Mr Lannegrace, Mr Varenne and Mr Neviaski;[1]

(vi)[1] the telephone conversations between Mr Deshpande and Mr Binatli on 30 January 2008 [1502870], 8 February 2008 [1502997] and 12 February 2008 [1503027].[1]

Further, some of the gold which was shipped to the trading companies (Meydan, Goldas Kiymetli and Goldas LLC) was shipped on a 3 month consignment basis (as to which, see (for example) paragraph 9 above); the Underwriter Defendants will contend that the inference to be drawn from this practice is that substantial periods of credit were intended to be given by the Claimants to the Goldas trading companies (by allowing 3 months for such companies to pay for some of the gold that they traded to third parties) in order to ease the Goldas group's cash-flow.[1] Accordingly the Claimants consented, in practice, to Goldas, as traders, dealing with the gold by sale and delivery directly from the IGE vaults to other members of the IGE such as HSBC (whose name features on the list in Appendix 3 of the Re[1]-Re-Re-Amended Particulars of Claim) prior to payment being made to the Claimants.[1] In the premises, there was no 'misappropriation' (or '*Physical Loss*' within the meaning and for the purposes of the insurance)[1].

(e)[1] Further or alternatively, the Claimants also knew that Goldas Kuyumculuk manufactured and sold gold jewellery and that large quantities of the gold supplied to the Goldas companies would, therefore, be used for these purposes. It is an inevitable inference from the very large quantities of gold which were consigned to Goldas Kuyumculuk, for periods of up 3 months, that the Claimants could have had no genuine belief that Goldas Kuyumculuk would retain or would have any need to retain gold bullion on

this scale at any one time and for such periods. The inevitable inference is that Goldas Kuyumculuk would be using and/or selling the gold before paying the Claimants for the same, and that the Claimants knew this. *A fortiori*, in circumstances where (as the Claimants knew) Goldas Kuyumculuk had relatively low net profits and/or cash flow, the price of gold was high and (from April 2006) Goldas Kuyumculuk needed to take substantial loans from the Claimants that it was unable to repay. It is the Underwriter Defendants' case that the Claimants had such knowledge by the end of September 2005 or, at the latest, by 27 November 2007. In support of the foregoing allegations, the Underwriter Defendants will rely upon the following facts and matters (in particular):[1]

(i)[1] the exchange of emails between Mr Deshpande and Mr Teboul on 21 September 2005 [10004821 & 10004827];[1]

(ii)[1] the discussion, from about 12 November 2007, of the fact that Goldas Kuyumculuk was treating the gold on consignment from the Claimants as its own inventory (and not merely as "Raw Materials", but as "Work in Progress", "Finished Goods" and – predominantly - "Merchandise" etc), including: the email from Ms Luet to Mr Merlin dated 12 November 2007 [10021040]; the emails between Mr Merlin, Mr Teboul and Mr Deshpande dated 14 November 2007 [10021040, 10021042, 10021043, 10021073]; the email from Mr Teboul to Mr Binatli dated 22 November 2007 [10021249]; the email from Mr Binatli to Mr Teboul dated 27 November 2007 [10021371], which was forwarded to Mr Merlin [10021373] and Ms Luet [10021390]; the email from Ms Luet to Mr Teboul dated 6 December 2007 [10021612], which was forwarded to Mr Binatli [10021613]; the email from Mr Binatli to Mr Teboul dated 14 December 2007 [10021837 & 10021838], which was forwarded to Mr Luet [10021892]; the email from Ms Luet to Mr Leroux dated 2 January 2008 [10022118]; the email from Mr Merlin to Ms Luet dated 2 January 2008 [10022124]; the email from Mr Leroux to Ms Luet dated 4 January 2008 [10022171]; the email from Ms Luet to

Mr Richard dated 9 January 2008 [10022330]; the email from Mr Richard to Ms Luet dated 11 January 2008 [10022501]; the email from Mr Froissart to Ms Luet dated 14 January 2008 [10022469]; the exchange of emails between Ms Luet and Mr Richard on 14 January 2008 [10022501]; the telephone conversation between Ms Luet and Mr Teboul on 14 January 2008 [1503112/1502691]; the exchange of emails between Ms Luet and Mr Teboul on 14 January 2008 [10022513 & 10022521]; the email from Mr Binatli to Mr Teboul dated 15 January 2008 [10022538]; the email from Mr Teboul to Ms Luet dated 15 January 2008 [10022557]; the exchange of emails between Mr Teboul and Mr Lannegrace on 15 January 2008 [10022559, 10022582, 10022585]; the email from Ms Luet to Mr Garbado dated 18 January 2008 [10022700];[1]

(iii)[1] the telephone conversations between Mr Deshpande and Mr Binatli on 9 October 2007 [1501974] and 14 December 2007 [1502557][1];

(iv)[1] the Credit Assessment which was produced by the Claimants' RISQ department on or about 15 January 2008, which stated (amongst other things): '*The gold on consignment, although not at that stage purchased by Goldas, is used as of its delivery to manufacture jewellery.*' [10022961][1]

(v)[1] the meeting which took place in Paris on 17 January 2008 between Mr Binatli and Mr Teboul, Mr Lannegrace, Mr Varenne and Mr Neviaski;[1]

(vi)[1] the discussion of the insurance protecting the Claimants, which took place within the Claimants' organisation (and with Cap Marine) from about 9 January 2008; in particular, the discussion as to whether (1) it protected the Claimant in respect of the loss of gold which was being used (by Goldas Kuyumculuk) and/or (2) it covered the Claimants in respect of "misappropriation" of the gold by Goldas, including:[1]

(a)[1] the exchange of emails on 9 and 10 January 2008 between Ms Luet and Mr Richard [10022330, 10022336, 10022343, 10022380, 10022381]; the exchange of emails between Mr Richard and Mr Jugé on 11 January 2008 [10022431]; the email from Mr Richard to Ms Luet dated 11 January 2008 [10022501]; the exchange of emails between Mr Froissart, Ms Luet and Mr Richard on 14 January 2008 [10022469; & 10022501]; the exchange of emails between Ms Luet and Mr Teboul on 14 and 15 January 2008 [10022513; 10022521; 10022557]; the email from Mr Teboul to Mr Richard (and Mr Neviaski) dated 21 January 2008 [10022827]; the email from Mr Richard to Mr Teboul dated 22 January 2008 (which was forwarded by Mr Teboul to Mr Neviaski) [10022823]; the email from Mr Teboul to Neviaski dated 28 January 2008 (stating, amongst other things, that the risk of misappropriation by the client was not covered by the Claimants' insurance and the premium for such cover would be 2 to 3 times more than their existing premium) [10023015]; the email from Mr Neviaski to Mr Teboul and Mr Williams dated 28 January 2008 [10023017]; the further exchange of emails between Messrs Lannegrace, Teboul, Richard and Neviaski on 28 January 2008 [10023035, 10023039, 10023042, 10023043]; the email from Ms Luet to Ms Engelhard dated 31 January 2008 [10023208]; the exchange of emails between Mr Neviaski and Mr Froissart on 8 February 2008 [10023500 & 10023501]; the exchange of emails between Mr Teboul and Mr Richard on 11 February 2008 [10023534, 10023550]; the email from Mr Leroux to Mr Teboul dated 13 February 2008 [10023661];[1]

(b)[1] the telephone conversation between Mr Teboul and Mr Richard on 14 January 2008 (regarding the scope of the

insurance contract written by the Underwriter Defendants) [1502695];[1]

(c)[1] the telephone conversations between Mr Teboul and Mr Richard on 28 and 29 January 2008 regarding cover for misappropriation by Goldas (on which Mr Teboul reported back to Mr Neviaski) [1502843, 1502850 & 1502854];[1]

(d)[1] the meeting and/or conversation between Messrs Teboul, Williams, Neviaski, Richard and Engelhard on 29 January 2008;[1]

(vii)[1] the instructions given by the Claimants to Cap Marine, on or about 29 January 2008, to secure the agreement of the Underwriter Defendants to an endorsement which would extend the scope of the insurance contract to include "misappropriation" of gold by clients. The draft "Misappropriation Clause" which was duly produced by Cap Marine on 29 January 2008 (following discussion between Mr Jugé and Mr Richard) stated (amongst other things):[1]

'*Misappropriation Clause*

This contract covers the risks of misappropriation of the subject-matter insured. The following risks are covered amongst others: fraud of any party, fraudulent transfer of ownership from the insured interest and/or embezzlement and/or dispossession of the goods except solely by State intervention. ...' [10023090][1]

(viii)[1] the email dated 5 February 2008 from Mr Jugé to Mr Glover of Cooper Gay recording the Claimants' insistence upon obtaining an endorsement which provided cover for '*fraudulent transfer of ownership of the Subject Matter Insured*'; the email from Mr Jugé to Mr Richard dated 21 February 2008 [10023920]; the memorandum created by Mr Richard for Mr Hauguel on or about 21 February 2008 [10029409];[1]

(ix)[1] the telephone conversations between Mr Deshpande and Mr Binatli on 30 January 2008 [1502870] and 12 February 2008 [1503027].[1]

Accordingly, the Claimants consented, in practice, to Goldas Kuyumculuk, as a manufacturer and re-seller, manufacturing and re-selling the gold prior to payment being made for the same. In the premises, there was no 'misappropriation' (or '*Physical Loss*' within the meaning and for the purposes of the insurance). For the avoidance of doubt, it is to be inferred that the only real development which took place in this regard, in late 2007, was that the Claimants began to become concerned that Goldas Kuyumculuk (which was seeking an enlargement of its loan facility from US$10m to US$30m) might not be able or willing to pay for the gold which was (and which continued to be sent) on consignment and wished to ensure that the risk of that eventuality was one against which it was insured.[1]

(f)[1] Further, in their dealings with each of the Goldas companies, the Claimants (with the knowledge of each of the Goldas companies) acted in a manner which was inconsistent with the terms of the BCAs and which would have led a reasonable buyer, in the position of the Goldas companies, to believe that the Claimants were waiving or otherwise foregoing their rights thereunder in material respects and (in particular) that the buyer was permitted to sell, use and deal with the gold prior to payment. It is to be inferred that the Goldas companies did so believe and acted accordingly. In particular:[1]

(i)[1] Delivery was never made by the Claimants to the "Location" specified in the Shipment Confirmation Notice issued for each shipment to the Goldas companies. Instead, in the case of Goldas Kiymetli, Meydan and Goldas Kuyumuluk, delivery was made to the IGE. Sub-paragraph 2F(j) above is repeated. Further, in the case of shipments to Goldas LLC, delivery appears (from the consignment receipts disclosed by the Claimants) to have been

made, on occasion, directly to third parties (who were, it is to be inferred, customers of Goldas LLC): namely:[1]

(1)[1] Swiss Gold Jewellery Co LLC (see, for example, the Group 4 Security Consignment Receipts Nos. 12672 [1603492] and 12989 (dated 3 September 2007) [1603496];[1]

(2)[1] Yusuf Nonoo Jewellery LLC (see, for example, the Group 4 Security Consignment Receipts Nos. 7386 (dated 13 November 2006) [1603457], 3540 (dated 11 December 2006) [1603474], 4014 (dated 8 January 2007) [1603485], 6078 (dated 19 March 2007) [1603486].[1]

On other occasions, delivery appears (from the consignment receipts disclosed by the Claimants in May 2011) to have been made to Brinks Global Services FZE in Dubai (see for example, the Group 4 Security Consignment Receipts Nos. 12815 (dated 8 July 2007) [1603490] and 17153 (dated 27 January 2008) [1603501] and the unnumbered Consignment Receipts dated 29 July 2007 [1603491], 9 September 2007 [1603497 & 1603498] and 16 September 2007 [1603500]. It is to be inferred that such delivery was being made pursuant to a sub-sale agreed by Goldas LLC.[1]

(ii)[1] The gold was not required by the Claimants to be held on consignment at the vaults of the Goldas consignee and no steps were taken by the Claimants to verify or ensure that the gold was so held. Sub-paragraphs 2F (i), (j) and (k) above are repeated.[1]

(iii)[1] The documentation which was provided by the Claimants to the Goldas companies with each shipment of gold did not comply with the provisions of the BCAs in that a straightforward commercial invoice, rather than a "Proforma Invoice", was provided (in the original) to the Goldas counterparty at the time of shipment or delivery, and the said invoice contained no reference to the BCA.

Instead, the invoice suggested that all material terms of the sale (including an agreed price) were set out therein and, in this regard, it did not contain any express reservation of title in favour of the Claimants but provided (to the contrary) for a settlement date which gave the Goldas company a period of credit following delivery. Sub-paragraphs 2F(r) above is repeated. In addition, a Shipment Confirmation Notice was provided by the Claimants to the Goldas companies, which was not even substantially in the form of Annex 2 to the BCAs in that (in particular) it failed to refer to the BCA itself and referred instead to a "delivery and sale agreement" (and referred to particular clauses of that "agreement" rather than to those of the BCA).[1]

(iv)[1] There was no adherence to the "Maximum Consignment Quantity" stipulated in the BCA; the quantities of gold which were authorized (within the Claimants' organization) to be shipped and which were stored by the Goldas companies were vastly in excess of the Maximum Consignment Quantity. Sub-paragraphs 2F (d), (e), (f) and (q)(ii) above are repeated. Further, from about July 2007, the quantities of gold which were sent on consignment to Goldas Kuyumculuk (in particular) substantially increased so that the amount on consignment on any given day ranged from (not less than) 103,000 to 159,000 oz (whereas the Maximum Consignment Quantity was 64,000 oz).[1]

(v)[1] Gold was permitted to be held for periods vastly in excess of the "Maximum Consignment Period" of 30 days, with some gold being held for 2 or 3 months (including quantities of gold which were shipped to the Goldas trading companies (Meydan, Goldas Kiymetli and Goldas LLC (as to which, see (for example) paragraph 9 above)). Sub-paragraph 2F (q)(i) above is repeated.[1]

(vi)[1] As pleaded above, gold was permitted to be traded or used by the Goldas companies in the jewellery production process and/or re-sold prior to payment therefor.[1]

(vii)[1] As pleaded above, "back to back" transactions, which formed a substantial part of the gold shipments made to the Goldas group of companies, were not governed by the BCAs at all and were antithetical in nature to the terms thereof.[1]

In the premises, the Claimants, by their conduct, deprived themselves of the right or ability (whether by way of equitable forbearance, estoppel, or waiver) to rely upon the strict terms of the BCA (as against each of the Goldas companies), particularly clauses 6(a) and 8(b) thereof[1].

0.8 MT of gold bullion on consignment to Kuyumculuk

22. The Claimants are put to proof of the facts and matters alleged at paragraphs 22-24 of the Re[1]-Re-Re-Amended Particulars of Claim. In practice, if the gold bullion was not traded by Goldas from the IGE vault (as appears to be alleged) it was stored at the vaults the subject of Endorsement 0001 and then either used or traded from there. Accordingly the Underwriter Defendants adopt the like defences set out at paragraphs 26 to 33[1] below.

22A.[1] Further or alternatively, if the Claimants' claim against the Underwriter Defendants (in respect of the 0.8 MT of gold said to have been consigned to Goldas Kuyumculuk) is advanced under the main insurance contract (rather than Endorsement 0001), then paragraphs 18 to 21 above are repeated.[1]

23. Further, to the extent that the Claimants rely simply upon the absence of delivery up of the gold, in response to the letter of 4th March, this constitutes one loss.

0.5 MT of gold bullion on consignment to Goldas LLC

24. This claim appears to relate to gold delivered by the Claimants to Goldas LLC or its customers ~~' vaults~~[1] in Dubai. Even if such gold were stored for the Claimants, and the Claimants retained title and it was misappropriated ~~from the vaults~~[1] in Dubai, (as to which the Claimants are put to proof) it was not insured by reason of a) the warranty as to storage in LME and COMEX warehouses only, and b) the warranty as to pure contingency cover, and c) the aforesaid consent of the Claimants to a course of dealings which meant that there was no 'misappropriation' (or '*Physical Loss*' within the meaning and for the purposes of the insurance).[1]

(a)[1] The gold was not stored at LME or COMEX approved warehouses.[1]

(i)[1] The "Location" specified in the BCA with Goldas LLC was the registered office of Goldas LLC or any other location in the United Arab Emirates as might be agreed in writing with the Claimants. The registered office of Goldas LLC was stated in the BCA to be Al Mamzar Centre, 1st Floor, Office No. 3, Dubai. The Shipment Confirmation Notices which were issued by the Claimants to Goldas LLC in respect of shipments of gold named the "Location" as Al Mamzar Centre, Al Ittihad Road, 86426 Dubai. That appears to be the address of the Al Mamzar Shopping Centre. If (which is not admitted) the said gold was delivered to and stored at that location, it was not stored at an LME or COMEX approved warehouse.[1]

(ii)[1] As pleaded above, the Claimants did not know where gold was actually supposed to be delivered or stored in Dubai, but left the Goldas group to resolve delivery in Dubai with the carrier and to store the gold as it saw fit. If (which is not admitted) the gold was delivered to and stored at the vaults of the carrier, Group 4 Securicor, in Dubai, as alleged by the Claimants, it was not stored at an LME or COMEX approved warehouse.[1]

(b)[1] The local insurance that Goldas LLC procured for its gold from Oman Insurance Company (PSC) only insured gold bars at the aforesaid location

at the Al Mamzar Centre (and not, for example, at the vaults of Group 4 Securicor in Dubai). Accordingly, there was no insurance in place for bars which were not stored at the said location. Further or alternatively, the said insurance only provided cover in respect of named perils (including 'burglary following violent and/or forcible entry/exit') and/or the said insurance would not (in any event) have covered the misappropriation of gold by the insured.[1]

(c)[1] Paragraphs 18, 19 and 21 above are repeated *mutatis mutandis*.[1]

2.575 MTs of gold bullion on consignment to Kiymetli

25. The Claimants' case appears to be that this gold was not misappropriated from the IGE vault but was misappropriated from the premises the subject of endorsement 0001~~:~~ (as to which, see paragraphs 26 to 33 below)[1].

25A.[1] Further or alternatively, if the Claimants' claim against the Underwriter Defendants (in respect of the 2.75 MT of gold said to have been consigned to Kiymetli) is advanced under the main insurance contract (rather than Endorsement 0001), then paragraphs 18 to 21 above are repeated.[1]

Endorsement 0001 to the Insurance Contract

26. *Avoidance of endorsement 0001.* Prior to placement of endorsement 0001, the Claimants by themselves and their brokers were under a duty to make full and frank disclosure of all material facts known to them, but not to the Underwriter Defendants, to make a fair presentation of the risk, and not to make any material misrepresentation.

27. By an email dated 3rd July 2007, sent in order to induce the Underwriter Defendants to agree to Endorsement 1, the Claimants represented that:

(a) Their precious metals manager was "about to accept a deal" with Goldas, a "well-reputed Gold manufacturer in Turkey".

(b) Goldas was a publicly listed jewellery producer.

(c) The extension to cover was sought only for "a particular safe deposit located within the premises of Goldas".

(d) The requested amount was to be insured on a contingency basis.

28. In the light of the foregoing and the further information noted on the slip that '*Information given to Insurer: Turkey single location up to USD 200,000,000 expected*' the Underwriter Defendants agreed to the endorsement.

29. The Claimants failed to make disclosure on placement of the endorsement in July-August of the following material facts, and/or misrepresented the position by the presentation in that:

(a) Goldas were not simply manufacturers but were primarily traders in bullion, and as such traders, could dispose of large quantities of gold with ease.

(b) Goldas were not new customers entering into a deal for the first time with the Claimants. The Claimants had had numerous dealings with Goldas since at least 2003, and they had not been satisfactory in their recent dealings, contrary to their being "well reputed". Prior to the completion of disclosure the Underwriter Defendants will allege that it would appear that the Goldas group had not been remitting sums on the dates due, but seeking extensions of time from the Claimants; that the Claimants had loaned money to Goldas so that outstanding payments could be cleared; and that quantities of physical gold delivered were rising and were far in excess of what had previously been held, and also were far beyond the maximum allocation set out in the BCAs.

30. The Claimants also failed to disclose that they had no system and did not intend to take any ordinary security measures such as commission inventory checks at Goldas' own vaults.

31. Prior to presentation of the revised endorsement in October 2007, which extended coverage to two locations, the Claimants also represented that "It is understood that USD180 million will be maximum exposure in total and at any one location". However at the date of the scratch of endorsement 001, the Goldas stock was over $240 million in Turkey and was on an upwards path (if the Claimants truly believed all gold was stored and not used or traded before payment to the Claimants). By February 2008, the Goldas stock was over $363 million and rising.

32. The above undisclosed and misrepresented matters were material to the risk, (including the moral hazard) and actually induced the Defendants to agree to the endorsement, and its terms including the low premium, which they would not otherwise have done. Accordingly the Underwriter Defendants are entitled to and have avoided the endorsement by letter dated 8th July 2008 and have tendered return premium.

33. *Policy defences under Endorsement 001.* Without prejudice to the foregoing avoidance, if, which is denied the Endorsement remains in force, the Underwriter Defendants rely upon the following coverage defences (additional to those pleaded on the main insurance) to any claim falling hereunder:

(a) The endorsement excludes "infidelity absolutely". If, as alleged by the Claimants, their custodian and consignee misappropriated the gold bullion, this conduct is infidelity.

(b) The endorsement excludes Directors and Officers liability. In context, this exclusion refers to the officers and directors who have control over the gold while in the named storage locations. It is inherent in the Claimants' case that the misappropriations were orchestrated by such directors and officers at Goldas.

(c) The coverage was granted on the basis of it being contingency coverage only, but the requirement for a principal policy to be in force and covering the loss was not satisfied.

The Insurance Claim

34. Save that it is admitted that Claimants have claimed indemnity and the Underwriter Defendants have rejected the claim (as they are entitled to do), paragraph 28 of the Re[1]-Re-Re-Amended Particulars of Claim is denied.

35. The Claimants are put to strict proof on quantum, including in particular, the date on which the loss was first discovered, and the number of losses.

36. In the premises, it is denied that the Claimants are entitled to the relief claimed, including damages, interest and costs, or any relief.

COUNTERCLAIM

37. The Underwriter Defendants repeat their Defence herein.

38. In the premises, the Underwriter Defendants (and each of them) are entitled to and claim a declaration that the insurance contract and each of the endorsements thereto were voidable and have been validly avoided *ab initio*.

AND THE FIRST TO FIFTH DEFENDANTS COUNTERCLAIM:

(1) A declaration that the insurance contract and endorsements 0001 to 0004 thereto were voidable and have been validly avoided *ab initio*; and/or

(2) Further or other relief; and/or

(3) Costs.

DOMINIC KENDRICK Q.C.

DOMINIC KENDRICK Q.C.

DOMINIC KENDRICK Q.C.

SIMON KERR

DOMINIC KENDRICK Q.C. [1]

SIMON KERR[1]

Served this 13th day of May 2009 by Clyde & Co LLP, 51 Eastcheap, London EC3M 1JP (Ref: JA/0801916).

Re-Served this 31st day of July 2009 by Clyde & Co LLP, 51 Eastcheap, London EC3M 1JP (Ref: JA/0801916).

Re-Re-Served this 1st day of April 2011 by Clyde & Co LLP, 51 Eastcheap, London EC3M 1JP (Ref: JA/0801916).

Re-Re-Re-Served this day of July 2011 by Clyde & Co LLP, 51 Eastcheap, London EC3M 1JP (Ref: JA/0801916). [1]

Statement of Truth

The Underwriter Defendants believe that the facts stated in this Re-Re-Amended Defence and Counterclaim are true. [1]

Signed: .....

of: .....

Position held .....

Claim No. 2009 Folio 307
and 2009 Folio 1492

IN THE HIGH COURT OF JUSTICE

QUEENS BENCH DIVISION

COMMERCIAL COURT

BETWEEN

SOCIÉTÉ GÉNÉRALE

Claimants

-and-

(1) WÜRTTEMBERGISCHE VERSICHERUNG A.G.

(2) ROYAL & SUN ALLIANCE INSURANCE PLC

(3) NAVIGATORS INSURANCE COMPANY

(4) SWISS RE EUROPE S.A., UK BRANCH

(5) GREAT LAKES REINSURANCE (UK) PLC

(6) CAP MARINE ASSURANCE ET REASSURANCES SAS

(7) COOPER GAY & CO LIMITED

Defendants

RE-[1]RE-AMENDED DEFENCE AND COUNTERCLAIM

Clyde & Co LLP
51 Eastcheap
London EC3M 1JP
Tel: +44 (0)20 7623 1244
Ref: JA/0801916

Solicitors for the First to Fifth Defendants

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Claim No. 2009 Folio 307
Claim No. 2009 Folio 1492

The Honourable Mr Justice Tomlinson

BETWEEN:

SOCIÉTÉ GÉNÉRALE

Claimant

- and -

(1) WÜRTTEMBERGISCHE VERSICHERUNG A.G.
(2) ROYAL & SUN ALLIANCE INSURANCE PLC
(3) NAVIGATORS INSURANCE COMPANY
(4) SWISS RE EUROPE S.A., UK BRANCH
(5) GREAT LAKES REINSURANCE (UK) PLC
(6) CAP MARINE ASSURANCE ET REASSURANCES SAS
(7) COOPER GAY & CO LIMITED

Defendants

ORDER

UPON THE APPLICATIONS of the parties for the resolution of certain issues regarding the scope of standard disclosure

AND UPON HEARING leading counsel for the Claimant ("Soc Gen"), the First to Fifth Defendants ("the Underwriters"), the Sixth Defendant ("Cap Marine") and the Seventh Defendant ("Cooper Gay")

IT IS HEREBY ORDERED AS FOLLOWS:-

Soc Gen's Standard Disclosure

1. Soc Gen shall carry out the standard disclosure searches identified in its Schedule of Disclosure dated 1 December 2009 and shall give disclosure of the documents relating to these searches (as its first tranche of disclosure) by 16 July 2010.

2. Soc Gen shall carry out additional standard disclosure searches for and disclose to the extent found the following categories of documentation (as its second tranche of disclosure) by 17 September 2010.

Documents created from 1 August 2003 to 31 December 2004

(1) Notes, minutes, presentations or reports produced within Soc Gen prior to entering into contracts with companies in the Goldas group from 1 September 2003 onwards, regarding the nature of the Goldas companies' operation (including the trading and jewellery operations) and the likely structure and size of any contractual arrangement with the group.

(2) Any documents relating to due diligence and/or risk assessment carried out in relation to the Goldas companies prior to entering into contracts from 1 September 2003 onwards.

Documents created in the period from 1 August 2003 to 17 April 2008

(3) All documents pertaining to the pre-contractual negotiations for all contracts between Soc Gen and Goldas companies.

(4) All contracts between Soc Gen and third parties (such as freight-forwarders, shipping lines, air or rail or road carriers, stevedores, terminal operators, security companies, warehousing companies) in respect of Goldas contracts for 2003, 2004 and 2005, together with all endorsements, addenda and variations relating thereto.

(5) All contractual documentation which relates to the day-to-day trading activities with the Goldas companies in the period 1 August 2003 to 2008 and evidences the procedures required in order for Goldas companies to purchase gold from Soc Gen. In particular, but without prejudice to the generality of the foregoing, Soc Gen shall search for and disclose to the extent found the following documents in respect of each shipment of gold to Goldas companies during the period 2003 to 2008:

(a) shipping request and shipping documentation (including an email request from the Goldas company to Soc Gen, an email

confirmation of the request for gold from Soc Gen to the Goldas company, a customs invoice, a provisional invoice, a shipment confirmation notice and shipment documents (including an air waybill, the receipt of shipment provided by the carrier));

(b) trade documentation (including trade sheets, a purchase confirmation email and a final invoice).

(6) All packing lists for gold consigned to Goldas companies.

(7) All survey reports or other reports concerning the carriage and/or storage of gold consigned by Soc Gen to Goldas companies.

(8) All correspondence between Soc Gen and (i) the Goldas companies (ii) the Istanbul Gold Exchange, in relation to the gold consigned to Goldas companies.

(9) All documents relating to the monitoring or inspection of inventory of gold consigned by Soc Gen to Goldas companies.

(10) All ledgers, books of account and financial statements relating to transactions between Soc Gen and the Goldas companies, or between Soc Gen and third parties, in respect of gold consigned to Goldas companies.

(11) All documents relating to the payment by Goldas companies of sums falling due to Soc Gen in respect of the gold (e.g. letters of credit, bills of exchange etc).

(12) All documents relating to the finance provided by Soc Gen to Goldas companies (whether by way of loan, overdraft, revolving credit facility or otherwise) in respect of sums falling due for consignments of gold (including all ledgers, books of account, statements and relevant correspondence), including but not limited to (a) documents evidencing any internal discussion within Soc Gen and (b) correspondence with Goldas companies regarding the provision of such finance.

(13) All documents relating to the security (if any) taken by Soc Gen over assets of the Goldas companies in respect of the gold and/or payment for or finance in relation to the gold, including but not limited to (a) documents evidencing any internal discussion within Soc Gen and (b) correspondence with Goldas companies regarding the seeking or obtaining of such security.

(14) All documents relating to guarantees, bonds, undertakings, documentary credits or standby letters of credit sought and/or obtained by Soc Gen from Goldas companies (qua third parties) or other third parties in respect of the payment obligations of Goldas companies in respect of the gold, including but not limited to (a) documents evidencing any internal discussion within Soc Gen and (b) correspondence with Goldas companies regarding the seeking or obtaining of such guarantees etc.

Documents created between 18 February 2008 and 2010

(15) All documents (e.g. minutes of meetings; board or committee decisions or resolutions etc) which were produced at board and/or committee level and which concerned the alleged misappropriation of the gold.

(16) All documents produced for auditors, regulators or other stakeholders explaining the alleged misappropriation and any replies and/or reports by auditors, regulators or other stakeholders addressing the alleged misappropriation.

(17) All documents evidencing any other claims or notifications by Soc Gen under any other insurance policies in respect of the alleged misappropriation by Goldas (including its bankers blanket bond policy), including copies of any such policies.

(18) Any documents falling within the categories set out at sub-paragraphs (19) – (22) below that were created on or prior to 17 April 2008.

Documents created in the period after 17 April 2008

(19) All documents relating to investigations or inquiries conducted by or at the behest of Soc Gen into the circumstances surrounding the alleged misappropriation and/or loss of the gold.

(20) All minutes or notes or other records of meetings, telephone conversations and correspondence between Soc Gen and Goldas companies.

(21) All documents relating to ongoing or concluded civil or criminal proceedings between Soc Gen and Goldas companies (or their employees or directors).

(22) All documents relating to the notification of loss or circumstances or the attempt by Soc Gen to claim under local Turkish or Dubai insurance policies in respect of the alleged misappropriation.

3. Soc Gen shall carry out a standard disclosure search for and disclose the relevant documents to the extent found of the following individuals (for the period 1 August 2003 to 17 April 2008, save as otherwise indicated below) by 17 September 2010:

(1) Grégoire Varenne;

(2) Michel Yarhi;

(3) Leon Edery;

(4) Serge Topolanski and Delphine Metier, for the period 1 January 2003 to 1 January 2005;

(5) Sebastian Wetter, for the period 18 February 2008 until the date of his departure from Soc Gen's commodities department;

(6) Christian Schricke, for the period 18 February 2008 to 17 April 2008.

4. In addition to the searches set out in its Schedule of Disclosure dated 1 December 2009 and at paragraph 2 above, Soc Gen shall conduct a standard disclosure search

for and disclose all relevant documents to the extent found (from whatever source and in whatever form) of the following individuals for the period after 17 April 2008, by 17 September 2010:

(1) Florent Teboul;

(2) Aneesh Deshpande;

(3) Alix Engelhard;

(4) Pascal Richard; and

(5) Corrine Burlet.

5. Further:

(1) the search which is to be made and the standard disclosure which is to be provided by Soc Gen shall also include the further searches that Soc Gen has agreed to undertake and the further documents that Soc Gen has agreed to disclose (whether in its letters from Clifford Chance dated 21 May 2010, 9 June 2010, 29 June 2010 and 1 July 2010, the Witness Statement of Zachary Sananes dated 21 June 2010 or the Witness Statement of Dominique Gilbert dated 24 June 2010 or otherwise);

(2) Soc Gen shall (by 16 July 2010) provide (in .csv format) to the Defendants a copy of the alphabetical list of the unique words contained in its production database.

6. For the avoidance of any doubt, references in this Order to 'documents' includes recordings of telephone calls retained by Soc Gen.

7. The Claimant shall pay 50% of each of the Defendants' costs of and occasioned by the hearing on 2 July 2010, insofar as those costs had been incurred in relation to the ambit of Soc Gen's disclosure , to be subject to detailed assessment on the standard basis if not agreed.

Underwriters' Standard Disclosure

8. By 17 September 2010, the First Defendant shall search for and disclose:

   (1) all metals policies (both precious and non-precious) written by Richard Morris in the period 2 April 2006 to 2 April 2007 (including final and draft wordings);

   (2) any publications written by Richard Morris in the period 2 April 2006 to 2 April 2007 regarding specie risk.

General Matters

9. Save as varied by this Order, the case management directions set out in the order of Mr Justice Tomlinson dated 14 June 2010 shall continue to apply.

10. Save as aforesaid, costs in the case.

11. Liberty to restore the Case Management Conference.

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Claim No.: 2009 Folio 307
Claim No.: 2009 Folio 1492

The Honourable Mr Justice Christopher Clarke (in public)

B E T W E E N:

SOCIÉTÉ GENERALE

Claimant

- and -

(1) WÜRTTEMBERGISCHE VERSICHERUNG-AG
(2) ROYAL & SUN ALLIANCE INSURANCE PLC
(3) NAVIGATORS INSURANCE COMPANY
(4) SWISS RE EUROPE SA, UK BRANCH
(5) GREAT LAKES REINSURANCE (UK) PLC
(6) CAP MARINE ASSURANCES ET REASSURANCES SAS
(7) COOPER GAY & CO LIMITED

Defendants

ORDER

UPON HEARING Leading Counsel for the Claimant ("Soc Gen"), the First to Fifth Defendants ("Underwriters"), the Sixth Defendant ("Cap Marine") and the Seventh Defendant ("Cooper Gay")

IT IS ORDERED THAT

1. The trial of the actions is re-fixed to start on 17 April 2012, with a time estimate of 8 weeks (excluding pre-trial reading time).

2. Soc Gen shall complete its standard disclosure searches for and complete the provision of the second tranche of its disclosure by 17 December 2010 and will use its best endeavours to produce documents so disclosed in electronic form by 17 December 2010 and in any event by 24 December 2010.

3. In the meantime:
   a) Soc Gen will provide its second tranche of disclosure on a rolling basis;
   b) Soc Gen will on 10 November 2010 write to the Defendants to provide an update in relation to its progress in respect of disclosure.

4. A further CMC is to be fixed for a date in the week beginning 28 March 2011, with a time estimate of one day.

5. Signed statements of witnesses of fact, and hearsay notices where required by rule 33.2, are to be exchanged not later than 29 July 2011.

6. Signed experts' reports are to be exchanged simultaneously by 5:00 pm on 28 October 2011.

7. The meetings of experts are to take place by 18 November 2011.

8. The joint memoranda of experts are to be completed within 14 days of the meeting in respect of each expert discipline.

9. Any short supplemental experts' reports are to be exchanged simultaneously by not later than 5:00 pm on 16 December 2011.

10. The progress monitoring date is 20 January 2012.

11. Preparation of trial bundles to be completed by 27 January 2012.

12. The pre-trial review is to be re-fixed for a date in the week commencing 6 February 2012.

13. Save as varied by this Order, the case management directions set out in the order of Mr Justice Tomlinson dated 14 June 2010 shall continue to apply.

14. The Claimant should pay the costs of the Defendants wasted by the failure of the Claimant to provide the first tranche of its disclosure by 16 July 2010, such costs to be summarily assessed (if not agreed), in writing, by Mr Justice Christopher Clarke as follows.

    a) By 4.00 pm on 22 October 2010, the Defendants are to file and to serve on the Claimant schedules of their costs explanatory of how the costs are said to have been wasted by the failure of the Claimant to provide the first tranche of its disclosure by 16 July 2010.

    b) By 4.00 pm on 29 October 2010, the Claimant is (if so advised) to file and to serve on the Defendants a schedule of its comments upon their schedules of costs.

c) By 4.00 pm on 3 November 2010, the Defendants are (if so advised) to file and serve on the Claimant a Reply in respect of the comments made by the Claimant pursuant to (b) above.

15. The costs of this Case Management Conference shall be the Defendants' costs in the case.

DATED the 8th day of October 2010

IN THE HIGH COURT OF JUSTICE CC/2009-307

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

Royal Courts of Justice

Friday, 2nd July 2010

Before:

MR. JUSTICE TOMLINSON

B E T W E E N :

SOCIÉTÉ GÉNÉRALE Claimant

- and -

WÜRTTEMBERGISCHE VERSICHERUNG-AG & Ors. Defendants

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MR. G. MORPUSS QC (instructed by Clifford Chance LLP) appeared on behalf of the Claimant.

MR. D. KENDRICK QC and MR. S. KERR (instructed by Clyde & Co. LLP) appeared on behalf of the First, Second, Third, Fourth and Fifth Defendants.

MR. T. ADAM QC and MR. T. KENEFICK (instructed by Barlow Lyde & Gilbert LLP) appeared on behalf of the Sixth Defendant.

Mr. A. SCHAFF QC and MR. A. WALES (instructed by CMS Cameron McKenna LLP) appeared on behalf of the Seventh Defendant.

P R O C E E D I N G S

MR. JUSTICE TOMLINSON: Yes, Mr. Morpuss?

MR. MORPUSS: My Lord, I appear for SocGen; Mr. Kendrick and Mr. Kerr appears for the underwriters; Mr. Adam, Mr. Kenefick for Cap Marine; and Mr. Schaff and Mr. Wales for Cooper Gay. Your Lordship has had, obviously, very full skeletons on this.

MR. JUSTICE TOMLINSON: I have.

MR. MORPUSS: I am very much in your Lordship hands as to how to proceed, whether it would be helpful to hear from me at this stage on the broad issues in relation to the requests against me, or whether to hear from Mr. Kendrick with his application.

MR. JUSTICE TOMLINSON: I am hopeful of course that, since these skeletons were written and indeed since the evidence was exchanged, there may have been further discussions and that we may have got closer to a consensus as to how we are going to proceed.

MR. MORPUSS: We have got closer, my Lord. We are still a long way from a consensus. We sent a further letter yesterday trying to knock on the head a lot of the smaller points and also some big-issue points. I hope that has found its way to you.

MR. JUSTICE TOMLINSON: If it has, I have not seen it. It may be in the bundle of correspondence.

MR. MORPUSS: It was sent late yesterday evening. It was intended to pick up on a lot of the smaller points in the skeletons and it simply means, I think, some of the underwriters' applications and some of Cooper Gay's and Cap Marine's will not be pressed because we have agreed various points.

MR. JUSTICE TOMLINSON: I have read the full skeletons and I have read the five witness statements but that took me many hours. I certainly have not read the correspondence.

MR. MORPUSS: It is a slow business, my Lord, and the correspondence ----

MR. JUSTICE TOMLINSON: I appreciate why it has to be.

MR. MORPUSS: It is just a re-hash of the arguments.

MR. JUSTICE TOMLINSON: It seems to me that, in the first instance, what we need to do is to identify the big issues, which presumably, between you, you have done.

MR. MORPUSS: Yes, my Lord.

MR. JUSTICE TOMLINSON: And we must deal with those first, I should have thought. It may be that the first big issues actually involve the scope of your disclosure.

MR. MORPUSS: Undoubtedly, my Lord, yes.

MR. JUSTICE TOMLINSON: In which case it is probably Mr. Kendrick who goes first, is it not, most helpfully?

MR. MORPUSS: He is asking for disclosure, certainly. I have some general points to make on the disclosure application against me but whether your Lordship wants to hear those now or would rather hear them after Mr. Kendrick: I am in your hands.

MR. JUSTICE TOMLINSON: If you have got some general pre-emptive points to make, by all means make them, but we obviously need to try to keep some structure to all this, in that it is a very difficult exercise. Perhaps I can just ask you two general points, at the outset, neither of which have got anything – one of them might, but, in general, they have got nothing whatsoever to do with this, but it just enables me to understand the shape of the litigation.

What steps have you taken to recover payment for this gold from Goldas?

MR. MORPUSS: We have commenced litigation in Turkey; it has not gone anywhere. We have attempted to pursue Turkish policies, to the extent there are any, but that has not gone anywhere. And one of the items of disclosure which we are going to give will be the steps which we have taken but the reality is it has not gone anywhere and we ended being sued by Goldas in Turkey for defaming them by launching proceedings saying they had stolen the gold.

MR. JUSTICE TOMLINSON: What is their defence to the action for the price?

MR. MORPUSS: It is not entirely clear, my Lord.

MR. JUSTICE TOMLINSON: They are still trading?

MR. MORPUSS: They are still trading, my Lord, yes.

MR. JUSTICE TOMLINSON: One of the biggest gold dealers in Turkey.

MR. MORPUSS: They do appear to be, my Lord, yes.

MR. JUSTICE TOMLINSON: So they are still trading, they are still solvent, presumably.

MR. MORPUSS: Yes. Part of their defence is the defence which underwriters and brokers are running, which is that my clients knew what was going on, and your Lordship will have seen reference to two statements from the Yalinkaya brothers --

MR. JUSTICE TOMLINSON: Yes.

MR. MORPUSS: -- in the early part of the disclosure where they say that my clients consented to that. We dispute that.

MR. JUSTICE TOMLINSON: But how would that give them a defence to the action for the price?

MR. MORPUSS: It is very difficult to see, my Lord, but we have struggled to proceed anywhere in Turkey with a claim against Goldas.

MR. JUSTICE TOMLINSON: You have got a worldwide freezing order – you applied for one anyway.

MR. MORPUSS: We have, yes, my Lord.

MR. JUSTICE TOMLINSON: And you have got one.

MR. MORPUSS: Yes, my Lord.

MR. JUSTICE TOMLINSON: Which either has caught some assets or it has not.

MR. MORPUSS: It is still in place, my Lord, for what it is worth.

MR. JUSTICE TOMLINSON: So you are suing them in Turkey.

MR. MORPUSS: They have not appeared under the English proceedings and they are sticking to Turkey, where they obviously would prefer to field a battle.

MR. JUSTICE TOMLINSON: I understand that. And the litigation is proceeding but not getting anywhere very fast.

MR. MORPUSS: That is right, my Lord, yes, to the extent it is proceeding at all.

MR. JUSTICE TOMLINSON: That is obviously very disappointing.

MR. MORPUSS: We are making what efforts we can. Obviously, they are the primary target, my Lord, but we are not hopeful.

MR. JUSTICE TOMLINSON: Secondly, I have not looked at the correspondence but it appears to be accepted on your side – and the term "ambush" is used – that you ambushed Cap Marine by deliberately starting litigation against them, having led them to believe that you would not. Is that broadly right?

MR. MORPUSS: I am not sure "the led them to believe" that we would not is accepted, my Lord. Certainly, we accept that we did not forewarn them about the litigation, and that was deliberate and was because of the concern about having two actions going on in two different countries. It is in fact something which was envisaged by the Commercial Court guide, which was the point we made to Steel J. on 7th December, that was the reason for doing it, the concern that they might launch some pre-emptive, negative litigation in France and we would end up with the same points being litigated in France and in England.

MR. JUSTICE TOMLINSON: Right, that puts that in context, thank you very much. What would you like to say by way of general introduction?

MR. MORPUSS: My Lord, a number of points have been made in the skeleton, in broad terms, about the way my clients have approached disclosure, which I have not dealt with in my skeleton. It may be helpful if I deal with that upfront and also the general approach which I suggest your Lordship should take to this application and then perhaps hand over to Mr. Kendrick and the others for their specific applications in relation to particular documents.

My Lord, it is said that my clients have jumped the gun and that they have gone off in a rather cack-handed way to look at disclosure in too narrow a way and, as a result, it is really their own fault that they are where they are now. In my submission, that is an unfair criticism. It has always been clear to my clients that this was going to be a big exercise of disclosure and they started the process, once they had the underwriters' defence in May of last year and brokers were only brought in in December and only served their defences early this year but it was clear from the underwriters' defence what a lot of the broad

issues were going to be and so SocGen, together with Clifford Chance, started the process very early on of getting together the documents.

Alone, amongst the parties, we served a disclosure statement at the very first CMC, in December, setting out what it was we were proposing to do and the underwriters gave some brief indication of what they were intending to do with disclosure – no disclosure statements. Brokers gave none. I do not intend that as a criticism of brokers; they had only just been into the action, but we were the only ones in December who set out what our position was on disclosure. It then took four months for anyone to come back and comment. Again, I take the point that the brokers were working on their defences but the disclosure schedule is only a 12-page document; it is not a long document to read. Certainly underwriters, if they had serious concerns that we were going off the rails at that stage, could have come back and said, "We don't agree with what you're doing. We think you ought to be doing it a different way." So my clients carried on in the way that they were doing it, and the consequence of that is that we are going to be a position to give a very bleak first tranche of disclosure in July.

We were encouraged at the first CMC, by Steel J., to get on with things on disclosure. He said people should not just sit on their hands until the restored CMC and do nothing on disclosure. So we did that. If we had just sat on our hands and done nothing, the consequence is that no one would be getting any documents for quite a long time. So, to criticise my clients for having gone about this the wrong way, in my submission, is misfounded. It is not as though all the energy which we have put into disclosure, so far, has been wasted. We have gathered together the documents, we know what there is. The question is what additional searches do we need to go away and do? It is not as though going away and doing the additional searches is in some way duplicative. It is not that, because we have gone about it in a particular way, from the start, a lot of time has been wasted which would not otherwise have been spent on this. If, at the very start last year, SocGen had started the process of disclosure in the way that the defendants suggest, in a wide-ranging way, then it would have taken a lot longer to do the whole process.

My Lord, that is my first submission, that it is wrong to criticise SocGen for the approach to disclosure. The question is now should that approach be widened in some way?

It is suggested by Cap Marine that SocGen has not been very pro-active in thinking about what documents ought to be disclosed, and that is said by Cap Marine in relation to the post April 2008 documents. Again, my Lord, I would say that is an unfair criticism of SocGen. Indeed, for the reasons I

have just set out, I would suggest that SocGen has been the most pro-active of all the parties: it was the one which first got this going and first served its disclosure statement.

That said, there is a truth in what Cap Marine says, in the sense that part of its complaint about post April 2008 is that my clients know what documents they have and the defendants do not, and therefore the defendants are approaching this very much shooting in the dark. In my submission, that is an important consideration when it comes to today's hearing, because what is being done by the defendants is they are arguing all these points on disclosure simply on the basis of my clients' disclosure statement and some witness evidence and a few documents. What they do not have is the actual documents which will show them where the holes are which they need to be trying to fill. Two good examples of this – if one takes, for example, the case of Mr. Varenne, who is one of the witnesses for whom they say we ought to be searching. What has happened is that they have gone away, found a press release saying Mr. Varenne was appointed as head of commodities and various other divisions. They say, "Well, he must be very important. Go away and search for his documents." What they have not been able to do, because they do not have the documents yet, is go through all the emails and see how important Mr. Varenne actually is in the scheme of things, which is the way one would normally approach things, and then come along and say, "Well, he appears on 50 emails, therefore he's terribly important, therefore you ought to be giving disclosure," or, "He's only there on one email. He obviously isn't a very important man." This shooting in dark, my Lord, means that the defendants, when they are asking for documents and asking SocGen to go away and search for things, are very much erring on the side of caution. If they find anyone who looks as though they might be relevant or might be interesting or might have documents, they say, "Well, let's go away and search for him."

In my submission, a more sensible approach to this disclosure exercise would be for the defendants to wait until they have got the documents, have a look at the documents, see what holes there are they need to fill and then come to us and say, "Well, these are the areas we're really concerned about," and it would be a much more focused approach than the rather scatter-gun approach we have got at the moment.

MR. JUSTICE TOMLINSON: That has raised a point which is of some concern to me in that there is obviously a balance to be struck, in that everyone will have a much better feel for where the further areas of inquiry are when they have seen the disclosure which you give. So there is a balance to be struck between waiting to see what comes up, and ensuring that time is not wasted and that the inquiry is properly directed, from the start. It is not easy to strike.

MR. MORPUSS: No, absolutely, my Lord, and it is very difficult to strike when everyone does not have the documents in front of them. The defendants are looking from a position – I do not say this pejoratively – of ignorance: they do not know what the documents are, and that, my Lord, is why we have tried to propose what we believe is a practical way forward. We have given a lot of ground since 27th May CMC. We have offered up a lot of documents. My clients do not accept that they ought to be giving disclosure of 2003/2004. It is another example, we say, of shooting in the dark because what the defendants are going to get is a lot of material from 2005 to 2008 about the relationship between Goldas and SocGen. They are going to get telephone calls between the key players – Mr. Binatli on Goldas' side, Mr. Deshpande and Mr. Teboul on SocGen's side – and they are going to see the actual conversations which went on, very lengthy transcripts, and either, from that three-year period, they are going to be able to construct an argument that the relationship was such that my clients were consenting to the sale of gold before they had been paid for it, or they are not. If they cannot construct it from those documents then it is very difficult to see how going back to 2003 or 2004 is going to take them much further. But what we have tried to do as a practical solution is say, "Well, we understand the defendants do have concerns about 2003 and 2004, so here are some documents, the core documents, for that period. Have a look at Mr. Teboul's emails and Mr. Deshpande's emails. Have a look at the lengthy schedule of what gold was being transmitted to the IGE and to Turkey. If that raises other queries, taken in the round with all the other disclosure, then we will try and accommodate them."

My Lord, what we have tried to offer is what we believe is achievable by 17th September. It is said by Mr. Schaff that that is some *in terrorem* threat which my clients are making to your Lordship. My Lord, it is not intended as that. It is intended to say some things are achievable and some things are not. My clients are very keen to hold the trial date, which I understand has now been fixed for 17th October next year. The reality is that what they have offered, to date, to the defendants is what they believe can be achieved by 17th September and if there is any extensive widening of the thing to go away and do, a lot of their tasks, on their own, are going to take months to do and, regrettably, if there is any widening, it is likely that trial date is going to have to be revisited and the whole timetable.

MR. JUSTICE TOMLINSON: That is a long way down the road.

MR. MORPUSS: It is, my Lord, yes, and, hopefully, we will not get there.

My Lord, I think those are all the general points I wanted to make. I hope that is of some assistance and perhaps I can hand over then, on the specific points, to Mr. Kendrick, who I understand wants to go first.

MR. JUSTICE TOMLINSON: Yes, thank you very much, Mr. Morpuss. Yes, Mr. Kendrick?

MR. KENDRICK: My Lord, I am going to focus on the 2003/2004 documents but I also have to say something about hard-copy documents as well. I am going to leave others to deal with various ...

MR. JUSTICE TOMLINSON: Has anyone got a formulated request which indicates, over and above what has by now been offered, what it is which you say ought to be done on top?

MR. KENDRICK: Yes, my Lord, I have done a schedule which shows our requests, their response and, although we have not actually got a box on the right-hand side where you can put ... down the margin, as you think fit --

MR. JUSTICE TOMLINSON: That would be very helpful.

MR. KENDRICK: ... items where we have basically agreed. So it is just those which appear in ... My Lord, it also summarises the arguments. What I should like to do is perhaps get ...

My Lord, the argument really in principle is at three levels. Firstly, there is a clash on the relevance of documents from the outset of the relationship, which seems to be in August/September 2003, up to January 2005. We say the start of the relationship is important to understand what kind of company Goldas was, what kind of relationship was aimed at and of course the development of that. The pattern of consent to course of dealings, which my friend has touched upon, was likely to have been by the end of this period. The other side's approach is, "That's not right. This is only historic interest."

MR. JUSTICE TOMLINSON: In a way, this is ships passing in the night, is it not, in that if you see from the 2005 to 2008 documents that there is a pattern of consent then you are home and dry – you are home and dry on that point anyway – in which case Mr. Morpuss would no doubt be able to say, "Since you can see that there is this pattern of our consenting to sale of the gold before payment, you don't need to see the earlier documents," that is obvious? If, on the other hand, you do not see a pattern of consent from 2005 to 2007 then you say, "Well, of course what we need to see are the earlier documents to see what were the patterns which had already been set and what was

therefore no longer needed to be set in the later period." That is what it comes to, is it not?

MR. KENDRICK: Yes, the difference is that, often, a consent comes by course of dealings and contact and you may not find an explicit email which says "I consent". You may, when you look at the pattern of trading, say, "Well, he couldn't possibly ..."

MR. JUSTICE TOMLINSON: "By now, you knew exactly what was going on and you didn't object to it in any way."

MR. KENDRICK: Exactly, and that is the area in that area. Then the second clash is the level of what disclosure for 2003 to the end of 2004 need be given? They say, "Well, email everything, that's all we need," and they say there is no other document, whether hard copy or documents served on a hard-drive in the computer or a server, which needs to be looked for. We say, no, we need a wider search for hard-copy documents, what is on the server and what is on the ... For example, we need the documents of title and the custody transfer documents. I have I mind things like the airway bills; Securicor receipts which they will take when they deliver gold to somebody, they will show which gold bars and where it is. The other side said in a letter last night, "Here's a schedule which does that all for your computer," and we will look at that and see if it is any use.

I add one important point here, my Lord. It seems to us, from the letter and indeed from my friend's skeleton, that we are going backwards in this sense. They seem to be going back on statements that they would be giving us such documents for the period 2005 to 2008. It now seems to me that they are saying they will not ...

The third point is there is a clash at the level of costs and the impact on the trial date – discretion or proportionality. They say it is too late now to stop the email-based approach to disclosure, the additional documents will take too long to search for and we may well miss the trial date. We do say that SocGen took a wrong-headed approach at the outset, contrary to the CPR, and we do say, despite my friend's opening comments, that they have compounded it by not telling us what they were actually doing. This is no reason for refusal of disclosure and we must say that we do not believe their evidence shows a convincing case that they will miss the trial date if the extra disclosure is awarded. If the choice in this important case were between putting the trial back by a few months, from October to January, or losing what could be very important disclosure, the disclosure should win. The trial date was only fixed last month and they took a risk that they may have to disclose the 2003/2004

documents. They should not be allowed to say, "Well, we've approached disclosure our way, it's too late to change, and now look at the trial date we've just had fixed."

MR. JUSTICE TOMLINSON: Can I say, straight away, I am not going to consider the trial date today. I am certainly not going to put off the trial date, having only fixed it a month ago, on the basis that it already appears undoable. It might have to be revisited in September or October, I simply do not know, but I am certainly not going to have counsel of despair today. Mr. Morpuss may come back in September or October and say, "The scale of what I've been required to do has proved to be so appalling that now is the time to reconsider the trial date," but that is not for today.

MR. KENDRICK: My Lord, I am obliged. Clifford Chance sent a letter last night with some comments on our skeleton and there were some concessions, there were also some refusals ... and when I get the schedule, I will take you through all that, my Lord.

Just to put the issue in context, this is not an uninformed fishing exercise when we asked for the earlier documents. Could I ask you, my Lord, to look at the May bundle just to remind you very briefly of the pleadings and then show you what Mr. Teboul for SocGen ... In the May bundle, the CMC bundle, if you go to tab 3, you will see, at p.13 in the points of claim and here is what SocGen said: "We entered into the contractual relationship in 2003," and then they refer immediately to "over the years, the relationship between ... companies progressed" and then they entered into BCAs in 2005 and they set them out.

We then set out our comments on the course of dealings, at tab 4, p.34, and this is not confined to 2005 to 2008, this is going right back over several years ... and we say look at the quantity of gold misappropriated, look at the fact that they were trading and active on the market and the IGE, the main function ... "You had no check on the vaults of Goldas or IGE. You sold large quantities of gold. You must have known the practice. The system required gold to be sold within a few days. So, in practice, you consented to Goldas trading, so this is really a credit loss rather than a physical loss and there was no misappropriation ..." And so the plea is begun with: "We ... and consented to the trading pattern of Goldas companies."

It is not clear to me at all that when Clifford Chance set the parameters for their disclosure exercise, which, on the evidence, was set in February 2009, before our defence was served, they had this is mind but it seems to be, from what the evidence is of Clifford Chance, that the parameters were set before the defence was served and really things have just gone their course under that.

I would like to show you the early BCAs but I do not have one in the bundle. I can show you the 2005 BCA just to remind you, my Lord, of that, and that is right at the back of this same bundle.

MR. JUSTICE TOMLINSON: The nomenclature changed, did it not? They seem to have been Gold Consignment Agreements, to start with, and then Bullion Consignment Agreements. Have I got that right?

MR. KENDRICK: I am not sure.

MR. JUSTICE TOMLINSON: It does not matter.

MR. MORPUSS: There is one at p.478 of the disclosure bundle, if anyone wants to see it.

MR. KENDRICK: I think I will stick with p.407, for one minute. It is the May 2005 and you will see, my Lord, at ----

MR. JUSTICE TOMLINSON: You want me to look at your first one, after all?

MR. KENDRICK: Pardon?

MR. JUSTICE TOMLINSON: Do you want me to go back to – it is p.408 in my bundle?

MR. KENDRICK: Yes, it is simply because this one is not marked up. This one was made as of 27th April 2005 ... Gold Consignment Agreement dated 3rd September 2003. Then there is item no.3: consignee may make shipment requests but he may not exceed the maximum consignment quantity. Then, over the page, once the gold arrives, he may make a purchase ... Then if I turn over to p.410, title and risk: title to the gold bullion remains with SocGen until the date of receipt of purchase price. Then transport: SocGen arrange the transport and insurance. Then custody and insurance and there is a term that the consignee shall maintain the insurance, namely SocGen has lost the ...

MR. JUSTICE TOMLINSON: I have got it, yes.

MR. KENDRICK: Then p.411, item (c): no shipment shall be held on consignment for a duration exceeding the maximum consignment period unless SocGen gives its express written consent thereto. So there are two limitations. One is there is a maximum quantity at any one time. The other is, if you are within the quantity, you cannot keep a consignment of gold for more than the maximum consignment period unless – with this one there is a rider – SocGen

consent. Then you pay for the gold on the settlement date, by a final invoice and there has been reference to a provisional invoice before then. The final invoice, we are told later, comes usually two days after Goldas phone up and say, "We would like to buy this gold." Then, at p.412, there is a condition precedent, and item 3 is there should be a legal opinion confirming the due execution of the agreement by the consignee and a valid, binding and enforceable ... I understand that to be a local Turkish lawyer ... Then you have other items annexed to that.

My Lord, if I go back now to the earlier document, at p.479, I do not think that any of the terms which we have alluded to are missing from that document. If I am wrong about that then perhaps I can be corrected. So there does not seem to be a large material shift in the BCAs.

My Lord, if I then turn back to what Mr. Teboul had to say about that – on that you need to go to bundle B, the most recent bundle, to tab 27 and it is at p.270. He tells us that he is the head of ... at p.277. Then, at p.278, he says: "Early Background: I first met with representatives of the first respondent ... in about August 2003." Just pausing there, that is actually significant to us today because it is all very well saying, "Well, these are the documents ... from January 2003 through to December 2004," but really we are talking about from August 2003 because that is when he first sees them. Following discussion with these representatives, SocGen began a banking and ... relationship, and it is interesting, my Lord, the way he puts it. It is not this one-off contract here, it is the beginning of a relationship with a number of companies in the Goldas group. These services included provision and sale of the gold bullion, so it is wider than that – the application wider than gold bullion. It is a banking relationship too. Then he says:

> "Initially, my relationship was limited to involvement with the first respondent and its operations in Turkey. However, I subsequently became involved in dealings with all the respondents."

I think his point here is that ... operates out of Dubai. "In my affidavit, I refer to the respondents collectively as 'Goldas'". He identifies them. The first one manufactures jewellery. The second one is a bullion trading company. The third one is ... The fourth one is trading on the Dubai gold exchange. Then he sets out the original agreements and he refers to the Bullion Consignment Agreement from 2005 ... Gold Consignment Agreement between the same parties, dated 3rd September 2003, so again that is consistent, that date, with – it is the latter period for 2003 at which one is going to be looking, not the start of it, and then he refer to April 2005, the contract with the next one. Then the

third one was a replacement contract, one where he made ... and so it looks like business was, as you would might expect, in a smaller way in 2003 and 2004, being dealings with only two of them, not with the four of them.

Then he refers to how the shipment would be dealt with, at p.280 to p.281. He quotes the terms I have referred to about ... and he says, at p.281, at the top of the page: "Telephone call made ...[reading to the words]... or myself." I bother to read that because one of the people for whom we ask for disclosure is Leon Edery, and the other side say, "Well, he had nothing much to do with it," but here is Mr. Teboul saying he is one of the three whom they usually contact.

Then he refers to an interesting passage at 12.2(3)(b), to the role of the provisional invoice, because of course, when the gold goes out, there is no contract to buy and indeed Goldas are entitled ... to say, "We don't want to buy it. Take it back." Then he says: "An invoice to be provided to Goldas as the ...[reading to the words]... Turkish customers." The he refers to the proposal forma invoice. The provisional invoice is not identical to the proposal forma invoice ... We are quite interested in this, but it looks like – and maybe we are being far too suspicious – it is important, as SocGen seem to know, that you issue a customer an invoice to make it appear to the customs that Goldas has agreed to buy this cargo and can therefore import it as the buyer and owner.

Turning over the page, it says at 2.8.2 – he refers now to the maximum consignment quantity and he says, under Clause 3, one of the schedules not to be such that the maximum consignment quantity was exceeded ... the maximum consignment quantity was 64,000 for one ... for another. It was designed to protect SG. The quantity of bullion which could be consigned was a matter ultimately decided by the risk division. As the relationship with Goldas developed, it was proposed the maximum quantity should be increased. This decision was approved by the risk decision. However ... it was not thought necessary to formally amend the terms of the agreement. So this is a good example of a relationship developing and conduct taking place which is contrary to the terms of the agreement, and SG relaxing that term because it is for their benefit and of course so is the term about a retention of title.

Then they refer to transport and note, at 12.4.4, that Turkish regulations required bullion to be first shipped to the Istanbul Gold Exchange before being transported elsewhere. SG shippers were Securicor, although Securicor sometimes can subcontract and can ship. The bullion ... do not say gold is to go to IGE. They say the gold is to go the customer's vaults or such other place as may be agreed in writing. But here, he said, "no", this has got to go to the IGE. Then, at 12.7, the bullion would be delivered to Goldas: "The shipper would provide ... [and when it says "shipper", it means Securicor] ...[reading

to the words]... to the Istanbul Gold Exchange." As I recall it, the carrier (Securicor) gets a receipt at the IGE and then Securicor checks out. If the gold is to be moved from the IGE to the customer's vaults, that is purely for the customer. Then he notes, pursuant to Clause 8 ... have to be stored at the vaults of Goldas and could not be dealt with in any way. Then he quotes the title and says they will not deal with the bullion: "It was critical to SG that Goldas comply with this requirement." Let us look at the documents to see if you ever get any documents to show you the gold ever arrives at the vaults of Goldas at all.

Then we go to p.285 and he is addressing now the maximum consignment period. He says: "Pursuant to the terms of Clause 8 ...[reading to the words]... the possibility of greater fluctuation ..." I understand that to be saying, "Well 30, the contract says, but we allow 60 and then we allow 90 as the relationship developed." The question of course is is 90 simply for payment ... actually believe the stock is there to be whipped out when the moment is right to make a killing? Then, at 12.11, he says: "I comment upon the maximum consignment period ...[reading to the words]... SG." At 12.11.2: "As the relationship developed, it was proposed that the maximum consignment period ...[reading to the words]... amend the terms of the agreement." It does not actually say it was ... but it points to that clause and indeed he is right ... Then he refers to the retention of title ...

Then he refers to the purchase provisions and then he says: "The request for purchase ...[reading to the words]... would be agreed during these discussions." We are quite interested in the statement that the purchase was made at the end, usually, of the maximum consignment period because that is consistent with this just being a credit period. What would be inconsistent would be if ten days in or 12 days in, they suddenly decide to buy it because they might have thought the price was higher.

MR. JUSTICE TOMLINSON: There has got to be a reason why the request for purchase generally comes at the end of the maximum consignment period because otherwise you would expect it to be random, I should have thought. So there must be a reason of some sort.

MR. KENDRICK: Yes, and then they say, at 12.14.3, the back office would issue them ... So what happens is, when they say, "We want to buy," the price is fixed on that day, documentation is sent out, up to two days later, and that is the final invoice. Then Goldas is required to pay them that invoice by the specified settlement date contained in the purchase confirmation email, which is generally two days later. Then he makes a comment on the arrangement. He refers to ... of the bullion and he says: "The agreement with SG ensured

...[reading to the words]... to cover fluctuations in ..." So we are back to the fluctuation ... "In addition, it is not overly expensive to Goldas to maintain bullion ...[reading to the words]... SG received a consignment fee," and that would stand whether or not Goldas had decided to. purchase, although, as I understand it, in every single case, they did decide to purchase and the gold was never sent back.

MR. JUSTICE TOMLINSON: If that is the case then presumably there must have come a time at which unpaid invoices were mounting up.

MR. KENDRICK: They say that was only reached later on, because of course there is no invoice until they say, "We want to buy," so the gold stays there. It is a very large amount and it stays there, usually, until the end of the maximum consignment period, at which point they say, "We want to buy." By that stage, they have got other gold which has come in and what in fact has happened, almost certainly, is that they have been using the gold which has come in to sell to get the cash to pay for the old invoices. So they are always playing catch-up and eventually ...

Then they say, at 14: "It was difficult for SG ...[reading to the words]... by reference to serial numbers." Obviously, one thing the agreements do not contain is any clause which says, "We can go and look in your vaults and do a spot-check to see that the gold is there." Nor, as we have seen, does the agreement really recognise the gold has got to go the IGE and then it is up to Goldas to take the ...

MR. JUSTICE TOMLINSON: What is the position about the insurance policy under which SG is the loss payee? Did that exist?

MR. KENDRICK: It seems that it did not, at the time of loss. It seems that it had been taken out, initially, the premium had not been paid and it had lapsed. That is a controversial statement, but certainly ... because our insurance is what is called "contingency insurance" and it is contingent on there being a policy .... and we say "no, no, no" at the time of loss, that is the critical time. You cannot have an underlying policy on Day 1 which lapses on Day 5 and then say ...

MR. JUSTICE TOMLINSON: I must not prejudge any issues but ----

MR. KENDRICK: No, but ... put by me, but that is initially ...

MR. JUSTICE TOMLINSON: Yes, I see.

MR. KENDRICK: ... see, my Lord, why, at one stage, I very keen to have a preliminary issue but I was advised it was not as simple as that, by all my friends.

Then we get the loan to Goldas, para.60: "At the request of Goldas ...[reading to the words]... under which sums were lent." These were April 2006, September 2006 and 8th March 2007 and the total was 9.18 million, This was effectively an authorised overdraft. "As at the date of this affidavit, payment has not been received for these sums owing, although a notice of default was served on the respondent," so ... from April 2006 to 2008. Then the default, he says: "For several years ...[reading to the words]... final invoices are as follows." He sets them out. I am not going to go through them all but I notice that the ones which fell due on 15th February totalled 40 million, so you can see ... volume of trading was significant, particularly since the large amount of gold was meant to be just sitting there.

Then he says, at 25: "In the first week of ...[reading to the words]... why he departed." This reference is quite tantalising as to what happened here and we note, on 15th February, they had not paid invoices and it is said: "In early February 2008 ...[reading to the words]...face-to-face meeting with him." Then we go round to the 14th and 15th: "I received a telephone call from ...[reading to the words]... agreed to meet," and then he refers to a phone call from Mr. Binatli, who was in Paris: "We agreed to meet in a bar ..." and then he summarises his conversations.

SocGen say, "It was on the 18th we realised there could be a fraud going on ..." We see this reference to the first week of February 2008 and we see this 40 million has not been paid by the 15th. I do not know if there was any discussion about. One would expect, particularly if it is of that magnitude, there would be. But it is also interesting that, on the underwriting side, as ... on 29th January, they were instructed to go round the market with a proposed endorsement which said, "Of course this policy will pay if there is a fraud by a customer," and that is quite interesting why that was. I think one explanation is, "Well, that was because SocGen had suffered a huge loss to a rogue trader ... but he was not a customer.

MR. JUSTICE TOMLINSON: That is a completely different sort of loss.

MR. KENDRICK: So the endorsement was not agreed, it was not approved and ... gave up about 6th February. I am mentioning this just to emphasise to Clifford Chance that we do not regard 18th February as a date cast in stone as the right date to start. We would suggest mid-January was more likely.

My Lord, there is one other point and it should only take a minute. I should show your Lordship what Goldas were saying and that is the same bundle, at p.434. to p.436. This is a statement which was made to the public prosecutor and, eventually, the public prosecutor decided not to pursue a criminal action against Goldas. At p.434 the board member, a Mr. Yalinkaya, says as follows: "I am a board member ...[reading to the words]... practice." Then he says all his competitors worked the same way. Dropping down: "As there had been no default ...[reading to the words]... but no solution ..." Then he talks about ... cashflow. Then if I drop down this page, at 4.3.5, by the second punch hole: "The agreement ...[reading to the words]... had been exercised." At the top of the page, he says: "Although it states ...[reading to the words]... since 2003."

MR. JUSTICE TOMLINSON: Sorry, where are you reading from now?

MR. KENDRICK: At the top of the page.

MR. JUSTICE TOMLINSON: Page 435?

MR. KENDRICK: Page 435, the very first paragraph.

MR. JUSTICE TOMLINSON: Yes, "in all our trading".

MR. KENDRICK: Yes, just to make the point that it is not just 2005, this is going back to 2003. Finally, his lawyers are asked to make a comment, at 4.3.6, and they say: "We agree ...[reading to the words]... to transact the goods in the exchange." He says it is ... not a crime. So he picks up the point that those provisional invoices are very important because they are the ones which enable the clients to get them through the exchange. Of course the question is did SocGen know that?

Against that background, the period for which we seeking the documents is plainly relevant. I will come to the detail of documents in a moment but we have got questions like this: did they at an early stage set up the transaction so that Goldas bought title, or at least apparent title, as far as the rest of the world, customs, traders at IGE were concerned?

MR. JUSTICE TOMLINSON: That is effectively what this chap is saying, is it not?

MR. KENDRICK: Yes.

MR. JUSTICE TOMLINSON: If you go back to 4.3.4:

"We always started using the goods after their delivery to us, while at the same time designing a payment plan which was compatible with our current financial situation."

MR. KENDRICK: So he is saying really, "It's very nice to have credit, very nice to sell the goods and then pay for them 90 days later at a slightly higher price."

MR. JUSTICE TOMLINSON: Just two lines down – I do not think he wrote that – "As for the payment, this was always done on the basis of the payment plan which had been agreed by the complainant company."

MR. KENDRICK: Indeed. There are things like where physically was the gold going? And was it only going to IGE? And was there no undertaking by SocGen to transport the goods, after IGE, to the vaults? And, if not, why not? And did anyone ever consider checking the stock in the vaults? And, if not, why not, and give themselves the power to do that?

It is at the start of the relationship that due diligence is exercised. The relationship is shaped by the decision whether to give credit, decision to trust and how the relationship should be structured. Then, after that, you get performance, and the relationship develops, as both Mr. Teboul and Goldas mention, and there will be relaxations, Mr. Teboul acknowledges, and so you get the question: what are these provisions about title? They are only for formality and the bank rule. It was the reality that, as far as the trader is concerned, SocGen were getting provisional invoices to enable them to sell as the owners and it has all been going well for years and did SocGen really expect Goldas to be keeping the gold ...?

The case which comes nearest to mind in this case is a case which is seared on the memory of Mr. Schaff and me, the *Metro* litigation ... but it is critical in that case – and Moore-Bick J. ... to construct the agreement going back to the first days to see it developed and see, "Well, that's what the contract said and what did the people actually do? Can they verify conduct?" Of course they can. There the documents, equivalent to ... Starting at 2005 is too late because the template is likely to have been set by then and indeed it does not look like there was any great difference to me in the agreements. Can I then drop down to the type of disclosure ...?

My Lord, it might be worthwhile just to consider how to go about disclosure, if you were to start at the beginning in a case like this. I would suggest a good working plan would be to identify the important individuals. Once you have done that, you go and look at their hard-copy documents, you go and look at all computer documents belonging to them, on the server, and on their own

local computer hard disk. You go to emails, of course, but you would not just go to that one source because you realise that there is going to be a wider trawl of important documents. Just test the position before ... those heady days. The trader would have a date for them, and he would note down important phone calls; he would write down memos of important meetings; and a trip report. He would not necessarily circulate them. He would circulate some, maybe, but not all. Just as counsel in a case make a chronology or notes of a consultation, which he does not circulate. None of this stopped when computers arrived; it just got saved to the hard disk or on to the server. It would be a very unwise trader who would think, "Well, I'll rely on the dodgy recording of a conversation I had two years ago," rather than, "I'll make the important note now."

A clear starting point is therefore, to identify the important individuals and search their hard disks and the right server. Again consider the documents of title and carriage. It is obvious that SocGen should have to disclose the core documents which show what gold bars were delivered, where to, when and how long the gold bars apparently stayed there.

MR. JUSTICE TOMLINSON: It is the documents of title and the instructions to the carriers and so forth which will tell the story, is it not?

MR. KENDRICK: Yes, my Lord, so you would have airway bills; you would have documents showing custody transfer. Brambles are out, they have delivered to Goldas. And we are very interested in these documents because they enable us to see where that gold is and how long it stayed and we can build up a pattern of trading and see how the course of dealings developed.

In the CMC bundle, at p.265 to p.267, this is our letter of March 10th and we set out schedule, which is very similar to the request which has been maintained today. At 7(b) and (c) (265 to 266), we are asking for these transportation/carriage/title documents. The response which we get is at p.301 ... categories of documents which had to be disclosed, and they do say, at 10.1: "In response to categories of documents ...[reading to the words]... in order for Goldas to purchase the gold from SocGen." Then, at p.334 to p.335, we have asked them about their pleading. Under para.10 of p.334: "For several years ...[reading to the words]... location at which the gold was stored." The answer we get to that request, at p.337 (a) to (b) – I hope that has got into your bundle, my Lord. If it has not, I can read it.

MR. JUSTICE TOMLINSON: No, I have got it.

MR. KENDRICK: It says, at item no.5: "This information is not required ...[reading to the words]... will be provided on disclosure." So we took that to mean, "You'll have the documents, the hard-copy documents, on disclosure," because that is what it said in their letter and that is what they said in their pleading. As far as we can see – and this applies to 2005/2008 as much as it does to the earlier period – SocGen are not going to do that. They seem to be saying in their skeleton – and I have in mind, my Lord, para.28 of the skeleton, at p.7:

> "Finally, underwriters have sought disclosure of hard-copy documents. SocGen does not agree to give such disclosure, and does not consider such disclosure to be necessary in addition to the electronic disclosure that it has offered to give. The electronic disclosure proposed above ought to capture all relevant documents – in particular, all communications between SocGen ..."

And then if you look up, my Lord, to item (c):

> "<u>All contractual documents relating to day-to-day trading with Goldas</u> – This is a very wide category that will require extensive disclosure of the most mundane documents, i.e. customs/shipping documents, bills of lading, etcetera. Details of the day-to-day trading will be apparent from the emails of the Mr. Teboul and Mr. Deshpande, as well as the print-outs from the monitoring systems. There is no basis for further disclosure."

I read that as saying, "We're not going to give you any of the core documents of carriage, title and custody transfer," and there it is, and that is for 2005/2008 just as much as it is for the earlier period.

MR. JUSTICE TOMLINSON: But those are the documents which they earlier said would be provided.

MR. KENDRICK: They are. What has happened since the skeleton is there was a letter served ... and if I can just show you that, my Lord. The letter may have got into the smaller bundle. At 82.L, they say, at paras.3 to 10 – and you will see, my Lord, here they are going right the way through from 3rd October to 18th February 2008. Perhaps I could ask you to read from paras.3 to 10, where they say they are not going to do it?

MR. JUSTICE TOMLINSON: Yes, I will read it.

MR. KENDRICK: "We have got a spreadsheet," they say.

MR. JUSTICE TOMLINSON: Shall I just read those few paragraphs?

MR. KENDRICK: My Lord, yes.

MR. JUSTICE TOMLINSON: (After a pause): What do they mean by "pro forma contractual documents"?

MR. KENDRICK: If you look at the back of the BCA, you will see a standard form and I think they mean that form filled out and I think they are saying that the gold was missing at the end of the period. The gold for which they are claiming, you will see the documents ...

If I, my Lord, were to show you the schedule to which ... is placed, it is a voluminous document, but we have got copies of one or two pages. I will pass that up to you. I will not waste a long time on this.

MR. JUSTICE TOMLINSON: This is the spreadsheet?

MR. KENDRICK: This is the spreadsheet.

MR. JUSTICE TOMLINSON: Thank you.

MR. KENDRICK: If you just take the very first entry and run your eye across this, there is a reference number. Then there is a trade date of the 28th. Then it says a value date of the 30th; a maturity date of the 28th; a maturity value date of the 30th; a quantity, which is given here in dollars.

MR. JUSTICE TOMLINSON: Sometimes it is. Sometimes it is ounces.

MR. KENDRICK: And sometimes it is given in ounces. Then there is a payment date at the end, of 30th March, and the client – this will be internal reference to Goldas companies. Deal time – I do not know, but no doubt my learned friend is going to explain that ... "CSH" might be "cash" but I am just speculating. What seems to happen is you seem to get three invoices in a clutch, with one very large one, which suggests that is the ... and there is something called a "premium" and the consignment date. But what you get from this is simply, looking at the dates – it seems to run from the time when Goldas say, "We want to buy," and that is why you have got that two-day gap, or thereabouts.

MR. JUSTICE TOMLINSON: So that is the trade date.

MR. KENDRICK: Yes, so that is the ... and the payment date is the date when they should have paid and you can see that very clearly when you get down to the last page or two of this schedule ... so that is date which was agreed, I imagine, when, on 28th March, Goldas phoned up and said, "We'd like to buy this gold." "When are you going to pay the ...?"

This document is useful to compare it to the kind of painstaking transactions we were suggesting, "How much have you got? How much have Goldas got in consignment? How long has it been there?" You cannot tell it at all from this document. This is just a snapshot of what should have happened at the end of the ... So this document is really no good at all for the task which we want, and we suspect that Clifford Chance may not quite grasp what we are going to do. It does not show us which gold bars were sold; does not show when they arrived; does not show how long they were there; what the quantity was; or even the location – Turkey/Dubai and, if Turkey, where?

My next point is this. It cannot be difficult to obtain these documents. Customs might ask, auditors might ask, for a test transaction. The French equivalent of the FSA might ask for a test document. You do not say, "I've got to ransack my emails to find out the information for you." You will keep a file together and you will generally do this in hard copy because you are looking at very relevant ... We are told there are 3,000 trades with eight documents each, which is 24,000 documents and, working out the lever-arch folder, 500, although these seem to grow up to about 650, that reckons about 48 level-arch files. As I understand it, reading the evidence from Mr. Gilbert, it is not that the documents do not exist or that he cannot find them. It is just that there are a lot of documents. But this must be something ... to locate and take away if the clients cannot do it themselves.

The third point: SocGen say, "What are you going to do with them?" The answer is we will reconstruct the inventory and we will establish what cargo was in Turkey, or should have been, at one time, and how long it was there for, and we will then be able to ascertain whether SocGen can seriously say they thought it was all being stored and none was being used. There will be peaks and troughs and when we look at a peak, we will ask ourselves, "Do you really think that that ... that amount and so far in excess of the contract was actually just being stored? And, if so, for what reason?" Then we will look at the proposition that Goldas knew ...

With that, can I just go through the schedule? I have made all the major points and I can go through very quickly. Item no.1: the category we are looking for here is the notes ... reports produced within SocGen prior to ... 2003 and 2004. Item no.2 I am looking at as well: any documents ... due diligence and all risks

... 2003. I think Clifford Chance's latest position in their letter – or at least in para.15 – is, "In principle, don't object, but we have found Mr. Teboul's computer. We will look there but we won't be looking for hard-copy documents." We say that you should look on the server and the right server because there are two servers, one for back-room people and one for people like Mr. Teboul, and they have got different names and you should look on the server and on the hard disk of Mr. Teboul and you should make a proportionate look, generally, for hard-copy documents and on the servers. So that is first one and two points. It is just the width of the search. Do you need to look at hard copy? Do you look on servers? Do you just confine it to Mr. Teboul's computer?

Item nos.5 and 6 are the carriage, documents of title ... transport documents and, as I have said, the position is, you are not going to get these, even for 2005 to 2008 and we say it is axiomatic that we should get the whole lot for the whole period.

MR. JUSTICE TOMLINSON: But what you want to do is to reconstruct how you have got into a position that there is apparently $½ billion-worth of gold which has been sold before being paid for.

MR. KENDRICK: Yes.

MR. JUSTICE TOMLINSON: And presumably you do not reach that position in a matter of two weeks.

MR. KENDRICK: No.

MR. JUSTICE TOMLINSON: It builds up, particularly if the suspicion is that you are using later consignments in order to pay for the earlier ones.

MR. KENDRICK: Indeed, my Lord. Item no.7 is a minor item. We want the packing lists.

MR. JUSTICE TOMLINSON: As a very minimum, I should have thought it is likely to be common ground that you have got to be given sufficient documents to demonstrate to you how the situation has arisen. Perhaps someone will explain to me what this spreadsheet tells me. But it does not really start, does it?

MR. KENDRICK: No. And then item no.7, I move on, it is really the path of these custody transfer documents. It is where the gold starts its journey from the refinery, and the underwriters say they will disclose the packing lists for those

shipments which are in dispute, which we take them to be the ones for which they say they have not been paid, and we say it should be the packing lists for all of the ... The packing lists will actually have the numbers of the gold bars and the ...

MR. JUSTICE TOMLINSON: But when they say "the shipments which are in dispute"?

MR. KENDRICK: That is their reference to the ones which, I think, they are in dispute with Goldas about because Goldas have not paid them.

MR. JUSTICE TOMLINSON: But that presumably just means they are the most recent.

MR. KENDRICK: Yes, the last ones which are unpaid, the ones which are identified in Mr. Teboul's witness statement.

Then item no.12: we have asked about the loans and they are going to give that, and I hope it is not going to be just for loans themselves but they do say documents in relation to the loans, so I hope there is no difficulty on that because there must have been consideration as to whether these people should get them, why they should get it and when it should be repaid.

Then document 13 is about security, and the answer is SocGen consider there was no need for any security over the assets of Goldas, except a ... guarantee, and we just request where was that consideration in correspondence regarding the consideration of what security they need to take over Goldas.

MR. JUSTICE TOMLINSON: But has that point been addressed yet in correspondence?

MR. KENDRICK: They say they are going to disclose the ... guarantee, but no documents other than guarantee and related documents will be disclosed. We request the surrounding correspondence regarding why they are not going to take any security.

MR. JUSTICE TOMLINSON: You would need to se, would you not, the internal SG documents generated by the discussion as to ----

MR. KENDRICK: Yes.

MR. JUSTICE TOMLINSON: That is what you really need, is it not? That is one of the things you need.

MR. KENDRICK: Yes ... And then we have asked about documents ... other forms of security, and the answer again is they considered there was no need for any security on the assets of Goldas, except for ... guarantee, the details of which will be disclosed.

MR. JUSTICE TOMLINSON: Is that a sort of parent company?

MR. KENDRICK: I think so ... I understand it to be a parent company, yes. We request the documentation ... internal regarding that decision. Then we move on to items for the period 2008 to the present day.

MR. JUSTICE TOMLINSON: We are jumping ahead now.

MR. KENDRICK: Yes ...

MR. JUSTICE TOMLINSON: I think we can stick to the 2003/2004 for the moment.

MR. KENDRICK: Yes. If we can move on to p.10.

MR. JUSTICE TOMLINSON: There is more, is there?

MR. KENDRICK: It is just a point we have already made, really. We want hard-copy documents. There should have been a starting point. We also want proportionate electronic documents other than emails and it is not enough just to say, "We've done email and there it is," and so we are looking for Word, Excel, PowerPoint ... of the relevant employees. The relevant employees ... 32, which SocGen have identified, and we have also added on five more. Possibly, we can leave that for the minute: Varenne, Yarhi, Edery ...

MR. JUSTICE TOMLINSON: Can we come back to individuals separately?

MR. KENDRICK: Indeed. Then finally, this is ... from SocGen and the Goldas companies ... in relation to the gold consigned to Goldas companies. This should be very easy. The other side say it is really very difficult, but we are just a sender and a recipient here. Even I can arrange my emails in that way. Therefore, we do not see what the great difficulty is on producing that. There was, indeed, correspondence with the IGE and SocGen. So that is the detail. Then, finally, can I address the question of discretion?

MR. JUSTICE TOMLINSON: Let me just work out which of these categories you are asking for. You are asking for one to ...

MR. KENDRICK: I am asking ...

MR. JUSTICE TOMLINSON: On this schedule, it is categories 1 to 7 and then it is 12, 13, 14.

MR. KENDRICK: And then we are missing out 2008, to the present day, for the moment.

MR. JUSTICE TOMLINSON: Yes, we are.

MR. KENDRICK: And then I am going back to ----

MR. JUSTICE TOMLINSON: Then you want 22/23.

MR. KENDRICK: And 24.

MR. JUSTICE TOMLINSON: That is enough to be getting on with. But you want to say something but discretion?

MR. KENDRICK: Yes, my Lord, just on discretion. On that topic, we say what has happened here is they decided ... indeed before our defence had been served, it seemed, and started well down the road before actually employing ... and now they are trying to foist what seems to us to be a wrong-headed approach as a fait accompli. It is too late to change it ... and their methodology in the Clifford Chance approach is helpfully set out in the most recent part of bundle B, and it is at tab 24, at pp.84 to 86 and it is under the heading "SocGen's ... disclosure" at para.5: "SocGen commenced its disclosure exercise ... [reading to the words]... carefully selected employees." So they identify the relevant employees, as far as they are concerned, and they go straight to the email boxes. They do not ... Then if I pass over the 32 employees, they say, in para.6, that they get three million on documents, and that is just raw documents, emails, including attachments, and they put that in what they call the "production database". Then to confine it into relevant documents, they applied a number of keyword searches to the production database and identified what an appropriate date ... and the starting point ... 1st January 2005.

MR. JUSTICE TOMLINSON: We know about that.

MR. KENDRICK: And then they say, at the bottom of 7: "This way, we got 267,000 documents." Then they say, in para.8, the next phase of SocGen's disclosure was to manually review 267,000 documents on the hosted database. This process involved a team of paralegals, bilingual in French and English, all

employed by Clifford Chance: "Due to the large quantity of documents involved ... was conducted to remove any clearly irrelevant data," which is by the searches referred to in para.7, the preliminary review. So we have narrowed it down by computer search into 267,000. In go the paralegals to do the preliminary review.

Following completion of the preliminary review and once SocGen initiated proceedings against the first to fifth defendants, a first-level disclosure review of the hosted database was commenced based on ... The preliminary review began in February 2009 and the first-level review was completed in May 2010. This combined exercise therefore lased for a continuous period of approximately 14 months. Our defence had not been served by February 2009, so what we have got to is a date – they have decided to go the email route, they have got their 32, they have cut it down and the paralegals have moved in. The only thing that seems to happen after the preliminary review is that, at some stage after we have served our defence, then the solicitors ... So what they have done is they have set their parameters really and their keywords, etcetera, before they have seen the defence at all and it may not have crossed their minds that it would be a course of conduct defence.

After we had served our defence, not much happened and then, almost simultaneously, we issued an application for preliminary issue ... CMC and then the CMC got derailed by later joinder of broker defendants. I think the placing broker had to be joined and the French broker had not yet acknowledged service – I think that is right – at the time of that CMC. Just before the hearing, the letter was served regarding electronic disclosure but of course nobody really addressed that because of the other issues which were on foot about the effect of the joinder on the preliminary issue, etcetera ... We awaited the brokers' defence, which came in March, and then within a very short time we wrote a very detailed letter, which is at tab 24 of the original bundle, the CMC bundle, pp.261 to 265. We say, now that we have seen ----

MR. JUSTICE TOMLINSON: Sorry, which page are you on?

MR. KENDRICK: Page 261, my Lord. We then set out our comments on their disclosure. We give them very detailed comments and we make the point that all the points we are making today ... Page 263 deals with the ... scope of the search. We go back to 2003, the entire course of dealings should be there. We then give categories, at pp.265 to 267. At the end, we say: "We acknowledge ...[reading to the words]... with regard to the ..." That was sent on 3rd March and we did not hear until just before the May summons, when Clifford Chance gave the position then and said, "Well, it's too late. We've done it and that's it." We have set out in our appendix to our skeleton – this is not actually what

the ... refer to a case which says if you decide to set your own parameters, go off, you do so at your own risk and you may have to do a more extensive search," and we quote the judge in our skeleton and that is Morgan J., I think it was, at p.34.

MR. JUSTICE TOMLINSON: Yes.

MR. KENDRICK: And so what has happened here is that is a problem in very large part of their own making and we ought to have proper disclosure, not the disclosure which was sent before the defence was even served.

There are a various number of submissions I could make, like is it too late anyway? But ... I will not explore that ... So, my Lord, unless I can assist you further, those are my submissions.

MR. JUSTICE TOMLINSON: Thank you very much. I take it no one else is going to say anything on --? Thank you.

MR. SCHAFF: My Lord, only just ...

MR. JUSTICE TOMLINSON: It is not all which could be said.

MR. SCHAFF: He said a couple of times that this exercise had been – this unilateral decision had been made before his defence ... had been served. My Lord, the position is rather more stark than that. What we learn from the evidence which Mr. Kendrick has just shown you is that this database exercise, which included setting the dates both at the beginning and at the end, had been done by February 2009, that is when ... review commenced, and Mr. Kendrick said ... My Lord, before the claim form had been issued – the claim form was issued on 9th March 2009, so this unilateral decision to set both the start and the end date for the disclosure exercise was set in stone before they commenced the proceedings at all; hence the tail wagging the dog.

MR. JUSTICE TOMLINSON: Mr. Morpuss?

MR. MORPUSS: My Lord, I touched on this at the very start --

MR. JUSTICE TOMLINSON: You did.

MR. MORPUSS: -- but I ought to go back to it, since there has been a lot of criticism of the way in which we have approached disclosure. It is not the case that we have set out disclosure in stone as of February 2009 and then refused to listen to anything which has been said or done since.

MR. JUSTICE TOMLINSON: No, plainly not.

MR. MORPUSS: I am grateful, my Lord. What we did was we tried to get on with things. We have taken account of a lot of comments which have been made, we have introduced a lot of new key words and we have tried to adopt a sensible approach to this. I will not address your Lordship at length on that because I did deal with it earlier. But, in my submission, it is wrong to say that we simply came back to them and said, "We've done it this way. It's our way. We're not doing it any other way." What we proposed in response to the various March letters and the April letters, just before the last CMC, was, "Well, we see your points. You've got some arguments for things we ought to be doing differently, but let's give you the first tranche of documents. That will be done on the basis that we've approached it. You'll get that in July. You can start working on those. Then we'll take account of your points and give you some more documents in September." In our submission, that is a perfectly sensible and pragmatic way of doing this. The authority to which Mr. Kendrick refers, which no one brought along, the *Digicel* case, is very different. It is about someone who does do it in their own way, no other, wastes a lot of time and money doing it and has to start the whole exercise over again, having wasted £2 million. In my submission, that is not this case at all, my Lord.

With that preliminary, my Lord, if I can go to the 2003 and 2004 documents – and there has quite a lot been said by Mr. Kendrick but I will try and deal with it as shortly as possible. He took your Lordship, to start with, to ----

MR. JUSTICE TOMLINSON: Is this the major area of dispute for today, this 2003/2004 point?

MR. MORPUSS: It is, my Lord. There is obviously a time issue because it has taken a long time. Hopefully, the others will go rather quicker, otherwise we may have review where we are at the end of the day.

MR. JUSTICE TOMLINSON: And this is the last day I am sitting in the Commercial Court.

MR. MORPUSS: We are aware of that, my Lord, so we will have to see where we get to by the end of the day. Obviously, I have my own implications for disclosure which I am very keen not to see punted, off at the end of the day, through lack of time. Perhaps we can see where we are after lunch.

My Lord, dealing with the substance of it, Mr. Kendrick took you to Mr. Teboul's affidavit at some length, took you to the statements from

Mr. Yalinkaya (his brother or his cousin), and showed you the sorts of things which they were saying. One thing which is telling about the Yalinkaya statements is, first of all, one might say, "They would say that, wouldn't they?" because they are being faced with a criminal investigation in Turkey. The other thing which is telling is that they do not go along to the police station, or there is no evidence that they do, and produce some documents backing up this. They do not say, "Here are some exchanges between us and SocGen which show that there was an agreement to vary the BCAs." They do not suggest that there are some emails which record that. All they say is, "Well, this is what we agreed," and I do submit that that is of relatively limited value. What it shows is there evidently an issue and it is going to have to be determined at the trial: did my clients agree to the sale or the use of this gold in a manner contrary to what was set out in the BCAs, before the price had been fixed or before they had been paid?

I come back to the point, my Lord, that the primary evidence on that is going to be in the period 2005 to 2008 because that is when my learned friends need to establish their case. They have got to show that, as of 2008, my clients had got themselves into a position where they were letting Goldas use the gold before paying for it and therefore it will be said there was no misappropriation. That case is likely to be made out from very much the telephone conversations, the emails or the other documents floating around in those three years. It is not as though we are saying, "We're only going to give you late 2007/2008 documents." We are saying to the defendants, "We'll give you everything from 1st January 2005."

My Lord, it is undoubtedly true that there will need to be some investigation of the underlying documents but the purpose of giving the schedule, the lengthy spreadsheet, of which your Lordship has seen a very small sample but which in fact is 6,000 lines long, is so that the defendants can take it away with them and they can look at the trades in which they are actually interested, because we do not deny that it is obviously of interest to them to know what some of the underlying trades are, but rather than requiring my clients to go away and dig out some 3,500 trades and eight documents relating to each, the sensible course, in my submission, is for the defendants to go away, look at the trades, analyse which periods in which they are interested and then come back to us and say, "Can we have some underlying documents relating to these?"

MR. JUSTICE TOMLINSON: But how will this document help them?

MR. MORPUSS: It gives them the information about every trade which took place, my Lord. It shows when it took place, the amount, what the payment date ought to have been, and, as a starting point, they can sit down and say, "Well,

this is the period in which we're interested. These are the documents," or possibly, "Give us a sample so that we can see." But having eight documents in relation to every one of 3,500 trades is ...

MR. JUSTICE TOMLINSON: But their position at the moment is that they are interested in all the trades because they want to see whether the manner in which the consignments were typically dealt with supports their case.

MR. MORPUSS: In my submission, that is not a reasonable position to take because what they ought to be doing is looking, for example, at a sample of trades and saying, "Well, having now looked at your schedule, here's a period we're interested in. Give us these 40 trades," and that is a manageable exercise for my clients to go away and do. It comes back to my point that these ought to be informed requests rather than just requests of, "This looks interesting. Can you give it to us?" My Lord, Mr. Gilbert does deal with this in his witness statement. Could I invite your Lordship to go to the disclosure bundle B, tab 32?

MR. JUSTICE TOMLINSON: Yes.

MR. MORPUSS: Paragraph 26, p.564 and perhaps I can invite your Lordship to read para.26?

MR. JUSTICE TOMLINSON: I have read it.

MR. MORPUSS: I am grateful, my Lord.

MR. JUSTICE TOMLINSON: I have read an awful lot and I will read it again.

MR. MORPUSS: The point is Mr. Gilbert highlights the scale of the task. Mr. Kendrick speculated as to what SocGen might be able to do or what the burden might be like for SocGen to go and look for various documents but Mr. Gilbert does make it clear that these are burdensome requests. If SocGen is ordered to go away and search for all 3,500 trades and produce them all, my Lord, it is not a quick process and that is the point Mr. Gilbert is making.

MR. JUSTICE TOMLINSON: I am sure it is not quick.

MR. MORPUSS: Therefore, taking that as an example, in my submission, the appropriate course is for the defendants to go away, look at the schedule, which gives them the basic information, and then say what they want.

MR. JUSTICE TOMLINSON: I may be misunderstanding this schedule. That, in a way, is a silly remark because I am not understanding it at all, actually. I simply do not understand what it is telling me, really, but perhaps others do.

MR. MORPUSS: My Lord, I am not in a much better position that your Lordship to assist on that. What it does set out is the basic information in relation to each trade, in the sense of the trade date, the value, the amount and the due payment date.

MR. JUSTICE TOMLINSON: But that is what ought to have happened. What they want to know is what actually was happening to these goods.

MR. MORPUSS: Yes, but my point, my Lord, is they do not need to know what actually happened in relation to every one of these 3,500 trades. What they ought to do is go away and identify some time period by reference to whatever other criteria they are choosing to identify them and say, "Well, this is a starting point, a sample of the documents we want to see." Let them look at those and, if they can then persuade a judge that they need to go wider, or persuade us they need to go wider, then they can have further documents. But to start from the proposition that they ought to have all 3,600-odd trades and every document in relation to every one, in my submission, is unnecessary at this stage.

MR. JUSTICE TOMLINSON: But your case is, presumably – and of course I am going to produce what is really a parody of it – that it came as a bolt from the blue to discover that Goldas had sold $½ billion-worth of gold without having paid for it.

MR. MORPUSS: Yes, my Lord.

MR. JUSTICE TOMLINSON: On the face of it, that is a sort fairly interesting proposition because one would expect a major bank like this to have in place all sorts of procedures and checks and balances which would be designed to stop something like that happening. So the starting point has to be, does it not, that you have got an awful lot of explaining to do as to how on earth this situation came about? If it is said, "This all happened without us having the first idea," people are going to want to look at the underlying documents to see how all these transactions had been handled, from Day 1, to see how on earth you could ever have got yourself into this position.

MR. MORPUSS: I take the point, my Lord, and I do not really want to start arguing the case, but I would say that it did come as a bolt from the blue to my clients and that is their position.

MR. JUSTICE TOMLINSON: Of course, it may prove to be entirely right, that is what the case is all about, but it is a fairly fantastic proposition.

MR. MORPUSS: Mr. Yalinkaya said it is a relationship of trust, and, of course, trust works both ways, my Lord. My clients understood they did have some local insurance cover in place.

MR. JUSTICE TOMLINSON: Yes, but when my bank lends me money, it does not trust me; it requires endless guarantees.

MR. MORPUSS: My Lord, clearly that is an issue which we are going to have to go into at the trial. The question is what underlying documents are going to be necessary for the defendants to look at to make out their case? I come back to the point that if it really is the case that my clients were just letting Goldas get on with it, not caring whether they were selling the gold or using it, that is going to be something which is apparent from the later documents.

MR. JUSTICE TOMLINSON: It may be, or it may not.

MR. MORPUSS: It may or may not. If it is apparent then, as your Lordship said to my learned friend, why does he need the earlier documents?

MR. JUSTICE TOMLINSON: True.

MR. MORPUSS: If it is not, then it is very unlikely to be apparent from the earlier ones because the telephone conversations between Mr. Teboul, Mr. Deshpande and Mr. Binatli in the later period are going to illustrate what was the relationship. I do not deny that obviously it is of interest to the defendants to know what happened in the earlier periods but the question at this stage of proceedings is is it necessary for them to see all those documents at this stage and for my clients to have to go away and search for them at this stage, rather than the defendants getting a more controlled disclosure of the documents from 2005, forwards, and a selection of the documents before 2005 and then making their own judgment as to what more they want to see after that?

MR. JUSTICE TOMLINSON: But it is your case, is it not, that when they look at the 2005 to 2008 documents, they will not find anything which will establish a course of dealing?

MR. MORPUSS: That is certainly my clients' case, yes.

MR. JUSTICE TOMLINSON: If you give them the 2005 to 2008 documents and they find nothing to support their case, sure as eggs are eggs, they will then ask for the earlier documents.

MR. MORPUSS: Yes, and we will then be able to say, by reference to the documents which they have and produce examples, they are not going to be able to get anything out of the earlier documents.

MR. JUSTICE TOMLINSON: That will be the argument.

MR. MORPUSS: But that will be an argument to be had in the future, my Lord. We do say it is pre-empting it for them to ...

MR. JUSTICE TOMLINSON: The trouble is, at that stage, you will say, in any event, it is now too late because there is not time to do this before the trial.

MR. MORPUSS: My Lord, that will be an issue, but ultimately if the court or judge hearing it at that stage disagrees, the ultimate option is to move the trial date, and my clients would have to live with that. That is why the suggestion that we hold some sort of threat that the trial date will have to be moved is not a very strong threat, on our part, because it can be changed.

MR. JUSTICE TOMLINSON: It seems to me that, from the outset, you may have been approaching this on the basis that it was a straightforward claim for misappropriating goods; whereas, on analysis, it turns out that it is something rather different.

MR. MORPUSS: Undoubtedly the issues have blown up, my Lord, as time has gone on, and that is why we have approached it in the way in which we have. But the difficulty is that we are where we are; we have proposed, as I say, a substantial chunk of disclosure which will give the defendants a lot to be getting on with. The question is whether my clients should at this stage be asked to be going away and looking for a lot more, on the possibility that it will give the defendants something further. In my submission, it is not appropriate at this stage to be ordering that. They may be interesting documents, they may be documents which the defendants can say, "Well, we might want, we might not," but I do say now is not the time to be making that decision. It ought to be an informed decision made, once some disclosure has been given.

MR. JUSTICE TOMLINSON: The significance of your 2005 date is simply that that is when the revised agreements were entered into, is it not?

MR. MORPUSS: Yes, the first revised agreement was signed on 27th April 2005 and those are the agreements (BCAs) under which the misappropriated gold was delivered and that is why originally the date of 1st January 2005 was chosen to try and capture any negotiations which preceded that, to give us three or four months before that.

MR. JUSTICE TOMLINSON: So if the revised agreements had been entered into a year earlier, your starting date would presumably be a year earlier.

MR. MORPUSS: Most likely, my Lord, yes, but one has to have a cut-off date somewhere. It is purely fortuitous that the relationship started in 2003. It might have been that the relationship had started in 1995. Because it is only 2003, it makes it easier for my learned friends to say, "Well, all right, it's just pushing back the date two years." If the relationship had started in 1995, I would be submitting even more strongly that it unreasonable to require my clients to go back an extra ten years.

MR. JUSTICE TOMLINSON: What they say is they want to look at the inception of the relationship, when the patterns were set.

MR. MORPUSS: My Lord, I say that would be apparent to them from the later years because what pattern was set will be clear to them from the communications between Goldas and SocGen in the later years, so they do not need to go back and dig around, or SocGen to dig around, in all the early material because it will be manifested by what actually passed between Goldas and SocGen in the later years.

My Lord, it is not as though we have simply shut up shop and said we are not giving anything before 1st January 2005. Recognising the arguments which my learned friend has put forward and some points your Lordship has made to me, we have tried to provide some insight into what went on in 2005.

MR. JUSTICE TOMLINSON: I appreciate that, yes.

MR. MORPUSS: I do say that really the question for your Lordship today is have we done enough at this stage to provide some insight for the defendants, from which they can then go and look at these documents and say that there is something more and try and persuade a judge or persuade us in the future that there is something more which they ought to be giving? What we have offered, as your Lordship knows, are the emails between SocGen and Goldas in the commodities departments, credit control departments and the commodities legal departments. We have offered the print-out from monitoring system, which your Lordship has seen. That may be of limited

utility but it is of considerable utility, I suggest, in trying to reconstruct the pattern of trading, from which further requests can then be made.

MR. JUSTICE TOMLINSON: What they want to know is how each individual consignment was actually dealt with on the ground and how one got into this situation. They do not want a theoretical list of when the payments should have been made. They want to understand what was happening to the gold, at least I think that is what they want.

MR. MORPUSS: My Lord, they are going to understand quite a lot of that from seeing the emails between Mr. Teboul, Mr. Deshpande and Goldas. They are going to see a lot of the day-to-day trading relationship in that way. They are going to get an overview of the day-to-day trading relationship from the spreadsheet except it is, in a sense, theoretical but it does record actual transactions and actual dates. The only theoretical thing about it is the payment date. The question is is it proportionate at this stage to be requiring us to evidence so that the defendants can reconstruct every one of those trades? In my submission, it is not. The way in which they ought to be approaching this is by identifying some sample of trades which they can then look at, see if that serves their purpose. If it does serve their purposes then all well and good; if it does not, then they need to come back and say, "Well, we need more." But it is starting from the wrong end to say, at this stage, it is absolutely obvious that they ought to have all 3,500.

MR. JUSTICE TOMLINSON: Have you offered them a sample and, if so, how defined?

MR. MORPUSS: What we said, my Lord, in the letter last night, which my learned friend did not take you to – it is the next paragraph.

MR. JUSTICE TOMLINSON: I am not complaining about this because it is inevitable but you will appreciate one of the difficulties I have in reading all these documents is that the goal posts are constantly moving.

MR. MORPUSS: Indeed they are.

MR. JUSTICE TOMLINSON: Of course they are, because that is the nature of the exercise, but it does make it quite difficult for me to assimilate it. What is last night's letter again?

MR. MORPUSS: It is the letter of 1st July, from last night. I think it is in your bundle, at 82.L, bundle A of the disclosure bundle. Mr. Kendrick read you para.3.3.10.

MR. JUSTICE TOMLINSON: Yes.

MR. MORPUSS: What we actually then offered afterwards was at para.11, over the page (82.M).

MR. JUSTICE TOMLINSON: Again, I am not being deliberately critical of you, but you cannot explain to me what they are going to find out from this spreadsheet which would enable them to identify the ones of interest.

MR. MORPUSS: It tells them what the trades are, it tells them the amounts of the trades, it tells them the dates of the trades and they ought to be able to go away and think about what area most likely in time it is that they want to cover and then come back to us and say, "Well, as a starting point, give us these 20/30/40 trades so that we can get a picture of how those trades were carried on." It is likely they will be the ones towards the end of the period, towards the period of misappropriation.

MR. JUSTICE TOMLINSON: Is it? Suppose it is the case that the later consignments were being used to pay for earlier ones. Then the later ones are not going to help at all, are they? It is the earlier ones you want to see, to see how the situation built up, such that gold was being sold without having been paid for.

MR. MORPUSS: My Lord, it may well be then it is the earlier ones but, in a sense, that illustrates my point: if the later ones are not going to help then there is no purpose in ordering us to go away and disclosure all the later ones at this stage. Let the defendants identify what it is they want, and see whether that is sufficient for what it is they are trying to establish. If it is, then fine. If it is not, then we can have another debate about other periods. That is the essence of my point on these 3,500 documents, which is one of the biggest concerns of my clients because it is one of the biggest areas to go away and search for. We do not accept, as Mr. Kendrick suggests, that it is just a case of going away and finding 50 lever-arch files.

MR. JUSTICE TOMLINSON: It depends how your filing system works.

MR. MORPUSS: Indeed, my Lord.

MR. JUSTICE TOMLINSON: And I have no idea but there are different ways it might be done. I should have thought that you would have some sort of system whereby the documents were stored by reference to transaction, but I may be wrong about that.

MR. MORPUSS: My Lord, all I can go back to is the evidence of Mr. Gilbert. I showed your Lordship para.26 where he does not go into the detail of how it is filed but he does say that this is a retrieving and organising the ... documents taken through a period of time ... costs, and he refers to the generation of eight documents per transaction.

MR. JUSTICE TOMLINSON: Yes.

MR. MORPUSS: I am instructed that it is not an easy task, and that is why I do say that some sort of sampling exercise is a much more sensible way of approaching this and much less likely to cause delay to disclosure than getting my clients to go away and do the whole exercise now.

MR. JUSTICE TOMLINSON: But if I were to agree to your suggestion of the sampling exercise, you would have to recognise that if the sampling exercise proved, for some reason, inadequate, you would simply face a request later on, at which time the court would be likely to be very unsympathetic to any suggestion that it was now too late to do it.

MR. MORPUSS: I entirely accept that, my Lord, and that is why I say, in a sense, a lot of the argument is about timing because it is not as though this is the defendants' only chance to come and ask for disclosure; it is not as though we are saying, if they do not get it now, they are shut out for good. Clearly, if they look at their disclosure and find something more which they can persuade a judge they ought to see, or persuade us they ought to see, we will have to go away and disclose it. Once the trial is set in stone and we are much closer to the trial, I can understand a judge being very unsympathetic to the idea that this is not achievable, but we will have to cross that bridge when we come to it. The concern which SocGen has at the moment – I understand that your Lordship does not want to address the trial date at the moment – is that if we are ordered to go away and do all this wide-ranging disclosure the defendants want, it is fairly inevitable that we will be coming back in September and saying, "Terribly sorry, we've done our best, but it just wasn't achievable," and that is likely to have an impact on the trial date.

I should perhaps just deal with one comment which was made in one of my learned friends' skeletons which is that we had effectively committed that we would do all this disclosure by 17th September. My Lord, that is not what we did at the last CMC. The order – I will not take you to it – from the last CMC expressly recognises that the timetable may have to be changed in the light of whatever orders are made today. We did not say, "We will be able to comply with any order by 17th September," because that was not our position.

My Lord, I have slightly jumped around on the 2003/2004, but let me just see what other points there are on which I need to pick up. Turning to my learned friend's schedule he handed up to you this morning, perhaps I can indicate what documents we have offered in relation to which there may be some misunderstanding. Taking items 13 and 14, documents relating to security, guarantees bonds, etcetera, we did deal with this area in the letter sent last night and it is not the case that we are refusing to go away and search any hard-copy documents. The only support staff back-office documents which SocGen is aware of are likely to be in its commodities legal department and it had indicated that it will go away and search those.

MR. JUSTICE TOMLINSON: This is one which has moved on, is it?

MR. MORPUSS: This is in the letter again, of 1st July, and if I can take you back to that at p.82.N, p.3 internal numbering, para.13, perhaps I could invite your Lordship to read paras.13 to 16.

MR. JUSTICE TOMLINSON: Is this responding to what is para.13 in this schedule?

MR. MORPUSS: It is responding to para.22 of my learned friend's skeleton, which is a rather more wide-ranging request. My Lord, it falls under 1 and 2 of the current schedule which was handed up to you this morning.

MR. JUSTICE TOMLINSON: Just to try and work out what the ambit of the dispute is here, let us just look at no.1 on Mr. Kendrick's schedule, which was addressed in para.22 of his skeleton. As I understand it, you accept that the documents which are there described are, in principle, disclosable.

MR. MORPUSS: In principle, yes, my Lord. The question is how one goes about it.

MR. JUSTICE TOMLINSON: They are obviously, in principle, disclosable, I should have thought, and you are not suggesting ----

MR. MORPUSS: No, we accept that in the letter.

MR. JUSTICE TOMLINSON: You have. So far, so good. The onus is on you, is it not, to carry out a reasonable and proportionate search to find such documents if they exist?

MR. MORPUSS: Yes, my Lord.

MR. JUSTICE TOMLINSON: So where have we got to in terms of what you are agreeing to do and what they say you should do?

MR. MORPUSS: What we are saying is reasonable and proportionate in respect of that request is to go away and search the various email folders which exist but also to go away and look at the only hard-copy documents of which we are aware which are likely to fall in that category, and that is the hard-copy documents of the legal department. We have agreed that we will go away and do that. It comes back to the point that this will give the defendants most, if not all, of what they want. If, having looked at those documents, they say, "Oh, but there's an email here which refers to something else," or. "There is a hard-copy document here which refers to something else," they can come back to us.

MR. JUSTICE TOMLINSON: Does it come to this? You are saying, "Yes, we accept that all these documents must be disclosed. We believe that we will find these by conducting the search in the manner which we have proposed."

MR. MORPUSS: Yes, and we believe that that search is proportionate and reasonable.

MR. JUSTICE TOMLINSON: In principle, one should first look at the category of documents and then say, "How can we go about identifying those documents?" It seems to me that the starting point is the documents, rather than the starting point being the storage systems.

MR. MORPUSS: The starting point is the types of documents and then one asks, "Where are we likely to find them?" What we have tried to do is to identify where we believe that they are likely to be found and so what is a proportionate search to go and carry out? We have said this is what we believe is a proportionate search and this is what we will go and do. It is not the case that we are just refusing to look up hard-copy documents before 2005. We are in this category where it appears that there may be documents which will assist.

MR. JUSTICE TOMLINSON: But why are you not going to search servers and things of that sort to which Mr. Kendrick has referred?

MR. MORPUSS: Because it comes back to the question, my Lord, of what is a proportionate search? We say what we have offered to give is a proportionate search and it is likely to give the defendants the material they want. In a sense, it is very easy to focus on each individual request and say, "Well, for that request, it would be possible or easy to go and look at a further

document or a further server," but it is a question of standing back and looking at the totality of it because, once one adds up all the little, easy, extra steps which it is possible to do, they add up to an awful lot and a large burden on my clients.

MR. JUSTICE TOMLINSON: I follow that. In principle, the way this ought to work, I suspect – and it may be that this discussion is premature – you have accepted, obviously rightly, that this is an area in which full disclosure must be given of this category of documents. You think that you will find those documents by carrying out the search which you wish to carry out. What you ought to do is go away and do it and produce what you get.

MR. MORPUSS: Absolutely.

MR. JUSTICE TOMLINSON: But you may you yourself find, when you do the exercise, that you are not finding the documents, in which case you will have to do something different.

MR. MORPUSS: If, when we go to do the search, we realise we are looking in the wrong place, we will obviously have to see if there is somewhere else to look.

MR. JUSTICE TOMLINSON: I am not going to tell you today that to do what you propose to do is sufficient in order to carry out your duty to disclose documents within that category because, until you have tried it ...

MR. MORPUSS: We understand that, my Lord, and, in a sense, that is my overarching point with which I started. These disclosure schedules are all well and good but there is a limit to how far one can go in debating issues of disclosure in the dark.

MR. JUSTICE TOMLINSON: That is true.

MR. MORPUSS: And that is the problem with disclosure statements: although there is a virtue to them in ironing out these sorts of points, they may also lead to premature arguments about detail, which either prove to be unnecessary or are unnecessarily unfocused at that stage at which they are argued and could be much better focused at a later stage. As I say, we are not saying to the defendants "this is your only shot", that what we are doing is absolutely perfect and we are asking your Lordship to rubber-stamp that. If it turns out that there are other things we ought to be doing, no doubt the defendants will come back and tell not your Lordship but someone else and ask for further disclosure orders.

My Lord, there is a point on timing of the 2003/2004. It had originally been suggested, I think, that we should be looking for all documents in 2003/2004. That may partly have been the result of a typographical error in some of our further information, which suggested there was a GCA or a BCA in February of 2003. That is incorrect and it appears to be common ground, from what Mr. Kendrick is saying, that a search ought to start in around August 2003.

MR. JUSTICE TOMLINSON: It sounds like it, yes.

MR. MORPUSS: That said, Mr. Kendrick makes the point, I think, to indicate that the 98,000 documents may not be 98,000, although the likelihood is that, given that the keyword search is to be directed towards the Goldas relationship but the majority of the documents will still be Goldas related and ... so the burden remains a large burden if we had to go away and search for all these documents.

My Lord, I am just flicking through Mr. Kendrick's schedule to see if I can assist you further on the individual items. I have largely covered the print-outs and the pro forma invoices and documents between SocGen and third parties. I started off with 13 and 14 because those are the sorts of documents which we say would fall within the legal department hard-copy search and therefore they are lumped together with 1 and 2, but the point I was making applies equally to 1 and 2.

MR. JUSTICE TOMLINSON: That is dealt with at 82.M, I think.

MR. MORPUSS: It is, my Lord, yes.

MR. JUSTICE TOMLINSON: But how will you find the documents which evidence the discussions internally at SocGen as to the need for security? How will those be located?

MR. MORPUSS: To the extent that they exist, my Lord, I believe they are likely to be evidenced by emails or possibly on the legal department hard copy. We may have to revisit that, once we have gone away to do the search.

MR. JUSTICE TOMLINSON: Does your letter at 82.M tell me what you are going to do for that? I do not think it does.

MR. MORPUSS: I do not believe it does, my Lord, no.

MR. JUSTICE TOMLINSON: Maybe I have got the wrong page.

MR. MORPUSS: 82.N or M, my Lord?

MR. JUSTICE TOMLINSON: I have written down on Mr. Kendrick's schedule that it was 82.M.

MR. MORPUSS: It is paras.13 to 16 ...

MR. JUSTICE TOMLINSON: I cannot find anything on 82.M which deals with this point about security. Perhaps I am missing it.

MR. MORPUSS: My Lord, I am told the reason it was not addressed in the letter is because it is actually addressed in Mr. Gilbert's witness statement.

MR. JUSTICE TOMLINSON: Paragraph 32.13.

MR. MORPUSS: Page 568, starting at 11, my Lord.

MR. JUSTICE TOMLINSON: Yes. If I just take 32.13 where he says:

> "SocGen owned the gold that was placed on consignment. SocGen therefore considered there was no need for any security over the assets of Goldas, except the ... guarantee."

That then leads to the point that one wants to see the documents which evidence the discussion which leads to the decision that there is no need for any security.

MR. MORPUSS: What we have offered to give, my Lord, is the guarantee and it is not believed that there are any documents going wider than that.

MR. JUSTICE TOMLINSON: What is this, just remind me ----

MR. MORPUSS: The parent company guarantee.

MR. JUSTICE TOMLINSON: It is a parent company guarantee.

MR. MORPUSS: Yes, or a group company guarantee, at least.

MR. JUSTICE TOMLINSON: As you say, for what it is worth. On the face of it, it is quite a surprising state of affairs.

MR. MORPUSS: It is not a position which my clients accept, my Lord, and my clients have a good explanation as to how this came to happen. It is probably

not productive for me to explain what my clients' case is on that, that will a matter for debate at trial, but it obviously requires some explanation and my clients will give that explanation and they say it is a convincing one.

Getting back to the question of where one is going to find the documents which evidence questions of whether or not there should be something further than a parent company guarantee taken out, I am instructed that the likelihood is that it will be in the legal department file, that is where we are looking and searching for it, or it will be in any of the emails passing around, and it is unlikely to be anywhere else and that is why we have identified those as the place to go away and search. I cannot really take it any further than that, my Lord.

MR. JUSTICE TOMLINSON: No, I follow. So what you would say in relation to Mr. Kendrick's category 13 is that you are going away to search the very places where, if there is any such correspondence, it will be found.

MR. MORPUSS: Where we believe it will be found, my Lord, yes.

MR. JUSTICE TOMLINSON: And the same is true of 14?

MR. MORPUSS: It is, my Lord. One then comes on 22, 23 and 24, which are hard-copy documents generally, electronic documents other than emails, and communication with the IGE and Goldas.

My Lord, we are not offering to go away and search all of those at the moment, and it comes back to the same point: what we are offering are the emails of the key people – and we have widened that considerably to include the various support departments – and those people's documents will be searched, those people's communications will be searched, the legal department's hard-copy documents will be searched. In our submission at this stage, that is a proportionate approach to be taking to disclosure of these documents. It is likely to capture most, if not all, of the key communications. If it is apparent to the defendants that, having looked, for example, at the emails, there may be some other communications missing and may have passed in some manner other than email, that can be a focused request which we can then go away and look for, rather than having to go away and dig out every other file which may relate to Goldas over the entire period.

MR. JUSTICE TOMLINSON: It goes a little bit further than that, does it not, in the sense – and I am not saying you will not do this, but just for completeness – if it becomes apparent to you that this exercise, contrary to your expectation, is not throwing up the hard-copy documents then it is incumbent upon you to

start searching for them in another way, is it not? If you are not capturing by searching emails documents such as, I do not know, position papers or whatever which might have been created at any given time, then you have got to do something else.

MR. MORPUSS: We may need to, my Lord, and, in a sense, that takes us on to the post 2005 period where we are testing the reliability of the question, "Do emails capture all the documents?" by going away and testing it with various employees and that will be as good an indicator as to whether that is a useful approach before 2005. It may be that, in searching the emails before 2005, it becomes obvious that there is somewhere else one ought to be looking, in which case it will have to be revisited. But it is likely that the testing of the later period will give a very strong indication of whether looking simply at emails is a useful process or whether there are key documents or interesting documents which are being missed out. Again, that is something we are doing and, as I say, it is premature for the defendants to be saying, "Well, go away and search everything other than emails because there might be something there," until we actually know whether something useful is being achieved by doing that search. It comes back to the point that this is a slightly premature exercise.

My Lord, there is a point made in my learned friend's submissions. I am not sure whether it is a point he touched on orally, and this goes to the correspondence between Goldas and SocGen, or the IGE and SocGen, that Mr. Gilbert has produced a list of 53 people who had email contact with Goldas. This, in my submission, is a prime example of acting prematurely. It is obviously not sensible for SocGen to go away and dig out every one of those 53 people's emails because some of them will have been of very peripheral relevance and I think Mr. Gilbert says that they are scattered around the world. It may be the Clifford Chance letter.

MR. JUSTICE TOMLINSON: Yes, I do not think he says that.

MR. MORPUSS: It may have been said in the Clifford Chance letter last night, that they are scattered round the world; there are 53 people, some of whom were simply copied in on emails.

MR. KENDRICK: If I can just help my friend, it is on p.12 ... 32 people identified as critical, plus additional notable individuals .

MR. JUSTICE TOMLINSON: Page 12 of what?

MR. KENDRICK: Page 12 of our schedule. That is for the electronic documents other than email. It is only the SocGen/Goldas/IGE ... looking for 53, where we think it is an easy thing of sender/recipient.

MR. JUSTICE TOMLINSON: This is Mr. Kendrick's point that even he can organise his emails.

MR. MORPUSS: Absolutely, my Lord, but it is yet another case of Mr. Kendrick giving evidence about SocGen's filing system, which is ...

MR. JUSTICE TOMLINSON: He probably does not send as many emails, either.

MR. MORPUSS: No, which is rather optimistic ----

MR. JUSTICE TOMLINSON: Nor receive them.

MR. MORPUSS: Indeed, my Lord, given the size of SocGen and the number of employees. I come back to the point: these are not easy tasks to do and, in my submission, your Lordship should only be ordering SocGen to do them if there is a good purpose to order it at this stage.

MR. JUSTICE TOMLINSON: Let me just try and identify, in relation to item 24, for example, what is the ambit of the dispute at the moment. I think what Mr. Kendrick is saying that you should look at the emails of all 53, but doing it in a manner which merely enables you to identify whether they have sent or received anything to a Goldas company or to the IGE. That is broadly it, is it not, Mr. Kendrick? And that is a relatively straightforward exercise, is it not?

MR. MORPUSS: My Lord, it requires us to go back and search through all the emails, which is, as I say, in itself, a reasonably confined task but, when taken with all the other tasks, it all adds up.

MR. JUSTICE TOMLINSON: I am far from being an expert in these things but does not one merely press the relevant buttons to ask the computer to re-order them in such a way that they simply identify those which have gone to or from a certain place?

MR. MORPUSS: My Lord, if that were simply one person's email folder then that would probably be the way of doing it; one would simply highlight recipient or sender. But Clifford Chance did deal with this in paras.19 to 21 of the letter last night. I wonder if I could, rather than my making submissions about evidential points, invite your Lordship to read those paragraphs?

MR. JUSTICE TOMLINSON: Yes, 19 and 21?

MR. MORPUSS: Paragraphs 19 to 21.

MR. JUSTICE TOMLINSON: Right, let me just read them.

I follow. So you say you gave them a list of all 53, in the spirit of openness, but what you have done is to select the 32 who you think are the most significant.

MR. MORPUSS: Absolutely, and I am instructed that we do not have the email folders isolated for the 53 because some of them were of such peripheral relevance, they are people who Clifford Chance had never heard of before, until the list of 53 was produced. Again this comes back to the point: it is must more sensible for the defendants to look at all documents, see the people who keep coming up and who look interesting and important and focus on those, rather than trying to identify, at this stage, individuals from a list of 53, or a press release, or whatever else.

MR. JUSTICE TOMLINSON: So far as concerns correspondence between SocGen/Goldas companies/IGE, why are you limiting this to email?

MR. MORPUSS: Because that is likely to capture most, if not all, of the relevant communications, my Lord, that is how the communications took place: by that or by telephone. So again it comes back to the point that that is the starting point. If it turns out that there appear to be lots of other communications which are missing, then it may be we will have to widen the search but let the defendants look at the emails, first.

MR. JUSTICE TOMLINSON: I agree. If the starting point is that, at all relevant times, all correspondence was conducted by email then obviously that is sensible.

MR. MORPUSS: I am not sure I can put it that highly, my Lord, but it is likely to be the primary source of communications between SocGen and Goldas. The problem is, before 2007, we do not have the recordings of telephone calls; they only date back to 2007. Before then, the recorded telephone calls have largely been wiped, so emails are likely to be the primary source.

MR. JUSTICE TOMLINSON: But what Mr. Kendrick says in this schedule is the search should not be limited to email but should extend to draft correspondence or correspondence received by fax or by post. In principle, he is obviously right that you should not restrict it to email. For example, if you

were searching my documents relevant to a transaction, you would not find very many emails but you would find quite a lot of correspondence. But you are saying that, in this case, is not the right approach because, in principle, all this was done by email.

MR. MORPUSS: Yes, and there is a further point, my Lord, which is that, although in principle that might be the right starting point, email and all other communications, there is the practical question of what is it sensible to give the defendants at this stage? I say the starting point is the emails. If it turns out there was extensive other correspondence, we will have to deal with that, and that may justify a further request.

My Lord, looking at the time, would that be a convenient moment?

MR. JUSTICE TOMLINSON: Let me just say this. You have said everything you want to say really about ----

MR. MORPUSS: I think I have, my Lord, yes.

MR. JUSTICE TOMLINSON: In principle, I am afraid I consider that your approach, so far, has been unrealistic in relation to the relationship going back to 2003. The point on which I am not yet persuaded, however, but I think it needs some further discussion, is whether a sampling exercise might or might not be appropriate. I will leave you to talk about that.

MR. MORPUSS: Very well.

MR. JUSTICE TOMLINSON: In principle, I am pretty clear in my mind that it is relevant to look back at the entirety of this relationship.

MR. MORPUSS: I had detected that, my Lord.

MR. JUSTICE TOMLINSON: In any event, I think it may be heading off problems later on, in order for you to start it now.

MR. MORPUSS: That is a helpful indication, my Lord, and we will see where we can get to.

MR. JUSTICE TOMLINSON: Thank you very much, then we will resume at two o'clock.

(Adjourned for a short time)

MR. JUSTICE TOMLINSON: Yes, Mr. Morpuss?

MR. MORPUSS: My Lord, on the 2003 to 2004, there seems to be no appetite on the other side for sampling, so your Lordship is going to have to decide whether or not that is an appropriate course.

Can I just add one further point to what I said this morning? In getting the emails which go backwards and forwards between Goldas and SocGen for the entire period, those will actually attach a lot of the underlying documents as well, the shipping documents, and so the defendants are going to get quite a lot of that, just from getting the emails which went backwards and forwards, so they will get quite a good feel from that as to what are the underlying documents. My Lord, other than that, I have nothing to add on 2003 to 2004.

MR. JUSTICE TOMLINSON: Thank you. Mr. Kendrick, shall I tell you what I am minded to do? I am with you on the width of the required disclosure going back to August 2003, in principle, so, in principle, they are going to have to do that. If there is no appetite for sampling, then I am going to order them to do the whole thing now because I think it is going to save problems later.

MR. KENDRICK: Yes.

MR. JUSTICE TOMLINSON: What at the moment I am minded to do, subject to anything further you have to say on the other 2003/2004 categories – I am at the moment not minded to be prescriptive now as to how they should go about conducting their search. On the other hand, because it seems to me, in a way, it is a matter for them, at this stage, as to how best they think they are going to retrieve the documentation which they accept to be relevant. I am not sure whether there are any other areas where relevance or disclosability is challenged; if there is, I will just have to rule on it. But, in principle, at this stage, I am just minded to say that of course they have got to disclose these documents. How they go about it, for the moment, is a matter for them, without prejudging any issues as to the adequacy of the search, and then we will wait and see.

MR. KENDRICK: My Lord, I just say two things on that. Emails, with limited exceptions, is the approach now from my learned friend, which is a move from effectively just emails. Emails ... the one thing an email cannot by definition catch is internal notes ----

MR. JUSTICE TOMLINSON: Absolutely right.

MR. KENDRICK: Under this new procedure in the CPR, asking for a vindication of this approach ...

MR. JUSTICE TOMLINSON: No, but I want to make it very clear I am not vindicating the approach. I hope I made that clear earlier. It seems to me that if it becomes apparent to them, whilst conducting it the way they wish, that they are not in fact capturing the sorts of documents you have just described, then it is incumbent upon them to do something more. I am certainly not ruling that the approach they propose to adopt is adequate. All I am saying is that, for the moment, let them go about it that way. If it becomes apparent, either to them or to you, that it is not adequate, then either they must do more or you must ask them to do more and, if that fails, you will have to come back. Also, I hope I have made it sufficiently clear already, you can report to whoever is hearing it, my view, that they should receive little sympathy for any suggestion that it is not going to be easy to do it within the time frame, because it may have been easier had they started from now.

MR. KENDRICK: My Lord, yes.

MR. SCHAFF: Forgive me, my Lord, I would adopt what my learned friend just said ... and your Lordship has been very clear that it is not a vindication of ----

MR. JUSTICE TOMLINSON: Absolutely not.

MR. SCHAFF: By definition, searching for emails is not going to find the notes of the meeting.

MR. JUSTICE TOMLINSON: Plainly not.

MR. SCHAFF: ... if by definition a search of emails is not going to find contemporaneous notes, which, electronically will be on the server or the hard drive, whatever it is, you will actually be in no different position when we come back on ... when, by definition, all you will have is a search for the emails and not for these electronic documents.

MR. JUSTICE TOMLINSON: As I understand it, what they are saying is that, by searching for the emails, they are in fact going to throw up these documents. That seems to me unlikely.

MR. SCHAFF: It is unlikely, my Lord. Not to put too fine a point on it ... correspondence unless, fortuitously, the correspondence happens to attach a contemporaneous memo of a meeting or a telephone conversation ...

MR. JUSTICE TOMLINSON: I may have misunderstood this, but I think what they are saying is that they will in fact discover the documents about which you and Mr. Kendrick concerned because they will be attached to emails or referred to in the emails, or whatever.

MR. SCHAFF: My Lord, my understanding of this approach is that this is – what drives this application is an attempt to vindicate what is, in my submission, an unreasonably limited search.

MR. JUSTICE TOMLINSON: I understand that.

MR. SCHAFF: I am not talking about 2003/2005. I am talking about emails ... means that you do not start, at the outset, by distinguishing between emails, on the one hand, and contemporaneous electronic documents, on the other hand. I quite understand if Clifford Chance say, "Well, this person out of the 52 was unlikely to have had any involvement. I'll exercise my judgment, acting reasonably," that is one thing. But prejudging the parameters of the search at the outset by excluding anything other than emails plus attachments is unreasonable, and we would be saying the same thing ... as sure eggs are eggs, on 15th October, if the search has been conducted in the way it is proposed to be carried out. My Lord, that is all I want to say. It is more, I would respectfully suggest, than just a non-vindication of the approach.

MR. JUSTICE TOMLINSON: I hope I have gone a bit further than that. What I hope I have made clear – and I think Mr. Morpuss and Clifford Chance understand because they know more about this exercise than I do – if it is apparent to them that doing it the way they are proposing to do it is simply not throwing up the documents which fall within these categories, as we have discussed, then it is incumbent upon them to do something different and to do it pretty quickly. But I do not think that it would be helpful for me, given what a very complex exercise it is, to attempt to dictate to them now how they go about it before we have seen what fist they make of it first time round. That is my approach.

MR. SCHAFF: That is your approach. With all due respect, by definition what we would say is you are not going to find that class of document ----

MR. JUSTICE TOMLINSON: I am highly sceptical about it as well but I think they should be given the chance, but if it does not work then they have got to do something else.

MR. SCHAFF: ... is that search has to, in effect, proceed on the basis that the solicitors ...

MR. JUSTICE TOMLINSON: Exactly, that is why I said this morning, as far as I am concerned, the starting point is the category of documents which is relevant and disclosable. You should, in principle, be looking for those now. If they say, "We believe that the most reasonable and proportionate way of capturing those documents is by conducting an email search, in the first instance," so be it. Let them see how that works. But I make it very clear that that is not the end of the exercise and, in principle, what they are doing is looking for the disclosable categories of documents.

Is that clear, Mr. Morpuss?

MR. MORPUSS: It is very clear, my Lord.

MR. JUSTICE TOMLINSON: I am sure it is.

MR. MORPUSS: If I can offer Mr. Schaff some reassurance because there may be some misunderstanding, we have searched the Arpege server and that has been a complete search; it is not just emails. In relation to the SCIB server, that is where we are conducting the testing to see whether there are documents other than emails in relation to key employees. So we are looking into this and we are very conscious of it. As far as hard-copy documents go, the only ones which we have identified, so far, which are likely to be relevant are the legal commodities department and we are going to search and disclose those. So it is not that we are just looking at emails and we shut our minds to everything else and, obviously, we have heard what your Lordship has to say.

MR. SCHAFF: With great respect ... all individuals, not all the identified key individuals, and say, "We will conduct a search of non-emails on those individuals," and, for other key individuals, the proposal is not even to conduct a test search ... that is the proposal, and that is the proposal which we say is an unreasonable ... I am not going to press your Lordship ...

MR. JUSTICE TOMLINSON: On your side of the court, you have heard everything which has been said and I have no doubt you will take it into account.

MR. MORPUSS: Of course, my Lord, yes.

MR. JUSTICE TOMLINSON: And what you are going to produce by – it is September, the second round, is it not?

MR. MORPUSS: September 17th, yes.

MR. JUSTICE TOMLINSON: I am not quite sure what the rules require at the moment but, presumably at the same time as producing your disclosure, you will by then also produce a comprehensive account of how you have searched and what you have done.

MR. MORPUSS: We will have to produce a disclosure statement which ...

MR. JUSTICE TOMLINSON: Yes, you will, will you not?

MR. MORPUSS: Yes.

MR. JUSTICE TOMLINSON: So that will contain all that information, so it will be clear what you have done and indeed why you have done it.

MR. MORPUSS: It will, my Lord, yes.

MR. JUSTICE TOMLINSON: And then we can take it from there.

MR. MORPUSS: We are obviously very conscious of what your Lordship has said and very conscious of the expressions of limited sympathy for asking for more time later on, and that will all be taken into account, of course, my Lord.

MR. JUSTICE TOMLINSON: That is 2003 to 2004 and indeed, to a certain extent, it covers other things. What is the next big point?

MR. MORPUSS: The next big one, I think, is April 2008, onwards, where there are differing positions from the defendants. Mr. Kendrick and I are, happily, agreed on that. We have offered to disclose various categories and he is content with that. Mr. Schaff and I are almost agreed on it. There are two items outstanding. Mr. Adam, however, says that we should conduct standard disclosure searches for everything after 17th April 2008, not just the limited categories. So I suppose the running is to be made by Mr. Adam on this one.

MR. JUSTICE TOMLINSON: Yes, Mr. Adam?

MR. ADAM: Yes, mo, as my learned friend says, the position were in is that what SocGen wants to do is limit its obligations to search for documents after 17th April 2008, to certain defined categories rather than conduct the usual standard disclosure search and we object to that form of proceeding. As I understand it from discussions this morning and over lunch, I have some support from both Mr. Kendrick and Mr. Schaff. I knew they would see the error of their ways.

MR. JUSTICE TOMLINSON: Do not be too confident about that.

MR. ADAM: I am never confident with Mr. Schaff, my Lord.

My Lord, my objections to this approach are both philosophical and practical. If you start by looking at it from a high level, the starting point is CPR.31.11 which says that a litigant's duty is to disclose relevant documents and it continues until the proceedings are concluded, that is a basic principle.

My Lord, instead of fulfilling that obligation, when SocGen commenced this super-tanker exercise in disclosure, and the course of which we have been endeavouring to ... since March this year, it decided not to search for any documents after 18th February 2008, that was a cut-of the date which was applied and that was shown on 1st December 2009 disclosure schedule. My Lord, there was no principled basis for that. The date was chosen, the schedule tells us, because it was the date on which the loss was discovered, but there was no basis for saying that, therefore, there were no relevant documents after that date. Once this was challenged, a new date was quickly substituted: 17th April 2008. That, too, was simply an arbitrary date and ... accepted that before your Lordship at the last CMC and it quickly unravelled, as the defendants pointed out obvious categories of documents which fell after that date which had to be disclosed. Your Lordship will recall, from the last hearing, where we said, "Well, what about the litigation which you have brought against the Goldas companies?" ... said, "Yes, well, of course you can have that." We said, "Well, what but the litigation documents ...?" He said, "Well, of course you can have that, too." So that was how this area of the case developed and, since that hearing, the same pattern has followed.

What SocGen has done is wait for the defendants to point out the categories of relevant documents which SocGen can be expected to hold and it has then responded to those suggestions. So, in relation to this period of documentation, SocGen has been utterly reactive.

I would say, in parenthesis, that Mr. Morpuss said this morning that that was not a fair characterisation, and I waited to see what he was going to point to in support. All he did was, just in support of the idea that SocGen was being pro-active, was to say, "Well, look at our 1st December 2009 schedule." Of course that was pro-active in relation to ... but that was the schedule which applied 18th February 2008 cut-off date. So, whatever its other merits, it was not pro-active for what one might call these "after-the-event documents". The fact is that all SocGen has done is to respond to suggestions from us and there is absolutely no sign or evidence that anyone in SocGen has made a considered internal review of where relevant documents might exist.

My Lord, this is not a satisfactory way in which to proceed. This effectively treats the disclosure process as a giant game of battleships in which the defendants have got to identify the grid co-ordinates of relevant documents and SocGen have then got to disclose them if we get it right. That is not right. The onus must be on SocGen to make a reasonable search of its own documents, the scope of which, the contents of which, the sources of which it knows far better than we do. It should fulfil the usual search obligations of a litigant under CPR.31.11

My Lord, that question, of what constitutes a reasonable search, leads me on to the objections which are advanced by SocGen and a logical ... at which they inevitably give rise. It is important for your Lordship's note to see that the objection to standard disclosure being ordered for the period post 17th April 2008 is only, "Well, it will create delay and expense," that is Mr. Morpuss' skeleton, para.34. That is supported by evidence from Clifford Chance saying how many documents there are between 17th April 2008 and 1st December 2009.

My Lord, that is a bad argument on the facts anyway and I can show your Lordship that, quickly, just by looking at the evidence to support it, which is at tab 24 ... and is at para.11. This is the sum total of para.11 of the evidence ... Your Lordship will see that there is a calculation of the number of documents retrieved during the period 18th April to 1st December 2009: 33,000-odd documents.

MR. JUSTICE TOMLINSON: Yes.

MR. ADAM: Take two months to complete. "Also my belief ... a large proportion of these documents will be legally privileged." My Lord, it is on that foundation that it is said, "Well, there's too much delay and too much expense."

MR. JUSTICE TOMLINSON: We have moved on from there, have we not?

MR. ADAM: Over the page, your Lordship will see that the moving on was taking place simultaneously and yet this – it is para.13, you can see, "Well, we'll concede that there will be some categories which will be searched for." That moving on completely undermines the para.11 evidence, as your Lordship has already perceived. The documents are going to have to be searched anyway in order to find documents in the categories which were being conceded. The privileged documents are going to have to be filtered out anyway. My case is how much extra work will have to be done? This evidence does not even begin to address that point. My Lord, that is a practical point. Quite apart

from that, the argument that a standard disclosure search should be refused because of delay and expense has a much more fundamental ... and, on any logical analysis, it places Mr. Morpuss on Morton's fork.

On the one prong, a submission can only be true, that there will be extra delay and expense, if SocGen already knows that ordering standard disclosure searches would oblige SocGen to make more searches than have currently been identified by the defendants. If SocGen is aware of other searches, additional to those which have already been identified, which it would have to undertake a standard disclosure ... then one immediately asks, "Well, what are they? What does SocGen know that we don't? What are these extra squares on the battleship grid which no defendant has yet identified?" If SocGen does believe that there will be more searches which will have to be made, then that exactly illustrates why standard disclosure should be ordered.

My Lord, on the other prong, if SocGen believes that in fact there is nothing more it could search for, the suggestions which have been made by the defendants and the concessions which have been made represent all the searches which could conceivably be made, then there is nothing in the argument advanced in Mr. Morpuss' skeleton of the delay and expense by ordering standard disclosure ... SocGen could simply proceed to search through the agreed categories. It could then say, "Well, we've fulfilled our obligations. We simply can't think of anything else to do. We've done all the searches which we can think of."

I should like your Lordship to know that nobody has said, for SocGen, "I have given careful consideration to the types and sources of potentially relevant documents and I can say that, once the searches suggested by the defendants and agreed to by SocGen have been made, there aren't any other searches to be made." Mr. Gilbert had the opportunity to make such a statement and he did not do so. All his evidence said (para.36) is that, for the reasons stated in the statement you have got open already, at para.11, it would be proportionate. That is all he says. Nobody is telling your Lordship, "Oh, well, this wouldn't add anything."

My Lord, that is my principal basis, those points cumulatively, for rejecting this course of action. Only SocGen knows where those documents are. SocGen should make a search through them. It should not be left to the defendants to make educated guesses. If SocGen believes that standard disclosure would entail extra searches, that is a very good indication that the defendants have not found all the places in which evidence might be. On the other hand, if SocGen believes that existing searches do equate to standard disclosure, then there is no harm in ordering standard disclosure.

My Lord, in addition to that philosophical objection, I have got two practical points. The first is that the agreed search categories will not turn up one type of document which is very likely to exist and which would be of considerable interest.

MR. JUSTICE TOMLINSON: You will have to remind me what the agreed categories are because I have not got them.

MR. ADAM: Your Lordship has the disclosure bundle at tab 26.

MR. JUSTICE TOMLINSON: By "the disclosure bundle", do you mean ...

MR. ADAM: There is a thick disclosure bundle and a slim disclosure bundle and it is in the thicker one. It is two tabs on from the tab 24 Clifford Chance statement.

MR. JUSTICE TOMLINSON: That is the witness statement?

MR. ADAM: Yes, and this is the witness statement of Michelle D'arcy ...

MR. JUSTICE TOMLINSON: For the insurers.

MR. ADAM: At p.226, para.16, insurers set out the categories which they say they would be satisfied with ... disclosure and these are conceded by SocGen and they say that if these categories are given, they will pretty much wrap up the more detailed categories ...

MR. JUSTICE TOMLINSON: Let me just read it again because, you will appreciate, I have read a mass of stuff and I do not carry this in my head.

MR. ADAM: My Lord, the type of document which is not going to be captured by any of these four categories, nor by the more details categories suggested by Camerons, is a type which can only be described rather loosely, which is the sort of document in which people start either to point the finger or to cover their own backs. These documents could take many forms but they are not covered by any of these four categories. The one which will come closest will be the ... all documents relating to investigations ... but that will not cover everything.

What it fails to capture is the informal documents, my Lord, the email chatter, the email traffic which your Lordship knows is very often the richest source of unguarded comment and, thus, best evidence. So this search is not going to capture, for example, the email where someone in the metals department says

to someone else, "Why on earth did you let ... have so much gold, given the limits in the BCA?" The response comes back, "Well, we never applied those limits. They were just for show because we wanted to keep the risk department happy." Or an email exchange where somebody defends himself by saying, "Yes, well, I knew that they were selling on before they had paid us, but I had no idea that they were funding earlier transactions from later sales. I thought it was all the same time, so I didn't think it mattered. I thought it was all funded from the same transaction." Or an exchange within the insurance department, or between the insurance department and the metals department, where someone says, "Why have we ended up with this rubbish wording? Why can't we recover?" and somebody in the insurance department says, "We discussed it all with you at the time. You agreed this. This was your idea." My Lord, nor is it going to capture a Word document – this is the point my learned friend was elaborating 15 minutes ago ... a word document in which somebody makes a note of points for themselves for their own use as an aid memoir in case they need to justify themselves at a disciplinary hearing or something of that nature: they are called in for an awkward meeting, to explain themselves, so they make a note about what they are going to say. Nor is it going to capture documents held on personnel files of key individuals if there has been some sort of disciplinary investigation or some sort of criticism of their performance.

My Lord, one could go on. It is not possible to put these kinds of documents into a neat category. They come in many different forms and they come in many different sources and the only real way in which your Lordship can ensure that this type of informal, indiscreet, unguarded chatter is searched for and is disclosed is to decline SocGen's suggestion that it should be permitted to depart from CPR.31.11 and limit its ongoing standard disclosure obligations. That is my first practical point.

My Lord, my second practical point is a consequence of the fact that this exercise – one has to keep reminding oneself of this – is taking place before we have actually seen any documents, so we cannot make any conventional, specific disclosure application saying, "Look at this document, t might suggest that there is another one." If on examination we realise that there are other searches which should be made, we are going to be five months down the line and your Lordship already has the point, that the risk this poses of de-railing the whole thing. The way to cut off that sort of dispute and delay is to order standard disclosure now.

My Lord, I do have a fallback position. I am slightly reluctant to develop it in case your Lordship thinks, "That's what he was really after all the time." But can I assure you that it is not? I regard this as a very poor substitute, but I will

briefly outline it. It is that SocGen should make a full standard disclosure search of all the post 17th April 2008 emails and documents of five key individuals whom we have named in in para.9 of our skeleton, and that search should not be limited in any way by category or type, but the full standard disclosure search, and that will go some way to alleviating our concerns about missing out the informal email exchanges because it is likely that the most important ones would show up as a trace on the radar, at least, for those individuals.

MR. JUSTICE TOMLINSON: Paragraph 9: that tells me who the people are, yes.

MR. ADAM: Yes.

MR. JUSTICE TOMLINSON: Two from the metals department; three from the insurance department.

MR. ADAM: My Lord, one would hope ... if it was going to involve anybody, it would involve those five, so that is why I think we made that suggestion. This is a more limited exercise. If your Lordship turns to the slimmer bundle, which has the correspondence in it at the back and the letter of last night, to which Mr. Morpuss has been referring you, and go to p.82.P, this is a helpful letter ... It was commenting on various points made in the defendants' skeletons: "We have run searches against emails ...[reading to the words]... 6,500." My Lord, we took that as an indication that they ... doing that exercise but when we inquired just to make sure that that was what was being envisaged, if your Lordship turns on to p.82.W, para.2 says ... Paragraph 3: "SocGen proposes to search these emails only to the extent that they are relevant ... categories of disclosure." My Lord, that is all completely pointless because, since they have agreed those categories anyway, they are going to have to search the documents ... and that adds nothing to what was on offer. If this is to be done, if it is to be limited to documents and emails of key individuals, there must be a full standard disclosure search.

My Lord, I do want to emphasise that we regard this is as an unsatisfactory, low-fat substitute and what we are really after is a full standard disclosure search for the period post 17th April 2008 ...

MR. JUSTICE TOMLINSON: Thank you very much. It was said that there was going to be some support, belated.

MR. SCHAFF: I would rather Mr. Kendrick went first.

MR. KENDRICK: My Lord, I was going to pass a little bit of support merely due to the letters I saw last night because I was a bit surprised just how many letters are going – emails primarily from Mr. Teboul and others, which are not really caught by our categories, with what seemed to be ... That is the only point I wish t make.

MR. JUSTICE TOMLINSON: So you support the "low-fat substitute".

MR. KENDRICK: My Lord, that is right.

MR. JUSTICE TOMLINSON: Mr. Schaff, dare you say anything?

MR. SCHAFF: I had got nothing to add, my Lord. I have got two specific issues which might arise, depending on what ...

MR. MORPUSS: My Lord, I would say the fact that this was something which was accepted by two of the defendants as broadly reasonable is a good starting point for suggesting that the search we were going to do was a reasonable search, and the fact they may have now jumped ship is an indication possibly of the persuasive powers of Mr. Adam rather than the fact that what we were suggesting was not a reasonable search.

Getting to the meat of it, my Lord, the philosophical issue, the difficulty which SocGen has is that this is another 33,000 documents to go away and search and it has been said by the other side, "Well, that's not going to take very long to do. You can just throw your ten paralegals at it and it'll be done." But if the paralegals are already working on the 2003 to 2005 documents, it is not something you can just throw resources at endlessly and it does cause further delay and further burden on SocGen. That is the reason that we are trying to identify what it is which is actually in issue for this period and that is what these categories are about; they are trying to identify the relevant issues to which documents might go, because the nature of post-event documents is that they are not generally that helpful or that relevant, although one might find the occasional gem. The reality is that this dispute relates to what went on before 18th February 2008 or even 17th April 2008, and after-the-event documents are generally produced with hindsight and, therefore, of rather less help. That is the starting point, my Lord, and that is the reason why what we have tried to do in dialogue with Mr. Kendrick, principally, is identify what the pleaded issues are which might be relevant after 17th April 2008 and where we might find some documents which are going to shed some light on what happened beforehand.

For that reason, we have agreed to give disclosure of the identified categories; we have agreed to give disclosure of 95% of the expansion of those categories which appears in Mr. Netherway's witness statement. You have not been taken to that, but it may be worth it if I were to do so. It is para.32 in the disclosure bundle B. Mr. Netherway is at tab 30, p.409.

MR. JUSTICE TOMLINSON: I am just trying to room for whom Mr. Netherway acts.

MR. MORPUSS: Mr. Netherway is Mr. Schaff's solicitor, so Cooper Gay. Broadly, subject to the two issues which Mr. Schaff has mentioned, we are in agreement that this wider category, running from 32(a) to (l), will be caught up by the disclosure which SocGen is going to give after 17th April 2008.

MR. JUSTICE TOMLINSON: Let me just read that again because that goes a bit beyond p.226, does it not?

MR. MORPUSS: It does, my Lord, yes, it expands on it. Mr. Schaff reminds me he has dropped (b); he is not pursuing that one.

MR. JUSTICE TOMLINSON: Legal advice?

MR. MORPUSS: The legal advice.

MR. JUSTICE TOMLINSON: (After a pause): Right.

MR. MORPUSS: As your Lordship will have seen, that is a wide-ranging set of categories and issues which is likely to capture all the things which are most important after 17th April 2008 and it is something which is achievable, which is, as I keep stressing, important, from SocGen's point of view. Again, it is not precluding the defendants from coming back if those documents throw up other documents which they say ought to be disclosable. In those circumstances, I do say that that is a reasonable approach for Clifford Chance and SocGen to have taken.

Mr. Adam says he does not want to have to wait another five months to come back and ask for more documents. Of course, if he gets these documents and sees things which are obviously relevant, which he wants further disclosure of, he can come back and ask us much sooner than that, and we will have in mind comments your Lordship has already made and whatever ruling your Lordship makes on this.

The fallback position of the five key individuals is obviously a more palatable position for us if your Lordship is against me on the main point but, again, does impose a wider burden on SocGen because it has got to go away and dig out these emails, search them and have them reviewed. It is difficult, in my submission, to see what all of the people identified by Mr. Adam are going to – what the relevance is of all of them in terms of what one might call "recriminations emails".

MR. JUSTICE TOMLINSON: Yes, that is what he is really about.

MR. MORPUSS: If there are recriminations emails going around, it is likely to be Mr. Deshpande and Mr. Teboul and if your Lordship were minded to go for the fallback, watered-down position of Mr. Adam, I would encourage you to limit it to those two key contacts with Goldas.

MR. JUSTICE TOMLINSON: Suppose there were some recriminations about not having the right sort of insurance?

MR. MORPUSS: I had understood it was largely focused on the recrimination of, "Why did you let them have all this gold?" It is conceivable that there could be recriminations but it is pure speculation, my Lord. That is again where I come back to the point that this is putting things the wrong way round. Let the defendants see what we are giving them and let them see if there is anything worth pursuing beyond that.

MR. JUSTICE TOMLINSON: So far as Mr. Adam is concerned, he is particularly interested in the nature of the insurance and its suitability, is he not?

MR. MORPUSS: He is certainly interested, yes, in the suitability of the insurance and whether it was appropriate to have these two so-called warranties in the insurance, but, as I say, it is pure speculation, the idea that there might be some recriminations going around about the way in which the insurance was placed. The starting point is to let him have the categories we are offering him and if he thinks he can build on that an application for specific disclosure then, so be it, we will deal with it.

MR. JUSTICE TOMLINSON: But there might be some relevant discussions going on which do not fall within the formal categories, that is his point, and he has identified the most likely people to be having the discussions.

MR. MORPUSS: It is conceivable, my Lord, but I would say anything is conceivable, and that is why I come back to the point that this is speculation on the part of the defendants.

MR. JUSTICE TOMLINSON: Necessarily so.

MR. MORPUSS: It is a case of weighing you the validity of the speculation against the burden which it imposes on SocGen.

MR. JUSTICE TOMLINSON: After this disaster had occurred, it is not too speculative to suggest that these people might have been discussing amongst themselves how they got into this mess.

MR. MORPUSS: We have agreed to give up all the investigations reports, anything which comes afterwards, and the strong likelihood is that the recriminations are going to be recorded in that, and that is the useful starting point. If it turns out that there are reports which say this was all someone's fault in insurance, for example, for not putting the right clause in, then Mr. Adam can come along and say, "Well, can I see his or her emails?" It is not as though he is getting no material going to these categories. He is getting a lot of material.

My Lord, I do not think I can take that any further.

MR. JUSTICE TOMLINSON: No, that is most helpful, thank you. Mr. Adam, I am minded to go for the "low-fat" alternative.

MR. ADAM: ...

MR. JUSTICE TOMLINSON: I think there is good sense in it but I make it clear again: I am not ruling that this is the extent of the obligation, for good and all. All I am saying is that, for the time being, this seems to me to be a sensible way to go about it. I do not think anyone is suggesting that the dye is now cast, and that by doing what they have agreed to do in terms of p.409 and by searching the emails of these five employees, I do not regard anyone as committing themselves to that being a complete, reasonable and proportionate search, but it is enough for the time being.

MR. ADAM: I am grateful. My Lord, the only point ... just so that we could try to minimise it. Your Lordship is ruling a full standard disclosure search of the emails certainly of those five individuals identified in para.9.

Is your Lordship also ordering a full standard disclosure search, which is what we ask for, not only of their emails but also of their electronic documents, so their hard disks, their server documents. That is really what I should like.

MR. JUSTICE TOMLINSON: I cannot see why I should not. Do you want to address me on that, Mr. Morpuss?

MR. MORPUSS: My Lord, this goes to the more general point which we have already touched on in relation to 2003 and 2005 and it is really the same point, that are the emails likely to capture all the electronic documents? As I said in relation to that, as far as the Arpege server is concerned, that has been done. In relation to the SCIB server, we are doing testing in relation to certain named individuals to see if it turns out that simply doing emails is not a useful exercise. I would urge your Lordship to adopt the same approach consistently post 17th April 2008 as before it. The first step is for us to do that test. If they come up with lots of useful documents then we are going to have to revisit our thinking on that and no doubt, if we do not, the defendants will be telling us to. But it would be rather odd to have a different approach after April 2008 and, in my submission, testing ought to be the appropriate course for the entire period.

MR. ADAM: My Lord, I would only say that Mr. Morpuss' approach is to put off as many evils days as he possibly can. This is ... which I think the nettle should be grasped because it is a much more limited number of people whose electronic documents have got to be searched for, for a much more limited period of time. That is just my carving it out from the ruling your Lordship made earlier today.

MR. JUSTICE TOMLINSON: There is also the point, Mr. Morpuss, that it will supply an additional cross-test as to whether or not the system is working.

MR. MORPUSS: I am sorry, I did not catch that, my Lord?

MR. JUSTICE TOMLINSON: It will supply an additional test as to whether or not the system is working, in general, so I think you had better do a full search in relation to all the documents of those five people in relation to this particular period: after 17th April 2008.

MR. MORPUSS: Very well, my Lord.

MR. SCHAFF: ... if your Lordship had Mr. Netherway's witness statement ... para.32.

MR. JUSTICE TOMLINSON: Yes, I have got it.

MR. SCHAFF: In subpara.(8), we had asked for letters, emails, correspondence, explanatory notes provided by SocGen to its auditors ...

My Lord, Clifford Chance said last night again, Mr. Morpuss having said it in his skeleton argument, that they were not going to give us anything passing between SocGen and their auditors in relation to the misappropriation, on the

ground, it was said, of relevance. It is relevance point, not a proportionality point. It is not in which cupboard, electronically speaking, the documents would be found. It is said that if SocGen reported to its auditors about circumstances of the loss and how it had come about ...

MR. JUSTICE TOMLINSON: Sorry, I thought they had agreed to para.32, with the exception ----

MR. SCHAFF: No, my Lord, the two points which I ... to tell your Lordship what were the two points.

MR. SCHAFF: I am, as it were, jumping in to tell your Lordship the two points of detail. It is my fault for not telling my Lord earlier.

MR. JUSTICE TOMLINSON: Never mind.

MR. SCHAFF: They say, "We're not going to give you anything passing between ourselves and our auditors." This is a very focused request. It is entirely relating to the period of 2008 when the balloon is going up. If there is a report to the auditors or correspondence with the auditors or anything falling within this category in which the loss is discussed, it is as plain as a pikestaff that that must be relevant and must be disclosed and we do not understand why there is a certain coyness on this subject, so that is the first point.

The second point, a very small point in para.(l): we had asked about insurance policies and we have been told by my learned friend Mr. Morpuss in his skeleton argument at para.33 – your Lordship does not need to go to it – there is a bankers' blanket bond policy and that this loss was notified ... We, for our part, and probably the underwriters as well, I do not know, are quite interested to see the terms on which this loss was notified under that policy. Your Lordship will have in mind the point which was made by Mr. Kendrick, in particular, that, on the face of this, this might be a credit loss rather than a physical loss. So we have asked for both of those. If they are to be disputed – I know they are short points but it might be best just to grasp that particular nettle.

MR. JUSTICE TOMLINSON: Yes, certainly.

MR. MORPUSS: My Lord, as far as the auditors go, the position is that we are not aware of any such reports, but the reality is that the defendants are going to have all the internal reports, investigations, recriminations, whatever, and however it was sanitised and then presented to auditors is not going to tell

them anything terribly helpful beyond that. So it is a proportionality question as well as a relevance question.

MR. JUSTICE TOMLINSON: But how can you draw a distinction between auditors and regulators?

MR. MORPUSS: The same, my Lord. What we have produced is a report which is on the website and in the public domain. What we are saying is that there is no good reason to order us to go away and search for whatever other reports we may have produced. This is going to be of very peripheral relevance, if any, because they are going to have far more interesting and useful documents than what we have agreed to do or what your Lordship has ordered us to do. My Lord, that is it, as far as auditors go.

As far as the insurance policy goes, we are content to disclose the policy. We had understood the request to be wider in relation to notification. I am not in a position to agree to give the notification in relation to this particular loss. The position of SocGen is that it will give a copy of the policy itself.

MR. JUSTICE TOMLINSON: You may not be in a position to agree it, but how can it not be relevant?

MR. MORPUSS: My Lord, it will give an indication of what we said to a third party about the nature of the loss. It is of limited relevance, but it is a small point and it is one document, my Lord.

MR. JUSTICE TOMLINSON: I am afraid I think it is of absolutely essential relevance.

MR. MORPUSS: Very well, my Lord.

MR. JUSTICE TOMLINSON: I am against you on both those points, I am afraid.

MR. MORPUSS: Very well.

MR. JUSTICE TOMLINSON: What next?

MR. MORPUSS: The next thing in my skeleton, my Lord, were the emails marked "PRV". I am not sure what Mr. Schaff's position is on that at the moment.

MR. JUSTICE TOMLINSON: I cannot resolve an issue of French law.

MR. MORPUSS: No, my Lord.

MR. SCHAFF: Mine is a very short point and the position is this. I heard some things from my learned friend Mr. Kendrick this morning about searching emails to see who sent them or received and this is purely ... whether emails have been sent or received to or from Goldas ... That is all I am asking for. All I am suggesting, my Lord, is that, given that certain individuals are having their emails checked for the purpose of this disclosure schedule, insofar as they are found to be marked "privé", whatever the abbreviation might be, all which one has to do for present purposes is run a keyword search ... to see whether per chance there is a Turkish Goldas individual, either sending or receiving the relevant email, in which case, it would seem to follow that, either by mistake or, I suppose, conceivably, by design, probably by mistake, the epithet "privé" has been wrongly attached to the email. My Lord, that is all we ask ... It is not, with respect, particularly difficult. It does not seem to be proportionately onerous because they are doing this search anyway.

The two objections which are taken to this course are, firstly, that it might somehow cause ... employment difficulties amongst the company because the senior employees, by and large, many of whom are coming to give evidence in this case and are having their emails searched anyway, might object just to this check being done to make sure that nothing relevant has slipped through the net. That seems to us, with greatest respect, to be farfetched.

The other objection is that the company would thereby be committing an offence under French criminal law and might expose themselves to the risk of criminal prosecution.

My Lord, I have to say, with the greatest respect, that the statute, which I can show your Lordship ... which talks about the malicious or the fraudulent opening of documentation and which our expert says requires ... the idea that even if one actually read the content of those emails pursuant to an order of this court, there would be a risk of prosecution, albeit negligible, but we are not even ----

MR. JUSTICE TOMLINSON: You are not asked for that, are you? No.

MR. SCHAFF: All we are asking for is just a double-check to make sure that nothing has slipped through the net. The idea, with greatest respect ... theoretically, or, if it were, would be liable to give rise to prosecution in France, I have to say is ridiculous. That is all we are asking for. Obviously, if it produces a nil return, we will all go away. If it ... that, per chance something has slipped through net, the relevant document can be disclosed and, if necessary, the employee. can be asked why it is that the epithet "privé" has been attached. My Lord, that is all I have got to say on the point.

MR. MORPUSS: My Lord, I entirely accept, in the light of the authority which my learned friend has produced and to which he has not taken your Lordship, but the *Morris v. Banque Arabe* case, that, on the analysis of the authorities, it does appear your Lordship has discretion to make this order. The fact that my clients might be committing a criminal offence in France is simply one factor on that discretion.

My Lord, I do say that there is a difference between the factors which influenced Neuberger J. in that case and the facts of this case. There are really two key differences, one of which is that, in that case, he heard evidence from French law experts who were able to satisfy him that the risk was negligible or virtually non-existent of any prosecution under the relevant French statute. Obviously, your Lordship has not had that advantage.

MR. JUSTICE TOMLINSON: No.

MR. MORPUSS: The second point is that, in *Morris*, what the court was concerned with there was a general blocking statute stopping people from disclosing documents in effectively an American litigation. It was to stop American-style disclosure. The evidence was that the risk of someone being prosecuted for breaching that was very small.

Of course here, my Lord, one is not simply looking at some general protection against disclosing documents abroad, which is being enforced by the state. Here what we are being asked to do is look at emails which belong to individual employees, and we have been advised that, as Mr. Gilbert says in his emails, this could cause labour-relation problems because effectively what SocGen is implicitly saying to these employees is, "We believe you've been misusing the PRV (the private labelling) on emails."

MR. JUSTICE TOMLINSON: Does he say that it would cause problems even to do what Mr. Schaff wants you to do?

MR. MORPUSS: It is para.50, my Lord, of Gilbert, at tab 32. The bit about labour-relation problems is at p.575, subpara.(h). Obviously, he does not specifically address the question of searching sender and recipient but it is implicit in our doing that that we are suggesting that these people have been exchanging emails with Goldas and wrongly labelling them "PRV".

MR. JUSTICE TOMLINSON: Yes, I see that, but it would be surprising if, under French law, it was not permissible for an employer to carry out some sort of random, non-invasive check just to ensure that its systems were not being abused.

MR. MORPUSS: But the difficulty is, my Lord, that searching recipient/sender could be exactly what the individual does not want searched. Supposing SocGen were to carry out a search for Citibank, for example, to see which of its employees might have been looking for jobs elsewhere. That might be exactly what it is from which the employee is entitled to have protection. Certainly the advice which we have received is that that is a risk and, in my submission, as a matter of logic, it is a risk for exactly that reason, that one cannot safely say just searching sender/recipient is not breaching the privacy of these people. So I do say that the circumstances are different from the *Morris v. Banque Arabe* case because it could well be that these employees will object to what is being done and it could cause difficulties for SocGen and it could be committing a criminal offence. My Lord, that is the starting point: what is the problem?

The other question is: why should we be doing this? Mr. Schaff's only justification for saying we should be doing this is the possibility that someone has mislabelled a Goldas email. Given that we have in place a policy on email usage, a policy on the usage of the PRV – and perhaps I can refer your Lordship to that. It is in the disclosure bundle B.

MR. JUSTICE TOMLINSON: I have seen it referred to, but I do not think I have seen the policy itself.

MR. MORPUSS: No, it is at tab 25, p.135 and it starts by saying: "A reasonable level of private email usage will be tolerated." Perhaps I can invite your Lordship to read it?

MR. JUSTICE TOMLINSON: Yes.

MR. MORPUSS: My Lord, the real question is is there any evidence that there is any likelihood that these employees who were dealing with Goldas had been wrongly using the PRV labelling for their emails? There is no suggestion of that at all. It is pure speculation on the part of Mr. Schaff. In my submission, weighing that against the risks to SocGen of having to carry out even this limited search, it is not a justification for requiring us to do that.

MR. JUSTICE TOMLINSON: Do you want to add anything, Mr. Schaff?

MR. SCHAFF: No, my Lord. If your Lordship is in doubt about the French law position ----

MR. JUSTICE TOMLINSON: I am not going to rule on this today.

MR. SCHAFF: And this could be stood over.

MR. JUSTICE TOMLINSON: I think it has got to be stood over. Furthermore, it may be – I am not saying it will be – but, in the light of the disclosure you do get, you never know, you might have better grounds for suggesting that there could have been a mistake made or a deliberate falsification, as it were.

MR. SCHAFF: I was called to my feet by my learned friend taking this point. I am entirely happy for that to be stood over.

MR. JUSTICE TOMLINSON: But I think it has to be stood over, yes.

MR. MORPUSS: My Lord, I think individuals is probably the next big item. I am not sure who is making the running on that.

MR. KENDRICK: My Lord, as to ... go to our schedule, p.39, item no.26. We are looking for certain documents of Gregoire Varenne. He is the head of the commodities department, within which Mr. Teboul worked, and he left SocGen shortly after the alleged loss but he was ... important discussions with Goldas and ... set out some them in the Teboul witness statement. The response to us is, "Well, he wasn't routinely involved." We would not expect a senior figure to be routinely involved but we would expect important matters or developments to be discussed with him. So his emails and documents are likely to be far less ... but equally significant. That is him.

Moving on to the next one, at 27, we now go up the corporate ladder again and get to Mr. Macary and he is global head of commodities trading in Paris, so his emails are likely to be far less ... Then Mr. Yarhi. Mr. Yarhi is director of insurance and he was working closely with ... It is said that in fact he played no role in placing insurance, except under ... However, we suspect that he must have been involved in discussions concerning the alleged loss ... the size of it, and he is likely to be involved in a curious endorsement ... misappropriation of property by its customers, particularly it was said the reason this was promulgated was not Goldas specific but all of SocGen's insurers.

MR. ADAM: Before my learned friend leaves Mr. Yarhi, this is going to be my sole contribution on individuals. My learned friend and I can do better than saying he must have been involved in discussions about the loss. We have got a document in our own documents which shows that he was involved. For your Lordship's reference, it is in the disclosure bundle, tab 29, p.398, which was exhibited by Mr. Cooper and it is an email from my clients confirming instructions ... and it says:

"Dear Sirs,

Following instructions I have received today from Mr. Yarhi by telephone, I can confirm that I have sent your claim dated ... of this month to our English correspondent to officially notify your insurers today."

So we can see for a fact that Mr. Yarhi is the person who instructed my client to notify this enormous claim to the insurers. He was the head of the department at the time. He must have been fully briefed. His documents have got to be searched. I am sorry to interrupt.

MR. KENDRICK: No, I am obliged for that. Then, finally, at 29, Mr. Edery. He was the junior trader and we ... Mr. Teboul's own evidence. He said he was one of the three members of the commodities department who would usually speak to the representative of Goldas and that is what he seems to ...

MR. SCHAFF: I have got to two more ...

MR. JUSTICE TOMLINSON: That is all right?

MR SCHAFF: My Lord, first of all, Mr. Saulay, he is a signatory of the brokers' letter ... is said to give rise to a duty of care ... responsibility on the part of the brokers in March of 2007, and in fact Mr. Yarhi, who we have just had, was also a signatory of an earlier version ... and both of those two gentlemen, since it is an essential part of the SocGen case against the brokers, and particularly against Cooper Gay, my clients, that a duty of care was owed on the basis of these letters, obviously, we say that Mr. Yarhi's emails need to be searched at around this time because ...

MR. JUSTICE TOMLINSON: Just while we are on it, no doubt it has just passed me by and I have missed it but I have never before come across a sort of term of art, "a broker of record letter". Is it a term of art?

MR. SCHAFF: Sometimes it is called a "letter of appointment".

MR. JUSTICE TOMLINSON: Is that all it means?

MR. SCHAFF: Yes, it is a term of art and indeed all the relevant parties have agreed to do ... keyword searches.

MR. JUSTICE TOMLINSON: Yes, we might run out of time before that.

MR. SCHAFF: It is some sort of term of art, my Lord, yes. But these letters were relied upon by SocGen as evidencing an assumption of responsibility ----

MR. JUSTICE TOMLINSON: I have seen that, yes.

MR. SCHAFF: The signatories to these letters are in fact Mr. Yarhi, who we have just had, and also Mr. Saulay. We need to have a search ----

MR. JUSTICE TOMLINSON: Saulay is insurance department, is he?

MR. SCHAFF: No, in fact Mr. Saulay is the head of life and it seems unlikely perhaps that he would have involvement other than in connection with this letter and so this might be quite ... search around the time in which this letter was sent, probably from January/February/March 2007. The last person on my list is Sebastian Wetter, who is the CEO of commodities.

MR. JUSTICE TOMLINSON: How do you spell him?

MR. SCHAFF: W-E-T-T-E-R. And it is agreed that there will be a search of his documents from 18th February.

MR. JUSTICE TOMLINSON: Sorry, he is head of commodities. I thought we had had the head of commodities.

MR. SCHAFF: He is the chief operating officer, commodities. It is agreed that his emails – again, it is the same point about emails not hard documents – will be searched ... He produced a report into the loss but, bearing in mind when we saw the material this morning ... we have asked, firstly, for the search to go back to the beginning of the year, to January, and, secondly, electronic documents generally, not just his emails, covering any notes, memos and drafts of the reports would be essential. I am conscious of the fact it is duplicating something we have covered already but ...

There is one other matter which I will just mention for completeness. We have asked for what are going to be described as "back-office emails". We refer to Sarah Fischer and there is another back-office email address. I am content, in the light of the orders which your Lordship has made already this morning in relation to what I will call the "transaction documents", to wait and see what comes out first time round, before I pursue that. I reserve my position.

MR. JUSTICE TOMLINSON: Thank you. Mr. Morpuss?

MR. MORPUSS: My Lord, as a general comment, I would go back to what I said at the outset, that this is, in my submission, a prime example of where one is trying to pre-judge whether or not someone is going to be a relevant individual and have documents and it is the problem of shooting in the dark, particularly with these individuals, because one takes the example of Mr. Saulay, who is the head of life insurance. As Mr. Schaff very reasonably concedes, it seems pretty unlikely he had much to do with this, as head of life assurance.

MR. JUSTICE TOMLINSON: Yes.

MR. MORPUSS: All he did was sign a broker's letter of record, which Mr. Schaff's evidence, is commonplace in the market. He signed this, and our evidence is that he signed it because he was head of life assurance: it needed a particular level of seniority in SocGen to sign the letter.

My Lord, if the consequence of having signed this one letter in a purely formal way is that we have to go away and apply all the keyword searches to Mr. Saulay's emails, restore the emails and then apply the keyword searches and then have someone review what comes up with the hits, that is, in my submission, rather an overkill on the part of Mr. Schaff's clients to require us to do that. He is a good illustration of why this in an appropriate category to leave until the defendants have got the documents and can actually see who appears in all the emails and documents on a regular basis.

MR. JUSTICE TOMLINSON: Mr. Schaff says it is likely to be a very limited search. Does he really mean by that that there is likely to be a very limited output or a very limited result? Or does he mean that it is easier to do the search?

MR. MORPUSS: My Lord, I think he means that, but the problem is it does not look as though it will be, because this is asking, it appears, unlimited in time for us to search his emails with all the keyword searches and we are going to get a mass of hits, we submit.

MR. SCHAFF: ... it does occur to me that there must be a more sensible way of ... which does not involve a keyword search ... further discussion rather than waste your Lordship's time because it seems to me in fact that there is an easy way of narrowing ...

MR. JUSTICE TOMLINSON: That is Mr. Saulay. Some of the other people look a bit more central.

MR. MORPUSS: They may or they may not be, my Lord.

MR. JUSTICE TOMLINSON: Mr. Edery was discussed, right at the outset, was he not?

MR. MORPUSS: Mr. Edery was the one – your Lordship will recall the reference to him in Mr. Teboul's affidavit as the "back-up man", and SocGen's evidence will be that Mr. Edery was the back-up man: he took the calls if Mr. Teboul and Mr. Deshpande were not around. We have agreed to disclose his telephone conversations, to the extent that he had any, with Goldas in the relevant period. Either he will appear to be a central figure, once all the documents are out, particularly in emails and one will see him copied in on emails or sending emails, or he will not. But, in my submission, that again is something which is best left over, as are all these witnesses. That is my primary submission.

Subject to that, my Lord, if I can address you on the other individuals? Mr. Saint-Macary, we have indicated, we are looking into and will disclose his emails if appropriate ones are found.

MR. JUSTICE TOMLINSON: So you have agreed to do him.

MR. MORPUSS: My Lord, that may be over-stating it. We have agreed to check his position and to disclose his emails if appropriate, I think, is what is said in the Clifford Chance letter.

MR. JUSTICE TOMLINSON: That means you are agreeing to do it, does it not, and you have agreed to look into his position?

MR. MORPUSS: We have agreed to investigate his involvement in Goldas. If it appears to us, in light of our investigations, that he played a more central role than we think at the moment, then we will disclose his emails. We are not saying we will disclose them come what may.

MR. JUSTICE TOMLINSON: That may be as much as Mr. Kendrick is entitled to at this stage. If you look into his position and find that he had any substantial involvement, you are going to have to search his emails.

MR. MORPUSS: That seems likely, my Lord, yes. My Lord, as far as Mr. Varenne goes – he was no.26 on my learned friend Mr. Kendrick's schedule – he was the joint head of SocGen's fixed income, currencies and commodities division, and Cooper Gay refer to the fact that he had a conversation with Goldas after the loss of the gold was discovered and they have asked for disclosure of his emails from 1st December 2007.

First of all, my Lord, we have agreed in relation to Mr. Varenne to disclose any relevant documents or telephone conversations which relate to his involvement in the discovery of the loss or subsequent discussions with Goldas. In my submission, that ought to be sufficient. We do not need to go back and look at his reconstruction, look at his emails as well. If we were to, it is not clear why there is any reason to go back to 1st December 2007, since he became involved in the middle of February, when the balloon went up.

MR. JUSTICE TOMLINSON: He was head of department.

MR. MORPUSS: He was, but there is no suggestion that he had any regular dealing with Goldas and presumably that is the reason why Cooper Gay have limited their request to 1st December 2007, onwards.

MR. JUSTICE TOMLINSON: But he is the chap presumably to whom Mr. Teboul reports, is he not?

MR. MORPUSS: Yes, he would have been, my Lord, but there is no evidence that he had any direct involvement with Goldas. What we have agreed to do is to disclose anything which comes out at the moment when the balloon went up. Even on Cooper Gay's application, they are only looking for us to go back to 1st December 2007.

Mr. Yarhi, my Lord, was no.28 on Mr. Kendrick's schedule. He was SocGen's director of insurance, although he retired in March 2008, so halfway through the balloon going up. Cooper Gay says that he is relevant to the assumption of responsibility because he signed the broker's letter of authority of 13th March and that he would have been involved in discussions at the time of the loss. Cap Marine say that he was involved in negotiating a document, which your Lordship has not been referred to, the 12th March 2008 waiver letter.

MR. SCHAFF: My Lord, I am so sorry, I should have ...

MR. JUSTICE TOMLINSON: I remember that from the list of issues.

MR. SCHAFF: He was involved in the negotiations for, and participated in telephone calls. It is another reason ...

MR. MORPUSS: My Lord, he did have involvement in one or two issues but that was the limit of his involvement and, as with Mr. Saulay, SocGen's evidence will be he signed the letter of appointment for the brokers, as head of department. He retired shortly after the loss was discovered and, throughout the time preceding his retirement – this is in the Clifford Chance evidence – he

was working closely with the successor, Ms. Burlet, whose emails are being disclosed and that is likely to capture the relevant documents from that period relating to Mr. Yarhi's involvement, to the extent he was involved.

My Lord, Mr. Wetter, I think, is the last one on the list. He was the chief operating officer in the commodities department, and his only involvement was after the discovery of the loss, on 18th February. We have agreed to search for his emails from that date until the date when he left the commodities department. Cooper Gay suggested we ought to shift the date back a little, but, as his only involvement was investigating the loss after the balloon went up, and producing a report, there does not seem to be any reason for moving it back, or certainly not moving it back to 1st January. If your Lordship were inclined to move it back, I would suggest move it back by a couple of weeks at most, possibly 1st February.

MR. JUSTICE TOMLINSON: In practical terms, moving it back to January, how much more work does that involve?

MR. MORPUSS: I am afraid it would be pure speculation on my part, my Lord, except that it would be applying all the keyword searches to all his emails for that period again. So it is likely to generate more documents but I cannot say to your Lordship how many.

My Lord, I think that covers everyone. As Mr. Schaff says, the back-office people, Ms. Fischer and the PAR-CITY email address have been dropped for the moment.

MR. JUSTICE TOMLINSON: Mr. Morpuss, I do not see how you can really resist, so far as Mr. Varenne, Mr. Yarhi and Mr. Edery are concerned. Those seem to me to be pretty central. I do not think you can really resist that. The others, I am minded to allow you to do what you are proposing to do, without prejudice to people coming back later and saying it is plainly inadequate.

MR. MORPUSS: Very well, my Lord. Keywords, my Lord, which I think will be a very short topic, fortunately, because we are largely agreed on that; I have said that before. My Lord, as far as SocGen is concerned, we have agreed to provide what is called the "CSV file of unique word strings" to Cooper Gay, who want to see all the words which have produced hits. That is largely a technical matter but that is agreed. We have agreed to search for the additional keywords identified in the underwriters' skeleton at para.39, so there is no issue between us and them. We have agreed to search for the more limited keywords requested by Cooper Gay in their letter of 30th June. I probably do not need to take your Lordship to it.

MR. JUSTICE TOMLINSON: No.

MR. MORPUSS: Apart from two words ... and "Securicor", I believe the only word which is in issue is "Securicor", although I will be corrected if I am wrong. The reason that we are concerned about searching for "Securicor" is simply the number of hits it has produced. It has produced several thousand hits. It does not seem to be a terribly helpful word to be searching for and, although it may be said against us that we have asked underwriters to search for that, it is likely, with underwriters, it will produce a small number of hits because of the nature of their business. In the nature of SocGen's business, it is using Securicor on a regular basis and therefore it is going to come up on a regular basis and not tell anyone anything terribly fruitful which is not caught by all the other searches. My Lord, I think that is the only issue on our keyword searches.

MR. SCHAFF: ... the challenge having been taken up, as it were. Securicor were the carriers of the gold to Turkey. Indeed, your Lordship saw a reference, I think, I Mr. Teboul's witness statement ----

MR. JUSTICE TOMLINSON: This is because Brambles is Securicor?

MR. SCHAFF: Yes, I forget which way round it is. It either Brambles becomes Securicor, or vice versa. Securicor were the carrier identified by Mr. Teboul in 12.4.4 of his witness statement, just for your reference. Clearly, the documents covering the carriage of the gold to Turkey by Securicor as carrier will need to be searched for and it may be it is one of those words which ... showing either 2,642 bits or 2,950 bits, depending on which version on takes ...

MR. JUSTICE TOMLINSON: That is plainly right. What is worrying me about this is that I have never conducted a keyword search and nor have I ever been involved in one. I am just conscious that I may be being asked to ask people to do things which are just not sensible.

MR. SCHAFF: What happens, my Lord, is that a keyword search has been done by all sides ... I had hoped that this one had been ironed out. In the letter we got last night, agreeing to everything else, it was said that they could not see the relevance of this one ... Of course it may be easier for one party than another party to search for a word and I fully accept that, and indeed it happens in reverse ... but you get a hit and then what happens is you search for the document which is revealed by the hit. You have a look at it and you have to review it.

MR. JUSTICE TOMLINSON: But, in language which I understand, the point is that it is a blunt instrument, is it not, in that, "We use Securicor so often for so many transactions, that we're going to get thousands of documents which have got nothing to do with this"?

MR. SCHAFF: That is absolutely right, my Lord. Securicor, however, are going to be carrying valuable consignments; by definition, that is what Securicor are for. I think the evidence is – I will be corrected – that a paralegal can review something like 750 emails a day, or something like that, that is the sort of scale of things. It is a relevant hit and it is a relevant subject. I am not sure I can say any more on that.

MR. JUSTICE TOMLINSON: I can see its relevance. Yes, it is obviously relevant.

MR. SCHAFF: And some words obviously are going to produce more hits than others and, by definition, there will be relevant words which produce fewer hits than some words which produce more hits.

MR. JUSTICE TOMLINSON: Presumably there are some words which are a worse problem than "Securicor", are there?

MR. SCHAFF: I think there may be. We thought perhaps "Securicor" within five words of "Turkey", or "Securicor" within five or ten or twenty of "gold" and this is possibly the sort of thing which we could carry on discussing between ourselves. My Lord, basically, it is going to have to be a review of these documents containing references to Securicor. I am not sure ... simply say, "Well, we've got all these hits showing "'Securicor', but we just don't review them because there are 3,000 hits."

MR. JUSTICE TOMLINSON: As you say, there must be some way of limiting it or making it more targeted.

MR. SCHAFF: They way ... my Lord, is to say "Securicor" within a number of words of "gold" or "Turkey". Maybe the answer is to carry on debating that one.

MR. JUSTICE TOMLINSON: That is how one used to search LEXIS; it probably still is.

MR. SCHAFF: My Lord, maybe the answer is to carry on debating this.

MR. JUSTICE TOMLINSON: I think it probably is. As I say, I am just very conscious that I could be just ordering people to do things which are just really a farcical waste of time.

MR. SCHAFF: If your Lordship ... we will carry on with correspondence.

MR. JUSTICE TOMLINSON: I think that is a good idea.

MR. MORPUSS: I am grateful, my Lord. My Lord, I have been identifying what was next on my skeleton, but it appears, from Mr. Schaff's reaction to the keywords, certainly, that it may not be that all these matters are being pursued and some it may be the defendants are happy to park.

MR. JUSTICE TOMLINSON: I had not really looked at this before. I see "ship" was one of the words; that came up with 33,512.

MR. MORPUSS: Yes, there are some fairly general words, which is one of the topics of debate as to what are useful words and what are not.

MR. JUSTICE TOMLINSON: Is that the end of keywords?

MR. MORPUSS: That is the end of keywords, as far as my disclosure is concerned, but there are some issues still, as far as the other defendants' disclosure is concerned.

My Lord, the next point I had on my agenda was electronic documents. I am not sure to what extent that is pursued in the light of rulings your Lordship has made or who is pursuing it.

MR. SCHAFF: That is the point your Lordship dealt with this morning.

MR. JUSTICE TOMLINSON: It is exactly the same point again, is it not?

MR. MORPUSS: I think it is, my Lord.

MR. JUSTICE TOMLINSON: In principle, you are obliged to disclose them. But, at the moment, what I have accepted is your assurance that you think that the best way to get at them and the most proportionate way to get at them, in the first instance, is by what you are proposing to do. You may or may not be proved to be right about that.

MR. MORPUSS: In that case, I will take that point no further, my Lord, at the moment. The next one is audio recordings.

MR. SCHAFF: Both these points, my Lord ... I intend to reserve my position for the future, to see what comes out first ...

MR. JUSTICE TOMLINSON: Thank you very much.

MR. MORPUSS: I am very grateful, my Lord. Back-up data is a particular concern, given the time involved.

MR. JUSTICE TOMLINSON: Yes.

MR. MORPUSS: English law policies, I think, is the last of the applications which are made against me.

MR. SCHAFF: My Lord, both my clients and indeed Mr. Adam's clients make an application against SocGen. I also raise this with Cap Marine, Mr. Adam's clients. This matter is being dealt with in correspondence and I trust it will be dealt with properly in correspondence ... and come back at the next hearing ...

MR. ADAM: Yes, my Lord, I am content with that, too. This has got to stalemate at the moment. We made this request a long time ago and the only response we have had, until a few days ago, was ... must be relevant and must search for it. There was no answer to that at all and the evidence which was served by SocGen said it ... Then, a few days ago, we got this statement saying, "Well, actually, we have done a search and there are only two policies." That raises a whole host of other issues: accuracy of the search; whom you ask; how is it done; and, "Really?" which is the principal question.

My Lord, these things are going to have to be explored in correspondence and they cannot be raised now. I do not have the evidence and we do not have ... The only reason I am explaining this to your Lordship is we had a letter, either very late last night or first thing this morning, I cannot remember, saying, "Well, you've had your chance to raise it, and that's it. If you don't bring it up at this hearing then you can't pursue it in correspondence." I hope that Mr. Morpuss does not endorse that approach but I just want to make it clear to your Lordship that, as far as we are concerned, this is very much ... get your Lordship's approval.

MR. MORPUSS: My Lord, we were not intending to shut them out forever from pursuing it if they want to. We are a French bank and we tend to use French insurance companies is the short point, but we can debate it in correspondence and if the defendants do not believe us, we will have to pursue it in the evidence.

MR. JUSTICE TOMLINSON: But you might have policies with French insurance companies which are governed by English law – you might.

MR. MORPUSS: The only two English law policies we have discovered are from 1988 and 1999, my Lord, and we have ----

MR. JUSTICE TOMLINSON: Again, on the face of it, it is quite surprising just because of the prevalence of English law. But it may prove to be right.

MR. MORPUSS: My clients' preference is ----

MR. JUSTICE TOMLINSON: It sounds as though it ought to be discussed further in correspondence.

MR. MORPUSS: Yes, it can be discussed further. We do not need to take it any further today, my Lord.

My Lord, as far as I am aware, I think that may be the end of the applications being made against me, but no doubt someone will tell me if I am wrong.

Everyone is sitting down, in which case, can I turn to the rather more limited applications which I am making against the defendants?

MR. JUSTICE TOMLINSON: Right.

MR. MORPUSS: There are, I think, four issues against Mr. Kendrick's clients and then some very limited issues against Mr. Schaff's and Mr. Adam's.

The first issue in relation to the underwriters' disclosure is as to the disclosure of metals policies written by Mr. Morris. Mr. Morris, as your Lordship may be aware, was the underwriter for the first defendants, who were the lead underwriters, and what we have asked for is disclosure of metals policies which he wrote in the period 2nd April 2006 to 2nd April 2007, the risk having been placed on 2nd April 2007. This goes principally to the question of the LME/COMEX warranty because Mr. Morris' pleaded position and no doubt his evidence is that he did not know that gold cannot be stored in Turkey or Dubai in LME or COMEX approved warehouses. It is common ground that it cannot be that the only warehouses approved by either body – LME does not deal with precious metals, and COMEX only approves warehouses within a certain radius of New York. The question is whether Mr. Morris was aware of that. He says that he was not. We say that disclosure of other policies which he wrote at the time may or may not give the lie to that, and underwriters say, "Well, you can't have them, for three reasons," first of all,

because his subjective knowledge is irrelevant to the proper construction of the LME/COMEX warranty; secondly, because this is a subscription slip and it is clear from a variety of authorities that the policy slip cannot mean different things to different underwriters; thirdly, they say it would in any event be burdensome to have to give that disclosure because there are a lot of tiles to search.

My Lord, as to subjective knowledge, there is no need for Mr. Kendrick to take you through all the authorities. It is not in dispute that subjective knowledge of Mr. Morris is not going to be of assistance to the trial judge in construing the LME/COMEX warranty in that his subjective knowledge does not bind him as to what the warranty meant.

MR. JUSTICE TOMLINSON: Just remind me about the policy. Have I got the policy?

MR. MORPUSS: It is in the back of the CMC bundle, p.379. The warranty with which we are concerned is at p.381 – rather the wording.

MR. JUSTICE TOMLINSON: I am just trying to see what the interest is. It says bullion, precious metals, non-precious metals in whatever form or state, warrants, warehouse receipts and the like. And the LME does not deal in bullion. Is that right?

MR. MORPUSS: No, the LME only trades in non-precious metals, and everyone is agreed on that. Although COMEX does, it does not authorise any warehouses outside the USA.

MR. JUSTICE TOMLINSON: And where is the warranty?

MR. MORPUSS: The warranty is two pages on, at p.381, just above "Attachment: Termination of Insurance". There are the two wordings upon which underwriters rely.

MR. JUSTICE TOMLINSON: Sorry, I am being slow, I have not found it yet.

MR. MORPUSS: On p.381, my Lord, there is a heading about a third of the way down: "Attachment: Termination of Insurance". Just above that there are two sentences which start "warranted".

MR. JUSTICE TOMLINSON: I have had this before: the pagination of my bundle is a page out. We had this when we were in tab 32. It turns out to be p.382 in my bundle.

MR. MORPUSS: In the top right, it says "page 3 of 28".

MR. JUSTICE TOMLINSON: Yes, I have got it now. "Warranted all storage," I see.

MR. MORPUSS: There are two issues, my Lord, which are going to have to be debated at trial on this point. One is what is the construction of that clause? Does it in fact apply to all storage, i.e. does it embrace precious metals as well? I will not take your Lordship through the argument, there are a lot of other clauses to refer to on that and there are other indications in the policy, which is not intended to be read that way, but if the trial court does decide that that is the proper construction, the second part of the question is whether the contract ought to be rectified to make it clear that only applies to non-precious metals, which is our pleaded case and Cap Marine's pleaded case.

My Lord, leaving aside the question of Mr. Morris' subjective knowledge, as far as it goes to construction of that wording, in our submission, his subjective knowledge is clearly relevant to the question of rectification and to the credibility of his evidence, that he was not aware of the fact that LME/COMEX warranty warehouses only exist in relation to gold at all in the United States. Therefore it is relevant to see what other experience he had had of LME/COMEX warranties in the year before – limited it to a year to try and reduce the burden. We did ask for rather wider but we have tried to be reasonable and limit it simply to one year.

Mr. Kendrick says in his skeleton – and this appears to be an argument as to why our rectification case is bad rather than a reason for not giving this disclosure – "Well, Mr. Glover says he didn't know this either." Mr. Glover was the point of contact at Cooper Gay, between Cooper Gay and Mr. Morris. Mr. Kendrick says, "Well, how can you ever get a rectification case off the ground if that's the position, that Mr. Glover says that didn't understand it?" My Lord, that is an argument for trial, but the answer is that the question is what was SocGen's understanding and what did SocGen agree with underwriters? If, as we submit, SocGen clearly understood that this warranty was only intended to apply to non-precious metals and if Mr. Morris in fact understood the same, because he knew that LME/COMEX warehouses do not exist in Turkey, then the fact that Mr. Glover in the middle, who was simply passing backwards and forwards, the fact that he was the placing broker in the middle, does not prevent a rectification case from working. That will all be a matter of evidence at trial and it is not a reason for shutting out disclosure at this stage. So, my Lord, that is my primary submission as to why these documents ought to be disclosed.

MR. JUSTICE TOMLINSON: Suppose you find another 150 policies during the same period, which he has led, all of which have the same warranty, all of which include bullion as part of the interest insured. How does that help you beyond your being able to say, "Well, you seem to be signing an awful lot of these contracts with wording you don't understand"?

MR. MORPUSS: That would not help me but if we find a lot of policies where we see that the warranty is restricted to non-precious metals, to the extent there is any warranty, or we see that every other bullion policy he wrote did not have this warranty in, or had a more limited warranty for only LME or only COMEX only for non-precious metals, then that will help and it goes to the credibility of his position on this.

MR. JUSTICE TOMLINSON: Yes, I see that.

MR. MORPUSS: My Lord, that is my submission on the policies. Perhaps I can also deal with the second category at the same time because ----

MR. JUSTICE TOMLINSON: So that is metals policies, precious and non-precious, written over a one-year period.

MR. MORPUSS: Yes, prior to 2nd April 2007. My Lord, the second category really turns on the same point, so it is probably sensible for me to deal with it at the same time.

MR. JUSTICE TOMLINSON: Yes.

MR. MORPUSS: That is publications of the ...

MR. JUSTICE TOMLINSON: This started out as publications of Mr. Morris, did it not?

MR. MORPUSS: I am sorry?

MR. JUSTICE TOMLINSON: This started out as a request for any publications of Mr. Morris himself, did it not? Or perhaps that is what it still is.

MR. MORPUSS: I had understood it to be a request for publications of the lead underwriter. Yes, there are nods behind me, my Lord.

MR. JUSTICE TOMLINSON: So it is publications of the lead underwriter.

MR. MORPUSS: Of the lead underwriter, going to the same point. It is publications in relation to specie risk and it goes to the same point: the LME/COMEX wording. Underwriters say these are irrelevant, essentially for the same reasons. They say this is all going to be a matter of expert evidence at trial, the question of what is sitting in Mr. Morris' files or somewhere at the first defendant's; publications about LME, COMEX or specie risk are irrelevant. But, my Lord, they are relevant for the same reasons. If Mr. Morris has in his files publications which show that he was aware of the scope of LME/COMEX ...

MR. JUSTICE TOMLINSON: Are we talking about documents or pamphlets or books or leaflets published by the lead underwriter? Or are we talking about publications which they happen to have in their possession?

MR. MORPUSS: Both are potentially relevant, my Lord, because both will show the extent of his knowledge; obviously one rather more clearly than the other if he happened to write the thing himself.

MR. JUSTICE TOMLINSON: I do not think I had quite hoisted on board that it was all publications which they may have in their possession.

MR. MORPUSS: It is both, my Lord.

MR. JUSTICE TOMLINSON: It is both.

MR. MORPUSS: Yes.

MR. JUSTICE TOMLINSON: So it is anything they have published, which I suspect will be a rather limited amount, and anything else they happen to have in their library, as it were.

MR. MORPUSS: Yes, my Lord.

MR. JUSTICE TOMLINSON: A working library.

MR. MORPUSS: Yes, it is to show the state of knowledge and it also goes more generally. Both these categories go more generally to the question of what is the market knowledge of LME/COMEX? What is the understanding? Neither of these is likely to be particularly burdensome and, certainly from SocGen's point of view, it has relatively limited sympathy for someone having to go away and search a few hundred, or even a few thousand, documents, given the burden which is on SocGen, my Lord.

MR. JUSTICE TOMLINSON: I see that. Suppose, for example, the lead underwriters have, which they circulate to their underwriters, a publication by someone, which describes a great trap for the unwary in relation to warehousing clauses in metals policies, it would be of some relevance.

MR. MORPUSS: Absolutely, my Lord. It may be optimistic to hope there is something, but we want the underwriters to go away and look for it.

MR. JUSTICE TOMLINSON: You never know.

MR. MORPUSS: Yes, one never knows. My Lord, so those are the first few categories and that is all I have to say on them.

MR. JUSTICE TOMLINSON: So far as publications are concerned, how is that bounded in time?

MR. MORPUSS: They are both the same period as for Mr. Morris' policies: 2nd April 2006 to 2nd April 2007.

MR. JUSTICE TOMLINSON: It just occurs to me that if you are giving disclosure in the traditional way, that would oblige them to account for anything which they might have had from April 2006 but have not kept, or anything which they had and which had got thrown away, which is an impossible task.

MR. MORPUSS: I was going to say it seems unlikely they are going to know that.

MR. JUSTICE TOMLINSON: Absolutely.

MR. MORPUSS: We are not asking them to do the impossible, my Lord.

MR. JUSTICE TOMLINSON: So it is simply anything which happens to remain on the files, as it were.

MR. MORPUSS: Yes, obviously if there is a record saying – it seems unlikely that there is a record saying, "Well, Mr. Morris had in his possession a publication in relation to LME/COMEX warehouses in 2006 but he's since thrown it away," that would be relevant. That seems pretty unlikely.

MR. JUSTICE TOMLINSON: Yes, we are in the realms of the long shot, really, are we not?

MR. MORPUSS: Very much, my Lord, yes.

MR. JUSTICE TOMLINSON: There we are, thank you very much. Mr. Kendrick?

MR. KENDRICK: Just so you know we will be saying at trial that COMEX and LME are badges of quality ... to more congenial topics, if you are invited to a 2-star Michelin restaurant ... for a nice meal, although you will not ... the precise criteria which a restaurant has to satisfy to qualify for that. The difference is, if it has not got a badge of quality, then the warehouse would be individually investigated. In fact what happened in this very case is that, in the course of the policy year, brokers of SocGen came and said, "We'd like to add two places which aren't LME/COMEX for the storage of gold: one in India and one in Turkey. So we went and looked at the premises, a survey was taken out and they were approved and the endorsement said, even though non-LME and COMEX, agreed to accept these two for storage of the gold ... say it is relevant to the construction of the warranty ... the Turkish one was indeed a Goldas one, but we avoided that and ..." So that is the background, what our case would be.

Moving on the individual matters here, the first defendant wrote approximately 1561 specie policies in the relevant period, so there is a number to go through. "Why are we doing this?" is the first question. It is not for a construction of the slip because I think it is now accepted that is a matter of market knowledge and market matters. It is for subjective matters. Even in the context of subjective matters, the court has set its face against any long inquiry and we refer you, my Lord, to *Marc Rich v. Portman*, at para.47, a case on inducement. This is the underwriter who wrote to Marc Rich ... did not seem to know what "demurrage" meant. Then there is the question of could such a person be induced? Disclosure came up and Longmore J. said:

> "It emerged that insurers had been asked to disclose Mr. Overton's writings over a period of five years and that they had declined to do so. It would, however, be a most unfortunate consequence of the House of Lords decision in *Pan Atlantic* ... if cases of this kind were to be saturated with inquiries about a plethora of risks written by the actual underwriter on occasions other than the time when the relevant risk was itself written. In my view the question whether the actual underwriter was induced to write the relevant risk is to be determined by reference to the actual risks underwritten and their immediate context. The question in this case is then whether the underwriter abrogated his functions in relation to these risks not in relation to numerous other risks when on different occasions of *Merchant and Manufacturers Insurance* ..."

What we are being asked for are numerous other policies. What then? Do we go through each one in the factual matrix and discuss what was said and what happened? So we would say that this is disclosure which is not going to get anywhere. It is a type disclosure, other risks, which the court just does not order, and rightly so. Then, when we get to the publications, we are truly in the realm of ... It may be something might turn up in a library; it may be that Mr. Morris had read it; it may be that he had remembered it; and it may be that it was just on the point and he had it in mind when ...

My Lord, again, we would say this is too farfetched to merit a proper disclosure.

MR. JUSTICE TOMLINSON: On the first point, does it make a difference that there is a rectification argument?

MR. KENDRICK: In my submission, not. Rectification is there to correct errors in the wording. In other words, an agreement has been made, but, by mistake, the parties ... There is no agreement prior to the warranted period in the slip. There is no suggestion by the placing broker that he meant something else. As a matter of construction ... but there is no doubt that words record the agreement and, therefore, there not being any relevant prior agreement, there is nothing to which these documents can go.

MR. JUSTICE TOMLINSON: Can I just have a look and see how it is pleaded?

MR. KENDRICK: That is in the main bundle, tab 3.

MR. JUSTICE TOMLINSON: 7(c) is the pleading of it. I will just read it to myself.

MR. KENDRICK: Yes, please, do, my Lord.

MR. JUSTICE TOMLINSON: And is document MC.000, and so forth, the slip?

MR. KENDRICK: Yes. Our pleading in reply appears at 27 to 29 of tab 4.

MR. JUSTICE TOMLINSON: Thank you.

MR. KENDRICK: Against that background, my Lord, we say this is going nowhere and I have to say we do not really understand the point my friend is making about the principal was SocGen. Surely the broker is the person with whom the agreement is made and he is the person whose mind is the relevant mind. So we do not see that, but, equally, we say that, to go looking at other ...

and this is a hand-crafted wording, is not going to get you anywhere. This is not something the underwriter stamps on his policies.

MR. JUSTICE TOMLINSON: I am not sure the rectification pleading goes quite far enough, in any event. I will take that up with Mr. Morpuss.

MR. MORPUSS: My Lord, could I ask you to turn on in the bundle, to the reply as well, which you have not seen, which is at tab 5? At p.41 in the bundle, para.9(b) at the bottom, is the response to 5(c) and if I could invite your Lordship to read paras.(a) and (b)?

MR. JUSTICE TOMLINSON: Yes.

MR. MORPUSS: My Lord, this is set out elsewhere. SocGen's position on the rectification is this. What happened was there was a pre-existing understanding that the LME/COMEX wording would apply only to non-precious metals. What happened is Mr. Morris wrote this on the slip before it was drawn up, when there was negotiation, and he wrote on the LME/COMEX warranty – he wrote it in the context of there having been a claim previously in relation to non-precious metals which had not been stored in an LME/COMEX warehouse and that was the genesis of this. He wrote this on and he put it in manuscript and, because of the way the page was laid out, the place where he wrote it was at the bottom of the page and, when it got typed up by Mr. Glover, it ended up applying to all the storage rather than just to the non-precious metals. We say there is an obvious error and there was a pre-existing understanding.

These are really matters for debate at trial, but, in my submission, the position is not as Mr. Kendrick suggests, that this is somehow a hopeless rectification claim. We say it is absolutely clear on the documents that Mr. Morris only intended this to apply to non-precious metals and it is simply the way it got drawn up by Mr. Glover, who did not understand the point, did not know about LME/COMEX warehouses not storing gold. It is the way in which the items then got transposed and typed up which makes it appear, on the construction, if you read those words in isolation, to apply to gold as well. So, in our submission, there is a compelling case for rectification, and Mr. Morris' denial of knowledge about LME/COMEX storage is going to be tested by looking at the other policies which he wrote. That is why we do say this is relevant disclosure, relevant material.

MR. JUSTICE TOMLINSON: But you accept that Mr. Glover did not know the point, do you?

MR. MORPUSS: Mr. Glover was not aware of the point, but we say that is neutral because what matters is SocGen's intention. SocGen is Mr. Glover's principal. SocGen was clear that it wanted the LME/COMEX wording to only apply to non-precious metals. We say it is clear that Mr. Morris intended that, once one analyses the documents, and that, when he says, now, that he did not intend that, that is wrong. The way of testing that is to test his understanding.

MR. JUSTICE TOMLINSON: Is Mr. Glover a specialist broker?

MR. MORPUSS: I am not sure. I think the answer is "no", my Lord.

MR. JUSTICE TOMLINSON: Are Cooper Gay specialist brokers, is perhaps the first question?

MR. SCHAFF: ...

MR. JUSTICE TOMLINSON: But not necessarily specialist specie brokers.

MR. SCHAFF: ...

MR. JUSTICE TOMLINSON: No, I see.

MR. MORPUSS: My Lord, on that basis, we say there is a serious rectification issue. I would not put it any higher or lower than that and it is not one which your Lordship can resolve.

MR. JUSTICE TOMLINSON: I cannot form a view either way. I certainly should not form a view that it is not serious.

MR. MORPUSS: No, I am grateful, my Lord. On that basis, there is a pleaded issue to there, to which this material goes and it ought to be disclosed.

MR. JUSTICE TOMLINSON: You mean on the basis that what you hope to find is that other policies he has written draw a distinction?

MR. MORPUSS: Yes, my Lord, and that is not pure conjecture; it is a reasonable probability, we say, when everyone agrees that LME/COMEX warehouses do not exist in Turkey and in Dubai. It is a reasonable likelihood.

My Lord, my learned friend referred to the *Marc Rich v. Portman* case. That is on very different facts and, as the extract which my learned friend quoted in footnote 20 shows, the reason there for not giving general disclosure of a policy is in the last couple of lines at footnote 20 of his skeleton:

> "The question in this case is then whether the underwriter abrogated his functions in relation to these risks not in relation to numerous other risks written on different occasions ...

That is not the issue to which our request for disclosure is going in this sort of case, my Lord. One can understand the resistance to widening up the issues in that sort of case.

MR. JUSTICE TOMLINSON: Your point is that it goes to his knowledge of the general structure of insurance of this sort.

MR. MORPUSS: It goes to his knowledge, my Lord, and, in a less direct way, it goes to market knowledge, given that he is a player in the market. The market knowledge is relevant both to rectification and to construction.

MR. JUSTICE TOMLINSON: But, as I said before, the publications is a bit of a long shot, is it not?

MR. MORPUSS: My Lord, if it is a long shot then it is not going to be very onerous to look for: simply a case of someone going round the library and looking for articles from that period and, if there happen to be some, there happen to be some. In my submission, it is not very burdensome and there is a possibility that there may be something there.

My fallback position on publication, if your Lordship were inclined to rule it out entirely, would be to at least order disclosure of any publications of Mr. Morris in that period because those are much more likely to be relevant and will be more limited and he ought to have some record of what he published.

MR. JUSTICE TOMLINSON: Mr. Kendrick, you say he wrote 1,561 policies.

MR. KENDRICK: The first defendant wrote 1,561.

MR. JUSTICE TOMLINSON: You are only being asked for Mr. Morris'. Will he have written all of those?

MR. KENDRICK: My Lord, I do not know, is the answer to that, but he was the leading underwriter ...

MR. JUSTICE TOMLINSON: Yes, I see, because all you are being asked to produce is those which were written by him.

MR. KENDRICK: Obviously, we would have to get them all out and go through ...

MR. JUSTICE TOMLINSON: You do.

MR. KENDRICK: And they are quite voluminous ...

MR. JUSTICE TOMLINSON: Yes, I am afraid I am persuaded that you ought to.

MR. KENDRICK: So be it, my Lord.

MR. JUSTICE TOMLINSON: But, so far as publications are concerned, I think I am inclined to limit that to Mr. Morris.

MR. MORPUSS: My Lord, there are two other issues in relation to underwriters, the first of which is emails and documents falling outside their underwriting or claims files. Underwriters have explained in their evidence that they are going to search simply the underwriting and claims files which they have, and they have explained very carefully how those are constructed: some are electronic, some are in hard copy, but they have separate files and that is all they are proposing to search. The question is should they be looking outside that against the possibility that other documents may have fallen outside the files at which they are proposing to look?

My Lord, this is a short point. The underwriters consist of five different institutions. It is undoubtedly true that, in a perfect world, everything which has been produced in relation to these risks which might be relevant would have found its way into the underwriting and claims files but, five different institutions, different people, the likelihood is that something will have slipped through the net, and the question is whether they ought to be obliged to go and search for those. They have done some limited testing of the position and, so far, discovered no additional documents. What our proposal is is that they ought to go and look for these documents outside the underwriting files. We have suggested limiting it to a narrow period, January to April 2007, to capture the placement period, and your Lordship has heard my learned friend refer to the endorsements which ----

MR. JUSTICE TOMLINSON: When was the placement?

MR. MORPUSS: The placement was 2nd April, my Lord.

MR. JUSTICE TOMLINSON: 2nd April, is it?

MR. MORPUSS: That is when it is finally signed up. But it was being placed from late January/early February, through to April.

MR. JUSTICE TOMLINSON: Is there not a bit of sauce for the goose and sauce for the gander here? Ought they not to be left to carry out the search in the manner which they have said is, in their view, likely to capture the documents and we ought to see what it produces and whether there are some obvious things missing?

MR. MORPUSS: I can certainly see, in the light of my submissions this morning, that your Lordship could take that view, yes.

MR. JUSTICE TOMLINSON: The trouble is I am being asked to second-guess considered conclusions made by people whose job it is to give this disclosure, that the best way to go about it in a proportionate manner is to do it in the way proposed. I shall not know whether or not that is right, or no one will know whether or not that is right, until one has had a look at what it produces.

MR. MORPUSS: I take your Lordship's point and we are happy to park this point and see what we get.

MR. JUSTICE TOMLINSON: I think that would be a good idea.

MR. MORPUSS: If there are obvious deficiencies then we will ...

MR. JUSTICE TOMLINSON: Right.

MR. MORPUSS: My Lord, there is final issue in relation to underwriters and that is, I am afraid, keywords yet again and it is a rather more extensive issue, at least on its face, because we have proposed a number of keywords which we say ought to be searched and they are footnoted in my skeleton, and that is the probably the easiest way of finding them.

My Lord, my learned friend is right, in the light of parking item 3, this can be parked as well, actually. It does not arise.

MR. JUSTICE TOMLINSON: Good.

MR. MORPUSS: So that is the end of my applications against the underwriters. I have one issue in relation to Cap Marine's disclosure, which again goes to the question of keyword searches.

MR. SCHAFF: My Lord, I am so sorry ... and we have not, and I am so sorry ...

MR. MORPUSS: I am most grateful, the easiest of today's applications. That leads me on to Cooper Gay then. Sorry, can I just clarify that the agreement is to search for all the additional words which we propose?

MR. SCHAFF: Yes.

MR. MORPUSS: Thank you. My Lord, as far as Cooper Gay goes, there are two issues, probably, which still remain. One relates to the broker of record letters, which your Lordship heard reference to earlier, and the importance of these letters is that it is part of my clients' case that having a letter signed by my client in favour of Cooper Gay, appointing Cooper Gay as its broker of record, together with Cap Marine, is evidence of an assumption of responsibility by Cooper Gay towards my client ----

MR. JUSTICE TOMLINSON: I do not suppose hat letter is in the bundle, is it?

MR. MORPUSS: It is exhibited somewhere, my Lord.

MR. ADAM: My Lord, there is one in bundle 2, tab 31, pp.511 and 512.

MR. MORPUSS: I am most grateful.

MR. JUSTICE TOMLINSON: It is obviously a failing on my part but I do not think I have ever seen a letter in that form before.

MR. MORPUSS: It is Mr. Schaff's clients' evidence that these are very common in the market, which is to what this point goes, my Lord, that we say, "If they're so common, can you show us how many you have got?" because we do not accept that evidence, that these are common in the market and, therefore, do not evidence any assumption of responsibility. In our submission, they are not common features of insurance practice and putting forward this letter is evidence of a direct link between Cooper Gay and my clients, and we say does support an assumption of responsibility. That is obviously a matter for debate at trial, but Mr. Netherway, in his evidence at para.83, says they are common in the market, they do not evidence an assumption of responsibility. If that is going to be Cooper Gay's case at trial, we are entitled to test it. What we have asked Cooper Gay to do is to produce broker-of-record letters held by it in relation to other policies to show how common they are. To meet Cooper Gay's concern that this might lead to widespread disclosure, we propose limiting it to the period 1st January 2006 to 2nd April 2007.

MR. JUSTICE TOMLINSON: But, apart from dealing, in part, with the point as to whether or not they are common, which will shed some light on it, how will the existence of those letters help, one way or the other?

MR. MORPUSS: They will demonstrate whether or not they are a common feature of the market because the argument against us seems to be, "Well, these are so common, they don't tell you anything, they don't evidence anything." Our submission is that is not correct and, if that is Cooper Gay's case, then they ought to be able to go away and say, "Well, we've looked in our placing file. Here's a whole host of them," and that will support their case. If they cannot come back and do that, and they do not have very many broker record letters, then it supports my clients' case. We recognise that there is some burden imposed in doing this, which is why we have tried to limit the time period.

MR. JUSTICE TOMLINSON: And you say they are not common. Therefore the fact that it is an unusual document, if it is, gives it some added significance.

MR. MORPUSS: Yes, my Lord, although ----

MR. JUSTICE TOMLINSON: Helps you towards an assumption of responsibility.

MR. MORPUSS: Yes, it is more to knock down the point being made by the defendants saying they are common and therefore you can attach no significance to them at all. It is when they put this up as their defence that we say, "Well, show us how many of these you've got then, if you say that they're a regular feature of the market." That is not our experience but then, as I have indicated, SocGen does not pretend to be greatly experienced in the English market. It is a matter of expert evidence, undoubtedly it will be, but this will assist the experts. My Lord, on that basis, I say they ought to be disclosed.

MR. JUSTICE TOMLINSON: Who are you asking for this: Cooper Gay?

MR. MORPUSS: This is Cooper Gay, my Lord.

MR. JUSTICE TOMLINSON: Have you asked Cap Marine?

MR. MORPUSS: No, we have not, my Lord.

MR. JUSTICE TOMLINSON: Why not?

MR. MORPUSS: One could ask Cap Marine to produce them as well, my Lord, but this is a point being run by Cooper Gay and, therefore, we have directed it at Cooper Gay. It is Cooper Gay which is making the running on this point.

MR. JUSTICE TOMLINSON: I see that, but if it is sensible to ask Cooper Gay to disclose all theirs, it would be equally sensible to ask Cap Marine, would it not?

MR. MORPUSS: I agree, my Lord, if they had them, but of course they are probably dealing in the English market less than Cooper Gay are.

MR. ADAM: My Lord, the difference is that there is no issue between myself and Mr. Morpuss' clients as to existence of duty. We have got a contractual obligation and so it does not ... The reason that it is relevant as between Mr. Schaff's clients and SocGen is that they are part of the eternal triangle of client ... and they want a letter of record to bolster their case, but it is not relevant for the case against my clients ----

MR. JUSTICE TOMLINSON: Because you accept you have got a duty.

MR. ADAM: There are all sorts of issues about the scope of duty. There is no case to say there is no duty at all, which is to what this document goes.

MR. SCHAFF: ... 33.3 of the points of claim, but I do not think your Lordship needs to turn it up. My Lord, the evidence in Mr. Netherway's witness statement in paras.85 to 86 – and I can summarise that, to save time. It is at ...

MR. JUSTICE TOMLINSON: Yes.

MR. SCHAFF: It is basically this. You get these broker record letters where you are dealing with a risk which has been ... through other brokers and there is suspected to be more than one broker in the market chasing ... the underwriter is not sure whether the broker who is ... is flying a kite, as it were, or actually has a client behind, that is what Mr. Netherway is saying. The facts of this case, our case, the one which matters, the one in which the court is going to decide whether there was any assumption of responsibility by the ... if so, what assumption of responsibility ... There was an existing placement by Aon – your Lordship may have seen some reference to that because some reliance is made on the fact that this was supposed to be, so it is said by SocGen, renewable on the same terms ... At the relevant time of this placement, Aon was still out in the market, Glencairn were out in the market – everyone was doing a keyword search for Glencairn – and we are out in the market. The position is that it is in that context that that first letter and the second letter are issued. The first is a non-exclusive letter. The second letter, which you have looked at, is exclusive. The question is, in the context of this case, do we owe them a duty of care and, if so, what duty of care and does this letter make a difference?

My Lord, in my respectful submission, it is not going to make a jot of difference one way or the other whether in different placements such letters were or were not obtained; whether in different placements and different insureds, different insurers may ... There were other competing brokers at the time, it was renewable by a different broker in relation to something which had been placed by somebody else or whatever. The only relevant question for present purposes is did we owe a duty of care and, if so, what? You are looking at this placement and no other placement.

MR. JUSTICE TOMLINSON: You deny a duty of care, do you?

MR. SCHAFF: As placing brokers, our pleaded position is we owed no duty of care but, in particular, we say, if we do owe a duty of care, albeit a limited duty of care, to negotiate terms on your behalf, which is actually what the letter says, as your Lordship saw a moment ago in bundle 12 ...

MR. JUSTICE TOMLINSON: ... to negotiate terms.

MR. SCHAFF: Yes, and one of the critical questions in this case – which is why I said a moment ago that it is not just, "Is there a duty, but what is the duty?" did we owe a duty to advise SocGen as to the cover which had been obtained and, in particular – we have not gone into this today because it is going to be dealt with by correspondence – that English law policies contained warranties ...? That is a big question and we deny ... anything, even if there is a limited duty to negotiate and to exercise reasonable care to negotiate ...

MR. JUSTICE TOMLINSON: You must have some duty.

MR. SCHAFF: The formal pleading position is that, and the law on placing broker duty ... the emphasis deliberately being put in a way in response to your Lordship's questions is not so much is there a duty ----

MR. JUSTICE TOMLINSON: No, it is the scope of the duty.

MR. SCHAFF: But it is not conceded that it is the scope of the duty.

MR. JUSTICE TOMLINSON: Like I say, it is an interesting point.

MR. SCHAFF: That is going to be the subject of expert evidence. If it is thought relevant on the facts of this case that a letter in these terms is ... no doubt that will be explored but one will have to get into the factual provenance of this letter. Your Lordship remembers half-an-hour or so ago, I raised the question of the head of life who signed this letter. One would want to know how ... was

it a mundane matter or was it with regard to something of substance? It is really a question for another day ... Going to a whole series of different risks to see whether or not there was a similar broker-of-record letter is not going to affect the issue for this court at all. We are either going to go – and I shall this because Mr. Netherway says this in his witness statement – we cannot press a button and electronically search for these documents, so we have to go to files and, in Mr. Netherway's second statement, where he corrects some information which he gave in his first statement --

MR. JUSTICE TOMLINSON: Yes, I remember that.

MR. SCHAFF: -- he gives the figures: 3,000 risks per annum in 2006 and 2007; 1,100, or thereabouts, risks in each year in marine and aviation department; 70 cargo risks in all, or thereabouts, between 1st January 2006 and 30th April and so on, most of which, if not all of them, being written by Mr. Glover. Just see how this would work. One would go to a file and have to wade through it manually and see is there or is there not a broker-of-record letter? Suppose there is. Then what happens? One has to say, "Well, why is there one in this file? What were the circumstances of this placement? Was this one where there was an existing placement with another broker? Are there lots of other brokers out in the market on this risk or not? One would have to investigate the circumstances of that risk. Suppose one goes to a file and there is no such letter. One would have to say where is there no such letter? What are the circumstances of this risk? Is this an existing placement? Is it a renewal? Are there different brokers and so forth?

We are not trying to be difficult about this. There will, if necessary, be expert evidence on these sorts of letters. The provenance of the two letters, on the facts of this case ... but it is not going to assist the court one iota for us to open up different risks on this aspect. If we do go down that road, we will have to explore the circumstances of any risk which we open up. My learned friend says, "Well, let's have a sample." Frankly, my Lord, one has no idea which risk one would go to for sample, one does not know what answer one would get when one does sample them and, as I said to your Lordship, any answer which is thrown up is going to raise more questions.

My submission is it is irrelevant, it is just not going to assist the court. And it is not as easy as just pressing a button. If one needs to press a button, one will try and do that. But, as I say, we have got to go to all these individual files and then, quite clearly, the answer "yes" or "no", there is or there is not a letter, is not going to advance the argument ... the circumstances in which these letters were obtained, so be it, and the circumstances in which these particular letters, on the facts of this case, were obtained, obviously can be ventilated. But, my

Lord, we say this is just an inquiry which is of no use to anybody. My Lord, I resist that application.

MR. MORPUSS: My Lord, of course the easy solution would be for my learned friend to concede that there is a duty of care and it would no longer then be an issue, as he seems almost inclined to. Since he insists on denying the duty of care, in my submission, this does remain relevant to his allegation that these are common.

If your Lordship is not persuaded to order general disclosure over a long period of these broker letters – and I do submit that sampling would be an appropriate way of testing the contention because it is said these are common features of Cooper Gay's placing. If they are, let them go away and look at 50 files and see how many broker letters of record they come up with and that will either prove their point of will not prove it. That is my fallback position, my Lord.

MR. JUSTICE TOMLINSON: And how do you suggest they should select the 50 files?

MR. MORPUSS: Do it at random, my Lord.

MR. JUSTICE TOMLINSON: Over your period.

MR. MORPUSS: Over my period. Simply choose 50 or so files randomly and see what comes out.

MR. JUSTICE TOMLINSON: And tell you whether or not there is a broker record letter in them.

MR. MORPUSS: Yes, my Lord, that is a way of testing their proposition.

MR. JUSTICE TOMLINSON: It only tests to a very limited extent the proposition as to whether they are common.

MR. MORPUSS: That is the only reason I have asked for it, my Lord. I do not suggest that it goes further than that.

MR. JUSTICE TOMLINSON: But have you taken expert advice as to whether or not they are common in the London market?

MR. MORPUSS: I do not believe we have instructed an expert on that yet, no, my Lord.

MR. JUSTICE TOMLINSON: In that case, again I suspect this is a premature application, is it not, because you assert that they are not common but, as you rightly say, you are a French company with very little experience of the English market? What is said on the other side is, "No, these are perfectly common for a particular purpose." You are simply asking for this disclosure in order to test the proposition that they are common but you are not actually in a position at the moment to controvert that proposition.

MR. MORPUSS: One option would be, my Lord, to park it and if we came back with evidence saying that they are uncommon then that may add weight to our application.

MR. JUSTICE TOMLINSON: I am just a bit nervous about it because it so happens I have never seen such a document before, but it would be very dangerous, on the limited experience which one inevitably gets as a lawyer, for me to assume that they are not common. Indeed they might have become common since I ceased to practise, or it may just be that I just happen never to have come across them because it just never cropped up in anything I was doing. I think, unless you are in a position to tell me on good authority that you say that what Mr. Schaff says about them being common is not right, then disclosure merely for the purpose of proving or disproving that they are common cannot be right.

MR. MORPUSS: No, I cannot say that, my Lord, so it may be sensible to park this one.

My Lord, there was one other issue, which was transit or storage policies but, in the light of what we have discussed today, I am not going to press that today and we will leave that over.

MR. JUSTICE TOMLINSON: Good.

MR. MORPUSS: I believe that, apart from that, that is everything. Mr. Adam has something.

MR. ADAM: I just want to clarify one thing ... what I said about agreement to search for additional keywords, it was those five he has listed in his skeleton at para.77 ...

MR. KENDRICK: My Lord, can I point out as a point of detail ... what we are proposing to do – and, please, my Lord, tell us if we are wrong – would be, for example, item 1 --

MR. JUSTICE TOMLINSON: Back on your schedule?

MR. KENDRICK: Item 1 on our schedule, to have that as in the schedule but with no reference to documents, electronic, hard copy, emails, etcetera; leave that to the discretion of the other side but with the words which my Lord has said.

MR. JUSTICE TOMLINSON: Yes.

MR. KENDRICK: And then when I get to the individuals, for example, Mr. Varenne, at 26, we are assuming it is the same again with regard to no specificity whether the documents are email only, hard copy, server, hard drive.

MR. JUSTICE TOMLINSON: Absolutely not. "The documents" means all his documents, basically.

MR. KENDRICK: ... 308 is right, is it not, my Lord?

MR. JUSTICE TOMLINSON: That was what I intended.

MR. KENDRICK: Yes, it is a reasonable search and that is to be interpreted ...

MR. JUSTICE TOMLINSON: Yes.

MR. MORPUSS: My Lord, I think those are all the applications.

MR. KENDRICK: It just remains for the costs, my Lord, whether the choice is between costs in the case and should there be some split order. Most of the time was spent on my friend's disclosure and ... therefore we would ask that the costs in relation to the applications for his disclosure should be paid by claimants, in any event ...

MR. SCHAFF: My Lord, I want to make the same application ... the costs since the last CMC before your Lordship, if I can say this, have been very very significant indeed.

MR. JUSTICE TOMLINSON: I am sure they have.

MR. SCHAFF: Not just on our side, I am sure, on every side.

MR. JUSTICE TOMLINSON: But, on the whole, they have been well spent, have they not, in advancing the argument and reaching sensible compromises?

MR. SCHAFF: It is very tempting, my Lord ... We have had a claimant who started from a false position and the process has been getting blood out of a stone and ... at the last CMC before your Lordship, that they did not want to argue the point of principle at that stage, so we parked that. We all had to put in our witness statements. They then give us a bit more disclosure before that, in a letter. We then put in our witness statements. They then put in another witness statement. They give us a bit more disclosure. We then put in our skeleton arguments. They gave us some disclosure last night. We come to court on the fundamental big-picture point which we spent most off morning on ... and obviously a lot of the costs, I accept, are kind of CMC related. They are constructive dialogue, the parties ... but, my Lord, it is, if I may respectfully say so, extremely generous to the claimant to say that this is just, overall, a costs in the case result. The figures on our side are in excess of £100,000 and I would not be surprised if others are in a similar ...

There are two ways of dealing with this, I would submit. Either one says that the costs of and occasioned by the applications in relation to claimants' disclosure exercise should be the defendants', in any event, and for the moment I am addressing your Lordship on behalf of my client, the seventh defendant – I do not know if the other defendants are ... but assuming they are, the defendants', in any event. The alternative would be to take a broad-brush approach which, at its most most generous to the claimants – and this really is as generous as one could be – and say, "Well, let's say 50% of where we have been getting to, or where we have got to, has been general making progress, CMC related, give-and-take on both sides," and 50% has been dragging and pushing and kicking the claimants further and further into line, and that is, I have to say, as generous as one could possibly be. I could pitch it at 75%, but I will put it as generously as one might. My Lord ... it is a costs in case application, but that does not really do justice to what ... That is all I wanted to say.

MR. JUSTICE TOMLINSON: But when you say "costs of and occasioned by the claimant's disclosure exercise", they cannot be all the costs of and occasioned by the claimant's disclosure exercise.

MR. SCHAFF: In relation to this application. It is since the last CMC, my Lord. The costs of and occasioned by this hearing and the evidence prepared for this hearing pursuant to the orders which your Lordship made at the last CMC, insofar as incurred in relation to the claimants' disclosure exercise. One could either, as it were, make that order, divide it up in those terms ...

MR. JUSTICE TOMLINSON: I take your point that, on the big points which we spent the whole morning on, they have lost. Have they lost on everything in

relation to their disclosure exercise? They have lived to fight another day on various points.

MR. SCHAFF: They have lived to fight another day on some points. Your Lordship has only see the tip – it may be a large tip – of the iceberg because a lot of ground has been given as a result of the correspondence, of the witness statements, which cost a lot of money; there is then a further witness statement from Clifford Chance; there is then further correspondence; then the skeleton arguments; there is further movement. We come to court and they have lost on the big-picture point today. They have lived to fight another day on electronic disclosure, although your Lordship has given some pretty strong indications about that. I respectfully submit that we are talking big numbers and it is not just to the clients I represent. I do not speak for Mr. Kendrick and Mr. Adam; they can speak for themselves. I simply say all this gets swept up in the wash in costs in the case. I may be pushing at a rather more difficult hurdle if I ask for immediate assessment or anything of that nature, but just in terms of should this be costs in the case or costs in any event, I would say that there should be some sort of ...

MR. ADAM: My Lord, I gratefully adopt those submissions. We thought we would save ... time by leaving the big-picture points to be run by Mr. Schaff and Mr. Kendrick, largely ... But the specific points we came to argue were post 17th April 2008 disclosure, on which we have had some success; Mr. Yarhi, on whom we have had complete success; and English law ... So I agree with what Mr. Schaff has said that that degree of success should be reflect in the costs.

MR. JUSTICE TOMLINSON: That would be a slightly different order from the order Mr. Schaff is asking for, would it not?

MR. ADAM: I do not think so, my Lord. It would result in a different quantum because our costs ...

MR. JUSTICE TOMLINSON: Yes, all right.

MR. MORPUSS: My Lord, our starting position is that the sensible order arising from today would be costs in the case. Yes, we have given a lot of ground; we have given a lot of ground before the hearing in an attempt to be reasonable. There has been an awful lot of dialogue between the solicitors, that is what has generated a lot of the costs, and a lot of that dialogue has been very productive. We are not the only ones who have given ground. I am not going to even attempt to take your Lordship through the correspondence, but points have been conceded by the other side, for example, keyword searches; there are

points I have not had to pursue today which I would have pursued otherwise if they had not been agreed. A substantial chunk of the costs certainly have been CMC-related costs, have been the costs of parties agreeing reasonable disclosure. I entirely accept that I came along today and lost a number of points; equally, I won some points, particularly against Mr. Kendrick. In my submission, either the appropriate way of dealing with this is simply costs in the case generally or, if your Lordship is going to make some sort of order in favour of the other defendants, the most appropriate way would be some very small percentage in their favour, costs in any event, but I would suggest a very small percentage. If I can add one more point ----

MR. JUSTICE TOMLINSON: I do think there is some force in the suggestion that you have stood out for quite a substantial principle and lost.

MR. MORPUSS: Yes, I do not dissent from that, my Lord, and that is why I say I can see that your Lordship may want to make some costs order in favour of the defendants, although I would add to that that, at the very first CMC, in front of David Steel J., there was significant argument brought by Mr. Kendrick's clients as to whether or not there should be a preliminary issue, which dominated a lot of the CMC. His clients then dropped that at the CMC before your Lordship. None of the other parties pressed for costs, recognising that those were CMC-type costs. In my submission, the same sort of principle applies. We could have asked for costs then on the basis they had all been thrown away by a wasted application and we did not.

If your Lordship is inclined to make some sort of costs order against my clients, I would urge it to be a small percentage of the costs and simply an order for costs in any event, rather than attempting to try and assess them. No one has produced any costs schedules anyway, so it is not going to be realistic.

MR. JUSTICE TOMLINSON: No.

MR. SCHAFF: For what it is worth ... Steel J. at the CMC, the one thing he did say is he was rather attracted by ... he wanted it to be considered in the light of brokers' defences. When the brokers' defences came back, we decided ... whether by accident or design, and we could not then extricate ourselves on that point. However, in this case there has been a win and a loss. It is a very different situation in comparison and shows why my friend should pay either a specific order or a broad percentage.

MR. JUSTICE TOMLINSON: Yes, I do think there is some force in the suggestion that the claimants have stuck to a particular stance in relation to the ambit of

their disclosure, which I myself have described earlier today as being unrealistic, that is to say their attitude to the earlier period, from 2003 to 2005, and, in the circumstances, I do think that that should be marked by some order for costs.

The order which attracts me is an order which awards to the defendants, in any event, 50% of the costs of this hearing, insofar as incurred in relation to the ambit of the claimant's disclosure. The other costs will be costs in the case.

MR. SCHAFF: ...

MR. JUSTICE TOMLINSON: I certainly do, of an occasioned by this hearing.

MR. SCHAFF: Thank you very much, my Lord.

MR. JUSTICE TOMLINSON: Is that sufficiently clear?

MR. MORPUSS: Does that include all the correspondence which went backwards and forwards before the witness statements?

MR. JUSTICE TOMLINSON: That is a matter for the costs judge.

MR. MORPUSS: Very well, my Lord.

MR. JUSTICE TOMLINSON: Thank you all very much indeed.

MR. MORPUSS: Thank you.

IN THE HIGH COURT OF JUSTICE — No. 2009 Folio 307

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

St. Dunstan's House

Friday, 8th October 2010

Before:
MR. JUSTICE CHRISTOPHER CLARKE

B E T W E E N :

SOCIETE GENERALE — Claimant

- and -

WURTTEMBERGISCHE VERSICHERUNG & Ors. — Defendant

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MR. C. MOGER QC and MR. GUNNING (instructed by Clifford Chance) appeared on behalf of the Claimant.

MR. D. KENDRICK QC and MR. S. KERR (instructed by Clyde & Co.) appeared on behalf of First to Fifth Defendants.

MR. T. ADAM QC and MR. T. KENNEFICK (instructed by Barlow Lyde & Gilbert) appeared on behalf of the Sixth Defendant.

MR. A. SCHAFF QC and MR. A. WALES (instructed by CMS Cameron McKenna) appeared on behalf of the Seventh Defendant.

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P R O C E E D I N G S

I N D E X

SEE SEPARATE TRANSCRIPT FOR JUDGMENT

NB: THIS TRANSCRIPT WAS PRODUCED WITHOUT REFERENCE TO DOCUMENTS AND FROM A POOR RECORDING. DUE TO THE ACOUSTICS OF THE COURT MR. JUSTICE CLARKE WAS DIFFICULT TO HEAR)

MR. JUSTICE CLARKE: We have with us this morning Madam Justice Cornelius from the High Court of Barbados, who ... what we do.

MR. MOGER: My Lord, I hope she will find the argument before your Lordship entertaining, although I am bound to say almost everything in the agenda is agreed.

MR. JUSTICE CLARKE: Yes.

MR. MOGER: My Lord, I appear with Mr. Gunning for the Claimants, Societe Generale, the First to the Fifth Defendants, underwriters, are represented by my friends Mr. Kendrick and Mr. Kerr, Cap Marine, the Sixth Defendant, who is the French broker, is represented by my friends Mr. Adam and Mr. Kennefick, and Cooper Gay by my friends Mr. Schaff and Mr. Wales. My Lord, I hope your Lordship has had an opportunity to look at the skeleton arguments.

MR. JUSTICE CLARKE: Yes.

MR. MOGER: This is the third CMC in the proceedings, and it concerns two matters, a request by the Claimants for an extension of time for the completion of its disclosure obligations, and consequential development of the trial timetable, first set in May. My Lord, may I make it clear at the outset that the Claimants are very sorry that they have found it impossible to comply with the provisional timetable set by the court on 27th May and are forced to ask for a delay of their trial as a consequence. But may I say that I am glad to say that there is little disagreement about either aspect of the application before your Lordship.

MR. JUSTICE CLARKE: Just before you go any further, I have read the witness statements about the thousands of documents and the 455 lever arch files, and I quite follow the difficulty of tracing documents from a morass of what may be relevant or irrelevant. When we get the trial, has anybody any idea as to how many of them are actually going to be needed and if so for what purpose? I am aware of the issues, but I could not quite understand why such an amount of time ....

MR. MOGER: My Lord, there was a lengthy argument before Mr. Justice Tomlinson (as he then was) in July, in which those instructing me and then counsel Mr. Morpus, who is unfortunately not able to be here, argued for a much more restricted disclosure but were unsuccessful. I am not seeking to revisit that.

MR. JUSTICE CLARKE: No.

MR. MOGER: I cannot answer the question of how much of the 100,000 plus pages of documents now will ultimately be of value. Your Lordship sees that there are a number of defences. Two of them have to do simply with the construction of the policy.

MR. JUSTICE CLARKE: That may not require a document at all ... the policy.

MR. MOGER: It requires a bit of evidence about market understanding in the specie market about locations for the storage of bullion, but, essentially, it is a short issue, and there is a rectification question on the back of that which requires another bit of evidence about the placement of the risk. In addition, among other defences, the underwriters have run a case that the course of dealing between Goldas and Societe Generale between 1st August 2003, when their relationship began, and February 2008, when the balloon went up, amounted to a variation of the contract terms upon which Goldas were sent the gold as consignees, such that Societe Generale knew and consented to a practice that Goldas sold the gold before paying for it, and therefore consented to an arrangement which deprived them of possession.

MR. JUSTICE CLARKE: I can see that that is a fact and document relatively intensive, but the essential question – I am not sure how many of these transactions there were, whether 15 tons worth, I do not know how many there are?

MR. MOGER: There were thousands over that period.

MR. JUSTICE CLARKE: Right.

MR. MOGER: Over a thousand transactions at least over that period.

MR. JUSTICE CLARKE: Right.

MR. MOGER: And the documents have been disclosed about those.

MR. JUSTICE CLARKE: Yes.

MR. MOGER: They formed a large part of the of tranche two that was delivered on 17th September, and it was an examination of those, together with all the e-mail traffic, conversations, and other things between the parties over that period that the underwriters in particular wanted to see with a view to building up this case. What joy they have got out of it, or not, I am afraid I do not

know, and I do not suppose they do because they have only had that material since 17th September, and they had a very large volume of material on 13th August as well. They are probably still wading through it, and it may be unfair to ask them at this stage how much is going to be needed at the trial.

MR. JUSTICE CLARKE: Obviously, one will need whatever the contractual documents are, and the consignment documents.

MR. MOGER: Yes.

MR. JUSTICE CLARKE: And any documents that indicate that the gold has passed on without payment.

MR. MOGER: Yes.

MR. JUSTICE CLARKE: But beyond that, having no knowledge of the case, it seems to me that ----

MR. MOGER: Mr. Kendrick persuaded the judge on 2ndJuly that it was only by an analysis of the whole history of dealing that he would be able to make a case, inferentially, possibly, that it must have been clear to Societe Generale what was going on.

MR. JUSTICE CLARKE: You may be right on that, but whether that involves looking at a thousand transactions at the trial ----

MR. MOGER: Speaking for myself, my Lord, and assuming I am still alive, in 2012 when this trial is scheduled to start, I rather hope it does not, and I am sure any judge faced with it will likewise be keen not to have hundreds and hundreds of files.

MR. JUSTICE CLARKE: Something must be done to prevent it.

MR. MOGER: Yes. But we are not quite at that stage at the moment.

MR. JUSTICE CLARKE: No, I follow that.

MR. MOGER: There is one further development that your Lordship will have picked up arising out of the disclosure that has so far happened, and that is that my friend, Mr. Kendrick, for the underwriters, has indicated that notwithstanding the early stage at which his examination of the documents has reached he is likely to wish to amend his defence to plead misrepresentation and non disclosure in relation to the placement.

MR. JUSTICE CLARKE: Right.

MR. MOGER: Reference is made to moral hazard and the presentation of the risk about gold not being fairly made, but we do not, beyond that, know anything about it.

MR. JUSTICE CLARKE: No.

MR. MOGER: But one can see that that is likely to give rise, possibly, to further factual exploration.

MR. JUSTICE CLARKE: Yes, but it has to be manageable.

MR. MOGER: One hopes so.

MR. JUSTICE CLARKE: One hopes. It is a question of what or was not said and what should have been said.

MR. MOGER: One hopes so, and the case on moral compass, it appears, is to be based upon what is disclosed so far.

MR. JUSTICE CLARKE: Right.

MR. MOGER: But, of course, I have no doubt it will be supplemented by anything that may in the future be disclosed.

MR. JUSTICE CLARKE: Yes.

MR. MOGER: That has the capacity to cause some hiccup in this morning's progress of the action, but we are proposing a timetable which takes that into account and we hope accommodates it. It may of course involve some consideration of the situation with the brokers as well, depending on how the case is put.

MR. JUSTICE CLARKE: That is all manageable, but you have got this what I call the 'morass' problem of dealing with the documents. Anyway, you can, in parallel with that, really have any number of quotations of non disclosure and misrepresentation ... against the brokers without including the timetable.

MR. MOGER: That is our hope. Apart from the caveat that we need to build a degree of flexibility in, and we do not want to be in the position of trying to

vacate a trial date a second time, the parties are broadly agreed about the necessity of the case to go off until 2012.

MR. JUSTICE CLARKE: It seems to me a trial date should be fixed upon the footing that when it has been fixed it is immutable, short of nuclear catastrophe, that it will take place on that date in whatever state of readiness the parties are.

MR. MOGER: Well, my Lord, with respect, I do not disagree with that. That is a reason for ----

MR. JUSTICE CLARKE: For a later date.

MR. MOGER: -- for a later not a sooner date.

MR. JUSTICE CLARKE: Yes.

MR. MOGER: But the differences between us, in the great scheme of things, are marginal. So, my Lord, that is where we are at the moment. There is an application against me, put in two different ways, in respect of the costs of today's CMC.

MR. JUSTICE CLARKE: Yes.

MR. MOGER: For that reason, I hope your Lordship will allow me to open the case, the history of it, why we are here where we are, in a degree of more detail than would otherwise be necessary, if we could go straight to the timetable questions.

MR. JUSTICE CLARKE: Right.

MR. MOGER: Can I go straight to the procedural history in my skeleton on p.2?

MR. JUSTICE CLARKE: Yes.

MR. MOGER: The proceedings began, my Lord, against underwriters alone in March 2009, and brokers were added in November 2009. Separate proceedings were brought against the brokers, and then at the first CMC before Mr. Justice David Steel on 7th December they were consolidated with the present action and a single set of pleadings was directed.

MR. JUSTICE CLARKE: Yes.

MR. MOGER: I just want to interpose some detail between para.7 and 8 of my skeleton. At a very early stage Clifford Chance had embarked on an exercise to recover documents from Societe Generale. They began that exercise in February 2009, before they had begun proceedings against the underwriters.

MR. JUSTICE CLARKE: Yes.

MR. MOGER: Then on 1st December 2009, in advance of 7th December CMC, they served a schedule outlining their disclosure intentions. Essentially, that focused on an electronic search of e-mails, and archived e-mails, and the database of one of the two systems used by Societe Generale, in relation to 33, I think it was, identified individuals, two key people for the placement and two key people for the relationship with Goldas, and then 28 more peripheral people. They set, and explained in their document of 1st December, they set their search by reference to 35 key words, and they chose as the date of the search, the date parameters of the search, a search beginning on 1st January 2005 and ending on 18th February 2008. The reason they chose that was that the bullion consignment agreements with Goldas, under which the particular consignments were sent to Goldas, were made under new agreements with the Goldas Group which were dated April 2005. So they started their search some months before that with a view to capturing the leader to those re-negotiated terms.

MR. JUSTICE CLARKE: Yes.

MR. MOGER: 18th February was taken as the end date because that was when it became known the gold was missing.

MR. JUSTICE CLARKE: Yes.

MR. MOGER: Mr. Justice David Steel made it plain in December that the parties should get on with disclosure and the pleading hiatus caused by the introduction of the brokers should not interrupt progress, and Clifford Chance did that. Under their exercise described in their schedule they produced in excess of three million documents, which they reduced by the key words 'date search' down to hundreds of thousands, and then further reduced to 42,000 odd prior to review for relevance by solicitors, and that was achieved by May of this year.

MR. JUSTICE CLARKE: Yes.

MR. MOGER: In mid March of this year, nearly four months after the December schedule had been circulated to the parties, the underwriters' solicitors, Clyde

& Co., raised questions about the approach that had been taken by Clifford Chance, and subsequently the brokers' solicitors also joined that correspondence. Of course, the brokers had been engaged during the interval from the December 2009 period up to March in dealing with their pleadings, so theirs was at a very early stage of the action. There was considerable correspondence before the adjourned CMC which was listed for 27th May about the shortcomings of the Clifford Chance approach. Some adjustments were accepted, for example, Clifford Chance accepted that it was too early to stop the search on the day the gold was discovered to be missing and extended it to 17th April 2008. But they resisted taking the search back to the beginning of the relationship in 2003, and they resisted general searches, other than for specific categories of documents, after April 2008, and they resisted a wide extension of their searches to cover all the backup documents in the thousand odd trades in the whole interval, between 2003 and 2008.

MR. JUSTICE CLARKE: Yes.

MR. MOGER: The case came before Mr. Justice Tomlinson on 27th May with those disagreements between the parties unresolved. At that hearing, on behalf of the Claimants, I proposed that the disclosure be given in two tranches, the first tranche the documents generated by the exercise we had started and described in December 2009, because on no view would that be wasted.

MR. JUSTICE CLARKE: No.

MR. MOGER: Then I proposed a second tranche for documents that would either be the product of an agreement between the parties for further disclosure searches or would be ordered by the court, because Mr. Justice Tomlinson at the hearing on 27th May laid down a timetable for the resolution of those disagreements to culminate in the hearing on 2nd July. I proposed dates for the first tranche of 16th July, which those instructing me were confident they could achieve, because at that stage all that was required was the lawyers' analysis of the 42,000 documents, the relevance, and I proposed 17th September for the second tranche. That was to assist in setting a timetable and was on the assumption, of course, that what was ordered on 2nd July would be manageable.

At that hearing the underwriters had proposed in their case management information sheet that it might be better for the court on 27th May only to make a timetable for disclosure orders rather than for the whole trial. At the hearing I think all the other parties, and in fact ultimately my recollection is Mr. Kendrick as well, agreed that it would be a useful discipline to set a trial date, which was set for October 2011, and develop a timetable on the

assumption that the disclosure exercise would not disrupt it, and that led to the order which is at tab 20 – if I may ask your Lordship to look at it – in the bundle marked 27th May 2010.

MR. JUSTICE CLARKE: Yes.

MR. MOGER: It is at p.246(a). The order was ultimately drawn up on 14th June, as one sees at the top. In para.1 the judge gave directions, set out a very crisp timetable to lead to the hearing on 2nd July. Then at para.2, over the page, he said:

> "The trial of the action is to be fixed to start on 17th October 2011 with a time estimate of eight weeks. The action is to proceed on the basis of the following provisional timetable subject to possible review at 2nd July 2010 hearing in the light of the court's ruling on disclosure".

Then he set out standard disclosure, and your Lordship sees in (a) Societe Generale's first tranche 16th July, second 17th September. First tranche to include all the disclosable documents located as a result of the searches identified in the disclosure dated 1st December. The second tranche, any further disclosure it has agreed, or does agree to give further disclosure required by the court. Then set out in (b) some provisions for the Defendants, essentially, to give disclosure by 16th July, except in the case of Cooper Gay, who were the English brokers, who were given until 30th July, and a second tranche again on 17th September. Your Lordship sees at 5 that it was at that hearing that a further CMC was fixed for date in the first two weeks of October 2010 with a time estimate of half a day, which is what brings us before your Lordship.

MR. JUSTICE CLARKE: Yes.

MR. MOGER: So, my Lord, as we have seen in that order the judge made a provisional timetable and expressed that it was subject to possible review on 2nd July. But, unfortunately, on 2nd July the judge expressed the view, early on the hearing, which is set out at para.9 of my skeleton:

> "I am not going to consider the trial date today. I am certainly not going to put off the trial date having fixed it only a month ago on the basis it already appears undoable. It might have to be revisited in September/October. I simply do not know. But I am certainly not going to have a counsel in despair today. Mr. Morfus may come back in September or October and say the scale of what I have been required

to do has proved to be so appalling that now is the time to reconsider the trial date but that is not today".

MR. JUSTICE CLARKE: And low and behold that which he forecast has come to pass.

MR. MOGER: It was not just he who forecast it, it was the result of – we have been saying that in argument before him and in correspondence. But, my Lord, the judge was not impressed by the Claimants' arguments about the parameter of the search and he expanded the dates back to 1st August 2003 and forward to 2010, he included all the trading records, which my friend, Mr. Kendrick, wanted to see in relation to his course of dealing defence, and increased the number of employees, all of them areas that had been contested by Clifford Chance. Notwithstanding the fact that it was a CMC, he ordered Clifford Chance to pay 50% of the costs of the CMC on account of his being unimpressed with the line they had taken on dates.

MR. JUSTICE CLARKE: When you say the line on dates, do you mean dates as to disclosure?

MR. MOGER: Yes. Can I ask you to look at that because there are a couple of passages in the transcript that I would be glad to show your Lordship? That is at tab 5 in the bundle for today. If we go in that tab, tab 5, to p.305, he says this at line 32:

> "I do think there is some force in the suggestion that the Claimants have stuck to a particular stance in relation to the ambit of their disclosure, which I myself have described earlier today as being unrealistic, that is to say their attitude to the earlier period of 2003 to 2005. That should be marked by some order as to costs".

And the order which attracted him initially, and which he ultimately made, was an order for 50% of the costs. Can I ask you, my Lord, to go, while we are there, back in the transcript to p.248? One of the arguments that arose at the hearing before the judge was a criticism by the Defendants of the essentially electronic nature of their disclosure searches, particularly the focus of that on the e-mail tracking. Various points were made, one of which was that there could be a danger that documents held electronically would not thereby be thrown up, and another was that obviously manuscript documents, notes and annotations, and so on, would not be discovered. It was not as if Clifford Chance were not looking for hard copy documents, not prepared to look for any hard copy documents, but they did say, and sought to argue, that the approach they had taken, which was to focus, particularly in the case of the

group of employees on the SGCIB system, to focus on e-mails, would be very likely to throw up, as it has, documents other than just the e-mails. The judge at the bottom of p.248, having made a ruling about the 2005/2004 period, said at line 40:

> "What at the moment I am minded to do, subject to anything further you have to say on the categories, I am at the moment not minded to be prescriptive now as to how they should go about conducting their search".

And Mr. Kendrick made the point at line 14 that that cannot catch internal notes. Mr. Kendrick was concerned that the judge's approach might amount to a vindication of the Societe Generale point, and the judge said this at line 21:

> "I want to make it very clear I am not vindicating the approach. I hope I made that clear earlier. It seems to me that if it becomes apparent to them while conducting it the way they wish they are not in fact capturing the sort of documents you have just described it is incumbent upon them to do more. I am certainly not ruling that the approach they propose to adopt is adequate. All I am saying is that for the moment let them go about it that way and if it becomes apparent either to them or to you that it is not adequate then either they must do more or you must ask them to do more and if that fails you will have to come back. I hope I have made it sufficiently clear. You can report to whoever is hearing it my view, that they should receive little sympathy for any suggestion it is not going to be easy to do it within the time frame because it may have been easier had they started from now".

The reason I have asked your Lordship to look at that is that I wanted to make it plain that to the extent that the judge was saying "my view to be conveyed to a later court is there should be no sympathy for an issue arising later in respect time" was confined to the way the search was done. He was not saying: "I am ordering a second tranche on 17th September and no court should entertain sympathetically an argument that it is impossible to do it".

MR. JUSTICE CLARKE: By simply saying if you do it one way now and then it transpires that you should have done it another way, in particular the way that the Defendants suggested you should have done it, you could say it has taken you longer when it could have taken you less before.

MR. MOGER: Exactly.

MR. JUSTICE CLARKE: But was there any discussion before the learned judge about whether or not in the light, forget about the manner of searching for the documents, that in the light of the quantity of documents which would be involved, he having acceded to the Defendants' submissions, whether or not the date previously fixed upon the footing of a different set of documents was any longer realistic?

MR. MOGER: My Lord, what happened was this, and if you look at the passage in the – can I just conclude the point I was on before dealing with that.

MR. JUSTICE CLARKE: Yes.

MR. MOGER: The point I was on I made because if your Lordship would be so kind as to look at Mr. Kendrick's skeleton, para.5(5) on p.3, in the last sentence he refers to the judge's indication:

> "...the court will have little sympathy to a subsequent argument by Society Generale that it should have more time for additional disclosure".

and Mr. Kendrick might inadvertently have given your Lordship the impression that that applied to the general point rather than to the specific point, and it did not, it relied only to the specific point.

MR. JUSTICE CLARKE: Very well.

MR. MOGER: My Lord, can I come to the point your Lordship asked about. What happened is set out in para.14 and following of my skeleton.

MR. JUSTICE CLARKE: Yes.

MR. MOGER: We had warned of the difficulty that this would cause in correspondence before the hearing, and the first document is to be found in our letter of 9th June 2010, which is in volume A of 2nd July hearing bundle, tab 9, p.37.

MR. JUSTICE CLARKE: Yes.

MR. MOGER: This letter attempts to reduce the number of points in dispute. This is between 27th May and 2nd July hearing. They say at the end of the first paragraph:

"This letter attempts to reduce the number of points in dispute pertaining to Soc Gen's schedule of disclosure. The temporal scope of disclosure..."

Then they set out what the work has involved so far:

"1st January to 17th April three million documents. 210 reviewed for relevance. The process has taken a team of paralegals 14 months. If they were simply to expand its search to run for two years prior to1st January until approximately two years after 17th April, as suggested by the defendants, they would be faced with a massive amount of extra data, the review of which would take a huge amount of time at great expense, inevitably resulting in significant slippage of the timetable ordered at the CMC since it would not be possible to provide such disclosure by 17th September and a trial date would be wholly unrealistic of October".

Then in the next bundle, 2nd July hearing, there was witness statement evidence before the judge on an application from all parties, and the evidence for the Claimants came in the form of two witness statements, the first of them from Mr. S..., who is at tab 24 in volume B.

MR. JUSTICE CLARKE: I am afraid to say that these bundles are beginning to ... as many documents in order to ensure that the lever arch does not work.

MR. MOGER: I am very sorry to hear that, my Lord.

MR. JUSTICE CLARKE: It happens all the time.

MR. MOGER: I know. It is para.10, first of all, on p.86 of the bundle.

MR. JUSTICE CLARKE: Yes.

MR. MOGER: Epiq, which is an independent firm handling the documents, has calculated the number of documents retrieved from the production database created between 1st January 2003 and 21st December 2004 is 98,000, and then he sets out what would need to happen to that. Then four lines up from the bottom:

"With regard to Soc Gen's experience, and based on practical assessment, I believe a first level review in respect of 98,000 documents would take approximately six months to complete. It would not have been possible to complete this exercise by 17th

September, the date by which it was currently suggested they give the second tranche of disclosure".

Then at 11:

> "The sixth defendant has also requested continuous disclosure for the period after 17th April 2008. Epiq has calculated the documents retrieved from the 32 employees existing during that period until December 2009 is 33,000..." *(that is not, of course, to 2010)* "... and that would take two months to complete".

Filtering out privileged documents, he says at the end, would take a considerable period of time. Then at p.89, para.17:

> "Epiq has calculated that the number of documents that relate to these two individuals..."

That is the ... proposal that more extensive searches should focus on the two individuals, Mr. Teboul and Mr. Deshpande, who manage the relationship with Goldas, and this is the resulting calculation:

> "The number of documents relating to those two individuals for the period 1st January 2003 and 31st December 2003 is 14,500. If they were ordered to search this number of documents for relevance I believe that a first level review in respect of the 14,000 would take approximately one month. I believe this quantity of documents provides Soc Gen with a realistic chance of providing its second tranche of disclosure by 17th September".

Then, finally, para.22 on p.91:

> "I believe that if Soc Gen were ordered by the court to undertake a first level review of all the disputed key words..."

So that is date, people and now key words:

> "...it would be unable to produce the second tranche of disclosure by 17th September".

In his skeleton, which unfortunately is not in the bundle, Mr. Morpus made the written submission set out at 14(c) in my skeleton.

> "Soc Gen has proposed additional areas of disclosure that would enable it to meet that timetable. However, the defendants have to be realistic. If every one of their requests were agreed to or ordered then Soc Gen would not be able to meet 17th September deadline. In relation to one request alone, 2003/2004 documents, Soc Gen estimates that full disclosure will take around six months".

My Lord, we then got to the ..., and for that we need to go to the present bundle, tab 5, again. May I ask you to look at Mr. Morpus' opening submissions in tab 5, p.205, line 32. My Lord, what we have tried to offer is what we believe is achievable by 17th September:

> "It is said by Mr. Schaff, that is for Cooper Gay, that this is some *in terrorem* threat that my clients are making to your Lordship. It is not intended as that, it is intended to say some things are achievable and some are not. My clients are very keen to hold the trial date, which I understand has now been fixed for 17th October. The reality is that what they have offered to date to the defendants is what they believe can be achieved, and if there is an extensive widening of the thing, to go away and do a lot of their tasks on their own, it is going to take months to do, and regrettably if there is any widening it is likely the trial date is going to have to be revisited and the whole timetable".

Mr. Kendrick then began his submissions on p.206, because he was making the running in relation to the time date, and at p.208, line 12, we have the passage from the judge, which I set out in my skeleton earlier:

> "Can I say straightaway I am not going to consider the trial date today? I am certainly not going to put off the trial date having fixed it only a month ago on the basis it already appears undoable. It might have to be revisited in September/October. I simply do not know. But I am certainly not going to have a counsel of despair today. Mr. Morfus may come back in September or October and say the scale of what I have been required to do has proved to be so appalling that now is the time to reconsider the trial date but that is not today".

That rather puts an end to any sensible application to the judge to extend the time date in relation to the disclosure, notwithstanding the fact he had said in his order before that the trial date might be reviewed in the light of the disclosure.

MR. JUSTICE CLARKE: The trial date then was October 2011.

MR. MOGER: Exactly.

MR. JUSTICE CLARKE: I can see that it was scarcely encouraging, but in fact although 2011 was at the time some way off, 17th September was not very far away.

MR. MOGER: No, no, no.

MR. JUSTICE CLARKE: In fact, it would have been possible to say forget about the trial date for the moment, the actual physical problem is producing these documents.

MR. MOGER: There was much evidence about the physical problem. We looked at six months, and two months, and so on.

MR. JUSTICE CLARKE: Yes. What happened was that you said: "I warn you it was going to take a long time", Mr. Morpus said: "This is not an *in terrorem* threat, it is going to take a long time", the judge said: "I am not going to think about changing the trial date and the idea of changing the disclosure date ..."

MR. MOGER: Exactly. Lastly, at p.237, Mr. Morpus returned, at line 26:

> "The concern which Soc Gen has at the moment, I understand that your Lordship does not want to request a trial date at the moment, is that if we are ordered to go away and do all this wide ranging disclosure the defendants want it is fairly inevitable that we will be coming back in September and saying: we are terribly sorry, we have done our best, it just was not achievable, and that is likely to have an impact on the trial date".

I should perhaps deal with one comment that was made in one of my learned friend's skeletons, which is that we effectively committed that we would do all this disclosure by 17th September. That is not what we did at the last CMC. The order from the last CMC expressly recognises the timetables may well have to be changed in the light of whatever orders are made today. We did not say we would be able to comply with any order by 17th September because that was not our position, indeed it could not have been any rational position until one knew what one was going to be ordered to do.

MR. JUSTICE CLARKE: Yes.

MR. MOGER: So I think your Lordship is right, it was not just the trial date that was not revisited, but it was left at the hearing of 2nd July that the judge took the attitude: "Whatever I order you will have to do it and you may have to come back in September or October and say it was not possible and you need further time", and that is exactly what has happened, and it was not for want of our making a claim to the judge that the extensions he was contemplating would have that effect.

MR. JUSTICE CLARKE: You say, effectively, you had to ... in terms of costs, ... lose it on the point as to how far discovery went. Well, there we are, that is past history, that is it.

MR. MOGER: Yes.

MR. JUSTICE CLARKE: But discovery having been ordered on an extensive scale, more than you suggest should be given, and you having said: "I warn you that this may take a very time long", it is not appropriate that you should have to bear the costs of extending the time necessary to give the more extensive disclosure that the Defendants asked for in the first place.

MR. MOGER: That is exactly what we say. We also say it is recognised on all sides that we do need until December to conduct these searches, and it is recognised on all sides the trial has to go off until 2012, and there are some minute differences ----

MR. JUSTICE CLARKE: You cannot have it both ways. If you ask for ... agreed you need for the production thereof.

MR. MOGER: Yes. My Lord, we do say that. There is a wrinkle, however, and that is – it is a wrinkle which has nothing to do with that general point, it is a wrinkle which has to do with tranche one.

MR. JUSTICE CLARKE: Yes, there is a different point on tranche one.

MR. MOGER: Tranche one we did not deliver by 16th July.

MR. JUSTICE CLARKE: No, you did not.

MR. MOGER: And nor did we say anything about it at all at the hearing of 2nd July. When we delivered it, it was a list on 6th August with copies on 13th August. What we delivered was a list of 1,474 pages long.

MR. JUSTICE CLARKE: A list that long?

MR. MOGER: Yes. We listed 25,259 electronic documents, 3,111 audio recordings, and 33 hard copy categories of documents, 21 of which are files, and I am indebted to Mr. Schaff for setting out at para.9 of his skeleton that that consists of 108,612 pages of documents and 114 hours of audio files. Can I hand to your Lordship, just by way of a specimen, I have not brought the document as a whole to court, a specimen of the various sections of the list. The top page is the list, a specimen page, the documents, as you see in the left hand column, beginning with document 23,845 of the electronic documents disclosed.

MR. JUSTICE CLARKE: Sorry, what am I looking at?

MR. MOGER: You are looking at pages extracted from the list.

MR. JUSTICE CLARKE: I cannot find the number you are talking about.

MR. MOGER: The top left hand corner.

MR. JUSTICE CLARKE: Oh, I see.

MR. MOGER: Those are the numbers of the documents disclosed.

MR. JUSTICE CLARKE: Yes.

MR. MOGER: And your Lordship sees that they have been disclosed in chronological order with a description of the document, author, recipient, copied parties, and a statement whether it was redacted or not.

MR. JUSTICE CLARKE: Yes.

MR. MOGER: And your Lordship sees that although many of the document types are e-mail, also many of them are electronic documents and not e-mails. As to the column of redactions, some of the documents, for instance, below half way, are redacted. That was the exercise that undid Clifford Chance because they were not prepared for the amount of work needed to redact the confidential client information about people other than Goldas. The second page is just a specimen of the audio disclosure, which gave rise, as your Lordship knows, to 114 hours of tapes. The third page is essentially the major part of the first 30 of 33 of the hard copy documents, of which your Lordship sees numbers 1 to 21 are files.

MR. JUSTICE CLARKE: Yes.

MR. MOGER: My Lord, can I ask you now to look at some correspondence about our failure to comply with the 16th July date, and that involves looking in the present file at tab 3.

MR. JUSTICE CLARKE: Yes.

MR. MOGER: There are two sorts of page numbers, 2 bottom right hand corner, 57 in the middle, is a letter from Clifford Chance of 15th July. This was the day before disclosure was required. They there say for the first time:

> "Societe Generale will not be in a position to provide the defendants with a complete first tranche disclosure on 16th July. Already reviewed 210,000 at its first level review. In addition to the temporal progress and reviewing 24,000 of its documents in the second level lawyer review remain approximately 17,500 documents left at second level review before complete disclosure of the first tranche can be provided. We estimate we can finish a review of these remaining documents by Friday 6th August and provide the defendants with inspection of documents that have been reviewed in database order, that is based on the reference code once uploaded on to the hosted database. Consequently, disclosure of these documents tomorrow will be of very limited benefit as opposed to providing one complete tranche of disclosure which will be ordered chronologically and make more sense. We regret it has not been able to meet the 16th July deadline and we assure you we are trying to move the review along as swiftly as possible by allocating as much resource as we can while not compromising the consistency of the review. However, an enormous redaction exercise has had to be carried out of the documents so that Soc Gen remains in compliance with its procedural obligations under French bank secrecy legislation and this has taken much longer that we anticipated. Given the detailed preparation invested in the 2nd July disclosure hearing valuable time has been lost which had originally been attributed to the review exercise".

Then in the middle of the page they say this:

> "We should also say at this point that given the need for a three week extension to complete the first tranche review, and given the significant additional disclosure now required for its second tranche, we do not consider the date of 17th September to provide the second tranche will prove to be realistic. A date closer to December gives Soc Gen a fair chance of meeting the deadline for its second tranche".

That led to understandable protests and demands for a detailed explanation, and if I may ask your Lordship to look on to p.82 in the middle numbering and 27 in the bottom right hand numbering. Clifford Chance wrote again on 19th July:

> "We fully acknowledge Soc Gen has failed to meet the deadline of 16th July for its first tranche of disclosure and the defendants are entitled to an explanation. We sought to provide that and we set out more detail below. Before 27th May CMC the first level review by paralegals had been completed, the second level review had just begun, that of 42,000 documents. However, our time estimate was found out to be overly optimistic and failed to take account of the true complexity of the exercise and the amount of time that would be involved in reviewing each document. For example, many of the e-mails attach spreadsheets listing the trading dates for many of Soc Gen's clients. The date of clients other than Goldas has to be redacted. Consequently, each spreadsheet had to be separately considered and marked up for redaction. Preparation for and attendance at the hearing on 2nd July also delayed the review. A hint of the scale of the work involved for 2nd July was given by Mr. Schaff when he mentioned a cost estimate for his client of over £100,000".

Cheap by comparison with his schedule today.

> "Both the redaction exercise and the 2nd July hearing have caused a significant delay. Realising that the schedules for the second level review were slipping we tried expanding the team further to speed up the second level review to meet 16th July deadline. What we found is expanding the team to include lawyers not otherwise involved with the case led to the process become more inefficient as it has taken a long time to instruct other lawyers in the complexity of the case to review the work has been carried out to ensure a consistent approach is taken and nothing is missed. There is a critical mass of the team size beyond which it becomes too unwieldy and inefficient to manage".

My Lord, I should say the evidence is six to eight solicitors are dedicated to this disclosure exercise.

> "The result is that the second level review is taking much longer than we anticipated in May. Last week it became clear, despite our efforts, not all the documents could be lawyer reviewed by 16th July deadline. As set out in our letter of 15th July, the nature of the review is that

batches of documents have been provided to lawyers for review neither in chronological order nor organised by reference to pleaded issues".

Then towards the bottom of the page:

> "We do not think this is an efficient and cost effective way for the defendants to be required to carry out a review of Soc Gen's first tranche of disclosure. Instead of splitting tranche 1 into A and B tranches we therefore decided to provide with you one complete tranche on 6th August. This has been done with the best of intentions and without meaning any discourtesy or intending any convenience to the defendants".

Then over the page at 11, once again reiterating that the September 2000 deadline is wholly unrealistic. We were conscious of the disruption, of course, that this must have caused to the plans of the Defendants but, nonetheless, we still received a very unsympathetic attitude and we were accused of treating compliance with the court orders as optional. We responded again, p.98, on 30th July. It was said, and said with a degree of force:

> "You have waited until 15th July to tell us. You must have known. Why didn't you say at 2nd July hearing?"

Then we said this:

> "Regarding the first tranche, we set out the explanation. In the run up to 2nd July hearing, with the focus on the issues to be argued at that hearing, we remained of the view we could meet the target of 16th July. We believed once it had passed all the lawyers would be able to devote their time. Accordingly, we thought there was no need to raise any issue regarding the first tranche of disclosure for 2nd July hearing. With the benefit of hindsight we do appreciate that that was overly optimistic. As it transpired, the exercise was more complicated and more time consuming than we had envisaged. Our time estimate, proved to be undeliverable, became apparent to us following 2nd July hearing. As explained previously, it was only in the week before 16th July deadline that despite our efforts to review the documents as quickly as we could we appreciated we were not going to be able to review them all by 16th July even if we were reviewed them round the clock. We considered the options available and concluded the most sensible option was to provide you with one complete tranche. We have done our best to comply with 16th July deadline but it has simply been impossible. We accept this is far from ideal. We hope that the

> defendants will be more sympathetic to this explanation once they have received the first tranche of Soc Gen disclosure".

It was by then being suggested by the Defendants that we all go back into court again at the beginning of September to give the court a progress report. Then at para.7 we say:

> "We see no benefit of convening a CMC in early September 2010 since inevitably we will not have a firm view as to how long a review of the documents will take. We are of the view it is pointless to seek a CMC in early September, precisely when Soc Gen is seeking to devote all its time to progressing a second tranche. Such an approach will only cause further expense to the parties and delay the delivery of the second tranche of Soc Gen's disclosure".

The application had been made informally to the court and the Defendants asked Lord Justice Tomlinson, as he then was, to reveal it. At p.102 of the bundle the court responded on 4th August in an e-mail:

> "Thank you for your e-mails. Referred to Lord Justice Tomlinson and Mrs. Justice Gloster. Mrs. Justice Gloster has directed the matter should remain listed for 8th October as the timetable was always tight. The judge sees little point in scheduling another CMC for September and has asked me to inform Clifford Chance. In spite what it says in your letter, you remain expected to work towards tranche two disclosure by 17th September. There is no reason why you should not give a substantial part of tranche two by 17th September, or shortly thereafter".

That is what we were doing anyway, that is what we did, and that is what led to the disclosure of tranche two. Tranche two, the first part, there is much still to do, my Lord, but the first part, on 17th September we delivered list number 2. It was 51 pages long, it contained 8000 odd copy documents and 50 files of documents which related to litigation Soc Gen has instituted in Turkey and Dubai against Goldas. Soc Gen has expended, as those 50 files will now bring home to the Defendants, a considerable amount of time and treasure in pursuing Goldas in Dubai and in Turkey.

MR. JUSTICE CLARKE: In what language are those?

MR. MOGER: I imagine the court documents are in Turkish, my Lord. In relation to the bulk of disclosure, notwithstanding Societe Generale is a French bank, the language of exchange with Goldas was English.

MR. JUSTICE CLARKE: Right.

MR. MOGER: Although there are French documents, and we have supplied translations. We have verified the translations and we have supplied them, and in relation to some Turkish documents also we have supplied some translations. (After a pause) Oh, I am told we have not supplied translations in French. I am so sorry.

MR. KENDRICK: We have not seen them.

MR. MOGER: Oh, I am sorry. I think where we have had translations we have given them is the story.

MR. JUSTICE CLARKE: Right.

MR. MOGER: That litigation has led nowhere.

MR. JUSTICE CLARKE: Sorry, I did not hear you.

MR. MOGER: Led nowhere.

MR. JUSTICE CLARKE: Led nowhere.

MR. MOGER: There were criminal proceedings, a criminal complaint was made, taken no further by the Turkish authorities, and the civil action was proceeded with. There is now an action by Goldas against Soc Gen on the grounds that its complaints were defamatory of Goldas. The documents in relation to that are currently being produced, and will be produced as part of our rolling disclosure.

My Lord, can I take your Lordship to para.15 of the skeleton, which sets out some of the results of the order that has been made, because, as I told your Lordship, dates were expanded, people were expanded, and key words were expanded. All this is set out in Mr. Gilbert's affidavit. I do not need to go to it because none of this is in issue. But at 15, as examples, the expansion of the key word search, I told you originally 35, and 76 further key words were added. Produced for review were 130,000 documents, 91 of which have ended up being disclosed. There were two further key words we omitted by mistake in that first tranche and they produced another 1,500 documents, which are currently being reviewed to see if any of those are disclosable. Expanding the date rate has led to a recovery of a further nearly 90,000 documents, and the review of that is

under way. The back office documents led to documents that have now been disclosed, that is the 8,000 hard copy documents, and then the retrieval of the Turkish and Dubai proceedings I have already told your Lordship about.

It is our evidence that with tranche one and the first delivery of tranche two on 17th September, Societe Generale is confident that the vast majority of documents had already been disclosed. Certainly all the trading documents my friend wanted have been disclosed to look into his course of dealing point. But, of course, we have not finished, and there is a very large volume still to do. Societe Generale's best estimate is they need until 24th December to produce copies. That means a list on 17th December and copies on 24th December. But there is a hope that although, for example, the date range has thrown up nearly 90,000 documents, there is a hope that ultimately a small proportion of those (if any) will be disclosable, and our proposal is that between now and December we provide rolling disclosure as soon as documents are identified that need to be disclosed, so that whatever remains of the iceberg will be melted before we get to the end of December.

MR. JUSTICE CLARKE: If you provide rolling disclosure are you able to provide it in chronological order, or in that database order, which appears to be no order at all so far as anybody ----

MR. MOGER: I think that will depend on categories.

MR. JUSTICE CLARKE: Right.

MR. MOGER: I think if categories and files are produced they will be in useful order. I think the examination of 87,000 documents from the database may be more difficult. But, my Lord, our plan is, and this is not contentious, to have eroded whatever remains of what we hope will be by far the smaller part of relevant disclosure before we get to December, so that by December we will get to ..., and Mr. Gilbert's evidence about this is in affidavit.

I have shown your Lordship some letters where we said 17th September. Frankly, it is not going to be possible and the trial will have to go off. What we did on 23rd September was to send to the Defendants a letter with an explanation of where we got to. I need not show your Lordship the letter. The reference is p.138 of tab 3, and that included the schedule at tab 4 of today's bundle. This is in two parts. The first part, Part A on p.180, deals with the expanded parameters of the search. We say this Part A sets out the expanded parameters of the search Soc Gen has been ordered to carry out and the status

of the searches that have been conducted to date. Part B at p.182 sets out categories of documents that Soc Gen has been ordered to provide and confirms the status of such categories. What it does, by reference to the July order, 2nd July, paragraph by paragraph, is set out the category sought, the relevant material (if anywhere) in the first tranche, relevant searches already conducted and material provided in the second tranche, further searches being conducted which it is believed might contain any documents in this category (if exist). That was designed to demonstrate where we are and where we are going, and it is hoped will provide a useful tool for the Defendants going forward, because we will be able to say, by reference to the schedule, search for that nothing, or search for that further material, and they will be able to see how things are progressing.

My Lord, Mr. Gilbert asks for an extension for completion of disclosure until 24th December. May I ask your Lordship now just to go to the end of my skeleton? Before we come to the timetable I just want to make some general points. It is accepted on all sides that disclosure has to go back to December. That is really a recognition of the enormity of the task. Time will tell how valuable that will be, but on any view an enormous amount of work, useful work, has been done to date. We did not delay starting, we have not slackened our effort, and we have produced enormous disclosure, and on all sides it is recognised that we need more.

When going to the timetable, there are necessarily contingencies to be taken into account. We have already referred to my friend's application for an amendment. What is broadly agreed between the parties is that if disclosure ends in December, just before Christmas, witness statements of fact should go back to the end of July. There is a wrinkle on that, but most parties agree the end of July, and Mr. Schaff looks as though he is no longer over enthusiastic about quibbling about it. That is a longer extension for the witness statements than the extension required for disclosure, and that is a reflection of the fact that the witnesses are going to have to consider this material.

MR. JUSTICE CLARKE: Yes.

MR. MOGER: My Lord, the other general point is that in the previous directions an eight month interval between the end of witness statements of fact and the trial timetable was allowed, which was a realistic one. If the trial is to start on 6th February that will have been reduced by other a month, and whatever this case teaches us it teaches us that compressing timetables is not wise, particularly when, as your Lordship has said, anything short of a nuclear catastrophe will be needed, nothing short of a nuclear catastrophe will be

needed if we are going to move the timetable. Can I ask you now to go to the draft order, and I hope your Lordship has a version of the draft order.

MR. JUSTICE CLARKE: Yes. I have got the latest version.

MR. MOGER: Does it have footnotes?

MR. JUSTICE CLARKE: Yes.

MR. MOGER: Good. Can I go through it with you then? Item 1: The trial is re-fixed to start. No problem. The parties, other than underwriters, agreed 17th April. Can I ask your Lordship to look at Cap Marine's skeleton at para.21 on p.9?

> "It is not straightforward to assess the appropriate trial start date when such a large unknown has recently been introduced to the equation".

That unknown is the anticipated but not yet developed amendment.

> "On balance Cap Marine submits it would be better to build in some extra time now, suggests a preferred start date of 17th April. There will be new areas of expertise. Item 2: It is highly unlikely to be moved for a second time".

He anticipates your Lordship on nuclear war.

> "Item 3: An April date would also be likely to allow enough breathing space to create an opportunity for mediation or some other form of ADR".

No one is suggesting an adjournment or a stay, but it has always been raised and discussed and kept in the back of everyone's mind that that is a possibility, and it would be a useful extra bit of slack for that. And then he predicts a longer trial. One of the difficulties about fixing a trial date is that if you took eight months from the end of witness statements in July one would arrive in March, but that would take the trial date over the vacation. So, Mr. Kendrick says, let us take 6th February because that gives you eight weeks up to the end of term. We say it is not sensible to compress the trial date, let us start at the beginning of the next term. It is true that the next term will be interrupted after six weeks by the Whitsun vacation, (a) shorter, and (b) may be a useful time for written submissions, or something of that sort, but neither is perfect and we say not a compelling reason to have an earlier date.

MR. JUSTICE CLARKE: Yes.

MR. MOGER: Now, if you look at Mr. Kendrick's skeleton on this, if one goes to para.16. In para.16 he sets out his timetable leading to the trial on 6th February, and your Lordship sees that he is contemplating, as everybody is, experts' reports concluding on 9th December, and then the trial starting, over the page, on 6th February. Then in the last paragraph he mentions the need to amend its defence. He says:

> "Even assuming an amendment to plead avoidance it is ... argue the aspect or not would add appreciably to the trial length or affect the start date. It is unnecessary to build in a contingency".

There is nothing really in the nature of a decent argument why compressing the time between witness statements and the trial would be a good idea, and, in our respectful submission, there is no benefit in it, there is a risk. My Lord, to an extent, subsequent paragraphs of the order are dependent on that. But essentially there is agreement that leads through to expert supplemental reports being on 9th December. So that would be the scenario that the court was faced with, the evidence would be in finally just under two months, with Christmas in the middle, before the trial began.

Can I go to the second paragraph of the order? The competition here is between 17th December for lists, which is what we propose, and 10th December for lists, which is what all the other parties propose. Their anxiety is that if we give a list on 17th December with a disclosure statement, and actually disclose copies seven days later, on 24th December, it will be difficult to upload the documents before Christmas. I mean Christmas this year.

MR. JUSTICE CLARKE: Sorry, just tutor me a little more in relation to that. You give a physical list ----

MR. MOGER: We give a disclosure statement and a physical list on 17th, seven days later we give electronic copies and hard copies of documents.

MR. JUSTICE CLARKE: Right. Uploading the electronic copies, provided electronically seven days later.

MR. MOGER: So they say. My Lord, our submission is that it is really unlikely to be helpful to compress what has been a torturous process by a further week when the people carrying out that process say they think they need until 24th December to do it.

MR. JUSTICE CLARKE: Wait a moment. If you produced a list by 17th December will you not also have it in electronic form by 17th December?

MR. MOGER: The documents themselves will be partly electronic and partly hard copy, perhaps.

MR. JUSTICE CLARKE: You can only upload something which is electronic.

MR. MOGER: We are talking about the documents themselves. If they are all available electronically it may very well be possible to give them – we do not have to wait seven days – it may very well be possible. But there is a further point, my Lord, and what we are actually talking about is what remains of disclosure after rolling disclosure. It is not that they are going to receive 100,000 on that date, and we just say it is not sensible to compress that further.

The third paragraph deals with the CMC. The competing contentions are the last week of February 2011, that is our proposal, and the week beginning 28th March 2011, and that is Cooper Gay. What they ask for is extra time to analyse disclosure. We say, and it is a matter for the court, we are concerned about a number of things. Most of the disclosure they will have had for very much longer than the period December onwards. It is much better not to crowd the witness statements and have a hearing which results in – there may be further applications for specific disclosure on that occasion, who knows. That crowds the witness statements at the end of July by an order that we search for further documents, or that they do, and that disclosure be given. For that reason, we say that the February CMC is a preferable date. Signed statements of fact, everybody but Cooper Gay is contending for 29th July – (after a pause) – and Cooper Gay now agree. Thank you.

Experts reports are agreed for 28th October, number 5. My Lord, there are a category of experts already, five categories of experts already, and there may be more. The meeting of experts is, we suggest, 11th November, Cooper Gay want a week later. The joint memoranda, Cap Marine, who propose a meeting on 11th, want a joint memoranda on 18th. Everybody else thinks that an interval of 14 days between the meeting and the memoranda is more realistic, and I respectfully suggest it is. Number 8, supplementals by 9th December is agreed. Progress monitoring date, everybody except Cap Marine suggest 9th December. Cap Marine suggest 20th January. We do not, for our part, see any useful reason to delay monitoring, but it is a matter entirely for your Lordship.

Then preparation of trial bundles. The current order is not later than eight weeks before the trial. Cooper Gay and Cap Marine, who subscribe now to a trial date of 17th April, propose 27th January for the bundles. That is just a

month and a half after the experts' reports and 11 weeks before trial. My Lord, it is a matter for the court, I am certainly not going to stand here as an advocate who may be appearing at the trial to say I am happy to have the bundles later rather than earlier. The earlier they are available the better. The question is: what is realistic?

MR. JUSTICE CLARKE: You can start preparing the bundles at the beginning of next year.

MR. MOGER: Exactly. I am not wishing to resist an earlier disclosure of bundles; it is merely a question of what is sensible.

MR. JUSTICE CLARKE: I agree.

MR. MOGER: Para.11, pre-trial review. Societe Generale and underwriters propose 16th December, Cooper Gay say they either go for the date proposed by Soc Gen, or even January, and Cap Marine say 6th or 13th February. Expert evidence will have been complete in December, on December 9th, and your Lordship may think that a pre-trial review before Christmas, providing an early opportunity to identify continuing problems would be a good idea, but it is entirely a matter for you. Then para.12: save as verified this order and so on.

MR. JUSTICE CLARKE: Yes.

MR. MOGER: Lastly, costs, and perhaps I will deal with that, to the extent I have not already dealt with it, later.

MR. JUSTICE CLARKE: Yes. The parity of the argument in this case is costs.

MR. MOGER: My Lord, I am afraid it is.

MR. JUSTICE CLARKE: Yes.

MR. KENDRICK: My Lord, I suppose it is me, if I am next to go.

MR. JUSTICE CLARKE: Yes.

MR. KENDRICK: My Lord, what would you like me to deal with first, the trial date or the extensive argument of costs?

MR. JUSTICE CLARKE: Whatever you want.

MR. KENDRICK: Well, can we get the trial date out of the way, my Lord, because I am in a minority of one on this.

MR. JUSTICE CLARKE: Right.

MR. KENDRICK: I am going to be short on this. Basically, underwriters want to get on with this case and get to trial as soon as reasonably possible. It is a very large figure that is being claimed against them. Whatever our views on the prospects auditors have to know, reinsurers have to know. We would like to know where we stand on this very large claim.

MR. JUSTICE CLARKE: There is no year end which will be affected according to which of the two trial dates you have.

MR. KENDRICK: Maybe not, but we would still like to know as soon as possible where we stand and get on with it.

MR. JUSTICE CLARKE: Yes.

MR. KENDRICK: All parties agree witness statements by the end of July. All parties agree that the expert phase should be completed by the service of supplemental reports on 9th December.

MR. JUSTICE CLARKE: Yes.

MR. KENDRICK: So that leaves two months to trial on February 6th, and that date has the virtue of being able to bring the case to finish in one term. We submit it is a reasonable period to fix. The other trial date being mooted, of course, is 17th April. The two reasons, as I understand it, are while 17th April is preferable, first, it will allow for float for slippage. In my submission, if this case teaches us anything it is that if we allow slippage it will occur. It is a self fulfilling prophecy. We have already picked generous times for witness, and for experts, and the float is there. For example, there is three months between the witness reports and the expert reports. The expert reports are on the knowledge in the market of things like that the IGE vaults, and it is hard to see that the expert reports are going to need, in truth, three months, witness reports and expert reports. The second reason is that we are likely to amend.

MR. JUSTICE CLARKE: Have you any idea, perhaps you cannot tell me, but have you any idea as to when you may be in a position to decide whether you want to amend?

MR. KENDRICK: Yes, my Lord. We hope that we will have a draft in circulation in December, or certainly in January.

MR. JUSTICE CLARKE: Right.

MR. KENDRICK: The date on which we serve the draft amendment is actually dependent upon the disclosure being largely complete.

MR. JUSTICE CLARKE: Right.

MR. KENDRICK: And taking Soc Gen at its word, if the disclosure will be rolling in November and completed in December we would expect to be in circulation in that period.

MR. JUSTICE CLARKE: Thank you.

MR. KENDRICK: And permission therefore to amend, if it was in dispute, or any consequential effects if it is allowed, could be dealt with in the CMC at late February.

MR. JUSTICE CLARKE: Right.

MR. KENDRICK: Along with other matters, such as any outstanding specific disclosure request from outside. So, my Lord, against that background, that is all I wish to say against the trial date of February.

MR. JUSTICE CLARKE: Thank you.

MR. KENDRICK: My Lord, can I then perhaps turn to what really quite a long time has been spent on today, and that is costs, and give you the background of costs. My Lord, I am going to be much shorter on this. What I am seeking are two things, costs thrown away by the first tranche coming late, and mutiny in the ranks that ----

MR. JUSTICE CLARKE: Mutiny?

MR. KENDRICK: Mutiny in the ranks, my Lord, from the persons who were told to wait, not go on holiday, and then to wait further because the documents had not come in.

MR. JUSTICE CLARKE: I can fully understand that and sympathise with you, but just help me. I quite see the point of saying: we were preparing for them and then out of the blue the first tranche did not come and that is something for

which the Claimants should pay. But what costs are we actually talking about? I can see the intense frustration of putting off holidays, but when the costs judge comes to assess the costs what are actually the costs thrown away?

MR. KENDRICK: They are going to be matters such as people have been cleared from their diaries, taken out of case number A, put on to case number B, and then twiddling their thumbs on case number B.

MR. JUSTICE CLARKE: Right.

MR. KENDRICK: And people being hired in, such as translators for particular days, and then they having to be paid off and having done no work. It is not going to be a huge amount.

MR. JUSTICE CLARKE: No.

MR. KENDRICK: In the scheme of things they claim £500 million.

MR. JUSTICE CLARKE: Yes.

MR. KENDRICK: We are talking nickels and dimes here.

MR. JUSTICE CLARKE: But you can use up the people who might have been doing this on something else.

MR. KENDRICK: In some cases, translators for example. Secondly, there is the costs of the hearing today.

MR. JUSTICE CLARKE: Right.

MR. KENDRICK: Why is this CMC being – why are we here at all? Answer: to reset the trial date.

MR. JUSTICE CLARKE: Yes.

MR. KENDRICK: And that is linked into the disclosure. My Lord, this stems from an unrealistic approach to disclosure by Soc Gen, and indeed by asking in May for this trial date of October 2011 when they knew of the full extent of the disclosure request against them.

My Lord, if I may start with the unrealistic, or unreasonable, approach point. The story starts prior to service of the claim form, let alone the service of the defence, because it was at this early point that Clifford Chance drew up their

schedule of disclosure, and this is what became what we now know as tranche one. This was their electronic documents, etc. They hung on to that and served it in December 2009, and in December 2009, just to remind you, my Lord, of the dates, we were just about to have the CMC before Mr. Justice David Steel and the brokers are being joined. One of them had not formerly been served yet. So we wait then for the defences from the brokers. I consider those and then say in the light of the pleadings there is much, much more needed.

We served a very detailed letter in March, and that is the letter that gets much discussed at the hearing in May, and indeed it is the basis of the applications in July. I am not going to take you through it, my Lord, in any detail, but can I ask you to pick up the bundle that is called 'Bundle for CMC 27th May 2010'. There are two documents there. They are at tab 24, and in that tab p.261.

MR. JUSTICE CLARKE: Yes.

MR. KENDRICK: This now is our letter of 25th March, which was written very shortly after the defences had been served by the two brokers. We refer to the electronic aspect. At p.263 we refer to the temporal aspect, the scope of the search. Then at p.265 we refer to the broad categories of document which we seek from Soc Gen. None of these are on the electronic schedule, which is basically a search of e-mail accounts. You will see, my Lord, if you look at p.266, that they are very basic documents, contractual notices, purchase orders, requests for shipments, certificates of quantity, documentation, customs documentation, shipping documents, delivery orders, forwarders certificates of shipment, packing lists, invoices and receipts. Essentially, this is an insurance, of course, on specie, on gold, it is not an insurance on traders or their profits, or credit risks, and we have got a very keen interest in where is the gold? Where is it being put? What do you know about it? Do you really think that there is half a billion dollars of gold in Turkey? For what purpose is it staying there? So there is a lot of disclosure along those lines.

MR. JUSTICE CLARKE: Yes.

MR. KENDRICK: My Lord, in the same bundle we then have a hearing that is coming before Mr. Justice Tomlinson in May, and we get no answer to that letter until very shortly before the CMC, and it basically says: you are not going to get this. At p.184, my Lord, in that bundle, at tab 13, you see our case management information sheet for that CMC.

MR. JUSTICE CLARKE: Yes.

MR. KENDRICK: If you go to p.185, my Lord, there is a question about: is specific disclosure required? We say that we do not think it is sensible to have two tranches. We are not sure what the second tranche is even going to be on Soc Gen's case. Then we say at item number 3 that we have given them comments and we have still not received a response. Then at item 4 we say:

> "Any major issues for the scope of disclosure should be identified and resolved at the CMC, for example, the claimants' disclosure schedule produced a search for documents between January 2005 and February 2008, whereas all of the defendants' ... issues the searches start in 2003 and continue beyond the proposed cut off of 2008".

If, for example, my Lord, just say beyond the cut off, we want to know what Goldas said, and it emerges that Goldas said that: "You well knew, Soc Gen, that we were doing this. You did not really think that we had $500 million dollars of gold bars". Then we go on to number 5:

> "If the major issues of the scope of the proposed second tranche of disclosure cannot be resolved prior to the restored CMC then it may be sensible for the pre-trial timetable not to provide the steps beyond disclosure as these issues will substantially shape the very substantial disclosure exercise which ... the starting trial. If the court is minded to lay down a timetable at the trial then the defendants insist that allowance will need to be made in the timetable for the application for specific disclosure for the search and for progress to be monitored".

So that was the background just before 27th May hearing, and, as I mentioned, Soc Gen did give a reply to our letter, which basically said there is a great deal between us that is in dispute here, we do not think we are entitled.

At the hearing Soc Gen said: "There is not enough time to give you this disclosure" and the hearing indeed started late anyway due to someone before it overrunning. The judge there set the trial date at the request of Soc Gen, who well knew there was a big issue regarding disclosure, and it had the detailed categories from us in that letter. They also knew, because obviously we got into disclosure a little bit, the initial indications from the judge on 27th May about the temporal search going back to 2003, and the period afterwards, were not booked. He was saying, on the face of it, it looks like the Defendants have a point here. It is at this stage that he said: "I will fix the trial date if Soc Gen want me so to do but I am going to be very unimpressed if later on, because of this application, which Soc Gen know about, they come back and say we need more time and the trial date needs to go back". It is that to which we were alluding in our skeleton.

MR. JUSTICE CLARKE: Can you show me the passage in the argument where the judge ----

MR. KENDRICK: I do not think we have got a transcript of 27th May. (After a pause) It may be that those next to me can show you. Certainly I think Mr. Moger and I are saying it is not in the bundle. I think that is certainly right. I refer to this in my skeleton at p.3.

MR. JUSTICE CLARKE: Just a moment. I was shown by Mr. Moger what appears to be a transcript.

MR. KENDRICK: That was July, my Lord. That is the second hearing.

MR. JUSTICE CLARKE: Oh, I see.

MR. KENDRICK: The point that I am making in p.3 of my skeleton is that the judge indicated at the hearing on 27th May. On 27th May – I think those beside me may have a transcript. I do not have a transcript, and it is not in the bundle.

MR. SCHAFF: My Lord, I am so sorry to interrupt. I seem to be the only person who has had a look at the transcript. It does exist. I have got it.

MR. JUSTICE CLARKE: What does it say?

MR. SCHAFF: My Lord, I cannot pretend to give your Lordship a full and complete account of it, but I did have a look at it upon seeing what was said in Mr. Kendrick's skeleton yesterday, and I brought along only a couple of pages. It does seem to me, on looking at those pages, that what Mr. Kendrick says in his skeleton might be an optimistic account of the argument. It is difficult when one is the only person in the room with the document in front of one, but can I read you a short extract?

MR. JUSTICE CLARKE: You are the only person who has got a transcript ... purposes.

MR. SCHAFF: My Lord, I wholly resent the description.

MR. JUSTICE CLARKE: You know what I mean.

MR. SCHAFF: Of course. My Lord, my solicitors provided me with an electronic version of the transcript soon after the hearing and I look through it this morning on my computer and found it.

MR. JUSTICE CLARKE: Well, there you are.

MR. SCHAFF: Anyway, there was this interchange – I was going to pass this over to Mr. Moger so he could make of it what he will – there is this interchange between Mr. Moger and Mr. Justice Tomlinson at the 27th May CMC, which is the one at issue:

> "MR. JUSTICE TOMLINSON: The next point then is whether – I do not think anyone is suggesting this – you have not yet committed yourself, have you, to giving disclosure by 17th September, in the event that you have got to give considerably more disclosure than you are planning to give.
>
> MR. MOGER: No.
>
> MR. JUSTICE TOMLINSON: On the other hand you might be directed to do that by the middle of September.
>
> MR. MOGER: On the other hand we might be.
>
> MR. JUSTICE TOMLINSON: If you did not give disclosure by 17th September I would then be a little bit worried about having a trial a year later.
>
> MR. MOGER: My Lord, yes, but it would be an issue that could be resolved this September rather than closer to the trial.
>
> MR. JUSTICE TOMLINSON: Exactly."

My Lord, for what that is worth.

MR. MOGER: I am very happy for your Lordship to see that. I seem to have expressed myself in my customary felicity.

MR. SCHAFF: I think it is the felicity of Mr. Justice Tomlinson that really impressed by learned friend, my Lord, for what it is worth.

MR. JUSTICE CLARKE: Thank you so much.

MR. KENDRICK: My Lord, I cannot say that there was not another passage 150 pages later on in which the point was expressed in different terms.

MR. JUSTICE CLARKE: Yes.

MR. KENDRICK: But that is, it seems to me, an exchange which is relevant to the argument developed this morning.

MR. JUSTICE CLARKE: All right.

MR. KENDRICK: There it is, my Lord. Furthermore, the judge said, to deal with disclosure, in the sense that he said: "I am going to defer matters to 2nd July for these outstanding issues" where we were largely successful ... the costs order. The judge, having set the trial date at Soc Gen's behest one month earlier, while adjourning the disclosure aspect, was unimpressed with the argument that disclosure should not be ordered because it would affect the trial date, because this was an argument that was being deployed, and on that, my Lord, I do have a transcript.

MR. JUSTICE CLARKE: Yes.

MR. KENDRICK: Can I show you that, my Lord, at 207 to 208. I introduced the case by saying there are three big points, one being 2003 to 2005, the second being is e-mail enough, and then the third point is:

> "There is a clash in the level of costs and the impact on the trial date, discretion or proportionality. They say it is too late now to stop the e-mail based approach disclosure, the additional documents will take too long to search for and we may well miss the trial date. We do say that Soc Gen took a wrong headed approach at the outset, contrary to the CPR, and we say, despite my friend's opening comments, that they have compound it by not telling us what they are actually doing".

This was that they had just started on that process of disclosure.

> "This is no reason for refusing disclosure. We must say if we do not believe the evidence shows a convincing case they will miss the trial date if extra disclosure is ordered. If the choice in support of the case were between putting the trial date back by a few months, from October to January, or losing what could be very important disclosure, the disclosure should win. The trial date was only fixed last month and they took a risk that they may have to disclose the 2003 and 2004 documents. They should not be allowed to say: we have approached disclosure our way, it is too late to change, and now look at the trial date we have just had fixed".

Then the answer comes:

> "MR. JUSTICE TOMLINSON: Can I say straightaway I am not going to consider the trial date today. I am certainly not going to put off the trial date having fixed it only a month ago on the basis it already appears undoable. It might have to be revisited in September/October. I simply do not know. But I am certainly not going to have a counsel in despair today".

So it was not as if I were saying that the trial date is fixed ... and they have got to do their best in between, I was recognising there could be a quid pro quo, as you pointed out, my Lord: if you are asking for a lot of disclosure the trial date may have to go back. That is why I wanted to show you this passage, my Lord, where I took that on the chin, as it were, at the outset. You will see, my Lord, how the trial date has been deployed. It has been deployed; it is a tactical answer to disclosure. What was being said by Soc Gen is: "The trial date is fixed now, we had that fixed in May, and we had that fixed on the basis of knowing what the position was, that you were making these applications, but now it is too late and therefore the disclosure should be cut down". The judge was having none of that, he said: "I am not going to consider the trial date. It may be revisited if the scale of disclosure is immense".

That really, I would suggest, is something that Soc Gen have brought upon themselves, a clear eyed view and knowledge of what the disclosure was, went for the trial date, fixed the timetable in consequence knowing of the disclosure application, they were not able to deploy the trial date as an answer to disclosure, but they tried, and so now we have to revisit the timetable and set it all again. That is the purpose of today, the sole purpose of today, and that is something that, in my submission, that Soc Gen should pay for. That is how I put the matter on costs.

My Lord, I just have a little word on disclosure. Obviously, there is a huge amount of gold bars that have been lost. Most of it was traded by Goldas on an exchange, a reputable exchange in Turkey known as the IGE, the International Gold Exchange. Each gold bar has a unique number, and it was sold, and the gold was traded, as the records show, to reputable third parties. HSBC might be an example. So Soc Gen knows where the gold went and who got it, not in all cases but in most cases, so why has it not got it back? The answer is because under Turkish law it has not got property.

MR. JUSTICE CLARKE: It has not got what?

MR. KENDRICK: Property.

MR. JUSTICE CLARKE: Right.

MR. KENDRICK: That then raises the next question: surely you must have explored what the position is on property before going into this scale of dealings? What is Soc Gen's position? Is it that it was a bolt from the blue? This is a point that the judge raised at 2nd July hearing itself. If I can go back to that transcript, my Lord, p.231 in the transcript.

MR. JUSTICE CLARKE: Yes.

MR. KENDRICK: Between line 13 to line 28:

> "MR. JUSTICE TOMLINSON: But your case is presumably..."

and of course I am going to produce what is really a parody of it:

> "... that it came as a bolt from the blue to discover that Goldas had sold half a billion dollars worth of gold without having paid for it.
>
> MR. MORPUS: Yes, my Lord.
>
> MR. JUSTICE TOMLINSON: On the face of it, that is a fairly interesting proposition, because one would expect a major bank like this to have in place all sorts of procedures and checks and balances which would be designed to stop something like that happening. So the starting point has to be, does it not, that you have got an awful lot of explaining to do as to how on earth this situation came about. If it said this all happened out of having the first idea people are going to want to have a look at the documents to see how all these transactions were handled from day one to see how on earth you could ever have got yourself into this position".

And that, my Lord, in a nutshell, is the substance of the disclosure applications being made by my clients, it is to understand the process, its insistence, and how it came about that this could happen, with respect, and you do not get that from the e-mail traffic between a trader necessarily at all.

Just on the e-mails, and I have seen a fair bit of this disclosure already, I think be very careful on counting pages of documents because you know how it is with an e-mail, you have an e-mail with one line at the top and you have all the five pages of e-mails underneath, three or four which will be confidentiality notices: If you are not intended sender of this etc.

MR. JUSTICE CLARKE: Yes.

MR. KENDRICK: But there is, undoubtedly, and I am not trying to minimise this, a great deal of disclosure.

MR. JUSTICE CLARKE: Yes.

MR. KENDRICK: Therefore, my Lord, it is important to know about the start of the relationship, how it developed, and also at the end of the relationship what Goldas were saying, why it was that the Criminal Department of Turkey decided there was no case to answer, and why it is that Goldas are still trading. There they are, and indeed they have, on the face it, the impudence to sue for defamation. Equally, there are things that we are quite interested to know, whose property had passed to Goldas? So, my Lord, there is a lot of disclosure that is here that has not been asked for just because it occurs to us it would be nice to have, but surely it is necessary to understand what has gone on here. Against that background, my Lord, we say they, knowingly, fixed the timetable appreciating our disclosure application, they thought they could beat it, and they thought they could use the very date of the trial to help them beat it. Now, that comes with a costs consequence, I would submit, when they find they are wrong.

My Lord, the only other thing I would ask for, and this is not in my skeleton, it is only a point of detail, it is a small point, is that we are promised rolling disclosure, and if I may just make a point here, Clifford Chance's recent disclosure, recent correspondence, has been entirely reasonable, I would like to make that point now. I would not say it necessarily about the past, but certainly that is the position for the last week or two. I am not therefore being disparaging about their attitude to disclosure in the future, but it would be helpful to have a progress letter, say on 10th November, where we either get with it a lot of documents, if we do not already have them, or get told things are on course or they are not on course.

MR. JUSTICE CLARKE: Right.

MR. KENDRICK: Rather than having it just a day or two just before the disclosure date. As I say, that is not made in any hostile way, it just would be sensible, it seems to me. My Lord, apart from that, I do not think I need to address you about any points of detail on the dates.

MR. JUSTICE CLARKE: No, you do not. Thank you.

MR. ADAM: My Lord, there are three areas in which I can make some submissions. The first is the reasons why an April trial and not a February trial, the second is some nuts and bolts points on the timetable, and the third is costs.

MR. JUSTICE CLARKE: Yes.

MR. ADAM: Your Lordship having heard from Mr. Kendrick, who I think is the only supporter of a February trial, if you are nevertheless currently inclined towards April rather than February then I need not take up your time with the first point.

MR. JUSTICE CLARKE: I am currently inclined towards April.

MR. ADAM: I am grateful. My Lord, can I deal with one or two nuts and bolts points on the draft order, if your Lordship still has that somewhere in the rather -----

MR. JUSTICE CLARKE: Yes.

MR. ADAM: My Lord, the provision on Christmas Eve, or 17th December, of the electronic documents, this is a purely practical point. If, as your Lordship has already observed, Soc Gen are willing to provide a list on 17th December then the documents must already, certainly so far as they are electronic, have been assembled already by 17th December in such a form as they could be burned onto CD or DVD and provided. We do not see any difficulty, if you are ready to provide a list on 17th December, with being able to provide the electronic documents, at any rate, also on 17th December. If they want to save the hard copy documents for Christmas Eve then we will accept that, but the point of asking for the electronic documents, the DVD, on 17th December is to enable those who understand these things to get busy with the process of uploading it onto a database, and if that could be done before Christmas then it would give a clean start in the New Year for the analysis of the disclosure, and that is why we ask for it. Mr. Moger says there is no point in compressing our time for it, but if you look at it through the other end of the telescope our time for consideration of the disclosure will be compressed if this is left until the New Year.

My Lord, the next point I would like to pick up is at para.7, which is the date for the joint memoranda. My Lord, we suggested having only a week between the meetings and the memoranda rather than two weeks. My Lord, the reason for that is twofold. The first is, as your Lordship will no doubt recall from the experience of being asked when at the Bar to settle a note of a conference after

the conference has taken place, the sooner one tries to record the events of a meeting after the meeting the better the purpose is served and things tend to be more accurate. Secondly, these documents are supposed to list the points upon which the experts have agreed, the points upon which they disagree, and the reasons therefore. That should not be a lengthy exercise. One does not want these documents effectively to be drafted by lawyers as weapons of war. There should be something that the experts are capable of producing. If they know going into their meetings that within a week of the meeting they are going to have to produce a memoranda crisply recording these points I think it may focus minds of experts both before and afterwards, and that certainly has been my experience. That is why we have suggested a shorter time at para.7.

Para.9, progress monitoring. My Lord, if the trial is 17th April a progress monitoring exercise on 9th December, I would respectfully suggest, would produce a rather limited and uninformative picture of where progress is, because there will no doubt still be quite a lot to do. So I would have thought postponing it until the New Year is sensible. Para.10, the preparation of trial bundles. Yes, that is early, but this is going to be a large bundle and early bundles are a consummation devoutly to be wished by all those conducting substantial litigation. As your Lordship has already observed, this is over a year after, 13 months after completion of disclosure, so we do not think that that is an impossible task. Then para.11, the pre-trial review. Similarly, if the trial is to be in April a pre-trial review before Christmas seems rather premature. There will be more to review, as it were, on 6th February than there will be on 16th December. So we would suggest that date. My Lord, those are the nuts and bolts.

Lastly, could I address your Lordship briefly on the question of costs? I am not going to add anything on the question of costs of today.

MR. JUSTICE CLARKE: I need to know what you are asking for.

MR. ADAM: My Lord, if there are costs going for today then we will gratefully receive some.

MR. JUSTICE CLARKE: I am sure you will, but I need to know what your application is.

MR. ADAM: Well, my Lord, I do therefore align myself with Mr. Kendrick and Mr. Schaff and make the application for today. My Lord, in terms of submissions, I only have submissions on the nickels and dimes point, as Mr. Kendrick characterised it. My Lord, there is no doubt the costs were wasted as a result of Soc Gen's failure to face up at an earlier stage, a much

earlier stage, to the fact that its disclosure exercise had gone off the rails and that 17th July was a deadline that was going to be missed. Now, that was announced to us on 15th July, but it must have been apparent well in advance of that, and one can make that good simply by recalling the terms of the letter of that date, of 15th July, which your Lordship has already been shown, in which Clifford Chance announced that there were still 17,500 documents which required lawyer level review. My Lord, one does not wake up on the morning of 15th July and suddenly notice that there are 17,500 documents to go, especially when that represents, as the letter tells us, over 40% of the total corpus that was being reviewed. It must have been known well in advance of 15th July that the number of documents still remaining to be reviewed was greater than the time available in which to review them, and it must have been known at 2nd July hearing, which had taken place only two weeks before, at which point there would have been more than 17,500 documents still to review, because the two weeks intervening had been spent frantically reviewing, so say it was at least 20,000.

There was no mention whatsoever before or during 2nd July hearing that there were difficulties with tranche one. There was a great deal of discussion about the difficulties of tranche two, and your Lordship has already been taken through that, but there was no mention in relation to tranche one. Now, either somebody took a somewhat optimistic view on or in advance of 2nd July that it was going to be possible to review 20,000 plus documents in two weeks, because that was all that there was to go, and that is what the correspondence has suggested, or else simply took a rather cynical decision that for tactical purposes it would be better not to inform the Defendants, or indeed the court, that the timetable which Soc Gen had volunteered in late May was known already to be unworkable. Now, your Lordship will form your own view as to which possibility is correct, but for my purposes it is irrelevant. Given the lateness of the notice that we were given, and the resulting waste of costs, whatever the reason for the lateness of the notice, Soc Gen should be obliged to pay those costs resulting, and the appropriate order would be in the form suggested at para.11 of Mr. Kendrick's skeleton argument, which is: "Costs of and caused by the Claimants breach of the order that the first tranche of its disclosure be provided..."

MR. JUSTICE CLARKE: That is confusing. "Costs of and caused by the breach..."

MR. ADAM: Yes.

MR. JUSTICE CLARKE: Costs wasted by the failure to comply ....

MR. ADAM: My Lord, I would be perfectly happy with costs wasted by the failure to comply or the breach. I am grateful.

MR. JUSTICE CLARKE: Thank you very much. Yes, Mr. Schaff.

MR. SCHAFF: My Lord, nuts and bolts of the order first of all.

MR. JUSTICE CLARKE: Yes.

MR. SCHAFF: My Lord, 17th April, I have got nothing to add to where we are on that.

MR. JUSTICE CLARKE: Right.

MR. SCHAFF: My Lord, para.2, like Mr. Adam, we would want to have the electronic materials provided and not merely listed on 17th December. I have got nothing to add on that.

MR. JUSTICE CLARKE: Yes.

MR. SCHAFF: My Lord, para.3, we, for our part, would see more sense in having the CMC towards the end of March rather than the end of February. The reason for that, my Lord, is that, firstly, it will enable there to have been a time to digest amendments which are flying around in relation to new allegations, in so far as they are, and I see, it slightly surprised me, the suggestion that they might filter down to the brokers. We will have to wait and see how that happens, but if they do then that is obviously a reason for having a chance to consider those. Secondly, and probably more fundamentally, we need time to digest the disclosure in case we are minded, in the light of disclosure, to want to amend, for example, our defence to adopt rather more positively than we have done thus far the sort of points that are pleaded positively by the insurers in relation to the insured or non insured loss. Frankly, bringing the CMC on sooner, before the disclosure review has been completed, is not going to enable, for example, specific disclosure issues necessarily to be flushed out by that time. If we have the CMC at the end of February in reality people are going to have to avert to what sort of applications they are going to make by the middle of February to give people a chance to deal with all those applications sensibly, and so you are really only allowing yourself six weeks, or thereabouts, in the New Year. That is why we have gone for the end of March. It seems to us more sensible.

MR. JUSTICE CLARKE: Right.

MR. SCHAFF: My Lord, it is a matter for your Lordship, but that is the only point.

MR. JUSTICE CLARKE: Yes.

MR. SCHAFF: 29th July for witness statements, that is fine. My Lord, experts' reports, we had put a slightly later date for the meeting of the experts, we said 18th November. There are at least four disciplines of expert evidence.

MR. JUSTICE CLARKE: Can you just remind me, there is Turkish law ----

MR. SCHAFF: Turkish law, French law, broking law ----

MR. JUSTICE CLARKE: Oh, French broking law.

MR. SCHAFF: French broking law and also, I think I am right in saying, French law of construction on the construction of this waiver that both the brokers rely on.

MR. JUSTICE CLARKE: Yes.

MR. SCHAFF: There may also be some underwriting specie evidence as well. So there is quite a lot of people to get together, not always at the same time, which is why we had perhaps pushed that back a little bit. 14 days for everyone to meet may be tight bearing in mind everyone has got to digest the experts' reports in the first place as well. Again, I am not going to press this too hard, my Lord, but if we can push that back to 18th November, joint memos 14 days thereafter. It might be said even that the supplementary experts' reports could go back to 16th December rather than 9th December. That is the sort of leeway that one might want to play around with. I am not pressing this too far, but those are the sort of considerations that might arise. Progress monitoring, like Mr. Adam, we say it makes sense to have that in January. We say bundles sooner rather than later. Pre-trial review definitely in the early part of 2012 rather than the end of 2011 to have any meaningful opportunity to have digested what has gone on so far as the experts' reports and the supplemental experts' reports are concerned. We say January, my learned friend, Mr. Adam, says February. We do not have a particularly strong view about that, but certainly it should be January and not December. My Lord, those are the nuts and bolts.

MR. JUSTICE CLARKE: Thank you.

MR. SCHAFF: My Lord, so far as costs, can I just make a couple of very short points, because your Lordship has the point already.

MR. JUSTICE CLARKE: Yes.

MR. SCHAFF: The money really is in turning up today.

MR. JUSTICE CLARKE: There are a lot of people here.

MR. SCHAFF: A lot of people today. My Lord, to state the obvious, this is expensive litigation.

MR. JUSTICE CLARKE: Yes.

MR. SCHAFF: There are a lot of case handlers. Every time one turns up for a CMC one has to prepare for it, one has to correspond, one has to do case management information sheets, one has to do skeletons, and one has to take them seriously. This is *a fortiori* because of course we are amending the timetable, subject to your Lordship's concurrence, and so this is not something that we would, as it were, take lightly. There is a lot of effort on all sides, and I do not suppose I am just speaking on our side, and a lot of costs.

My Lord, we are here today for one reason and for one reason only. The reason we are here is because the timetable has had to be changed, notwithstanding the fact that it was set on 27th May and reconfirmed on 2nd July, because was not provided in accordance with the timetable. That is the only reason why we are here. My Lord, my learned friend, Mr. Moger, said that his clients did not delay in starting their disclosure. They did, with respect, delay in starting the disclosure on a proper basis, the proper basis having been clarified by Mr. Justice Tomlinson (as he then was) on 2nd July. They took the risk that the exercise that they had started precipitously would prove wrong, and indeed it did prove wrong.

My Lord, on 27th May, before 27th May, in the case management information sheet, and in Clifford Chance's correspondence before that, they proposed two tranches, and they proposed the dates of those two tranches, and they proposed the second date for the tranche knowing and specifically recognising that the second tranche would cover that disclosure that was to be provided over and above that which they were already putting together either by further agreement or pursuant to the order of the court. At the hearing of 2nd July, and your Lordship has seen some of the transcript, there was, as my learned friend, Mr. Kendrick, had said, and as we said at the time, a bit of an *in terrorem* submission based along the lines of: "Well, we have got a trial date, we do not want to lose it, and if you make us provide anymore than we are prepared to

provide at the moment we will not be able to meet that trial date" and Mr. Justice Tomlinson would have none of that.

But, conspicuously, the one thing that was not done on 2nd July hearing was to say to Mr. Justice Tomlinson: "Having ruled against us it is necessary to revise the timetable for the giving of disclosure and in consequence it would have been inevitable to revise the trial timetable". No submission was made at that hearing either that the first tranche would not meet its date of 16th July or that in the light of the order that was being made as to the scope of disclosure it was necessary to put the September date back to December. If it had been, my Lord, if that had been the submission that was made, and if that had been the subject of analysis and the date had duly been put back, as inevitably one suspects it would have to be, and if the same sort of submissions that are being made now would have been made then, then we would not have been here today. We would have had a CMC, as was originally envisaged when this CMC was fixed, after the completion of the second tranche of disclosure, because this date in October was set at the May CMC on the assumption that effectively the date for the second tranche would have passed and we would be there dealing with points which might have arisen on the second tranche of disclosure. We have come back today because those dates were not amended at the time and it has been necessary to revise the timetable.

The last point that I want to make on this, my Lord, my learned friend, Mr. Moger, showed you one side of the correspondence that followed from the Clifford Chance letter of 15th July, where they advised, one day before the first tranche was due: "We are not going to make the first tranche and we are not going to make the second tranche and we are going to need to go back to December". My Lord, your Lordship is not going to thank me, I suspect, at 12.40 to go through all the subsequent correspondence, but I can tell your Lordship that what happened immediately from all three of the Defendants' solicitors, Barlow Lyde & Gilbert, Mr. Adam's solicitors, Clyde & Co., Mr. Kendrick's solicitors, CMS Cameron McKenna for my clients, we all wrote back on 16th July and we said, apart from protesting on what we described in various languages 'unilateral non compliance with the order', we said: "This is going to have a major affect on the trial timetable. The trial timetable is no longer achievable. The court needs to be brought up to date. The court needs to be told because the October 2011 date is no longer achievable".

Now, that spawned a lot of correspondence, which I can summarise in this way. Clifford Chance, and their then case handlers, and I endorse what my learned friend, Mr. Kendrick, has said himself, that things appear to be moving more, if I can say so, progressively in recent weeks, but the immediate reaction

was to try and justify the position that had been reached without any recognition that the effect of non compliance to date, non compliance within the September deadline, was going to derail the timetable. We kept saying we are going to have to go back to court, and we tried in fact to bring the matter back to court both in July and indeed in September but were unable to do so. It was only, in fact, on 30th September, in a letter your Lordship I do not think has seen, that Clifford Chance acknowledged for the first time that because of the delays in disclosure it was going to be necessary to revisit the trial timetable, and proposed for the first time that the trial go back to 2012. Until that point one of the concerns that my clients had, and I do not know whether I speak for the other Defendants, but I certainly speak for my clients, was that Clifford Chance and their clients appeared to be envisaging maintaining the existing trial timetable, going forward to a trial in October 2011, but curtailing the amount of time which my clients would have for reviewing the very voluminous disclosure, and it was not until, in fact, 30th September that we appreciated that the trial was going to be unnecessarily adjourned.

Now, all that spawned quite a bit of correspondence, quite a bit of effort, quite a bit of work on our side. When the scales finally dropped and we realised that, yes, it was agreed that the trial was going to have to go back, of course then we go into the second phase of trying to work out consequential directions, we have had a week and a half of correspondence, we have had skeleton arguments, we have had revised case management information sheets, and the reality of this case, my Lord, is that we are at a CMC prematurely, in the light of where we have got to in disclosure, which has been occasioned by slippage of the Claimants' fault and not the Defendants' fault. My Lord, it is very tempting, I know, to say it is a CMC, it is very tempting to say, as my learned friend, Mr. Moger says: "We told you so, we told you so, we told you so", and of course there is an element of truth in that, but the reality of it is that his clients started from the wrong position, put forward a timetable, which on his own analysis was doomed if a correct view of his clients' disclosure obligations had been taken, and, with respect, it is not to put the boot in to say that his clients, not my clients, must bear the financial consequences of this.

So, my Lord, that is the reason why, leaving aside the nuts and bolts of costs wasted by not complying, which in a sense is obvious, if I may respectfully say so, although fairly *de minimis* in the scale of things, today we say we should have the costs of turning up on a CMC which had matters been dealt with properly the next CMC would have been in January or February or March of next year. My Lord, that is my submission.

MR. JUSTICE CLARKE: Thank you.

MR. MOGER: My Lord, may I deal with one or two points before I come to costs, and that is that if your Lordship wants a list of experts you will find that in the order.

MR. JUSTICE CLARKE: Good.

MR. MOGER: Secondly, my instructions in relation to the step between an electronic list and the electronic CD with the document copies of them, is that there is an interval between those two.

MR. JUSTICE CLARKE: Sorry, the interval between what?

MR. MOGER: Between the producing of a list and ----

MR. JUSTICE CLARKE: A physical list?

MR. MOGER: Yes, but a physical list which is rendered electronically, even if it is rendered electronically, the list, the step between that and the production of documents in electronic form on the CD as copies. I hope, as I have said to your Lordship earlier, that we will be dealing with the tiny tail end of undisclosed documents by December, and I am certainly prepared on behalf of Societe Generale to give a best endeavours to produce the copy documents electronically (if any) that are outstanding on or with the list on 17th December, but I cannot tell your Lordship that there is no step required between that list on 17th and the production of copies by electronic means. I am afraid I am not qualified to explore the explanation for that in detail. Those are my instructions.

MR. JUSTICE CLARKE: Yes.

MR. MOGER: Can I now deal with the suggestion that Mr. Kendrick made for a progress letter on 10th November. I accept that suggestion.

MR. JUSTICE CLARKE: Yes.

MR. MOGER: Can I now deal with costs, and deal first of all with 16th July/6th August. As I understand it, what is actually sought is an order for costs caused by late notification of non compliance with 16th July. Of course, I do not want to minimise the irritation and disruption it must have caused the Defendants who had teams in place ready to receive documents on 16th July, with summer holidays coming up, when they did not receive them until August. But that is not a proper basis for an order for costs to be paid by Societe Generale to the parties represented by the Defendants in this case. As I understand it, it comes

down to the costs that are thrown away are the incidental expenses on the translators, and the like, rather than on solicitors twiddling their thumbs, because solicitors twiddling their thumbs, if they are not employed on other work for other clients which is remunerative, are certainly not going to be charged to the clients for whom they are doing no work. It would be wholly disproportionate, in my respectful submission, all other things being equal, it would be wholly disproportionate to order a taxation of the expenditure on lost expenses, third party expenses like translators, there being no material before the court to demonstrate there is anything of significance other than nickels and dimes in this case.

My friend, I think it was Mr. Adam, invited you to infer that the problem had been known about at the hearing of 2nd July. In my respectful submission, that is not a proper submission. The only evidence in the form of correspondence is they did not know about it on 2nd July, were overly optimistic, and accept that they were overly optimistic. What would have resulted if they had? They would have applied for extra time, and what extra costs would have been incurred?

May I know deal with the costs of today? I do not want to fight old battles, particularly when they are battles, and I understand why he goes back to it, that Mr. Kendrick one on 2nd July in relation to the orders that were sought on that occasion. What he says is: "Why are we here at all?" and the answer, he says, is: "We are here because of the disclosure failings of Societe Generale", and Mr. Schaff said we did not delay starting the disclosure, we delayed starting the disclosure properly. The problem with that submission is that the work we did in accordance with 1st December 2009 schedule of work was all valuable work which needed to be done anyway, and anyway took more than 14 months to do, and that got us into the difficulty in August. That is not work that is of no value, it is not work that is wasted, it was not time that was wasted, it was work that had to be done. The sole consequence of a more accurate appreciation of the task in hand, despite the fact that the judge was this on 2nd July, the sole consequence is that proper disclosure has taken, as it always would have taken, longer than 17th December to provide.

My Lord, my friend, Mr. Kendrick, at the hearing on 27th May – you see this from his case management information sheet in the first volume, which I think I asked your Lordship to look at, the 27th May bundle tab 13, p.135 – said at (v), having argued in (i) that it was not sensible to have two tranches, which the court otherwise accepted it was, at (v) said:

"If major issues as to the scope of the proposed second tranche of disclosure cannot be resolved then it may be sensible for the pre-trial timetable not to provide for steps beyond disclosure".

That is a perfectly understandable position. At the hearing it was thought more constructive to provide for discipline purposes a trial date at which all parties would aim. That is why everything was provisional, because there were these outstanding issues. That was intended to be a constructive proposal, and October 2011 was intended to be a realistic shot at it. In May 2010 it was not known to what extent issues of disclosure would be resolved. Mr. Kendrick was claiming disclosure in the enormous way he has claimed it now, and it is perfectly true we resisted, and it is perfectly true that the judge thought we were unreasonable as to some part of that resistance and ordered us to pay costs. But if he had his way and there had been no timetable, what would now be being said?

In May a CMC for today was proposed, partly because disclosure was unresolved, and partly because the timetable was provisional, and in the passage my friend handed up to you about the transcript of that day, I see that there was actually contemplated a return at this date to revisited the timetabling. So throughout this has been a provisional matter which the parties, particularly my clients, have sought to deal with in a constructive way, and it is a bit rich now to be told that provision that was made in May, the CMC today, is provision that would never have been necessary, and all the costs have been thrown away, merely because our work on disclosure would take longer than we then hoped.

My Lord, I have no other submissions to make.

MR. JUSTICE CLARKE: Thank you very much.

(For Judgment, see separate transcript)