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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. : see below list

Victoria House,
Bloomsbury Place,
London WC1A 2EB

2 May 2019

Before:

The President: The Honourable Mr Justice Roth
The Honourable Mr Justice Fancourt
Hodge Malek QC
(Sitting as a Tribunal in England and Wales)

Royal Mail Group Limited v DAF Trucks Limited & Ors

Case: 1284/5/7/18 (T) Royal Mail Group Limited v DAF Trucks Limited & Ors

Case: 1290/5/7/18 (T) BT Group PLC & Ors v DAF Trucks Limited & Ors

Case: 1291/5/7/18 (T) Ryder Limited & Another v MAN SE & Ors

Case: 1292/5/7/18 (T) Suez Groupe SAS & Ors v Fiat Chrysler Automobiles N.V. & Ors

Case: 1293/5/7/18 (T) Veolia Environnement S.A. & Ors v Fiat Chrysler Automobiles N.V. & Ors

Case: 1294/5/7/18 (T) Wolseley UK Limited & Ors v Fiat Chrysler Automobiles N.V. & Ors

Case: 1295/5/7/18 (T) Dawsongroup Plc & Ors v DAF Trucks N.V. & Ors

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CMC – Day 1

Thursday, 2 May 2019

1
2 (10.30 am)

3 (Proceedings delayed)

4 (10.47 am)

5 Case management conference

6 THE PRESIDENT: Good morning, everyone. As last time, the
7 proceedings are being live streamed to court 2 as not
8 everyone could fit into this court.

9 If at any point it is necessary to go into camera to
10 hear any applications or any part of the submissions,
11 then the live stream will, of course, be turned off.

12 You will be aware that the composition of the
13 Tribunal hearing these cases has changed since the last
14 occasion. Mr. Justice Hildyard has had to step down
15 from the Tribunal because he is engaged in a very heavy
16 trial in the High Court and Mr. Justice Fancourt has
17 been appointed to the Tribunal in his place.

18 Mr. Justice Hildyard continues to be involved in the
19 production of the pending judgment in Wolseley's
20 application to strike out Daimler's counterclaim.

21 Judgment in that application is imminent.

22 Mr. Justice Hildyard will continue to deal with any
23 consequential matters on that judgment, but for all
24 other purposes, he has ceased to be a member of the
25 Tribunal.

1 Thank you all for your skeleton arguments and
2 bundles. Obviously a lot of work has gone into
3 producing the bundles. Some of the material in various
4 documents is confidential. We hope that has always been
5 highlighted. Just occasionally, it seems to me, it may
6 not have been, but we will all have to be careful how
7 any reference is made to that.

8 I, while we are on bundling, just say in future,
9 please can all documents be double-sided, all paper
10 documents. Some of the parties have done that, others
11 have not. Keeping paper documents double-sided
12 obviously reduces the bulk of the bundle and also saves
13 trees.

14 There is no need to include in each bundle a copy of
15 the Commission decision. We have numerous copies of
16 that decision across all these bundles. We have all got
17 our own working copy and it is quite enough to have
18 a cover sheet saying "Annex 1, Commission decision".

19 When you first speak as counsel, please would you
20 introduce yourself for the benefit of the transcribers
21 and also the Tribunal. We will take, for the benefit of
22 the transcribers and no doubt everybody else, a short
23 break mid-morning.

24 As on the last occasion, we will seek to structure
25 the CMC so that some matters are held over for tomorrow.

1 It may be that not all parties need attend all the
2 issues tomorrow, although it is a little harder to
3 achieve that, I think, on this occasion. But in
4 particular, all questions of disclosure will be dealt
5 with tomorrow, and that includes the Dawson group
6 disclosure matters.

7 But we will continue our overall approach of case
8 managing all these cases together, and doing it in
9 a staged way.

10 You have, I think, each of you, followed the
11 provisional agenda. We will not quite follow the same
12 order because it seems to us that the first matter that
13 can usefully be addressed is the Director General's
14 letter to the Tribunal of 20 December 2018.

15 There were two aspects to that. The first was the
16 redacted footnotes in the decision and that, as we
17 understand it, relates to various ID numbers, and he has
18 explained the Commission's position. At least my
19 understanding of what is said by all the parties is that
20 nobody wishes to pursue that further and that everyone
21 is content with the degree of disclosure given. Is that
22 correct or is anyone seeking to raise anything about the
23 footnotes to the decision?

24 Yes.

25 MS. BACON: Kelyn Bacon for Iveco. My understanding is that

1 that is correct and it is common ground that the
2 redacted footnotes should remain. Those relate to both
3 references to documents withheld on leniency grounds,
4 broadly speaking, and redactions on Pergan grounds.

5 I am not entirely sure whether, on the latter point,
6 there is an issue. Certainly on the former point in
7 relation to redactions based on the leniency ground,
8 that does seem to be agreed. On the latter point on
9 redactions relating to Pergan grounds, I am not sure if
10 the VSW claimants do agree that, and perhaps that could
11 be confirmed.

12 THE PRESIDENT: Yes, I think, Ms. Demetriou, do you want to
13 take instructions?

14 MS. DEMETRIOU: Yes, we do agree that.

15 THE PRESIDENT: That is agreed. Fine.

16 MR. BREALEY: Can I just --

17 THE PRESIDENT: Yes.

18 MR. BREALEY: Mark Brealey for Ryder. I think we do have
19 to, maybe not at the CMC, address the Pergan issue,
20 because it will reduce the value of the Scania decision
21 quite substantially.

22 THE PRESIDENT: Yes.

23 MR. BREALEY: The 20 December letter did not envisage Pergan
24 material, it referred to leniency and settlement.

25 THE PRESIDENT: Yes, let us see where we get to on the

1 Scania decision, which is indeed the next point to which
2 I wish to come, which is the other part of the letter.

3 The Director General explains that the, as it were,
4 official non-confidential version that the Commission
5 will issue is delayed because of an application before
6 the hearing officer, and then whatever he decides, can,
7 I think, always be subject to appeal. One is,
8 therefore, considering a provisional non-confidential
9 version, as it is called, and that was, as I understand
10 it from his letter, sent to Scania on 18 December.

11 It is clearly not going to be furnished soon by the
12 Commission, and I think that is recognised by everyone.
13 What has been proposed, as both, I think, VSW and Ryder
14 in particular have pursued applications for a copy of
15 that decision, is directions for a timetable whereby
16 Scania can furnish it to the other addressees and then
17 take account of their comments. I think that timetable
18 is found in various places. It is in the Iveco
19 skeleton, for example.

20 MR. POBJOY: Sir, if I can assist, there has been subsequent
21 correspondence on the --

22 THE PRESIDENT: Yes, can you just say who you are, please.

23 MR. POBJOY: Sorry, it is Jason Pobjoy, junior counsel for
24 Scania.

25 THE PRESIDENT: For?

1 MR. POBJOY: Scania.

2 THE PRESIDENT: Scania.

3 MR. POBJOY: It appears at {VSW-D1/178/1}.

4 THE PRESIDENT: Yes, that is an electronic document.

5 MR. POBJOY: It is an electronic document, so it should
6 hopefully appear on the screen.

7 THE PRESIDENT: Would you like to give the reference again.

8 MR. POBJOY: VSW-D1/178/1.

9 THE PRESIDENT: Yes.

10 MR. POBJOY: If you go to the second page of that document,
11 it is a revised timetable which has now been agreed with
12 VSW.

13 THE PRESIDENT: So that is agreed, and I think the -- so
14 that is agreed with VSW, that is right, is it,
15 Ms. Demetriou?

16 MS. DEMETRIOU: Yes, that is correct.

17 THE PRESIDENT: The decision, as I have indicated
18 previously, seems to us of relevance, not just to VSW
19 who have -- where Scania is a party as a Part 20
20 defendant, or the Tribunal's equivalent, but to all
21 parties, all claimants, because since what we have is
22 a settlement decision and that is an infringement
23 decision, full decision, it will clearly have
24 considerably more detail. So if it is to be disclosed
25 under this arrangement, which I will come to in

1 a moment, it should be disclosed, it seems to us,
2 subject to anything Scania or anyone else wants to say
3 to all the claimants.

4 MR. BREALEY: I am obliged for that.

5 THE PRESIDENT: I know. We see that you have asked for it
6 in your skeleton.

7 MR. BREALEY: With our skeleton. We were not copied into
8 this correspondence, so we did not know anything about
9 this until the skeletons. Indeed, last night and a few
10 days ago, we were told that it is not relevant to our
11 claim, and so --

12 THE PRESIDENT: While you are on your feet, Mr. Brealey, as
13 dealing with the timing, one can argue about dates, but
14 it seems a reasonable timetable.

15 MR. BREALEY: We have got no issue with the timetable.

16 THE PRESIDENT: No issue with the timetable.

17 MR. BREALEY: From what we have seen from the skeletons, we
18 have got no issue.

19 THE PRESIDENT: Well, can I ask Scania, is it resisted that
20 it should be provided to all the claimants?

21 MR. POBJOY: It is resisted on the basis that no request has
22 been made of Scania for the document. We understand
23 a request was made of the other OEMs, but they do not
24 have a copy of it, so they will not have it to provide.
25 Our submission is --

1 THE PRESIDENT: Well, they will have a copy of it pretty
2 soon because you are about to send it to them.

3 MR. POBJOY: I understand the way it has been done is it is
4 all electronic, so they will not actually have
5 possession of the document while the redaction process
6 is being undertaken.

7 THE PRESIDENT: Yes. Well, we think it is sensible that it
8 should go to all claimants and we have that power,
9 whether there is an application or not. So is that
10 resisted?

11 MR. POBJOY: We do not resist that.

12 THE PRESIDENT: The next point is~-- it is suggested here
13 that it should go to the inner confidentiality ring, and
14 this is, by definition, a non-confidential version.
15 That is what has been produced. So at the moment, it is
16 not entirely clear to us why it should be confidential
17 when it is expressly a non-confidential document and
18 certainly why it should go into the inner
19 confidentiality ring as opposed to the outer
20 confidentiality ring.

21 Is there anything you want to say about that from
22 Scania's perspective or anybody else's?

23 MR. POBJOY: Just one moment, sir.

24 MS. BACON: Sir, while that is being discussed --

25 THE PRESIDENT: To be fair, counsel cannot take instructions

1 and listen to you, so ... (Pause)

2 MR. POBJOY: Sir, we are content for it to go in the outer
3 ring.

4 THE PRESIDENT: In the outer ring. What we will do is this:
5 we will keep it in the outer ring for the moment because
6 the Director General in his letter said they have no
7 objection to it being disclosed into a confidentiality
8 ring. We will write to the Director General asking him
9 to clarify on what basis the Commission considers that
10 this document should be confidential, and obviously all
11 will be copied into his answer and we can revisit the
12 matter in the light of that.

13 But that will enable all parties to take full
14 instructions, and it will be on the -- so it will be as
15 per the timetable in the letter, which -- I cannot
16 access the date at the moment. What is the date of that
17 letter that is on the screen?

18 MS. DEMETRIOU: 30 April.

19 THE PRESIDENT: Thank you. So two days ago, yes. The
20 letter of 30 April. But in the last bullet, it will be
21 "the outer confidentiality ring". Does anyone want to
22 add anything to that for the moment?

23 Yes, Ms. Bacon.

24 MS. BACON: Sir, I am not sure -- my point is not relating
25 to the confidentiality of it, but given the very quick

1 nature of the discussion that was had on relevance,
2 Iveco would like it on record that we are in no way
3 conceding that this is relevant to the Ryder proceedings
4 and, indeed, we consider it is not relevant to the Ryder
5 proceedings. Just to underscore that at the moment, we
6 do not have any control over that document, so we are --
7 but as you have made the point, eventually we will have
8 it, but at the moment, we do not.

9 THE PRESIDENT: Eventually, there will be a public document
10 that the whole world can see, and it is really
11 a question of trying to move that process along, as it
12 seems to be taking a rather long time, to put it mildly,
13 in the Commission's handling of it.

14 Right. I think that is all on the Director
15 General's letter. The next question is -- or next
16 heading, as it were --

17 MR. BREALEY: Sorry, sir, I think we just have to -- we will
18 not do it now, but we do have to at some point, I think,
19 address this Pergan issue.

20 THE PRESIDENT: Yes. Well, let us see. When you get the
21 decision, see what is redacted and then we can take it
22 from there.

23 MR. BREALEY: I am obliged, but it may well be that we have
24 to write another letter to the Commission.

25 THE PRESIDENT: Yes. I take your point, Mr. Brealey, but we

1 will not address that now. It will be much easier to do
2 it when we have actually got a document.

3 MR. BREALEY: When we see it is a lot thinner than the
4 settlement decision.

5 THE PRESIDENT: Yes.

6 Pleadings. All parties, I think, have now put in
7 what have been referred to as non-addressee liability
8 pleadings, but since that was done, there has been the
9 *Skanska* judgment from the Court of Justice.

10 The defendants, or most of them, I think, have
11 indicated they want to amend in the light of that.
12 First of all, do any of the claimants want to amend
13 their non-addressee liability pleading in the light of
14 the *Skanska* judgment?

15 MS. DEMETRIOU: We do not.

16 MR. BREALEY: No.

17 MR WARD: No.

18 THE PRESIDENT: Thank you. The defendants, some of you,
19 I know, do. I do not think we need necessarily go
20 through each of you. The question really is simply what
21 timetable there should be for those amendments. Is
22 there a suggested timetable somewhere or, if not, how
23 long is desired? (Pause)

24 MR. PICKFORD: Meredith Pickford for DAF.

25 There is some lack of clarity about which one of us

1 is going to go forth on this highly weighty subject, but
2 we would ask for 21 days from today.

3 THE PRESIDENT: Yes. 21 days to amend. While you are on
4 your feet, Mr. Pickford, if one looks at your current
5 non-addressee liability pleadings in the -- I will take
6 the Royal Mail case, which is A1, Royal Mail, tab 12,
7 and I think it is the same in some of the other cases --

8 MR. BREALEY: I am sorry to interrupt again. It is not on
9 the screen. It is one of those things that we do not
10 have access to. Ryder, we do not have access to the
11 other electronic documents --

12 THE PRESIDENT: I think I understand.

13 MR. BREALEY: -- which has been a real nuisance.

14 THE PRESIDENT: This is not a confidential document in any
15 way. We can find the equivalent, no doubt, in your case
16 and in the VSW case.

17 MS. DEMETRIOU: In the VSW case, it is in {VSW-A4/16/1}.

18 THE PRESIDENT: A4/16. I think it is phrased the same way
19 in every case.

20 MR. PICKFORD: It is in a very similar way, but is it going
21 to help to go to VSW, because is that not going to cause
22 the same difficulty to the one in VSW?

23 THE PRESIDENT: Just one moment. Let me just see.

24 MR. PICKFORD: It is on the screen now.

25 THE PRESIDENT: Yes. Let me now try and find the paragraph.

1 Yes. Well, if you go in that one, then, to
2 paragraph 5(b) in the VSW {VSW-A4/16/3}, and it is
3 indeed paragraph -- it is 5(a) in the DAF Royal Mail and
4 it is 5(b) I think -- it is 5(b)(i) on the screen:

5 "The Fourth Defendant was aware at some times during
6 the period of infringement of the fact of the Admitted
7 Conduct, but not of its illegality ..."

8 Those same words are in, unsurprisingly, DAF's
9 non-addressee liability pleading in the other cases.

10 MR. PICKFORD: Yes.

11 THE PRESIDENT: When you amend to take account of *Skanska*,
12 would you also, please, give particulars of
13 that statement to indicate at what times during this
14 period when it says "at some times" and to identify the
15 individual or individuals who were so aware and the
16 positions that they held? (Pause)

17 Yes. You may need more than 21 days, but I think
18 that is important.

19 MS. DEMETRIOU: Sir, it would also be helpful to know the
20 relevance, if any, that they place on lack of knowledge
21 of illegality.

22 THE PRESIDENT: Well, I think they are saying that that
23 means that they are not liable for that reason. They
24 are saying that is the test. That is the legal point.

25 MR. PICKFORD: Sir, we can certainly do that, but what we

1 can do is plead -- particularise, rather, the basis for
2 that pleading. What we will not necessarily be able to
3 do is say exhaustively every individual that might or
4 might not have known, but we can certainly particularise
5 the basis on what we have pleaded here, which is
6 obviously, at this stage, the best we can do.

7 THE PRESIDENT: Yes. Well, I think that is -- we want some
8 more flesh on those bare bones, basically.

9 MR. PICKFORD: We are very happy to do that. In that case,
10 given that that is a more substantive exercise, could
11 I ask for 28 days in order to --

12 THE PRESIDENT: Yes, I think that is sensible. The same
13 point, I think, may apply to other defendants as well,
14 that if it is accepted that there was some awareness, it
15 is important to know to what extent and over what
16 period.

17 MR. BREALEY: Same point --

18 THE PRESIDENT: Let us take this in order. We are dealing
19 with defendants at the moment.

20 Ms. Bacon.

21 MS. BACON: Sir, I do not know if the Tribunal is aware that
22 this morning at some point between 10.00 and 10.30,
23 Mr. Justice Barling handed down a judgment in the
24 *Media-Saturn* case, which does discuss these
25 issues, including the *Skanska* judgment. There

1 is, as far as I am --

2 THE PRESIDENT: The short answer is we are not aware.

3 MS. BACON: There is, as far as I know, one person who has
4 read the judgment, and that is Mr. Singla because he was
5 in that case. The rest of us have not. I was going to
6 propose in any event that when we come on to discussion
7 of whether this point could go forward as a preliminary
8 issue -- we will all need to have read it overnight. It
9 is a long judgment. It is over 100 pages. So I just
10 want to mention that now because others in the room may
11 not be aware of it.

12 THE PRESIDENT: Yes.

13 MS. BACON: I think it will be useful to have a discussion
14 at some point of these issues in light of that judgment,
15 but that necessarily will not happen today.

16 THE PRESIDENT: No. Well, it is very helpful to know that,
17 and we will also have a look at it.

18 I do not want to jump ahead, but I can indicate that
19 having read what all the parties have said, we are not
20 at the moment particularly disposed, subject to what we
21 may hear in argument, to order that as a preliminary
22 issue in any event.

23 But returning to the particular point we are on,
24 time to amend the non-addressee defence pleadings,
25 28 days for DAF, and can the same period be for all the

1 other defendants?

2 MR. HOSKINS: I am Mark Hoskins for Volvo and Renault.

3 We would certainly be happy with that. I should say we
4 also need to make amendments to our defence because
5 there are issues in the defence that relate to this
6 non-addressee liability issue.

7 THE PRESIDENT: Yes.

8 MR. HOSKINS: But I think it is sensible, if you agree, let
9 us have a timetable to deal with the specific
10 non-addressee liability pleadings and a date proposed.
11 We can deal with amendments to other pleadings that may
12 come separately.

13 THE PRESIDENT: Yes. So 28 days and to provide -- to
14 include any particulars of awareness, if it is accepted
15 that there was some awareness of the admitted conduct,
16 and over what period and by whom.

17 Is there, in the Royal Mail/BT cases, Mr. Pickford,
18 any issue, which I saw floating about, to whether what
19 is in the replies should be in the particulars of claim?
20 That was raised at some point. It is not being pursued,
21 is it?

22 MR. PICKFORD: There is an issue in relation to that, but it
23 is being pursued in correspondence at the moment. There
24 is no need to trouble the Tribunal for an order.

25 THE PRESIDENT: Yes, thank you.

1 The next point on pleadings. Dawsongroup seek
2 permission to amend their particulars of claim, but as
3 I understand it, that was served only on 17 April and
4 the defendants say they need more time to consider it.

5 Mr. Ward, whether that is -- whether you think that
6 is reasonable or not, are you prepared to accept that?

7 MR WARD: Well, sir, Tim Ward for Dawsongroup.

8 Volvo/Renault have, in fact, confirmed that they are
9 prepared to consent to the amendment and they have asked
10 for 56 days to plead, which would be to 27 June, and we
11 do not resist that.

12 As you say, sir, the pleading was provided in draft
13 two weeks ago and we do regret that the other two
14 defendant groups have not been able to even indicate
15 whether they do consent.

16 Obviously, we are not in a position to force them
17 to, but we would invite the Tribunal to order them to
18 make clear their position on a short timetable, perhaps
19 giving them a further week to 8 May. We would then
20 respond by 15 May and indicate whether we are prepared
21 to remove any parts that may be subject to objection.
22 Otherwise, they too could plead to it by 27 June, just
23 as Volvo/Renault are prepared to do.

24 THE PRESIDENT: Yes. There is one issue raised, which is --
25 and I do not know if that is -- is that raised by

1 Volvo/Renault -- which is the point about an undertaking
2 concerning relation back, which was given as part of the
3 permission to amend in Royal Mail.

4 MR WARD: Well, having regard to the details which are
5 currently still within the confidentiality ring, we do
6 not think that issue arises. Now, if the defendants do
7 and they want to pursue it in correspondence, of course
8 we will engage with that.

9 THE PRESIDENT: Yes.

10 MR WARD: But the draft particulars are, at a glance, in
11 a form that would appear familiar to the Tribunal from
12 the Royal Mail case.

13 THE PRESIDENT: Yes.

14 MR WARD: But in certain material respects, they are
15 different.

16 THE PRESIDENT: Yes.

17 MR WARD: So we do not think that issue will arise.

18 THE PRESIDENT: Yes. Well -- so you are suggesting that
19 they respond in a week, and we will take it from there.

20 Can I raise, before asking the defendants one point
21 that struck at least me upon looking at the claims and
22 what has been said, and this is your particulars of
23 claim.

24 MR WARD: Amended?

25 THE PRESIDENT: Well, no, it arises on the original one and

1 is not addressed, I think, in the amended one. So that
2 is in the Dawsongroup bundle, A1, at tab 2.

3 MR WARD: Yes.

4 THE PRESIDENT: But I have to say I have not checked the
5 amended one, paragraph 39 {DG-A1/2}. It may not be on
6 everyone's screen, but I can read it out. It is
7 completely innocuous in this sense. It says:

8 "Causation and loss. The Defendants' breaches have
9 caused the Claimants loss and damage. In particular,
10 the effect of the said breaches is that the purchase
11 prices paid by the claimants were higher than they would
12 have been absent the unlawful collusion. The measure of
13 the Claimants' damage is the difference between the
14 purchase prices which the Claimants paid during the
15 relevant period and such lawful prices as the Claimants
16 would have paid."

17 That is the overcharge. My question concerns the
18 first claimant, which, as I understand it, is a holding
19 company, or at least parent company, and which did,
20 looking at the first pleading you have served now on use
21 of trucks, not actually purchase any trucks.

22 MR WARD: That is right, sir. The first claimant is
23 there -- it is a holding company, but it is not there
24 purely in the capacity of holding company. It is not
25 claiming reflective loss. The reason it is there in

1 fact relates to the claim for compound interest, that it
2 bore financing losses. You might remember that in the
3 *BritNed* case --

4 THE PRESIDENT: Yes.

5 MR WARD: -- the High Court disallowed finance and loss
6 claims that were brought by shareholders because they
7 were not claimants.

8 THE PRESIDENT: Yes.

9 MR WARD: So it is -- I would have to accept it is not
10 absolutely clear on the pleading, and we can make that
11 clear.

12 THE PRESIDENT: Well, that's what I would like you to do as
13 you are amending.

14 MR WARD: Yes.

15 THE PRESIDENT: I would not have pursued this if there was
16 not going to be an amended pleading anyway.

17 MR WARD: Yes.

18 THE PRESIDENT: But if that is the case, then the paragraph
19 that I just read out, 39, does not include the first
20 claimant. You may want to clarify how they come in when
21 you have your claim for compound interest. Can you make
22 those changes when you -- in your draft amended
23 particulars of claim?

24 MR WARD: Yes.

25 THE PRESIDENT: Is the position -- that will apply, no

1 doubt, as regards the claim against -- even though it
2 has been consented to by Volvo/Renault. So if you can
3 make that revision, you can do that within how many
4 days?

5 MR WARD: Well, I am sure we can do it within seven days,
6 sir. It should be very quick to do.

7 THE PRESIDENT: Yes. So in seven days, you will do that and
8 recirculate and then are Volvo -- excuse me, Volvo, as
9 I understand it, Mr. Hoskins, have consented to the
10 amendment and will now have this further revision, but
11 it is a clarification revision. Does that consent
12 stand?

13 MR. HOSKINS: Sir, it does. There is only one wrinkle,
14 which is this: obviously in the time available, we went
15 through and we could not see an objection. Some of the
16 other parties have raised this relation-back point.

17 THE PRESIDENT: Yes.

18 MR. HOSKINS: I would simply ask that if some of the other
19 defendants get the benefit of a relation-back
20 undertaking, we should have that as well.

21 But subject to that protection to make sure we are
22 not unequally treated, we do not have any substantive
23 objection. We have done our best in the time available
24 to us. That is all I ask for. If there is
25 a relation-back undertaking, we should get the benefit

1 of that as well. But that is the only point I make.

2 THE PRESIDENT: Yes.

3 Mr. Ward, if you are going to end up giving it to
4 some, you should give it to all.

5 MR WARD: There is obvious logic to that, sir.

6 THE PRESIDENT: So it is just a question of how we fashion
7 the order. You will now, as I understand it,
8 recirculate by 8 May. So that sort of pushes the dates
9 that you just gave me back by a week.

10 MR WARD: With respect, sir, does it really need to be
11 a week? The point we will be amending is a very short
12 one.

13 THE PRESIDENT: Yes.

14 MR WARD: It will be a sentence or two. The real issue
15 here, of course, is the existing proposed amendment is
16 extensive, setting out additional particulars of the
17 infringement. So might we suggest that perhaps this
18 date -- these dates are only moved back by two or three
19 days?

20 THE PRESIDENT: Yes. Well, let us see what the defendants
21 say about the dates.

22 This is the defendants, obviously, to the
23 Dawsongroup action. So shall we start with DAF,
24 Mr. Pickford?

25 MR. PICKFORD: Thank you, sir.

1 So we ask for 21 days from receipt of the amended --
2 newly amended pleading in order to provide consent or
3 otherwise. The reason for that is because, contrary to
4 Mr. Ward's submissions, we consider that there quite
5 possibly is an issue about what is properly in scope and
6 what is not in scope in relation to this particular
7 amended pleading, the same issue, potentially, as we had
8 in relation to Royal Mail.

9 THE PRESIDENT: Yes.

10 MR. PICKFORD: We need adequate time in which to consider
11 that properly.

12 THE PRESIDENT: You have had already 14 days. I know there
13 was Easter.

14 MR. PICKFORD: Well, we have -- sir, Mr. Ward said it was
15 regrettable we had it for 14 days. The pleading was
16 provided the day before Easter. We have had, since
17 then, responsive evidence, skeleton arguments and a very
18 large amount of work on the part of my team preparing
19 for this CMC. One of the things we have not really had
20 the time to do was spend a lot of time going through
21 a very substantially amended and detailed pleading.

22 THE PRESIDENT: Yes.

23 Daimler, Mr. Harris?

24 MR. HARRIS: Sir, I echo those submissions. The difficulty
25 has been, as you may have seen, there are some 36 pages

1 of very detailed proposed amendments. We also require
2 time, with respect, to consider issues such as within
3 scope and relation-back. We have not had that
4 opportunity, given when it was served. May I add that
5 one of the reasons we have not had that opportunity,
6 which you will perhaps hear more about tomorrow, is that
7 the same claimant group has presented this misconceived,
8 haphazard and piecemeal disclosure application that has
9 occupied a vast amount of time from those of us who
10 appear in court today.

11 So that has distracted what might have potentially
12 have been possible, and so -- and we all have to bear in
13 mind that there is now two days of court and then there
14 is the Bank Holiday Monday.

15 So to cut to the chase, what we say is please may we
16 have until 15 May to give due and proper consideration
17 to any basis for objecting to this set of pleadings?
18 Then, although I cannot for sure say how much time
19 I will then need, or my team will then need, to respond
20 to those to which we do not object, I can already
21 foresee that it is going to be longer than the end of
22 June.

23 I would respectfully suggest that by reference to
24 36 pages of very detailed pleading, it is going to be
25 the end of July. Bear in mind, my Lords -- members of

1 the Tribunal, that these are presented as being detailed
2 factual allegations to which we are to present
3 a detailed factual response, and that ties into the
4 debate we are yet to have about binding recitals.

5 You may have seen in the skeleton that one of the
6 reasons that these detailed factual allegations are
7 presented is so that we -- it is said it can obviate the
8 need for a preliminary issue on bindingness of recitals.
9 In other words, unless we respond with quite some degree
10 of detail, we are going to be met with, "Oh, well, you
11 have not done it properly".

12 So when you add those together, my submission is we
13 would like, please, until 15 May to respond on the basis
14 of any objections, and then it will be no doubt at least
15 until the end of July to be able to respond to these
16 36 pages.

17 Also to take into account, as we are told by the VSW
18 claimants, that they too are going to present a whole
19 series of detailed amendments, that, I think, in their
20 case was going to be by the end of July or within
21 a month of the Scania decision being disclosed to them,
22 whichever is the later. But in any event, it is a
23 similar time period.

24 Then Mr. Brealey's position on behalf of Ryder is
25 a little less clear, but we already know from the

1 previous hearing at which the misconceived specific
2 disclosure application was presented that there are
3 pages and pages of detailed allegations there to which
4 the defending groups will have to respond.

5 So when you put that together, that requires quite
6 an amount of time. So those are my submissions.

7 THE PRESIDENT: As I understand, the Ryder and VSW position
8 is that they are going to wait before producing
9 an amended pleading, until they see the Scania decision.
10 That is the way I understood it.

11 MS. DEMETRIOU: Sir, yes, that is correct. One point that
12 I would like to raise is that we are not quite sure we
13 understand why we are not permitted to see the pleadings
14 in the other cases, so the Dawson group amended pleading,
15 because it presumably refers to contemporaneous
16 documents which are not confidential. It would
17 obviously be helpful to us to see that pleading before
18 we embark on what may be a similar exercise ourselves --

19 THE PRESIDENT: Yes.

20 MS. DEMETRIOU: -- in terms of efficiency going forward.

21 THE PRESIDENT: Yes. Am I right in thinking that the reason
22 why parts of the pleading, Mr. Ward, are marked at the
23 moment confidential is that it is only recently there
24 was agreement that the Commission file documents can be
25 removed from the confidentiality ring?

1 MR WARD: Yes, all of the amendments are based upon a review
2 of the documents that have been disclosed from the
3 Commission file. There are still some wrinkles in
4 correspondence with DAF about -- just to make sure that
5 everything that is in there is material they now regard
6 as non-confidential. That is the only reason.

7 Whilst I am on my feet, if I may, although
8 Mr. Harris seems quite exercised about this, all these
9 amendments are drawn from documents on the file that, of
10 course, his clients have had and are based on
11 allegations which are admitted by them, as recorded in
12 the decision itself.

13 So really to ask until the end of July is, bluntly,
14 kicking that into the long grass.

15 THE PRESIDENT: Yes. Well, before we hear further, just
16 give us a moment.

17 (The Tribunal conferred)

18 Mr. Ward, the point being raised by my colleagues is
19 this: you have not got the Scania decision at the
20 moment.

21 MR WARD: No.

22 THE PRESIDENT: You will get it. Now I think the date is
23 the end of May. Obviously, you do not know and we do
24 not know what is in it.

25 MR WARD: No.

1 THE PRESIDENT: It may be when you see it you want to make
2 further amendments. We think it sensible there should
3 be one round of amendments at this point and not two.
4 That is why, as we understand it, Ryder and VSW are
5 holding back. It might make more sense that in fact we
6 do not proceed with these pleadings, but delay until
7 after you get the Scania decision, unless you are bold
8 enough to say you are not going to make any further
9 amendments in the light of that decision.

10 MR WARD: Well --

11 THE PRESIDENT: Because we really do not want yet another
12 lot of amended pleadings and amended defences and so on.
13 That is totally inefficient.

14 MR WARD: Sir, will you just give me a moment to take
15 instructions on that?

16 THE PRESIDENT: Yes. (Pause)

17 MR WARD: Sir, we obviously cannot say categorically: no, we
18 will not amend in the light of the Scania decision. But
19 the points that are being made to me are that we, of
20 course, have already looked at the file or at least the
21 extract of the file that has been sent to us and
22 developed our case on that basis.

23 There is a concern, of course, as well that as we
24 understand it, the Scania decision is, in any event,
25 under appeal. So we would prefer to be allowed to make

1 these amendments now and then revisit the question in
2 the light of the Scania decision.

3 THE PRESIDENT: We are talking, in the context of the
4 litigation, a month. It really does not seem a sensible
5 way forward. Your trace is this case, on everybody's
6 view, is far away from trial. If this is put back such
7 that you can serve your amended draft, amended pleading,
8 in mid-June, with any further changes you want to make,
9 then that will give, of course, the other defendants
10 more time to consider what you have produced so far.

11 So it does not mean that, then, what was Mr. Harris'
12 end of July gets put back to the end of October, because
13 the Daimler team can be looking at the amendments you
14 have got so far.

15 MR WARD: Well, sir, I think if I understood correctly, the
16 Scania decision is going to be provided to my clients at
17 the end of May --

18 THE PRESIDENT: Yes.

19 MR WARD: -- if that was right. So in fact, if I may
20 respectfully ask, we would want more than two weeks to
21 consider it and see what difference it might make.

22 THE PRESIDENT: Yes.

23 MR WARD: Of course, I do not even know at the moment --
24 Mr. Brealey was making blackly humorous remarks about
25 this, but how much Scania decision there will be, we do

1 not even know how long it is.

2 THE PRESIDENT: Yes.

3 MR WARD: So it is possible that we will need to look at it
4 closely before we go to look at it for the purpose of
5 this round of amendment. So whilst I am most reluctant
6 to ask for additional time for anything in this case, it
7 seems more realistic that we would have a month to look
8 at it before there are any further amendments.

9 THE PRESIDENT: Well, I am sure there will be no objection
10 to that. So if we say 30 -- I will just check the
11 weekends.

12 If we say 28 June, which is the Friday, I think.
13 28 June --

14 MR WARD: Thank you, sir.

15 THE PRESIDENT: -- which is the Friday. 28 June to
16 circulate draft amended particulars of claim. Then for
17 indication of the basis of objecting to that, how long
18 for the defendants to --

19 MR WARD: Mr. Harris seemed to think three weeks would be
20 sufficient this time. By then, they will have had
21 several months to consider the existing pleading, so
22 I might suggest a further three weeks for that?

23 THE PRESIDENT: Yes, so that is three weeks into July, which
24 is -- is it the 19th? 19 July, basis of objecting, and
25 then for actual amended defences. Yes, it will depend

1 on what happens with the objections.

2 MR WARD: Sir, if there is no objection that needs to be
3 resolved by the court, could it not be done by the end
4 of July?

5 THE PRESIDENT: Well --

6 MR. PICKFORD: No.

7 THE PRESIDENT: I think that is a bit unrealistic. I would
8 have thought some time in September. Could it be done
9 by -- I thought it could be done by 20 September, could
10 it not, for amended defences?

11 MR. HARRIS: Sir, could we put down a provisional date of
12 the end of September, and I say "provisional" for this
13 reason. Of course, we do not yet know what the further
14 scope of the amendments -- the premise has been hitherto
15 by everybody, notwithstanding the blackly humorous
16 remarks, that the Scania decision is going to provide
17 a great deal of further elucidation about this cartel,
18 which is precisely why Mr. Brealey and Ms. Demetriou and
19 others have wanted it.

20 So working off that same premise, one imagines the
21 additional amendments are going to be substantial.
22 Then, of course, August gets in the way. So I would
23 respectfully ask for, provisionally, the end of
24 September, but in the usual way, liberty to apply
25 depending on the scope of the additional amendments.

1 THE PRESIDENT: We think 20 September should give you ample
2 time. There will be, I am sure, some people working
3 some parts of August. So do we need more detailed
4 directions on that pleading?

5 MS. DEMETRIOU: Sir, can I just clarify that when the
6 amended pleading is served, that we will then have it?

7 THE PRESIDENT: Yes, there is this question of sharing
8 pleadings. (Pause)

9 (The Tribunal conferred)

10 What is the -- I think all the claimants would
11 clearly make their life easier if pleadings can be
12 shared. Is there objection from any of the defendants?

13 MR. HOSKINS: I do not think there is a problem except for
14 confidentiality, which, as you see, has largely gone
15 because of the position of Commission file documents.
16 There are a few remaining documents that remain
17 confidential.

18 THE PRESIDENT: Well, if bits have to be redacted, that is
19 fine, but in -- subject to any redaction, can --

20 MR. HOSKINS: That is absolutely fine.

21 THE PRESIDENT: -- pleadings be shared across the board?
22 Because we are trying to -- if we are, as everyone
23 agrees is sensible, to case manage these cases together,
24 it causes unnecessary complication when we look at
25 pleadings that other people in the room -- other legal

1 representatives have not seen.

2 MR. BREALEY: We endorse that.

3 THE PRESIDENT: Yes.

4 MR. HARRIS: Sorry, I beg your pardon. Sir, can I just
5 clarify that it is going to be the same dates for the
6 proposed amended pleadings on the back of the Scania
7 decision for Ryder, for VSW and for Dawsongroup?

8 THE PRESIDENT: No, because they have not served any
9 particulars of claim yet -- amended particulars of claim
10 yet.

11 MR. HARRIS: I accept that, but they -- we know, for
12 example, that Ryder has already done, on its own case,
13 a vast amount of proposed amendments based upon the
14 Commission file, because they were -- at one stage they
15 were presented in some 200 pages of exhibits to
16 a witness statement.

17 We know that VSW has had at least the same amount of
18 time to consider disclosing the underlying file
19 documents. So whilst they have not produced even
20 a draft amended pleading on that basis yet, they ought
21 to have been working on it, and then it is a question of
22 what further amendments come on the back of the Scania
23 decision.

24 So what we are anxious to avoid -- the reason
25 I raise it is just the point I made before, which is we

1 do not really want to be presented with completely
2 different timetables for an additional series of factual
3 detailed amendments. We want to be able to -- that is
4 more efficient for us to be able to deal with them all
5 at a similar --

6 THE PRESIDENT: Mr. Brealey.

7 MR. BREALEY: I hate to agree with Mr. Harris, but I do. We
8 can circulate a draft by 28 June, and then hopefully
9 that will fit in with --

10 THE PRESIDENT: Yes.

11 Ms. Demetriou.

12 MS. DEMETRIOU: Sir, we are not in a position to do that.
13 We do need until the end of July. We do not have
14 a draft pleading in circulation. The position for us --
15 and I do remind the Tribunal that Mr. Harris has asked
16 for three months, since having Mr. Ward's pleading, to
17 respond to it.

18 We have been faced over the last few months with an
19 enormous amount of work in terms of putting together the
20 procurement of witness statements and all of the --
21 responding to all of the data requests. We are simply
22 not in a position to do this properly until the end of
23 July.

24 THE PRESIDENT: It will give you two months, the end of
25 June, from today. Are you saying two months is not time

1 enough to produce the amended --

2 MS. DEMETRIOU: Sir, we are, it seems, less progressed than
3 the other claimant groups in terms of synthesising our
4 review of the access to file documents, and the reason
5 for that is because we have been very, very largely
6 occupied with this other exercise, which has not fallen
7 on the other claimant groups. (Pause)

8 (The Tribunal conferred)

9 THE PRESIDENT: I am sorry, Ms. Demetriou, we are not
10 sympathetic to that. We think two months from now, even
11 if you are from a standing start, and you will see the
12 pleading now if the other parties -- which will help
13 you.

14 MS. DEMETRIOU: Sir, if that is -- my understanding was that
15 we were going to see the pleading of the other parties
16 when they were served because --

17 THE PRESIDENT: Yes.

18 MS. DEMETRIOU: You are giving us the same date as -- so we
19 are not going to see those pleadings in advance of the
20 service.

21 THE PRESIDENT: Yes.

22 MS. DEMETRIOU: Sir, the difficulty really is -- and
23 I understand what the Tribunal -- the desirability of
24 having all of this in parallel.

25 THE PRESIDENT: Yes.

1 MS. DEMETRIOU: But the difficulty for us is that you are
2 giving, for example, Dawsongroup, which already has
3 a pleading on the stock, this amount of time until the
4 end of June to respond only to the Scania decision, but
5 we -- the task that you are --

6 THE PRESIDENT: Yes.

7 MS. DEMETRIOU: -- going to be asking us to do is much
8 greater because we do not have a draft pleading on the
9 stock.

10 THE PRESIDENT: You will have the Royal Mail and the BT --

11 MS. DEMETRIOU: We do not have the Royal Mail --

12 THE PRESIDENT: You will get that because those have been
13 amended, so you will now receive them.

14 MS. DEMETRIOU: Sir, we do not know what is in them and so I
15 am unable to say on that basis, "Well, that is okay, we
16 can do it by the end of June". Obviously we do want to
17 assist the Tribunal, but this is a large undertaking and
18 we just simply do not think we can do it properly in
19 that time.

20 (The Tribunal conferred)

21 THE PRESIDENT: No, Ms. Demetriou. 28 June.

22 Can I ask with the amended defences: Volvo,
23 Mr. Hoskins, you said you want to make some other
24 amendments to your defence and I was not quite -- there
25 was reference to limitation, I saw.

1 MR. HOSKINS: Yes, there may be. We want --

2 THE PRESIDENT: It is a bit cryptic. What actually is --

3 MR. HOSKINS: Sir, I need to tidy up the non-addressee
4 liability part, so it marries with our submission on
5 that. Consideration is given. There may be some UK
6 limitation points that are being discussed. Obviously,
7 I do not want to say too much.

8 THE PRESIDENT: Yes.

9 MR. HOSKINS: But there is nothing major coming. It is
10 a bit of gardening, I think, is probably the --

11 THE PRESIDENT: Yes, and while you are doing that --

12 MR. HOSKINS: I want to say as well: there is the applicable
13 law issue we are going to come to.

14 THE PRESIDENT: We are going to come to that, so --

15 MR. HOSKINS: What we suggest is applicable law is dealt
16 with by separate, free-standing pleadings, because
17 obviously if we bring that in, that further complicates
18 this.

19 THE PRESIDENT: We are fully on board with that and we will
20 come to it. But one particular narrow point on your
21 defence -- I think this is Dawsongroup, that is the one
22 we have got. If one could look at your defence as it is
23 in Dawsongroup, tab 5 of bundle A1 in Dawson, on page 4,
24 paragraph 16 {DG-A1/5/4}, the road sweeping trucks. As
25 I understand it, that is now accepted; is that right?

1 MR. HOSKINS: No, there is a live issue in relation to road
2 sweeping trucks. I am actually -- I think it is a more
3 important issue than we had anticipated at the last CMC.
4 So I am going to address you on that when we come to the
5 preliminary issue part of --

6 THE PRESIDENT: I thought that had been -- I obviously
7 misread it --

8 MR. HOSKINS: No, it is still --

9 THE PRESIDENT: -- something had been agreed on that.

10 MR. HOSKINS: It is agreed. Dawsongroup are not claiming
11 for what are called superstructures, where you get more
12 than a basic truck. Ryder have told us they are not
13 claiming for superstructures. VSW are claiming for
14 superstructures.

15 THE PRESIDENT: Yes, but if --

16 MR. HOSKINS: I see, sir, in the Dawsongroup one --

17 THE PRESIDENT: So it is in the Dawsongroup one. I think it
18 should be then -- I see. This affects, then, Mr. Ward's
19 pleading to make clear you are not claiming for road
20 sweeping trucks, if that is advanced:

21 "It is unclear whether claims, for the avoidance of
22 doubt ..."

23 I see. But what is it? It is -- the position is
24 that Dawsongroup have told you they are not claiming.

25 MR. HOSKINS: That was my understanding, because we had

1 pursued this in correspondence. We understood that they
2 were not pursuing it, but Mr. Ward seems not sure that
3 is the position.

4 MR WARD: No. I was, in fact, confused by what Mr. Hoskins
5 was saying, and then it turned out it was about VSW.
6 This was a point that the defendant, Volvo, raised on
7 the pleading. Essentially: are you claiming for road
8 sweeping trucks? The answer that has been given in
9 correspondence is: we are not claiming for the
10 superstructures, eg the road sweeping element. We are
11 claiming for, if you like, the truck body and chassis.

12 I do not want to use those terms in a technical
13 sense, as I will no doubt get it wrong, but I had
14 understood that there is now satisfaction on both sides
15 that that issue has gone away in the Dawson case.

16 THE PRESIDENT: If you can perhaps make that clear in your
17 amendment and then --

18 MR WARD: My Lord, yes.

19 THE PRESIDENT: -- that paragraph 16 can drop out.

20 MR. HOSKINS: Absolutely. We are ad idem on the position.

21 THE PRESIDENT: Just so it is clear on the pleadings. The
22 less -- the more we can simplify what are complex claims
23 and pleadings, clearly the better.

24 MR. HOSKINS: I think the same issue may arise in relation
25 to Ryder. I do not have the Ryder defence in mind, but

1 again, they have clarified in correspondence that they
2 are not claiming for superstructures. So if the same
3 issue arises, if we can tidy that up, that would also
4 make sense.

5 THE PRESIDENT: Yes.

6 MR. BREALEY: We will clarify in --

7 THE PRESIDENT: Thank you.

8 On VSW, Ms. Demetriou, we have had a letter to which
9 I think everyone has been copied -- I am sorry,
10 Mr. Pickford?

11 MR. PICKFORD: Sir, I had a footnote point in relation to
12 the service of pleadings on parties in other
13 proceedings, which is that if there are going to be
14 non-confidential versions produced to deal with whatever
15 confidentiality issues may still arise, it might be
16 sensible for two provisions to be included in any order.

17 Firstly, that the obligation to produce those and
18 provide them should lie on the person who is the
19 originator of the pleading. So the claimants need to
20 produce the non-confidential version of the claimants'
21 rather than for that then to be something that we need
22 to do as defendants in those proceedings.

23 Secondly, there should probably be a period of seven
24 days after the primary date for exchange of pleadings to
25 allow any non-confidential -- to allow any

1 confidentiality issues to be addressed and the
2 non-confidential versions to be produced. This is
3 merely a practical suggestion.

4 THE PRESIDENT: Let us see. To be provided to the parties
5 who are not the party --

6 MR. PICKFORD: Yes.

7 THE PRESIDENT: -- on whom the pleading is formally served.

8 MR. PICKFORD: Yes. So obviously, that is not to delay the
9 primary date for any of these things, but just to ensure
10 there is some period and mechanism by which it is clear
11 how many non-confidential versions which seem to be
12 contemplated are going to be produced and when they are
13 going to be produced by.

14 MR JUSTICE FANCOURT: So the draft non-confidential version
15 will be served at the same time on the respondent and
16 then there will be seven days in effect for the
17 respondent to --

18 MR. PICKFORD: Yes, that is fine, or, "No, if you can deal
19 with point X", or whatever.

20 THE PRESIDENT: Yes, Ms. Bacon.

21 MS. BACON: I have a non-footnote point as well as
22 a footnote to Mr. Pickford's footnote.

23 I will start with the non-footnote point, and it
24 concerns the timing, because we of course are not
25 defendants in the Dawson group claim. We are going to

1 have to serve an amended defence in relation to the VSW
2 proceedings and as currently envisaged, as you have just
3 ordered, we are going to get the amended pleading from
4 VSW, which is envisaged to encompass significant factual
5 amendments, at the end of June.

6 Having not ever seen a draft of that until that
7 point, we are only going to -- at the moment, it seems
8 to be envisaged we will have only until 20 September to
9 do our defence. That really is not enough because the
10 20 September date was set for Mr. Harris' clients on the
11 basis that they had seen the majority of the amendments
12 already, and they are only going to have to address the
13 Scania amendments. Our position is different, in that
14 we will not have seen any of the VSW amendments that are
15 proposed to be made until the end of June.

16 So we will need longer than 20 September, bearing in
17 mind, not least, the holiday period.

18 MR. PICKFORD: Sir --

19 MS. DEMETRIOU: Sir, that is incorrect because Mr. Harris
20 has not seen any of the VSW amendments, so Ms. Bacon's
21 client is in the same position.

22 MS. BACON: No, I am referring to Mr. Harris having seen the
23 Dawsongroup amendments. The date of 20 September was
24 set by reference to the Dawsongroup issue, and it seems
25 to be being transposed over to the VSW amendments, which

1 are different. That is the problem.

2 MS. DEMETRIOU: Sir, I see that, but then what is sauce for
3 the goose is the sauce for the gander. We have been
4 subject to the same timetables as the other claimants.
5 They can look at the Royal Mail pleadings and also get
6 to work on it in the same way you have asked us to do.

7 MR. PICKFORD: Sir, there is one pertinent difference here,
8 which is each claimant only has to produce its own
9 pleading. As defendants and as DAF defendants, we are
10 in every single one of these claims and we have to,
11 therefore, produce our amended pleading in every claim.

12 Whilst we were content when it was framed merely in
13 terms of the Dawsongroup plea that we should be
14 responding by 20 September, we are very concerned if we
15 have to respond to everyone's pleaded plea at the same
16 time, because that is a very substantially greater task.

17 (Pause)

18 (The Tribunal conferred)

19 THE PRESIDENT: Yes, we can see some force in that. We have
20 not heard from you yet, Mr. Jowell, but what we
21 envisage -- having listened to that, what we are minded
22 to do is to say 4 October for the defences, and that
23 will be all defences can come on the same day.

24 MR. JOWELL: May I just add one point, which is --

25 THE PRESIDENT: Can I just say, Mr. Jowell, you appear for

1 MAN, I think.

2 MR. JOWELL: I do. I am grateful.

3 It is simply this: that in some ways, it is much
4 easier to make these allegations for the claimants than
5 it is for the defendants to respond to them, because the
6 claimants can effectively look at the Commission file or
7 potentially the Scania decision and take an allegation
8 or an apparent -- something that appears on the
9 documents and simply make the allegations in their
10 pleadings.

11 The defendants, on the other hand, we have to
12 potentially go back to employees, sometimes
13 ex-employees, in order to plead back to those
14 allegations.

15 So whilst we are content with 4 October as
16 a provisional date, we would ask that it be made clear
17 that in light of the allegations, it may be necessary
18 for us to apply back for further time.

19 THE PRESIDENT: Well, there is a general liberty to apply,
20 but this is not litigation that comes out of nowhere.
21 You have all been through a very detailed Commission
22 investigation. The allegations have been put to you.
23 You have considered them over years in *Interchange*
24 with the Commission. One would expect that
25 a lot of the investigation and consideration of what you

1 admit and what you do not has been done.

2 So I am not over-sympathetic, speaking for myself,
3 to the suggestion that, "Oh, this is going to create
4 a whole new round of exploratory investigation". But
5 there is a general liberty to apply and you will have to
6 make your case as to really why 4 October is not
7 adequate, but I would expect that it would be.

8 MR. JOWELL: Very well.

9 THE PRESIDENT: Ms. Bacon.

10 MS. BACON: Sir, I am grateful.

11 So my second point, which was the footnote point and
12 relates to Mr. Pickford's point about redactions, is
13 that we need to remember that the file disclosure in the
14 BT Group of cases is different to the Commission file
15 disclosure in the VSW cases, because there were some
16 documents that were not relevant to the VSW cases that
17 were to BT.

18 For that reason, I think that we need to ensure that
19 when the pleadings are exchanged, the redactions redact
20 out any references to file disclosure that has not been
21 carried across to VSW and Ryder. It applies across the
22 board.

23 THE PRESIDENT: Yes. Well, no, that will be done. We will
24 see if that starts causing problems.

25 MR. BREALEY: It starts causing problems because we have

1 seen Ms. Bacon's approach to relevance on the Scania
2 decision. It may well be that we would need to have the
3 same access to the documents that have been pleaded in
4 Royal Mail, but we will see where we go.

5 THE PRESIDENT: We will see. It is much easier to address
6 this --

7 MR. BREALEY: It is.

8 THE PRESIDENT: -- when you see what you get, and then you
9 can make a complaint, rather than in the abstract.

10 MS. DEMETRIOU: Sir, first of all, it is difficult to see on
11 what basis the documents that are referred to could be
12 said to be confidential. But, secondly, our deadline
13 which the Tribunal set, with which of course we will
14 comply, but with difficulty, is based -- was based on
15 the fact that we would have the Royal Mail pleading at
16 least.

17 THE PRESIDENT: Yes.

18 MS. DEMETRIOU: Sir, we would like confirmation that we will
19 be provided with the Royal Mail pleading forthwith.
20 Otherwise, the deadline really seriously is in doubt.

21 THE PRESIDENT: Yes. My understanding was that while
22 previously there were differences as to which documents
23 are treated as confidential for other cases, there is
24 now a common acceptance that all contemporaneous
25 documents from the Commission file are non-confidential.

1 We will come on to confidentiality, but that did
2 seem to be one thing on which all the skeleton arguments
3 we had received were agreed.

4 Ms. Bacon, if that is so, then the fact that
5 previously there were different degrees of disclosure
6 does not matter because these are non-confidential
7 documents.

8 MR. BREALEY: That is the point I was making.

9 THE PRESIDENT: Yes. I mean, I do not think -- it is really
10 a question for -- this is the Royal Mail and BT claims
11 which have been amended. So this is, Mr. Ward, your
12 pleading. Is there any difficulty that you can see of
13 those pleadings being made available to VSW and Ryder?

14 MR WARD: Someone behind me is saying yes, and if I may just
15 check it is the same point I was about to make.

16 THE PRESIDENT: Yes. (Pause)

17 MR WARD: Yes, there is just one point. I alluded to it
18 earlier. At the moment, we understand that DAF are
19 considering whether any of the documents we have
20 referred to in the existing pleading are in fact within
21 the category that they say should be -- should retain
22 the protection of confidentiality, such as RFI
23 responses. So once that confirmation has been given and
24 subject to any necessary redaction for that, then there
25 is not a difficulty.

1 THE PRESIDENT: Well, can that be done, Mr. Pickford?

2 MR. PICKFORD: Yes.

3 THE PRESIDENT: Can that be done next week?

4 MR. PICKFORD: I was just trying to seek instructions, sir.

5 MS. DEMETRIOU: Sir, in the meantime --

6 THE PRESIDENT: Just a minute.

7 MS. DEMETRIOU: I am so sorry. (Pause)

8 MR. PICKFORD: Yes, sir, within seven days.

9 THE PRESIDENT: Within seven days.

10 I think that concludes the main pleading. We

11 slightly delayed taking -- no, it doesn't.

12 MR. BREALEY: One further point on that. I do not quite

13 understand what that exercise is, because the -- if DAF

14 are going to be taking away documents which are said to

15 be the RFI responses, surely everybody, all of the

16 claimants, should be able to see these responses.

17 THE PRESIDENT: Well, let us see what happens, because at

18 the moment, it is not clear whether anything is going to

19 be taken away at all.

20 MR. BREALEY: No.

21 THE PRESIDENT: I am not entirely clear what the position

22 is.

23 MR. BREALEY: No.

24 THE PRESIDENT: It is very hard until you --

25 MR. BREALEY: Yes.

1 THE PRESIDENT: -- as I say, to discuss this in the abstract
2 until you actually see a pleading where something, it is
3 said, has to be redacted.

4 MS. DEMETRIOU: Sir, might I suggest -- because this is, to
5 some extent, an exercise discussing it in the abstract,
6 and what we do not want is a very heavily redacted
7 Royal Mail pleading after a week.

8 THE PRESIDENT: Yes.

9 MS. DEMETRIOU: So might I suggest in parallel it is
10 disclosed into the confidentiality ring at least so that
11 the legal advisers can see it when preparing our draft
12 pleading?

13 THE PRESIDENT: The inner ring, then, that would be?

14 MS. DEMETRIOU: Yes, the inner ring.

15 THE PRESIDENT: Mr. Pickford, I think this is --

16 MR. PICKFORD: Sir, so far, the rings have actually been
17 kept separate so that what is confidential information
18 in one ring is not automatically confidential
19 information in another ring. I think what Ms. Demetriou
20 is suggesting is effectively that we breach that
21 principle that so far --

22 THE PRESIDENT: Well, no, she is --

23 MR. PICKFORD: -- or at least we may.

24 THE PRESIDENT: No, what she is saying is can the pleading
25 not be disclosed now forthwith into the inner

1 confidentiality ring in VSW?

2 MS. DEMETRIOU: Exactly.

3 THE PRESIDENT: It is not a general revision of the rings,
4 it is just saying -- so that Ms. Demetriou and her team
5 can start work.

6 MR. PICKFORD: I will just seek instructions. (Pause)

7 We are content with that.

8 THE PRESIDENT: Yes. So, Mr. Ward, that has been accepted,
9 so that can be disclosed tomorrow.

10 MR WARD: Yes.

11 THE PRESIDENT: On that basis, I think we will take
12 a five-minute break.

13 (12.00 pm)

14 (A short break)

15 (12.11 pm)

16 THE PRESIDENT: There are two other small pleading issues.
17 We had a letter from Messrs Hausfeld regarding the claim
18 brought by another client of theirs, Kent Frozen Foods,
19 in the High Court. The expectation is that that claim
20 will be transferred to the Tribunal. As I understand
21 it, the other members of the group which Kent Frozen
22 Foods are part of are in the Wolseley action; is that
23 right?

24 MS. DEMETRIOU: That is correct.

25 THE PRESIDENT: What is expected then is that that action

1 can be consolidated with the Wolseley action; is that
2 right?

3 MS. DEMETRIOU: That is correct.

4 THE PRESIDENT: I will see, wearing my other hat, whether
5 that transfer can be done fairly promptly. I do not
6 know if you have written or your solicitors have written
7 to the defendants in that claim to ask for their
8 consent -- it makes it quicker, obviously -- to
9 a transfer, but if not, if that can be done. So if it
10 can be done by consent, that will help.

11 MS. DEMETRIOU: Yes, I understand that they have consented
12 to transfer and so I think that it can now proceed.

13 THE PRESIDENT: Yes, well, I will look into that next week.
14 If it can be then -- obviously we cannot, I think,
15 formally consolidate until it is here, but I will ask if
16 anyone is objecting to that. Once it is consolidated,
17 once you amend your claim, it can be brought in as
18 an additional claimant without having a separate set of
19 pleadings.

20 MS. DEMETRIOU: We agree.

21 THE PRESIDENT: I am sure nobody wants to plead a whole
22 separate defence just to a Kent Frozen Foods claim.

23 Is there any limitation issue that arises from the
24 later issue?

25 MS. DEMETRIOU: I am not sure of the answer, but we will, if

1 necessary, give the undertaking on relation-back.

2 THE PRESIDENT: Yes. If, on that basis -- I do not know --

3 I have not looked at the Kent Frozen Foods particulars.

4 Is it against the same defendants as the Wolseley claim?

5 MS. DEMETRIOU: It is just -- it has only been brought

6 against DAF. Sorry, DAF and Iveco, I am so sorry. Just

7 Iveco. Somebody else should answer your questions.

8 THE PRESIDENT: It is only against Iveco?

9 MS. BACON: Yes. Sir, I can confirm we have consented to

10 transfer, but not yet to consolidation. The position is

11 this: we do not object in principle to consolidation,

12 but we do want to consider whether that might impact on

13 our position, particularly in relation to limitation.

14 But there may also be other issues too. So we just need

15 a bit of time to work through those, but in principle,

16 we do not consent -- we do not object to consolidation.

17 What I was going to propose is that the issue of

18 consolidation is dealt with at first in correspondence

19 and we can then set out our position on whether there

20 might need to be any consequential orders to take into

21 account, for example, limitation.

22 THE PRESIDENT: Yes.

23 MS. BACON: I hope that will then be capable of being dealt

24 with by consent.

25 Given that the proceedings have not been transferred

1 yet, the Tribunal is not in a position today to make
2 an order in that regard. We hope that through
3 correspondence, we will not need to trouble the Tribunal
4 with that --

5 THE PRESIDENT: Yes.

6 MS. BACON: -- in future.

7 THE PRESIDENT: Well, if it can be agreed, we can make the
8 order without any further hearing, of course.

9 MS. BACON: Yes.

10 THE PRESIDENT: What I am seeking to avoid, because there
11 will not be another hearing, I think, before the
12 defences are served, that you have a separate defence to
13 the Kent Frozen Foods' action.

14 MS. BACON: Yes, yes.

15 MR JUSTICE FANCOURT: Am I right in assuming this: it is
16 a bare claim form without particulars of claim at this
17 stage?

18 MS. BACON: No, there are particulars of claim.

19 MR JUSTICE FANCOURT: There are particulars of claim there.
20 Yes, okay.

21 MS. BACON: Can I suggest that the parties discuss and
22 endeavour to reach agreement on how that is going to be
23 done and with then liberty to come to ask for an order
24 if an order needs to be made by the Tribunal?

25 THE PRESIDENT: We certainly cannot make any order today,

1 that is clear.

2 MS. BACON: No.

3 MS. DEMETRIOU: We are content with the approach suggested
4 by Ms. Bacon.

5 THE PRESIDENT: I think that is sensible. I just wanted to
6 flag it up in the hope it can be dealt with.

7 The other, I think, small point is I think,
8 Mr. Ward, your client, is it BT, seeks the costs thrown
9 away by reason of the DAF amendment to its defence to
10 remove a foreign law pleading, is that right, and that
11 has been agreed?

12 MR WARD: That is not right today. It is being pursued in
13 correspondence.

14 THE PRESIDENT: I thought it had been agreed and we were
15 asked to make an order.

16 MR WARD: Is that right? Then you are ahead of me.

17 THE PRESIDENT: I was looking at DAF's skeleton at --

18 MR. PICKFORD: Sir, we do not object to the payment of the
19 costs. What we do object to is that there should be any
20 attempt to determine them now --

21 THE PRESIDENT: No. We are not going to -- I am not
22 proposing --

23 MR. PICKFORD: -- which is what was asked for by the
24 claimants.

25 THE PRESIDENT: -- to determine them now.

1 MR. PICKFORD: We --

2 THE PRESIDENT: It is paragraph 119, I think, of your --

3 Mr. Pickford, of your skeleton, the very last paragraph,

4 your skeleton argument --

5 MR. PICKFORD: Yes.

6 THE PRESIDENT: -- that you say you do not oppose an order

7 in principle at this stage. But we're not going to

8 assess them now, but we can -- if not opposed, we might

9 as well make the order.

10 MR WARD: Yes.

11 THE PRESIDENT: I assume you do not object to that,

12 Mr. Ward?

13 MR WARD: We would be delighted.

14 THE PRESIDENT: So costs -- those costs to be assessed, if

15 not agreed.

16 The next item is the geographic scope of the VSW

17 claims. I think, Ms. Demetriou, your clients have

18 stated that they are only claiming in respect of trucks

19 for which the purchasing entities are in the EEA?

20 MS. DEMETRIOU: That is correct, and everyone, I think, now

21 agrees that this is no longer a live issue.

22 THE PRESIDENT: Yes. Can I then just ask you, if one looks

23 at the particulars of claim as they stand in the

24 Wolseley action, which is Wolseley page 3 at -- A3.1 in

25 our bundles, at tab 2, your particulars of claim,

1 obviously before any amendment.

2 On page 4 {VSW-A3/2/4}, you deal with the Metro
3 Group. In paragraph 12(iii) it says, I think:

4 "During the cartel period, claimant C99... purchased
5 trucks which were put out for tender and negotiated..."

6 As I understand it, claimant C99 is located in
7 Russia.

8 MS. DEMETRIOU: Yes.

9 THE PRESIDENT: So not within the EEA. Is that dropping
10 out?

11 MS. DEMETRIOU: It is, and we will make -- we will tidy it
12 up and make the amendments when we serve our amended
13 pleading at the end of June.

14 THE PRESIDENT: Yes. The other aspect, while we have that
15 open, is that a number of these claimants within Metro
16 are claiming, I think, for -- it says "companies which
17 paid for logistics services rendered by other Metro
18 Group claimants". So they are not claiming for
19 purchases of trucks, but seem to be claiming for
20 logistic services.

21 MS. DEMETRIOU: Yes, so they are indirect --

22 THE PRESIDENT: I did not quite understand what that claim
23 is, really.

24 MS. DEMETRIOU: Well, it is an indirect purchase claim in
25 effect, and so they are claiming for an overcharge that

1 they were required to pay for the logistic services,
2 which used the relevant trucks.

3 THE PRESIDENT: To another member of the same group?

4 MS. DEMETRIOU: Yes, because there were transfers within the
5 group.

6 THE PRESIDENT: The other -- the company that bought the
7 truck is claiming for the --

8 MS. DEMETRIOU: Yes.

9 THE PRESIDENT: -- price of the truck.

10 MS. DEMETRIOU: That is correct. Then there is a question
11 as to whether the overcharge will have been passed on
12 within the group to the company that used the service.
13 So obviously, we are not going to pursue any
14 double-recovery.

15 THE PRESIDENT: Yes.

16 MS. DEMETRIOU: But there will be a question as to the
17 extent to which the loss rests with one or the other
18 member of the group.

19 THE PRESIDENT: Yes, but, I mean -- so basically, the focus
20 can be on the company that bought it. All you are
21 saying is -- well, you are guarding -- is this right,
22 have I understood it? You are just guarding the defence
23 against saying it was not that entity that suffered the
24 loss.

25 MS. DEMETRIOU: That is exactly right.

1 THE PRESIDENT: It was another entity within the same group.

2 MS. DEMETRIOU: That is precisely it.

3 THE PRESIDENT: Yes. But we do not need to get into how the
4 logistics services were charged and so on.

5 MS. DEMETRIOU: No, we say not.

6 THE PRESIDENT: Yes. Yes, I see. I was just trying to
7 understand that. Well, it may be that is not accepted
8 by everyone, but I just wanted to see what is going on.

9 MR. HARRIS: Just on a point of clarification, especially
10 because there are going to be amendments, but in your
11 order -- in the Tribunal's order, which is in the VSW
12 claim at A4, tab 11, if people want to turn it up, at
13 paragraph number 4 on amendment to the pleadings
14 {VSW-A4/11/3}, what the order was, was that --

15 THE PRESIDENT: Just a minute.

16 MR. HARRIS: I beg your pardon.

17 THE PRESIDENT: If you want us to turn it up, we have to get
18 it out. A4, tab?

19 MR. HARRIS: It is VSW A4, tab 11, internal page 3 and
20 paragraph number 4.

21 THE PRESIDENT: Yes.

22 MR. HARRIS: Quite -- if I may respectfully put it like
23 this, the nature of the clarification to the amendment
24 was as to whether or not the claims, and I am reading
25 from the bottom line:

1 "... extend to trucks purchased and/or leased
2 outside the EEA."

3 What the VSW claimants have confirmed in
4 correspondence is as to the location of the purchasing
5 entity as opposed to the purchase. That can make
6 a material difference to issues such as applicable law,
7 which was one of the reasons we thought that
8 clarification was going to be made.

9 It stands in sharp contrast, for instance, to
10 Ryder's clarification in correspondence, and I believe
11 also in their skeleton argument at paragraph 8, where
12 they have said:

13 "Ryder's claims do not relate to trucks purchased
14 outside the EEA."

15 What we do not want there to be is any confusion
16 about, for instance, a non-EEA VSW claimant having
17 purchased in the EEA or vice versa. In other words, it
18 is as per the order. What needs clarification is where
19 did purchases or leases take place, as opposed to: where
20 is the physical location of the purchaser or the lessor?

21 It may be that that can be clarified in
22 correspondence or in the next round of pleadings, but
23 that was what the order was about and it is not quite
24 there yet in VSW.

25 THE PRESIDENT: Yes, although if the location of the

1 purchaser is in the EEA and the suppliers are all in the
2 EEA --

3 MR. HARRIS: You would have thought that that one -- you
4 would have thought that, but the reason for the order
5 was to be specific about where the purchases or the
6 leases are taking place. What is the territory of the
7 purchase or the lease? As I say, there can be other
8 permutations of this.

9 THE PRESIDENT: By the territory of the purchase, you mean
10 the entering into of the contract?

11 MR. HARRIS: Yes, that is right. I think -- yes, exactly,
12 essentially, yes.

13 THE PRESIDENT: Yes.

14 MS. DEMETRIOU: Sir, on this point, obviously that is the
15 question, the very question, that we were asked by the
16 Tribunal to address in detail in the very detailed
17 procurement statements.

18 THE PRESIDENT: Yes.

19 MS. DEMETRIOU: Now, Mr. Harris' solicitors have not come
20 back with any queries on those statements. Mr. Harris
21 will well know that the upshot of all that is that
22 trucks were bought in the country of the purchaser --

23 THE PRESIDENT: Yes.

24 MS. DEMETRIOU: -- so that is the basis on which we pleaded.
25 I cannot see at all that there is any lack of clarity.

1 THE PRESIDENT: I think, Mr. Harris, I have looked at those
2 statements, and there are a series of them and they are
3 quite detailed. If there are any queries arising from
4 that, they should be pursued in the first instance in
5 correspondence.

6 MR. HARRIS: We will take aboard that message. We have
7 a specific query in the light of that.

8 THE PRESIDENT: Well, you pursue that in correspondence.

9 MR. HARRIS: Thanks.

10 MR. PICKFORD: Sir, I am asked to make clear on the
11 inter-company transfer point, lest silence be taken as
12 acquiescence, we do say that an issue may arise in
13 relation to those inter-company transfers, but I think
14 the Tribunal should be aware of that.

15 THE PRESIDENT: Yes. That is, no doubt, why the different
16 companies remain in the pleading.

17 Apart from that, is there anything else on the -- so
18 you will -- when amending, Ms. Demetriou, you will deal
19 with the non-EEA entities. There are about five of
20 them, I think --

21 MS. DEMETRIOU: We will. We will do that.

22 THE PRESIDENT: -- the Russian, the Swiss and the Kazakh
23 company, and how they relate or whether they, in fact,
24 drop out.

25 MS. DEMETRIOU: We will.

1 THE PRESIDENT: The next question then is the foreign law
2 issue. VSW have provided now tables showing the places
3 in which the trucks were acquired. There are various
4 places where one can find that. There is one in,
5 I think, it is, VSW? Well, it is put, I think, into
6 a -- conveniently into a witness statement of, is it,
7 Mr. Farrell on the VSW-B bundle at tab 9.

8 MS. BACON: Sir, yes, that is our witness statement.

9 THE PRESIDENT: Yes.

10 MS. BACON: It is paragraph 44. I am sorry --

11 THE PRESIDENT: Tab 9.

12 MS. BACON: Yes.

13 THE PRESIDENT: It is page -- internal page 12 {VSW-B/9/12}.

14 MS. BACON: Mr. Farrell has done his best, but --

15 THE PRESIDENT: Just a minute. Let everyone turn it up.

16 No, I do not -- this concerns only, of course, the VSW
17 action.

18 MS. BACON: Yes, this issue arises in relation to VSW only.

19 Now, at paragraph 44 onwards, Mr. Farrell explains
20 what we have done with the data that we have received.
21 Now, this table is based on our current understanding of
22 the data. As Mr. Farrell explained in the previous
23 paragraph in paragraph 45, that data still is materially
24 incomplete, and what we have done is to send Hausfeld
25 the letter yesterday regarding the remaining

1 inconsistencies and omissions in the data.

2 One of the problems has been that the data provided
3 to us is not consistent with the claim, so with the
4 schedules annexed to the claim. Secondly, they are also
5 not, in many cases, consistent with our own internal
6 data.

7 So there has been quite an arduous process of trying
8 to match and match up those data to ensure that they are
9 referring to trucks that we know about, particularly
10 where we do not have things like VIN numbers or where
11 there are duplicative or incorrect VIN numbers.

12 THE PRESIDENT: Yes.

13 MS. BACON: So that is ongoing. So the table here sets out
14 the position as we currently understand it to be. We
15 are not saying that is a complete and exhaustive
16 statement because of the issues that we are still
17 pursuing.

18 THE PRESIDENT: But I think there are two quite separate
19 points here, are there not, Ms. Bacon? One is: what is
20 the exact number of trucks purchased and which trucks in
21 these different jurisdictions? The other was to get
22 a sense of where is the preponderance of the
23 purchasing --

24 MS. BACON: Yes.

25 THE PRESIDENT: -- such that getting into foreign law is

1 proportionate?

2 MS. BACON: Yes, and that is --

3 THE PRESIDENT: Because whether there were, you know, seven
4 trucks bought in Spain or nine trucks bought in Spain
5 does not really make a difference from the point of view
6 of whether anyone was going to embark on an extensive
7 investigation of Spanish law.

8 MS. BACON: That is correct. That is exactly why our
9 current position, as set out by Mr. Farrell, is that,
10 pragmatically, we are willing to take a view based on
11 the information that we currently have. We are not
12 saying that our consideration of the foreign law point
13 should be held up until we have nailed down exactly
14 which trucks were bought where.

15 What we are saying is, pragmatically, let us proceed
16 on the basis of the information that we have got, just
17 caveat it that we may at some point need to revisit that
18 if it turns out that there is a whole load of trucks
19 purchased somewhere that are not included on this table.

20 THE PRESIDENT: Yes. So you reserve your position in that
21 respect.

22 MS. BACON: Reserve the position, but we are prepared to
23 proceed on that basis. The issue now between us is now
24 not really a very major one, it is purely a timing
25 issue.

1 THE PRESIDENT: Yes, and you want to plead foreign law, as
2 I understand it. You, I think, have indicated that in
3 particular, reflecting these percentages, as it were, am
4 I right, it is German -- is it German, Swedish --

5 MS. BACON: And French. Those are the foreign laws that are
6 currently in contention, and we have set out a proposed
7 timetable.

8 THE PRESIDENT: Yes.

9 MS. BACON: I think it is fair to say that there is not
10 a huge amount of difference between us and the VSW
11 claimants. It is a matter of weeks. Our timetable does
12 seem largely to align with the timetable that the
13 Tribunal set in relation to the other pleading
14 amendments earlier this morning. So we have proposed
15 that we provide draft amended pleadings by 28 June.

16 THE PRESIDENT: Yes.

17 MS. BACON: Then --

18 THE PRESIDENT: It is in your skeleton.

19 MS. BACON: At paragraph 6, yes.

20 THE PRESIDENT: Just one moment. So that is in the
21 skeletons bundle.

22 MS. BACON: That is the timetable that has been proposed on
23 behalf of all of the defendants, following some
24 agreement between us.

25 THE PRESIDENT: That is for all defendants.

1 MS. BACON: There is one important point to make about
2 that --
3 THE PRESIDENT: Just a minute.
4 MS. BACON: Yes.
5 THE PRESIDENT: Just a minute. (Pause)
6 Do not forget, you know which document you are about
7 to go to, we do not.
8 MS. BACON: If it is called up on the screen, if you -- if
9 you could call up the letter sent by Slaughter and May
10 with this timetable.
11 THE PRESIDENT: You need a reference, I think.
12 MS. BACON: VSW bundles D1, tab 162, but it is also
13 extracted at paragraph 6 of our skeleton argument
14 {VSW-D1/162/1}.
15 THE PRESIDENT: That is the timetable that has been agreed
16 by all the defendants.
17 MS. BACON: By the defendants, but not by the claimants.
18 THE PRESIDENT: So it is a question, Ms. Demetriou -- and
19 the proposal, which seems to us sensible, is that the
20 foreign law is pleaded separately.
21 MS. DEMETRIOU: Yes.
22 THE PRESIDENT: So we have separate pleadings on foreign
23 law. It does not impact on the other pleadings. You
24 see the timetable set out there.
25 MS. DEMETRIOU: Yes.

1 THE PRESIDENT: What is your position on that?

2 MS. DEMETRIOU: Sir, in light -- we had been pushing for
3 a more compressed timetable, but in light of the
4 timetable that the Tribunal has laid down this morning
5 for the other pleadings, we would be content with this,
6 save that we need a little more than four weeks to
7 respond to all the pleadings that are going to be coming
8 in our direction. So we would propose respectfully that
9 our reply also aligns with the other timetable and we
10 submit it -- we lodge it on 4 October. (Pause)

11 At the moment, we do not know what the defendants
12 and the additional defendants are going to plead, and
13 obviously there is then a matter of investigating the
14 various foreign laws on which they may seek to rely.

15 THE PRESIDENT: Yes.

16 MS. DEMETRIOU: So that is why we seek to bring the
17 timetable into alignment with the other one.

18 THE PRESIDENT: Yes.

19 MS. DEMETRIOU: We would ask the Tribunal to set 4 October.

20 THE PRESIDENT: Is that -- does that go to item (d)?

21 MS. DEMETRIOU: (d), 6(d).

22 THE PRESIDENT: It is better to have a date anyway,
23 4 October.

24 MS. DEMETRIOU: Yes.

25 THE PRESIDENT: Yes. Is there any opposition to that? Very

1 well, we will make that order.

2 In the pleadings where you plead what foreign law
3 applies, you say, can you also indicate the consequence
4 of that that you wish to rely on?

5 MS. BACON: As in for which issue in the case?

6 THE PRESIDENT: Yes.

7 MS. BACON: That is naturally the case. We are not just
8 going to say, "French law, full stop". Indeed, I think
9 it is going to be tied specifically to certain issues
10 where the relevant foreign law differs materially from
11 English law, or at least in our submission does.

12 THE PRESIDENT: Yes, because obviously that is what we need
13 to get a hold of.

14 Is there any other issue on the foreign law
15 pleadings?

16 Can we then move to the next item, which is
17 confidentiality, where I think there seems to have been
18 constructive progress made. We understand it has now
19 been agreed that all contemporaneous documents from the
20 Commission file should be treated as non-confidential.

21 Secondly, as regards requests for information from
22 the Commission and replies and also OFT requests and
23 replies to the OFT, it has been proposed that they
24 should be in the outer confidentiality ring, and that
25 will also include, I think, five documents identified by

1 Scania as well.

2 I know, Ms. Demetriou, your clients' position is
3 that one should distinguish between requests for
4 information concerning leniency and requests for
5 information that are made under Article 18 of -- by the
6 Commission.

7 I understand the point you are making. I think, for
8 present purposes, I would rather not get into that. Let
9 us put them all into the outer confidentiality ring
10 without distinguishing between them. If, then, there is
11 a particular response that you feel is important and
12 should be non-confidential, you can raise it on that
13 response, rather than addressing and spending time on
14 that issue. I mean, you will have them all in the outer
15 confidentiality ring.

16 MS. DEMETRIOU: Yes.

17 THE PRESIDENT: So you will be able to work on them and, to
18 some extent, take instructions. Then if you need, on
19 any one you say, to take further instructions and
20 discuss with someone within the client who is not in the
21 outer confidentiality ring, you can raise it first in
22 correspondence and, if necessary, we can rule on it.
23 But I think for the moment, can we deal with it that
24 way?

25 MS. DEMETRIOU: Sir, provisionally, yes. I say

1 "provisionally" because at midnight last night,
2 Freshfields sent my solicitors some correspondence they
3 had had with the European Commission. The
4 correspondence took -- happened in March, so I think
5 Freshfields wrote to the European Commission in March to
6 ask about the Commission's attitude to this and the
7 Commission responded on 11 March.

8 As I say, that was sent to us at midnight last
9 night. We had not seen it previously. I have not
10 properly myself -- I was sent it this morning just
11 before the CMC -- properly digested it.

12 THE PRESIDENT: Yes.

13 MS. DEMETRIOU: So can I just reserve our position formally
14 on this until I have read those letters and maybe come
15 back after the short adjournment?

16 THE PRESIDENT: You can come back tomorrow, if necessary, on
17 that.

18 MS. DEMETRIOU: I am very grateful.

19 THE PRESIDENT: Then there remain the request made by Ryder
20 and VSW to be able to discuss these RFIs and replies,
21 which are in the outer confidentiality ring, between you
22 because you are in different confidentiality rings.
23 That is made by both those sets of claimants. Is that
24 opposed by anyone?

25 MR. HOSKINS: It is not opposed subject to the

1 confidentiality rings being amended appropriately. VSW
2 have proposed an amendment, but we have not had the time
3 to see if it works. I would suggest in principle no
4 opposition, but let us work out between us what
5 amendments need to be in there.

6 THE PRESIDENT: It does seem sensible. It is rather
7 artificial at the moment. If you are able to produce --
8 I do not know if that can be produced overnight -- an
9 amendment --

10 MS. DEMETRIOU: We have already produced it and we sent it
11 to the defendants, I think, probably two days ago.

12 THE PRESIDENT: Well, see if, in discussion after court --

13 MS. DEMETRIOU: Yes.

14 THE PRESIDENT: -- or overnight, we can have an agreed order
15 in that respect tomorrow.

16 MS. DEMETRIOU: Of course.

17 THE PRESIDENT: We can make it and that will assist you in
18 making progress.

19 MS. DEMETRIOU: That is very helpful.

20 THE PRESIDENT: Is there anything else on confidentiality?
21 Good.

22 We then move on to preliminary issues. I think it
23 is important to distinguish between two kinds of
24 preliminary issue, if I can put it that way.

25 One is what one might say is a common issue across

1 many of the claims where the logic for having that as
2 a preliminary issue is really to ensure consistency,
3 because, as was acknowledged by everyone at the last
4 CMC, we wish to avoid, so far as possible, inconsistent
5 rulings in the different actions. It is clearly going
6 to be impossible to have a full trial on all these cases
7 together. It would be unmanageable.

8 So if there are certain significant issues that are
9 capable of being heard in advance involving everyone and
10 having one decision binding on everyone and, if
11 necessary, it goes on appeal, that is clearly desirable.

12 This is, therefore, quite separate from all those
13 authorities of which we have been reminded, insofar as
14 we need reminding, about taking preliminary issues and
15 when it is inadvisable and so on. We are in a very
16 special situation here.

17 The second kind of preliminary issue is one that may
18 arise only in one of the actions or two of the actions
19 where hearing it first may have the benefit of avoiding
20 significant costs in terms of disclosure or expert
21 evidence, depending on the way it is decided, and
22 different considerations might apply.

23 So with that introduction, the first -- the Tribunal
24 raised, as you know, in the provisional agenda a number
25 of points to be thought about. The first one was

1 concerning the question of binding recitals in the
2 decision. That is something that clearly applies across
3 all the cases. It would have to be decided in every
4 case. If it is a live issue, there seems a lot of force
5 in doing it as a common preliminary issue.

6 The real question is, it seems to us: now that you
7 have all helpfully pleaded as to which of the recitals
8 are, as a matter of fact, admitted, whether there remain
9 recitals that are not admitted that are important and
10 relevant such that this is worthwhile as an exercise?
11 Because even if the defendants say, "This recital, we do
12 not accept it is binding, but we admit the facts in that
13 paragraph of the decision", well, it is an academic
14 exercise.

15 We have not, of course, carried out the exercise of
16 going through all the admissions and seen what is left,
17 but I imagine the claimants have looked at this. We
18 would like some help, please, as to whether, in the
19 light of what has been admitted, there really are live
20 issues remaining such that it is worth pursuing.

21 MS. DEMETRIOU: Our position is not. So we take the view
22 that the defendants have admitted a fair amount of the
23 material in the recitals, even in circumstances where
24 they do not accept that it is binding. So we think in
25 those circumstances, it would not be an efficient way

1 forward to have a preliminary issue on the legal point
2 of the bindingness of the recitals.

3 Also, of course, the Tribunal has seen that there is
4 now going to be an exercise of serving amended pleadings
5 based on the Scania decision and access to file
6 documents, which, to some extent, will also supersede
7 that exercise, and those will be pleaded back to by the
8 defendants.

9 THE PRESIDENT: Yes, but there is nothing in the Scania
10 decision which would be binding on anyone.

11 MS. DEMETRIOU: No, of course not.

12 THE PRESIDENT: So that does not really affect this point.

13 MS. DEMETRIOU: No, it does not affect the point, but the
14 reason it is relevant to the point is because we say
15 that in substance, the real issue for the Tribunal when
16 it comes to trial is not formally whether the recitals
17 are binding, but whether they are admitted or not.

18 THE PRESIDENT: Yes.

19 MS. DEMETRIOU: We say in light of what we have seen so far,
20 we think that there is no purpose, really, that would be
21 served by having a preliminary issue on the legal point.

22 THE PRESIDENT: Yes.

23 MS. DEMETRIOU: One point that I do wish to raise, and I do
24 not think it is appropriate to go into detail here about
25 the detail of the pleadings, but one -- the approach

1 that all of the defendants have taken in pleading to the
2 recitals is not to plead to conduct of the other
3 cartelists.

4 We are content with that, in a sense, if they accept
5 that, for example -- so we can see that it might be
6 a problem. So if one defendant settles, then we would
7 not want the other defendants to say -- to attempt to
8 reopen that defendant's pleading.

9 So if they are all content, essentially, to be bound
10 by the pleading of the defendant as regards their own
11 conduct, then there is no need for them to plead to the
12 other cartelists' conduct. But they know about the
13 conduct because they are in the cartel together.

14 So we are not going to -- so they have taken the
15 blanket approach, sir. So they have said, "We are not
16 pleading to the other conduct of the other addressees".
17 We just want to forestall a practical issue which may
18 arise, which is where defendant number 1 has admitted to
19 a particular recital and then the case -- the
20 proceedings are compromised vis-à-vis that defendant,
21 that issue is then reopened by the other defendants, so
22 the issue of the liability of D1 who has settled in
23 circumstances where that defendant has admitted the
24 conduct in the particular recital.

25 I am not saying it needs to be determined now, but

1 I just want to flag it as a possible issue. We are
2 content to pursue it in correspondence.

3 THE PRESIDENT: We are not sure we quite understand the
4 point.

5 MS. DEMETRIOU: Sir, let me try again. That is obviously my
6 fault.

7 So each of the defendants in pleading to the
8 recitals have made admissions in relation to their own
9 conduct --

10 THE PRESIDENT: Yes.

11 MS. DEMETRIOU: -- but have taken an approach of principle,
12 which is that they are not going to plead as regards
13 conduct of the other cartelists. That is true even
14 where they must know of the conduct because it relates
15 to meetings that they were both at, for example.

16 THE PRESIDENT: Yes.

17 MS. DEMETRIOU: So we do not see any --

18 THE PRESIDENT: Just to interrupt you, of course, in many
19 cases, they may not because --

20 MS. DEMETRIOU: They may not in some cases.

21 THE PRESIDENT: -- if there is a joint meeting, yes, they
22 will know whom they met, but --

23 MS. DEMETRIOU: Sir, they may not in some cases, but they
24 have taken a blanket approach to that.

25 THE PRESIDENT: Yes.

1 MS. DEMETRIOU: The practical difficulty that may arise down
2 the line, and we just flag it -- we are content to
3 pursue this in correspondence and try and reach
4 agreement -- is that in circumstances where, for
5 example, defendant number 1 has admitted conduct in
6 a recital and then drops out of the litigation because
7 the proceedings have been compromised --

8 THE PRESIDENT: Yes.

9 MS. DEMETRIOU: -- then it would be unfortunate if the other
10 defendants could then in the trial allege that they do
11 not accept that admission that has been made as regards
12 defendant 1.

13 HODGE MALEK QC: Then you do not want to be left having to
14 prove something you were not ready to deal with.

15 MS. DEMETRIOU: Yes, exactly. So at the moment, we do not
16 have to prove D1's admissions because they have admitted
17 it. If they drop out of the litigation, we do not want
18 to be in a position potentially on the eve of the trial
19 where we are having to prove D1's conduct because
20 although they have admitted it, formally speaking, the
21 other defendants have not pleaded to the point. That is
22 the issue.

23 THE PRESIDENT: Yes. Yes, I now understand. (Pause)

24 (The Tribunal conferred)

25 I think your approach is, we think, the right one:

1 raise it in correspondence.

2 MS. DEMETRIOU: We will. We flag it now, but we will raise
3 it in correspondence.

4 THE PRESIDENT: Yes, but your primary position on the
5 question is: no point having a preliminary issue.

6 Yes, I think we will go through everybody.

7 Mr. Brealey.

8 MR. BREALEY: We would endorse that and there are clearly --
9 there is still an issue, but things have narrowed
10 substantially. We would say it is not cost-effective
11 now to take this as a separate issue.

12 THE PRESIDENT: Yes.

13 Mr. Ward.

14 MR WARD: Yes, our position is the same as Mr. Brealey. The
15 schedules they have served do contain extensive
16 admissions. That is not to say there is nothing left
17 that is disputed, but we agree that it is not worthwhile
18 to pursue as a preliminary issue.

19 THE PRESIDENT: Yes.

20 Yes, we do not at the moment have much sense of what
21 still is disputed and how important that might be.

22 I mean, you have all exercised your judgment on that.

23 MR WARD: I am not sure if there is a shorthand way to make
24 that clear.

25 THE PRESIDENT: Yes.

1 MR WARD: But I can try if you --

2 THE PRESIDENT: Well, let us hear from the defendants.

3 Mr. Harris.

4 MR. HARRIS: Sir, yes. There is a problem in principle with
5 what my learned friends for the claimants have just
6 said, which is if they are going to rely or to attempt
7 to rely upon any recital as being binding, it having not
8 been admitted in fact, and we do not accept that that is
9 binding, that needs to be resolved, because otherwise,
10 you are not going to have consistency of approach across
11 the cases.

12 Now is the time for that to be resolved, because if
13 it is resolved in the claimants' favour that it is
14 binding, then obviously disclosure does not need to be
15 given. If it turns out that they are wrong, then
16 disclosure does need to be given in both directions. It
17 is as simple as that.

18 What we have not heard from a single one of the
19 claimants so far is that there are no alleged binding
20 findings that they are going to rely upon. So the
21 dichotomy is very simple: either they say categorically,
22 "We are not in the future going to be relying upon
23 a single recital as containing a binding finding,
24 instead we are going to pursue it in the manner in which
25 they have drawn to your attention, namely detailed

1 factual pleadings and detailed factual responses", no
2 problem.

3 But what we cannot have is a situation where they
4 are going to have their cake and eat it, where they say,
5 "We will have all of these detailed factual pleadings,
6 and yet later on there are still some binding findings
7 that we want to have resolved". So that is the simple
8 point and it needs to be grappled with now before
9 disclosure.

10 HODGE MALEK QC: Surely that is what they are seeking.

11 MR. HARRIS: Sir --

12 HODGE MALEK QC: But they are seeking --

13 MR. HARRIS: No, what was just submitted was -- Mr. Brealey
14 said, "There is still an issue, but let us not do it
15 because it is not cost-effective". Ms. Demetriou said
16 no purpose to be served and Mr. Ward said the same. So
17 they are saying there should not be a hearing on the
18 bindingness of any findings.

19 HODGE MALEK QC: What they are saying is that given that the
20 scope of the -- what is in issue now on that
21 bindingness, it is probably not worth a candle to
22 resolve that in advance of the rest of the case.

23 But to me, a lot depends on how many recitals and
24 which recitals are in issue. If it is a tiny
25 proportion, I would be quite happy to leave it until

1 later. If, on the other hand, it is something
2 substantial, then clearly the view may be different. So
3 why do not you take us to your schedule and let us have
4 a look?

5 MR. HARRIS: First of all, Mr. Malek, we accept that if it
6 is really de minimis, then it might be capable of being
7 left. But what it does not deal with is the point about
8 disclosure. So if it is binding as a matter of law upon
9 this Tribunal and, for that matter, upon all of us on
10 this side of the bench, then we do not -- then it is
11 binding and that is it, there is no disclosure.

12 That is the point that has not been grappled with by
13 my learned friends. You cannot say later on -- let us
14 say, I do not know, six months out from trial or
15 something that it suddenly turns out that there is
16 actually a fairly large schedule of things that are said
17 by the claimants to be binding and then there is
18 an issue there about whether or not that is right as
19 a matter of law and it turns out that they are wrong and
20 it is not binding, then disclosure is long since past
21 and we would have to go through further disclosure.

22 That is deeply inefficient.

23 HODGE MALEK QC: You know which recitals they say are
24 binding.

25 MR. HARRIS: Well, no, we do not, as at today. So my

1 practical --

2 MS. DEMETRIOU: Sir, I am so sorry to interrupt, but we have
3 got pleadings on this point.

4 THE PRESIDENT: You do surely, because the claimants have
5 all served pleadings saying what is in their --

6 MR. HARRIS: But what they are now saying is that -- their
7 submissions just a moment ago is that is largely
8 overtaken by the fact that we want to present detailed
9 factual pleadings. So for example --

10 THE PRESIDENT: I think what we are concerned with at the
11 moment is something different. The fact they are
12 detailed factual pleadings, that is the basis of their
13 case. The question is: what can be -- of their
14 pleadings can be contested or what is, in their
15 assertions, binding?

16 You have seen the recitals they say are binding.
17 You know what is admitted and you can, therefore, see
18 what is left and work out whether what is left seems to
19 be significant.

20 The claimants say, "We think it is so insignificant
21 it is not worth having a preliminary issue". You may
22 point us to some of the recitals that they say are
23 binding which have not been admitted. You say, "Look at
24 that recital. They are relying on it. It is clearly
25 something of great significance. It would involve a lot

1 of disclosure, et cetera, but we just need to see it to
2 form a view."

3 MR. HARRIS: That is fair enough. Whether it is them in the
4 first instance that do a bit more work or us, that work
5 can be done and we can set a timetable for that.

6 But, in my submission, if there are any examples of
7 those sorts of bindingness -- alleged bindingness [of
8 the] recitals, then that needs -- the nettle needs to be
9 grasped before the disclosure process develops further.

10 THE PRESIDENT: We are rather hoping that we deal with that
11 today; not setting the timetable, but actually
12 addressing it today.

13 MS. DEMETRIOU: Sir, what would assist, actually, is
14 Mr. Malek asked Mr. Harris to go to his schedule in
15 fact --

16 HODGE MALEK QC: I want to look at his schedule, yes.

17 MS. DEMETRIOU: -- Daimler alone amongst the defendants was
18 excused from this task, and they do not have a schedule.
19 But it would, in fact, be very helpful for Daimler to
20 produce one, because the difference between what Daimler
21 had done previously, which is why they were initially
22 excused from the exercise, and what the other defendants
23 have now done is that there is a difference because
24 Daimler have only admitted a recital in circumstances
25 where they admit everything within that recital. But

1 the other defendants have been rather more helpful and
2 admitted particular sentences within a recital.

3 So we get a much better picture from the others as
4 to what facts they -- so it would be very helpful if
5 Mr. Harris' client could now carry out the same exercise
6 as the other defendants.

7 MR. HARRIS: Sir, this is a last-minute suggestion that we
8 saw in my learned friend's skeleton. What happened, and
9 let me just cast the Tribunal's mind back to how this
10 developed, was there was a question at the last CMC as
11 to whether or not there were going to be allegations of
12 bindingness in the findings and the defendants would
13 respond.

14 We alone responded to make admissions of fact, as
15 well as whether or not, as a matter of law, there was
16 bindingness within that particular finding. That is why
17 we were not ordered to provide additional schedules.
18 So, in fact, we had done expressly what the Tribunal
19 contemplated and ordered, where -- and that is why we
20 were not ordered to do anything else.

21 May I also remind the Tribunal that at that stage,
22 quite properly -- and indeed, repeatedly you, sir, said
23 that this was not -- this schedule that the complaint is
24 now made about was not intended to be, in your words,
25 sir, complex. It was not intended to be voluminous and

1 item by item.

2 So we did exactly what it was that was envisaged by
3 the Tribunal. We were not ordered to do anything else.
4 So we reject the suggestion that we have done anything
5 or that we should go --

6 THE PRESIDENT: Never mind, Mr. Harris. I will interrupt
7 you. We are not interested at the moment whether it is
8 said you did anything wrong or not. We are not
9 exercising any judgment on that.

10 What we would like is, in practical terms going
11 forward, to know exactly what Daimler, from the
12 decision, admits. You have admitted certain recitals.
13 The point that was made is whether it was right to do it
14 that way or not. It does not matter.

15 There may be other recitals where, although you do
16 not admit the whole of the recital because this is
17 a long paragraph, you actually admit the second
18 sentence, and that that is not at the moment clear and
19 it is something that should be clarified.

20 That is all that needs to be done. Is that
21 something that you resist doing?

22 MR. HARRIS: That is something we resist doing because what
23 we need to do is we need to have a composite set, across
24 the defendants as a whole, of points that are said to be
25 binding findings that are then opposed so we can

1 identify whether or not there is any point in having
2 a preliminary issue on the question of bindingness.

3 So this is not a Daimler-specific exercise. May
4 I also say, and I say this if I can muster up some
5 vehemence on this point, that the -- this is
6 an expensive --

7 THE PRESIDENT: I am sure you can.

8 MR. HARRIS: I take -- I am grateful for that indication.

9 The point is that this is a very expensive exercise.
10 If you have to go through -- and it takes some time. We
11 do not see this as being separate from, if you like,
12 a composite approach on what there is that should be
13 litigated as a preliminary issue on bindingness. So we
14 do resist the notion that there should be some separate
15 Daimler-specific exercise in going through line by line.

16 THE PRESIDENT: Just a moment. (Pause)

17 (The Tribunal conferred)

18 Yes, okay. Thank you, Mr. Harris. We want to hear
19 from the other defendants before lunch.

20 MR. HARRIS: I am grateful. Should I just say if there is
21 to be some further exercise, then it should take some
22 alignment with the pleading amendment.

23 THE PRESIDENT: Yes.

24 MR. HARRIS: I am grateful.

25 THE PRESIDENT: Mr. Pickford?

1 MR. PICKFORD: Thank you, sir.

2 We are somewhat surprised by the position taken by
3 some of the claimants on this issue. There is a certain
4 amount of schizophrenia in that if we take, for
5 instance, the BCLP claimants, they take a point against
6 us in relation to parts of our pleading where we have
7 mitigated or denied claims and they say those parts are
8 strike-able because we are not -- it is not open to us
9 to make those pleas because they are contrary to binding
10 findings against us. That is what they say in their
11 reply pleadings to our defence.

12 THE PRESIDENT: Yes.

13 MR. PICKFORD: Notwithstanding that they thought it was
14 sufficiently important to raise those points in their
15 replies, today we hear that they say that there is
16 really nothing of any consequence here that justifies
17 a preliminary issue, and we do not really understand how
18 they reconcile the two.

19 Certainly if one looks at the schedules that were
20 produced, we understand what the Tribunal wanted was the
21 claimants to indicate those recitals that they relied
22 upon and then what we pleaded back to was, of those,
23 what we admitted or not.

24 THE PRESIDENT: Yes.

25 MR. PICKFORD: We have not distilled that table further, but

1 one can see quite easily if one wants to go, for
2 instance, our plea in relation to that, which is --

3 THE PRESIDENT: Shall we have -- it might help to look at
4 something specific just in the five minutes before
5 lunch --

6 MR. PICKFORD: Yes.

7 THE PRESIDENT: -- before we adjourn.

8 MR. PICKFORD: Yes, so if we --

9 THE PRESIDENT: That is in your --

10 MR. PICKFORD: It is in VSW A4, tab 37. (Pause)

11 So if one starts on page 3 {VSW-A4/37/3}, that is
12 where our table begins. The very first recital we come
13 to, we see that the second sentence is not admitted;
14 similarly the fourth sentence. The second sentence
15 concerns the issue of commercially sensitive
16 information. This is one of the main points that is
17 taken against us by the BCLP claimants, because we say
18 that no commercially sensitive information was exchanged
19 in the sense of information that was such as to affect
20 pricing decisions. They say in response to that, "You
21 cannot say that because it has been found against you as
22 a binding finding by the Commission".

23 One can see that is a central issue in this case.
24 How one determines that issue necessarily involves
25 an assessment of whether this recital is or is not

1 binding, or indeed that sentence of that recital is or
2 is not binding against us.

3 HODGE MALEK QC: Which is -- the fourth sentence is just as
4 important.

5 MR. PICKFORD: Indeed.

6 THE PRESIDENT: This is the sort of thing that, if it is not
7 binding, might involve witness evidence explaining it.

8 MR. PICKFORD: Indeed. I mean, it obviously will.

9 THE PRESIDENT: Yes.

10 MR. PICKFORD: I could continue, but we have 47, 48, 49, 50,
11 51, 52, 53, 54, 55, every single recital, there are
12 aspects of those recitals that are not admitted.

13 THE PRESIDENT: Yes.

14 MR. PICKFORD: For instance, the second sentence of 47 is
15 not admitted. That is the sentence beginning:

16 "By exchanging current gross prices and gross price
17 lists, combined with other information gathered through
18 market intelligence, the Addressees were better able to
19 calculate their competitors' approximate prices."

20 THE PRESIDENT: Which is fairly important, yes.

21 MR. PICKFORD: These are the central issues in this case.

22 So we do not understand how, at one and the same
23 time, the claimants can say, "Well, we have got you,
24 these are all binding", and then to stand up today and
25 say, "Well, these issues are really of very little

1 consequence at all".

2 THE PRESIDENT: Yes.

3 HODGE MALEK QC: They are certainly of great consequence to
4 you, are they not, Mr. Pickford?

5 MR. PICKFORD: Indeed.

6 THE PRESIDENT: I think it would be helpful to hear from all
7 the defendants before we rise.

8 MR. PICKFORD: I am assuming that the Tribunal does not need
9 to continue through this table, which illustrates my
10 point again and again.

11 THE PRESIDENT: We can look at it a little over the
12 adjournment.

13 MR. PICKFORD: I am grateful.

14 THE PRESIDENT: Ms. Bacon.

15 MS. BACON: Yes. Our position is exactly the same as that
16 of Mr. Pickford. For the Tribunal's reference, our
17 schedule is at tab 36 of that bundle. As you will see,
18 if you want to look at that over the short adjournment,
19 there are, as with Mr. Pickford, a number of recitals of
20 which there are either no admissions made or no
21 significant admissions are made in relation to
22 particular sentences.

23 That creates precisely the problem that has been
24 identified. It is not a case of just waiting until
25 trial, but witness evidence, disclosure, will have to be

1 provided if those recitals are not binding. So we do
2 need to know now on what basis we are going -- and, of
3 course, the claimants' position is not -- they are
4 binding because all of this formed the essential basis
5 for the findings in the operative part. So on the one
6 hand, they are saying this is binding because it is an
7 essential basis, ie it is important. It is described as
8 the very conduct which is at issue in these proceedings.
9 On the other hand, they are saying now it is all
10 irrelevant.

11 So I suggest that the way forward would be that the
12 claimants should now go away and decide whether they are
13 going to withdraw some of the claims of bindingness of
14 some of these recitals --

15 THE PRESIDENT: Well, we want to --

16 MS. BACON: -- or whether they maintain them.

17 THE PRESIDENT: We will hear from you later, Ms. Demetriou.

18 MS. BACON: Yes. That was our suggestion.

19 THE PRESIDENT: We are keen to try and progress this today.

20 Thank you. So that is your schedule.

21 Mr. Hoskins?

22 MR. HOSKINS: We are in a very similar position. This is
23 clearly a candidate for a preliminary issue. The
24 problem is, to be frank, that nobody has had the time to
25 do the exercise which the Tribunal would like to have

1 been done because, given the supplementary schedules
2 were served last Friday -- and what is required is
3 a comparative exercise between what the claimants say is
4 binding recital-wise and what has now been admitted?

5 That clearly is an exercise that has to be done to take
6 us to where this conversation started: how much is at
7 stake and how important is it?

8 HODGE MALEK QC: I do not think we necessarily have to have
9 another round of material to decide whether or not there
10 are sufficient gaps between the parties on this issue.
11 If you look at what Mr. Pickford has shown us, that is
12 pretty key stuff.

13 MR. HOSKINS: Certainly if one was to -- if that is the
14 Tribunal's view, then the next question is what is the
15 preliminary issue? I think, sir, to be frank, you still
16 would need another round of pleadings, because even if
17 a preliminary issue is deemed to be appropriate, we
18 would still need to work out between us: preliminary
19 issue in relation to what?

20 I think there may be some narrowing. Rather than
21 having a preliminary issue, just taking what the initial
22 offers were from the claimants on what we say is binding
23 and what we have now had in detail from the defendants,
24 I imagine if there is to be a preliminary issue, it will
25 be narrowed somewhat if there were to be a further round

1 in which that comparison is done and the claimants
2 consider their position.

3 Sir, I understand the point you are making to me
4 that this looks like it should be a preliminary issue,
5 but I think there may have to be another -- at least
6 further thought given as to what that is going to look
7 like and what particular recitals it is going to
8 concern.

9 THE PRESIDENT: Yes, thank you.

10 Mr. Jowell.

11 MR. JOWELL: Yes, we would take a very similar stance to
12 Mr. Hoskins. We think that the next stage is in fact to
13 identify, really, what are the recitals that the
14 claimants say are binding...

15 MS. DEMETRIOU: We have done that.

16 MR. JOWELL: Forgive me. Let me finish my sentence; and
17 that the defendants say are not admitted and that the
18 defendants also say are not binding.

19 Once you have identified all of the recitals falling
20 into those parts, then one is in a position to assess --
21 to do a final assessment of the type that Mr. Malek
22 envisages or envisaged and also to identify which of
23 those are then suitable for a determination by
24 preliminary issue, because it may be that some of the
25 bits that are -- fall into that category or into that

1 intersection are, in fact, so small it is simply not
2 worth taking as a preliminary issue. Others may --
3 THE PRESIDENT: Well, it looks as though the material is now
4 there in -- subject to any question about Daimler, but
5 certainly is there for most of you. It is just~-- it
6 may be Mr. Hoskins' point that no one has had the time
7 yet to go through it and carry out that exercise, and
8 that is the situation.

9 Just give me a moment. (Pause)

10 (The Tribunal conferred)

11 I think we want, in response to that, to hear from
12 the claimants and then we will consider the question
13 over the adjournment.

14 So, Ms. Demetriou, take the same order, you have
15 heard what has been said and what Mr. Pickford has shown
16 us.

17 MS. DEMETRIOU: Sir, so, first of all, I think the Tribunal
18 has this point, but we, of course, do not accept or
19 concede that the recitals that we have said in our
20 pleading are binding are somehow not binding.

21 THE PRESIDENT: Yes.

22 MS. DEMETRIOU: So the issue we have been dealing with is
23 whether it is worth determining the area of dispute in
24 a preliminary issue.

25 Now, I just make one point, which is that in some

1 circumstances, the reason why it seems that conduct has
2 not been admitted is because it is expressed in very
3 general terms in the decision. The purpose of the
4 amended pleading that we are going to serve is to plead
5 in more detail precisely how we say the cartel operated.

6 THE PRESIDENT: Yes.

7 MS. DEMETRIOU: So we do say that this exercise, although
8 the determination of whether there should be
9 a preliminary issue, whether it is worthwhile to have
10 one, should await that round of pleadings, because it
11 may be that once we have pleaded more specifically to
12 the operation of the cartel~-- that the issues will
13 narrow once we have had the response.

14 THE PRESIDENT: Because you are pleading out the facts that
15 are in the recitals, as well as what you have from the
16 Commission file documents.

17 MS. DEMETRIOU: Exactly. So where, for example, the
18 recitals say that information that was exchanged was
19 confidential and not very much detail is given as to the
20 nature of that information, then that is something which
21 may well be refined and narrowed once the next round of
22 pleadings happens.

23 So we do think it is -- we are dubious, as I have
24 said, that this will be a preliminary issue that is
25 worthwhile, but we do say, in any event, it is premature

1 to determine the point now because of this round of
2 pleadings that is going to give greater flesh to the
3 bones on the facts.

4 THE PRESIDENT: Yes, thank you.

5 Mr. Brealey?

6 MR. BREALEY: Yes. Forgive me. We agree with that. If
7 I can just go back to that DAF recital --

8 THE PRESIDENT: Yes.

9 MR. BREALEY: -- I think when one looks at this, a lot of
10 the sentence -- it goes sentence by sentences.

11 THE PRESIDENT: Yes.

12 MR. BREALEY: Clearly, DAF has not admitted some key points.
13 That is a given. So I think you were taken to 46, the
14 first one {VSW-A4/37/3}:

15 "All of these elements constituted commercially
16 sensitive information."

17 That is exchange of gross price lists.

18 We say that is binding because that is in the
19 settlement decision. If they want to not admit it,
20 okay, we will have to have an argument about it. We
21 could go on to another example --

22 THE PRESIDENT: But I think the point, to interrupt you --

23 MR. BREALEY: Yes.

24 THE PRESIDENT: The point that is being made is, yes,
25 clearly there has to be an argument whether it is

1 binding or not, but if you win that argument, then that
2 obviates a whole raft of witness evidence because it is
3 not open to them, if you are right, to put in that
4 evidence.

5 MR. BREALEY: I take that point, but is it -- do we need
6 a preliminary issue to determine that an exchange of
7 gross price lists between competitors does not concern
8 commercially sensitive information?

9 THE PRESIDENT: Well, it looks as though we do, because it
10 is not admitted.

11 MR. BREALEY: Well, if the issue is we have got to give up
12 on the issue of binding recitals unless we have the
13 preliminary issue, then clearly we need the preliminary
14 issue because we still say this is an essential part of
15 the settlement decision on any view, on any realistic
16 view. I do not really know why they are not admitting
17 it. Are we going to have a preliminary issue?

18 THE PRESIDENT: Well, if it is important -- what we are
19 trying to establish is not whether they are right not to
20 admit it or not. They have taken their position, as
21 they are entitled to do. It may be you will, therefore,
22 succeed, but whether what is not admitted is important
23 to whether it is Daimler's case, if it is de minimis,
24 then clearly a preliminary issue is not worthwhile.

25 MR. BREALEY: If that is the test, then clearly it is more

1 than de minimis.

2 THE PRESIDENT: Yes.

3 MR. BREALEY: The other example I was just going to refer
4 to, just another flavour, if one goes to 51, so if we go
5 down on that page, 51 so the Tribunal has another
6 example.

7 THE PRESIDENT: Yes.

8 MR. BREALEY: So if you have got it in hard copy, so 51, if
9 one goes down to sentence 7 {VSW-A4/37/7}, which says:

10 "In addition to agreements on the levels of price
11 increases, the participants regularly informed each
12 other ..."

13 You will see there the answer:

14 "As to the seventh sentence, it is admitted that
15 this information was exchanged."

16 Which is helpful:

17 "It is not admitted that the exchanges took place
18 regularly."

19 The question is, you know, are we to have
20 a preliminary issue as to whether regular -- we will
21 have the documents, but it is more than a de minimis
22 fact as to whether there were regular exchanges. We
23 will say, having seen the Commission file, there were
24 clearly regular exchanges. We do not know how they
25 could possibly not admit that.

1 Again, if the test is: is it more than de minimis,
2 then clearly this is more than de minimis.

3 THE PRESIDENT: Well, that might be a matter of assessment,
4 what is 'regularly', but if I look down to 52, for
5 example, point 5 {VSW-A4/37/8}:

6 "During a meeting on 6 April... in the context of
7 an industry association meeting... the participants
8 co-ordinated on the introduction of Euro 3 standard
9 compliant trucks."

10 "The fifth sentence is admitted in respect of the
11 representatives at the meeting. It is otherwise not
12 admitted."

13 MR. BREALEY: Yes.

14 THE PRESIDENT: That might be rather important because what
15 is said there is that there was this collusion on
16 introduction of Euro 3 standard compliance and that is
17 not admitted. So, otherwise, one may get into evidence
18 what happened at the meeting.

19 MR. BREALEY: Also -- just in response to that, when one
20 sees the document which we saw at the last application
21 for disclosure, it is as plain as a pikestaff as to what
22 the Commission has said there. We have got no idea why
23 they would not admit it because the document clearly
24 shows there is some sort of collusion.

25 THE PRESIDENT: Yes.

1 MR. BREALEY: So we are trying to make an assessment as to
2 whether we need a further preliminary --

3 THE PRESIDENT: Yes.

4 MR. BREALEY: -- issue to sort this out or whether it will
5 be done by way of evidence.

6 We will be pleading a lot of this -- sorry, just we
7 will plead this meeting in our amended particulars of
8 claim. The document is there. It is what it is. If
9 they want to not admit it, notwithstanding the plain
10 text, then they can do that.

11 THE PRESIDENT: Yes.

12 MR. BREALEY: It is a question of the cost balance.

13 THE PRESIDENT: Yes.

14 MR. BREALEY: But we certainly are not going to give up --

15 THE PRESIDENT: Yes.

16 MR. BREALEY: -- on whether it is binding or it is of high
17 relevance.

18 THE PRESIDENT: Yes.

19 Mr. Ward?

20 MR WARD: Sir, I associate myself with Mr. Brealey's
21 remarks. In the case, of course, of BT/Royal Mail,
22 there is already a pleading in which we have essentially
23 tried to particularise what lies beneath these rather
24 general recitals; not exhaustively, but insofar as we
25 have tried to explain the operation of the cartel using

1 the file.

2 Now, that exercise is imperfect because this was
3 a settlement decision. It is based on leniency
4 materials that we have not seen. But nevertheless, in
5 the way that Ms. Demetriou anticipated, we have, in
6 fact, actually done that.

7 If you are turning it up, sir, it is in bundle A --
8 sorry.

9 THE PRESIDENT: A1 for Royal Mail.

10 MR WARD: Yes, it is, A1 at tab 2. (Pause)

11 You will see -- perhaps the easiest place to start
12 is on page 10 of that pleading. (Pause)

13 MR. PICKFORD: I have been asked to say: I am sure Mr. Ward
14 has this well on board, but there is still a process to
15 be gone through to make sure that anything that is
16 currently marked as confidential is indeed something
17 that can be re-designated. So just a little warning
18 that he respects that.

19 MR WARD: I was not going to read out the particulars of any
20 particular piece of evidence that was relied on, but the
21 scheme of what we have done is explained on page 10 and
22 basically says that we -- what follows, if you look, is
23 essentially illustrations that we have found from the
24 file of the various recitals.

25 So just to read the part that Mr. Pickford cannot

1 possibly object to, I think, just by way of example,
2 page 11, 18(f), I will not read any particular bullets,
3 but the introduction to this seems unexceptionable:

4 "During the relevant period, as found by the
5 Commission in Article 1 of the settlement decision, the
6 cartel has colluded on gross price increases. In
7 particular, as found by the Commission in recital 51,
8 the cartelists regularly informed each other of their
9 planned gross price increases. In some cases, as found
10 by the Commission in recital 51, the cartelists agreed
11 their respective gross prices increases, for example."

12 That is a flavour of the form of the pleading. It
13 does not presume to be exhaustive because we just do not
14 have the materials to make it exhaustive.

15 So that, I think, is what Ms. Demetriou was
16 anticipating her clients were going to do.

17 We do have a concern about the preliminary issue in
18 its ability to lead to, essentially, satellite
19 litigation, appeals and delay. Like Mr. Brealey, we
20 think a number of the non-admissions are frankly lacking
21 in reality.

22 One aspect of that is, of course, as I hope I can be
23 forgiven for reemphasising, it is a settlement decision
24 and there is an issue, in our view, as to whether it is
25 open to the defendants to resile from the admissions

1 they made to the Commission. That is something, if
2 there was going to be a preliminary issue, that we would
3 want part of.

4 THE PRESIDENT: It clearly could be part of it. This is the
5 *Iberian* point of abuse of process --

6 MR WARD: Yes, exactly so, sir.

7 THE PRESIDENT: -- because that clearly would be part of --
8 but I am looking -- you have drawn our attention to
9 18(f) and how it is pleaded. The question is what is
10 admitted. If one goes to the defence at tab 3 at
11 page 10 where I think the defendants have pleaded to
12 this --

13 MR WARD: Yes.

14 THE PRESIDENT: -- one sees certain things are denied --

15 MR WARD: Yes.

16 THE PRESIDENT: -- which you may say, well, the decision has
17 established that.

18 MR WARD: It may do, and obviously, what we have been trying
19 to do is, bluntly, put the case both ways. We start
20 from the proposition we think the decision is
21 essentially binding insofar as it describes the cartel.
22 However, given the opposition we encountered to that
23 proposition, we also have pleaded fairly extensively how
24 we think it operated really just by way of illustrating
25 what is, of course, a summary decision.

1 So I do not want the Tribunal to have the impression
2 that we think the non-admissions are de minimis. We do
3 not. It is really just a question of whether it is
4 efficient to try a preliminary issue and run the risk of
5 satellite litigation or litigate this out at trial,
6 having regard to the fact that there are substantial
7 factual pleadings in any event.

8 THE PRESIDENT: Yes. But our other concern, as I indicated,
9 this is an issue where one reason we are thinking about
10 preliminary issues is consistency.

11 MR WARD: Yes.

12 THE PRESIDENT: I understand, if the only case we had was
13 Royal Mail/BT v DAF, you would say: what is the point of
14 doing this in advance? It will all be there at the
15 trial. Do it in advance, you have an appeal in advance,
16 et cetera. It holds it all up. I can fully understand.

17 But our other concern is if this is going to be
18 an issue in every case and we are going to have -- one
19 Tribunal is going to have to decide it, it is important
20 it is decided the same way. Of course, what is decided,
21 let us suppose, as you are, indeed, urging, the
22 Royal Mail/BT claim against DAF goes first, this is
23 decided one way. Well, it is not going to bind any of
24 the other defendants or indeed any of the other
25 claimants.

1 MR WARD: Well, sir --

2 THE PRESIDENT: One might get, on different argument,
3 a different outcome. Then we are precisely in the area
4 of inconsistent judgments that we are keen to avoid.

5 So it is slightly different to the normal situation
6 where you say, "Well, we do not want this to be taken
7 first, it can be done at trial".

8 MR WARD: Sir, I of course hear what you say, and no doubt
9 this afternoon we are going to have a wider discussion
10 about timetabling.

11 THE PRESIDENT: Yes.

12 MR WARD: There is a concern on my client's part for
13 BT/Royal Mail that they are so far ahead that they
14 should not be held back, but that is for this afternoon.

15 On the topic of consistency, though, I do also want
16 to associate myself with what Ms. Demetriou said about
17 Daimler because they have not pleaded out with the same
18 degree of clarity as the other defendants.

19 THE PRESIDENT: Yes.

20 MR WARD: I can show you their schedule if you like, but
21 essentially, they give a list of recitals where
22 admissions are made, but they are very clear they have
23 not done a line by line job of the kind that you have
24 seen from DAF.

25 If you want to look at it --

1 THE PRESIDENT: No, I have seen it. That's a subsidiary
2 point in a sense.

3 MR WARD: Perhaps it is, sir.

4 THE PRESIDENT: I think we have heard from all the
5 claimants. I think we will consider this over the
6 adjournment. We will -- I think we are -- we have got
7 two days. I think we are making good progress. I think
8 we can say 2.30.

9 (1.24 pm)

10 (The luncheon adjournment)

11 (2.34 pm)

12 THE PRESIDENT: We have considered this over the adjournment
13 in the light of the submissions we heard from everyone.
14 We do think, in the interests of consistency across all
15 the cases, that it is appropriate and, on balance,
16 beneficial to have a preliminary issue.

17 The wording we would suggest, and we leave this with
18 you to consider overnight and we can finalise it
19 tomorrow, is as follows: which of the following
20 statements in the decision are binding on the defendants
21 such that they cannot contest them in these proceedings?

22 It is phrased that way so that it covers both
23 binding as a matter of EU law or under the *Iberian*
24 principle of abuse of process.

25 That is, as we see it, a pure question of law. What

1 we envisage, then, is for the claimants -- and we think
2 it would be helpful if the claimants' representatives
3 could get together and produce a single table setting
4 out the statements which they wish to rely on. They
5 will, of course, use the tables that have been served
6 and where matters are admitted by everyone, they can be
7 omitted from this list, because it is unnecessary to
8 consider them.

9 So we will have a series of statements, and then
10 that there should be, rather as in the Scott schedule,
11 a column for each defendant group to express its
12 position saying "dispute", that it is disputed and if --
13 because there may be some differences between the
14 different defendants, and that will make it clear what
15 the position is.

16 Then there is the question of when this might be
17 heard. We think it -- we do not see why the process
18 cannot be gone through while preparing that table while
19 pleadings are still being prepared, but we think it
20 should be heard after pleadings have closed, because it
21 may be, on the completion of pleadings, some of these
22 statements can then be deleted.

23 MR. BREALEY: Yes.

24 THE PRESIDENT: So what we envisage is that it might be
25 heard in mid-November. We would have thought, subject

1 to anything you wish to say, given the number of parties
2 involved, that two to three days is appropriate, and
3 that it would be prudent to allow three. If there were
4 less parties, we would say two, but given the number of
5 parties, three.

6 MR. BREALEY: I am obliged.

7 THE PRESIDENT: It is a question of setting a timetable for
8 that process.

9 MR WARD: Sir --

10 THE PRESIDENT: Mr. Ward.

11 MR WARD: -- I will hope you forgive me if I just revert
12 back to the question of Daimler's schedule which we
13 touched on this morning.

14 THE PRESIDENT: Yes.

15 MR WARD: Would you mind turning it up?

16 THE PRESIDENT: Yes.

17 MR WARD: It is in the Dawsongroup bundle, A1.

18 THE PRESIDENT: I appreciate what you say -- about to say,
19 I think, because I looked at the Daimler schedule. If
20 there is now this new schedule, Daimler will be pleading
21 in it --

22 MR WARD: That is fine.

23 THE PRESIDENT: -- to each statement and will that not
24 supersede the problem that you have at the moment?

25 MR WARD: I hope so, but forgive me, maybe I misunderstood.

1 I thought I heard you say it was for the claimants to
2 set out a table saying which of the statements they
3 wished to rely on, ie those which are, as it were, not
4 accepted to be binding.

5 THE PRESIDENT: Yes.

6 MR WARD: The difficulty with Daimler's statement is it only
7 pleads to entire paragraphs where they are prepared, I
8 think I understand it to mean, to make admission as to
9 the entire recital.

10 THE PRESIDENT: Yes.

11 MR WARD: So the problem is, to take, for example,
12 a literally random example --

13 THE PRESIDENT: You want me to look at it?

14 MR WARD: I think it is easier.

15 THE PRESIDENT: Very well.

16 MR WARD: It is in the Dawson bundle A1 under tab 22. No
17 doubt it is elsewhere as well.

18 THE PRESIDENT: Dawson, A1 at tab 22.

19 MR WARD: Tab 22. (Pause)

20 THE PRESIDENT: Yes.

21 MR WARD: If we could just look at the first page,
22 paragraph 2 {DG-A1/22/1}:

23 "Daimler makes this statement pursuant to [the
24 Tribunal's orders] ..."

25 Which were the Tribunal's orders in November.

1 THE PRESIDENT: Yes.

2 MR WARD: Then at paragraph 3, it recites its understanding
3 of that order:

4 "Whilst Daimler is not required to admit or deny in
5 fact any of the recitals identified by the Claimants of
6 the Orders, to assist ..."

7 Then it makes various points. Then (b)
8 {DG-A1/22/2}:

9 "No admissions have been made in respect of recitals
10 which cannot presently be admitted in their entirety
11 without qualification, explanation or further
12 investigation. That is not to say Daimler will deny or
13 not admit all of these recitals in fact, but rather, it
14 takes the position it is not appropriate for it to make
15 any further admissions as part of this process."

16 Then over the page at paragraph 4 {DG-A1/22/3}:

17 "Applying those principles, Daimler makes admissions
18 in respect of the following recitals ..."

19 You can see at a glance there are some recitals
20 which we think means they are admitted in their
21 entirety, although Mr. Harris will correct that, I am
22 sure, if it is wrong. But in any event, a large number
23 of recitals are just not addressed at all, whereas, as
24 you have seen, DAF took a rather more itemised approach.

25 THE PRESIDENT: Yes.

1 MR WARD: In fact, in your second order on this topic, you
2 ordered that more itemised approach of DAF and Volvo,
3 who did comply.

4 THE PRESIDENT: Well, of course, that order was not made as
5 against Daimler.

6 MR WARD: Indeed, but we are where we are.

7 THE PRESIDENT: Yes.

8 MR WARD: What we are suggesting is, in order to narrow the
9 issues as much as possible, it would be, in my
10 submission, evidently helpful if Daimler would take that
11 approach now. Then we will know, for example, in
12 recital 47 that Mr. Pickford showed you which bits of
13 that are accepted by Daimler, if any.

14 THE PRESIDENT: Yes.

15 MR WARD: We just do not know the answer to that question at
16 the moment. (Pause)

17 (The Tribunal conferred)

18 THE PRESIDENT: Well, Mr. Harris.

19 MR. HARRIS: We see this as a storm in a teacup. As we had
20 written down what you were saying earlier, sir, after
21 consideration with your colleagues over the short
22 adjournment, it was that there would be a column for
23 each defending group that will make it clear their
24 position in response to what the claimants are saying.
25 So this is exactly what Mr. Ward says he wants.

1 THE PRESIDENT: I mean, it is a question of which -- which
2 way round it is done. If you do not produce the sort of
3 schedule that DAF has produced, the number of
4 propositions they have to set out will be rather longer,
5 because although DAF has admitted the second sentence
6 and Iveco has admitted it and MAN has admitted it, they
7 do not know what your position is. So it will have to
8 be included and then, you might say, admit what
9 everybody else has admitted.

10 MR. HARRIS: Maybe.

11 THE PRESIDENT: So that is the point, I think.

12 MR. HARRIS: It may be, but on the other hand, it will
13 introduce an unnecessary delay if we are told now, "Oh,
14 well, you were not ordered to do it before because you
15 have not done any wrong, but now there is to be you
16 alone to do some further itemised approach before which
17 the claimants can even begin to put forward their
18 schedule". That could all be short-circuited by them
19 putting forward their table and we just -- as you had
20 already indicated, there is a column for each defendant
21 group, that includes us, which will make it clear what
22 the position is.

23 That seems the sensible and proportionate course, in
24 our respectful submission. Otherwise, there is more
25 unnecessary delay.

1 THE PRESIDENT: Ms. Demetriou?

2 MS. DEMETRIOU: Sir, there is not more delay because, as we
3 have indicated, the exercise will have to be done by
4 Daimler at some stage.

5 THE PRESIDENT: Yes.

6 MS. DEMETRIOU: The point is that if it is not done first,
7 what we produce is not going to be very useful because,
8 for example, when it comes to recital 47, we will have
9 to put the whole of the recital down as something which
10 is contested because Daimler has not gone through the
11 exercise. So the whole exercise on our part would have
12 been wasteful.

13 MR. HARRIS: Sir --

14 THE PRESIDENT: Just a moment. (Pause)

15 (The Tribunal conferred)

16 Yes, Mr. Harris.

17 MR. HARRIS: Sir, that is simply not right. There is no --
18 as we looked at before when we looked at, more
19 particularly, Mr. Pickford's schedule and then, to
20 a lesser degree, possibly Mr. Jowell's statement, there
21 is no unanimity of approach as regards all the other
22 recitals or the sentences within the recitals amongst
23 the groups of defendants.

24 THE PRESIDENT: Yes. Well we appreciate that, but it does
25 narrow it down, everyone else -- as I say, this is not

1 about criticism about whether you should have done it
2 before or not. No one is suggesting at the moment you
3 should, but everyone else has been able to do it. We
4 think it would be helpful if Daimler did it.

5 It should not take you particularly long because you
6 have been through all the recitals already and the
7 others have been able to do it within a reasonable time,
8 so how long would you like to produce that, starting
9 from today?

10 MR. HARRIS: One month, sir.

11 THE PRESIDENT: Yes. So -- well, if we say the end of
12 May --

13 MR. HARRIS: Yes.

14 THE PRESIDENT: -- which is, to say -- conveniently, it is
15 a Friday, so by 31 May. It is a schedule in the same
16 form as the others. Then the claimants to co-ordinate
17 the production of their statement of propositions to be
18 by some time in July. What would be a convenient time?
19 (Pause)

20 If we said 19 July, would that be reasonable?

21 MS. DEMETRIOU: That is reasonable.

22 THE PRESIDENT: Then the defendants to complete their
23 columns by some time in September, and if we say
24 20 September. Most of the work has been done in
25 preparing these schedules, so it will not be very

1 difficult, 20 September.

2 MS. DEMETRIOU: Sir --

3 THE PRESIDENT: The preliminary issue -- are people agreed
4 that three days is an appropriate estimate? I see no
5 one disputing. So three days in mid-November or
6 thereabouts, dates to be arranged through the usual
7 channels. Thank you.

8 The next matter for preliminary issues that was
9 raised is the question of pass-on, and we have seen what
10 everybody said. We do see that that is difficult.

11 Moreover, there is this: as it seems to us, a lot of
12 the parties have referred to the test set out by the
13 Court of Appeal in the *Sainsbury's v MasterCard*
14 judgment. As I understand it, that judgment is
15 now on appeal before the Supreme Court, and one of the
16 points in the appeal concerns the Court of Appeal's
17 approach, at least evidentially, to pass-on.

18 MR. BREALEY: That is Mr. Hoskins' appeal.

19 THE PRESIDENT: Yes, that is my understanding.

20 MR. BREALEY: That is correct. It is one of the issues on
21 appeal. 20 January.

22 THE PRESIDENT: So you have a date. Well, I do not think we
23 really can do anything about pass-on, it seems to us,
24 until we have the Supreme Court judgment, because it may
25 affect the approach.

1 MR. HOSKINS: I do not want to dissuade you, because I do
2 not want to (inaudible) on pass-on. The scope of the
3 appeal is not quite as broad as simply the pass-on
4 findings of the Court of Appeal have been -- are going
5 to be heard by the Supreme Court.

6 There is a particular issue on pass-on that is going
7 to be heard, which is the extent to which the broad axe
8 principle is applicable when assessing quantum where
9 there is a pass-on issue. As long as I am remembering
10 correctly, none of the basic principles, legal
11 principles, are being appealed to the Supreme Court.

12 THE PRESIDENT: Yes. Well, we have seen --

13 MR. HOSKINS: So I just wanted to make sure --

14 THE PRESIDENT: The Tribunal has seen your notice of appeal
15 because it was provided to us, given the case had been
16 remitted to us.

17 MR. HOSKINS: I said (inaudible) any confusion.

18 THE PRESIDENT: Nonetheless, who knows, but in examining
19 that ground, the Supreme Court may well say something
20 about the approach to pass-on.

21 MR. HOSKINS: I do not want a preliminary issue on pass-on,
22 because I am just making sure there is no
23 misapprehension --

24 THE PRESIDENT: Our present view is that it would be
25 inappropriate to proceed with that until we have the

1 Supreme Court's judgment and we should consider it
2 afterwards. So on that basis, we are not going to take
3 that forward, but we have not ruled it out. But
4 equally, we recognise it may be a difficult one to have
5 as a preliminary issue.

6 The next one is applicable -- I am sorry, Ms. Bacon.

7 MS. BACON: I am sorry, there is one related issue, which is
8 that provided that the claimants do, as they appear to,
9 accept that there is -- for the moment, there is no
10 knockout legal blow, we will want to be talking about
11 disclosure in due course. So we are not accepting at
12 this point that there should be no disclosure on that,
13 unless the Tribunal wanted to explore that together with
14 the -- well, the preliminary issue.

15 THE PRESIDENT: Well, we will deal with disclosure tomorrow.

16 MS. BACON: Yes, I just wanted to flag at this point that
17 there is a related issue on disclosure because if the
18 position on the part of the claimants is as currently
19 set out, that they do not take a legal point that knocks
20 everything out, then there would need to be disclosure
21 in due course. At the moment, that does not seem to
22 have been unequivocally accepted by the claimants. So
23 the position seems to be still ambiguous.

24 THE PRESIDENT: Yes. Well, I think that there may be
25 a difference between the different cases in any event,

1 the sort of pass-on that may occur in the case where the
2 claimant is a truck leasing company or where the
3 claimant is Royal Mail.

4 MS. BACON: Yes.

5 THE PRESIDENT: It is a rather different conceptual pass-on.

6 MS. BACON: Yes, there is a general point of principle,
7 which is whether, as a legal issue, pass-on can be
8 relied on in principle as a defence in relation to
9 downstream supply of goods and services.

10 Now, if the claimants are accepting as a general
11 point of principle that it can be relied upon and then
12 it is just fact-specific as to how that is implemented
13 in practice, I think that is what they are saying, but
14 it is not entirely clear, then that will engender
15 a discussion about disclosure.

16 THE PRESIDENT: Yes.

17 MS. BACON: The other point to make while I am on my feet is
18 the Tribunal skipped over the question of
19 non-addressees. Were you going to come back to that?

20 THE PRESIDENT: Yes.

21 MS. BACON: Because that was in between binding recitals and
22 pass-on in the agenda.

23 THE PRESIDENT: On the agenda. Yes, I am coming to it.

24 I am not quite following the same order as in the
25 agenda.

1 MS. BACON: Yes.

2 THE PRESIDENT: On the point that you make about this
3 question of a knockout pass-on, I think that we will
4 look at it when we come to deal with disclosure. But in
5 any event, it seems a very different kind of issue as
6 between the different cases.

7 As I say, if the claimants' business is renting out
8 trucks and it has got a claim for the overcharge of
9 purchasing trucks, yes, it is the supply of goods and
10 services, but it is -- the goods are the truck. That is
11 a rather different situation from some other cases. So
12 it may not be the same kind of common issue across all
13 the claims.

14 MS. BACON: Yes, and our position is that it will be
15 fact-specific to the claimants' business.

16 THE PRESIDENT: Yes. The next one I wanted to mention was
17 applicable law. We can see that might well be
18 a potential candidate for a preliminary issue, but it is
19 only in the VSW actions that it arises. It is something
20 we will have to revisit after the foreign law pleadings.
21 So I do not think we can take any view on that.

22 MS. DEMETRIOU: We agree.

23 THE PRESIDENT: Thank you. Ms. Demetriou says that the
24 claimants agree and I assume the defendants agree.

25 The next one, which Ms. Bacon has rightly drawn

1 attention to, is the liability of non-addressees, which
2 arises, it is true, in all the cases. Again, we are due
3 to receive revised pleadings following *Skanska*.

4 We think we can revisit it then, but given what we
5 have read, at the moment, we are not sure that it would
6 achieve a great deal as a preliminary issue. Given that
7 in each group there are addressees of the decision that
8 are defendants, there might be some scope for
9 a preliminary issue because of the consistency point,
10 but I would be interested to hear from you -- we have
11 very different submissions in the skeleton arguments on
12 this from different parties.

13 Ms. Bacon.

14 MS. BACON: Our view had been on behalf of Iveco Ltd, which
15 is the non-addressee defendant affected in our case,
16 that it would in principle be an appropriate preliminary
17 issue because, as matters stand, Iveco Ltd is still
18 an addressee -- sorry, is still one of the defendants
19 subject to the Ryder claim. So that point is going to
20 have be determined at some point. One cannot simply
21 duck it because there are addressee defendants within
22 the claim.

23 THE PRESIDENT: Yes.

24 MS. BACON: However, we agree with the provisional view to
25 park this, not only for the reason that the pleadings

1 are going to address this further, but also for the
2 reason that I raised this morning that there is now the
3 *Media-Saturn* judgment and I think it would be
4 appropriate to wait to see if that is appealed, because
5 if, of course, the Court of Appeal addresses that, that
6 will be binding on this court --

7 THE PRESIDENT: Yes.

8 MS. BACON: -- which the *Media-Saturn* judgment
9 would not be, because it is of a court of equivalent
10 jurisdiction.

11 So that is the second reason why we agree that the
12 question should appropriately be parked for the time
13 being. But eventually, there will need to be a decision
14 as to how to progress this, because it seems to us that
15 it is something that can conveniently be hived off and
16 dealt with as a common issue ahead of the trial rather
17 than bundling it in with all the other issues in the
18 trial.

19 THE PRESIDENT: Yes.

20 MS. BACON: There will have to be determination one way or
21 the other.

22 THE PRESIDENT: We will certainly revisit it. Caution about
23 it is essentially this: it is fine if, as it were, the
24 claimants' bald proposition were held to be correct,
25 namely that if you're part of one undertaking as

1 a matter of EU law, then you are liable. But if it is
2 not as simple as that and if it is a question of, as
3 they put in the alternative, that you are aware or
4 participated in the cartel, then we get into detailed
5 evidence, which is different as between the different
6 defendants. Some defendants are not in some of the
7 cases and this is not, then, a simple, clean preliminary
8 issue like the one we have agreed to go forward.

9 MR. BREALEY: That is --

10 MS. BACON: Yes.

11 THE PRESIDENT: That is why we have what I would say are
12 reservations about it, but we are not going to decide it
13 now, for the reasons we have indicated.

14 MS. BACON: No. If it helps to make our position clear, we
15 are only suggesting it go forward on the legal test
16 precisely because that would enable the factual evidence
17 that may later become relevant to be crystallised. If
18 one knows what the legal test is, then we know what
19 factual evidence we may or may not have to adduce on
20 questions; for example, knowledge and awareness.

21 THE PRESIDENT: Yes, but it is always difficult to say you
22 have to be aware and then the whole question is, well,
23 what constitutes awareness and so on? Deciding that in
24 the abstract can be challenging. But we will not say
25 any more about it now.

1 The next one that was raised was investigation costs
2 only in VSW. We do not think that is appropriate to
3 consider at this point.

4 Tax issues. It could be a preliminary issue, but we
5 think it might be more appropriate to deal with it as it
6 was dealt with in *Sainsbury's v MasterCard*;
7 that is whatever is the opposite of
8 a preliminary issue, a subsequent issue, as it were.
9 That is to say that the Tribunal, if it finds there is
10 a loss, gives a judgment for damages pre-tax subject to
11 further argument on what should be done about tax, and
12 that that is heard subsequently.

13 In *Sainsbury's v MasterCard*, that was the
14 approach taken, and happily, the parties were then able
15 to agree without a further hearing on the tax
16 consequences.

17 MR. BREALEY: That is --

18 MS. DEMETRIOU: We --

19 THE PRESIDENT: That seems to us a sensible way of tackling
20 that.

21 MS. DEMETRIOU: Sir, we agree with that approach.

22 MR. HARRIS: Sir, the issue that arises here goes squarely
23 to the question of disclosure. So there are
24 formulations -- there has already been some tax
25 disclosure in some of the cases and some of the cases

1 are -- the parties are grappling with what should be
2 disclosed in order to deal with the tax questions that
3 arise.

4 There seems to be, so far as we can make out,
5 a distinction of position between various claimants,
6 thus giving rise to potentially inconsistent approaches.
7 We understand the position to be, for instance -- this
8 is not intended to be exhaustive, but, for instance,
9 that Dawsongroup has accepted that there needs to be
10 a tax adjustment to reflect differential tax rates
11 historically compared to today.

12 They say that they have already made that adjustment
13 and it is reflected in their current pleading. That is
14 their position; in which case, we ought to be entitled
15 to, as a minimum, the disclosure of what they have done
16 so that we can satisfy ourselves or not as to whether or
17 not that has been the correct reflection of changing tax
18 rates and compensatory approaches towards tax.

19 At the other end of the spectrum, as I apprehend it
20 today, the position of the VSW claimants is that they do
21 not accept that there should be what in the jargon is
22 called the post-tax approach, ie effectively taking
23 account of the fact that the tax rates have changed. So
24 they resist that altogether as a preliminary issue, but
25 that, of course, will give rise to (a) an inconsistency

1 of approach between the claimants, which is something we
2 are very keen to avoid and I understand the Tribunal to
3 be keen to avoid, and (b) allied to that, of course, it
4 will give rise to very different disclosure if they are
5 right.

6 So what we say is that, for that core reason, there
7 needs to be a grappling with the question of what is the
8 correct approach to tax, as I say in the jargon, either
9 post-tax or pre-tax.

10 I ally to that the following submission, which is
11 somewhere in one of the skeletons, it is suggested that,
12 "Oh, well, this is just a quantum issue and it can be,
13 therefore, pushed off". But, with great respect, we say
14 that is not the correct approach in the context of these
15 cases because quantum in many ways is the key -- not in
16 every way, but in cases of this nature, quantum can keep
17 the parties apart from trying to compromise cases.

18 If you are radically different in your approach to,
19 say, taxation or in your approach to, say, compound
20 interest or in your approach to this or to that, then
21 you cannot -- you cannot ever talk to each other because
22 you have just got wildly different expectations.

23 So sensible case management, in my respectful
24 submission, on the part of the Tribunal would be to
25 allow a grappling with -- I know we are only talking

1 about tax now, so I will focus on tax, but that is
2 potentially a very big difference, pre- or post-tax.

3 So for that reason as well, we say it would be
4 sensible for there to be a preliminary issue on tax,
5 unless all the claimants are going to say unequivocally,
6 "No, we are all ad idem, we can all do the so-called
7 post-tax approach", which, in the end, has been decided
8 in one of the cases and was the approach that was taken
9 in the so-called subsequent hearing that you mentioned,
10 sir, in *Sainsbury's*.

11 May I just ...

12 THE PRESIDENT: Yes.

13 (The Tribunal conferred)

14 Yes, Mr. Harris.

15 MR. HARRIS: Sir, just the additional point; you will have
16 seen in the skeletons there are two types of tax issues
17 here.

18 THE PRESIDENT: Yes.

19 MR. HARRIS: There is essentially corporation tax and that
20 historical movement and possibly VAT in a similar ilk.
21 But then there is what has been called a second
22 tax-related issue, which is what has been the effect of
23 having allegedly higher costs of trucks on your balance
24 sheet and how do you treat them largely for depreciation
25 purposes if you are right that there has indeed been

1 an overcharge? That makes a difference to your actual
2 underlying damages figure, and that is in dispute.

3 THE PRESIDENT: Well, when you said Dawsongroup had accepted
4 there should be tax adjustment, does that cover both the
5 two points?

6 MR. HARRIS: No, we do not believe it does. I confess, I do
7 not -- just the first one.

8 MR WARD: I can clarify, the schedules to Dawson's
9 particulars of claim include figures which are adjusted
10 for tax in both the respects that Mr. Harris' clients
11 have relied upon. (Pause)

12 MR. HARRIS: Well, that, in many ways, crystallises the
13 point, doesn't it? Dawsongroup has behaved in manner X
14 and will, therefore, give disclosure on manner X and
15 that trial will proceed in manner X, and yet VSW says
16 the opposite.

17 THE PRESIDENT: But as we understand it, this is not
18 an issue in the Royal Mail/BT case. That is as we
19 understand that.

20 MR WARD: Well, Daimler is not a defendant in that case, so
21 no one has taken the point, but there has also been tax
22 adjustment on those schedules.

23 THE PRESIDENT: Yes. So --

24 MR. PICKFORD: It certainly is an issue in Royal Mail/BT.

25 THE PRESIDENT: I see. Can I just, before hearing from you

1 again, Ms. Demetriou, but in Ryder, I know Daimler is
2 not a defendant, but what is the position now?

3 MR. BREALEY: They are a defendant.

4 THE PRESIDENT: They are, sorry. What is the position on
5 tax there?

6 MR. BREALEY: Well, we were proceeding on the basis that is
7 the same as in *MasterCard* that everything could
8 be done in a quantum -- measured quantum hearing with
9 forensic accountants getting together at the end of the
10 trial.

11 Can I just say, on the tax issue generally,
12 Mr. Harris keeps on referring to Dawsongroup and if --
13 can I just ask the Tribunal to go to the Daimler
14 skeleton.

15 THE PRESIDENT: Yes.

16 MR. BREALEY: We are concerned that this is just being
17 floated as preliminary issues which have not really been
18 properly articulated. If we go to the Daimler skeleton
19 at paragraph 44, where one gets a sense of why Daimler
20 wants this, they want to flush us out. That is not
21 usually the case -- a justification for a preliminary
22 issue. They say it has not been clarified by the
23 claimants.

24 Then if one goes over the page at 14, we have got to
25 make the position on tax clear, shape disclosure, and

1 then there is a footnote to AlixPartners, obviously the
2 accountants/economists.

3 Now, there are two things about this. The first is
4 that if Daimler want to put forward a positive case,
5 they could ask us for disclosure. We can go to their
6 pleading in a moment, but, really, at the moment, it is
7 very, very woolily pleaded. We have not -- so if they
8 want to seek disclosure from us, then we can hear that
9 application. If it is contested, the Tribunal can
10 determine it.

11 We have not seen that Grantham statement. So,
12 again, it is one of those -- there is no joined-up
13 writing here that the defendant, here Daimler, is making
14 a submission against us in the light of a tax statement
15 saying it is necessary, which we have not seen.

16 THE PRESIDENT: Yes.

17 MR. BREALEY: The whole thing just seems -- there is no
18 application, though maybe that is not -- you do not need
19 a formal application, but it needs to be a little bit
20 more than a couple of sentences in a skeleton argument
21 and in a letter in order to properly determine what this
22 is all about. That is what we are concerned about.

23 THE PRESIDENT: Yes. Can you -- give us just a moment.

24 (Pause)

25 (The Tribunal conferred)

1 Yes. Mr. Harris, we do not, subject to what you
2 have to say, really see this as a particular problem.
3 As we understand it from Mr. Ward, Dawsongroup is making
4 its claim on a post-tax basis, so it says, on both the
5 respects you referred to.

6 You are, therefore, able to get disclosure of those
7 issues and consider them with your accountants and if
8 you say it is not done correctly, that will be an issue
9 in the trial, but that is the way they are putting their
10 case. As I understand it, so is BT/Royal Mail. Again,
11 if DAF says they have not done it fully or correctly,
12 that is the subject of disclosure and argument.

13 If VSW and Ryder put their claim on a pre-tax basis,
14 then we can decide that case on the way they have put
15 their case, reserving the issue of taxation to be
16 decided subsequently. We do not have to impose the same
17 approach at this stage on all the claimants.

18 MR. HARRIS: But the issue to which that gives rise, sir, is
19 that then there is -- if it turns out that it is wrong
20 as a matter of law to do a pre-tax approach, then they
21 will not have given disclosure -- that is the issue, is
22 it right --

23 THE PRESIDENT: No, the disclosure will come subsequently.
24 Any judgment in favour of Ryder and VSW will be subject
25 to questions of taxation.

1 MR. HARRIS: I see.

2 THE PRESIDENT: Then there will be a subsequent argument and
3 hearing and accountancy evidence based on the actual
4 damages found, which makes it easier to discuss whether
5 there should be a tax deduction. It will be open to VSW
6 to say, as a matter of law, there should not be, in
7 which case, Dawsongroup have been too generous, so it
8 does not matter.

9 MR. HARRIS: I see.

10 THE PRESIDENT: That is the way Dawsongroup puts its case.

11 MR. HARRIS: I have understood it correctly, then. What the
12 Tribunal is envisaging is that then there would be no
13 tax-related disclosure above and beyond the way that VSW
14 and Ryder put their case now, but that following
15 a trial, which, if it results in any damages, it would
16 still be at large for Daimler or whoever else to say,
17 "Well, the way you proceeded to date is wrong, it should
18 be a post-tax approach". If we are right and that is
19 the correct way forward, there might have to be
20 significantly further disclosure because it will not
21 be --

22 THE PRESIDENT: Well, there will then be the sort of
23 disclosure that relates to tax.

24 MR. HARRIS: That is right.

25 THE PRESIDENT: That is right. There will be no tax

1 disclosure at this stage, but the judgment will say
2 these damages, if there are damages awarded, are subject
3 to any questions of the applicability of tax.

4 MR. HARRIS: May I just take a moment then, now that I have
5 understood.

6 THE PRESIDENT: If it is put in issue, as it is.

7 MS. DEMETRIOU: Sir, we agree with that approach.

8 THE PRESIDENT: Just a moment, because Mr. Harris needs to
9 hear you. (Pause)

10 MR. HARRIS: Well, the two reservations that we have --
11 I mean, I have heard what the Tribunal has to say is --
12 there is the settlement point, compromise, meeting of
13 minds, which will not then happen on that approach.

14 Again, and it is a big point, tax is going to be
15 a big point. If you think about this claim that began
16 20-odd years ago, or the claim period is 20-odd years
17 ago -- but that is what it is.

18 The other one is we respectfully contend that it is
19 a less efficient way forward because if you are delving
20 into your tax records in order to give what you contend
21 is pre-tax disclosure, which means categories, whatever,
22 one through ten, and then at a later stage you have to
23 go back to your tax records in order to give
24 categories 10 through 20 -- but I recognise they go as
25 far as they go.

1 THE PRESIDENT: Yes, but equally, there is an economy in the
2 trial that we do not have to deal with accountancy
3 evidence on that.

4 Yes. Well, we think that is the sensible approach.

5 MR. HOSKINS: Sir, can I just pick up the disclosure point?

6 I am not pushing back at all on the post issue, if we
7 call it that. I would like to address you on the
8 question of timing of the disclosure on tax, because if
9 it is -- it is a live issue between the parties.

10 Regardless of the legal position that is taken, it is
11 clearly a live issue. Our submission is it would be
12 advantageous to have the disclosure on tax as part of
13 the current disclosure process.

14 THE PRESIDENT: How onerous is that disclosure?

15 MR. HOSKINS: Sorry?

16 THE PRESIDENT: How onerous is that disclosure?

17 MR. HOSKINS: I do not know. The reason we would like it
18 is, of course, if and when one comes to settlement
19 discussions, as Mr. Harris has alluded to, the impact of
20 tax can be quite significant on what each side thinks
21 they are likely to get. That is why we would like the
22 tax disclosure early.

23 THE PRESIDENT: Yes. (Pause)

24 I see your point, Mr. Hoskins. Can we revisit it
25 when we look at disclosure tomorrow.

1 MR. HOSKINS: Absolutely.

2 THE PRESIDENT: But you heard the point being made.

3 MS. DEMETRIOU: Yes.

4 THE PRESIDENT: I do not, at the moment, know -- obviously
5 tax rates, the first point, is public knowledge. What
6 year the loss was incurred, anyone can work out the
7 corporation tax, the depreciation and how capital
8 allowances were treated may be complicated, particularly
9 for your clients because you are in many different
10 jurisdictions.

11 MS. DEMETRIOU: Sir, yes, and another complication -- so the
12 first point to note is that as regards the point in --
13 that Daimler raises, Daimler, of course, is only party
14 to the Wolseley proceedings. So insofar as they want a
15 preliminary issue, it would just be in the Wolseley
16 case, not in Veolia and Suez.

17 As far as disclosure is concerned, we do say, and we
18 can return to this tomorrow, that it would be very, very
19 complicated because aside from the tax position, and we
20 are unclear -- there are two points that we are unclear
21 about at the moment in terms of the scope of the
22 dispute.

23 So we do not presently understand the VAT point made
24 by Daimler, nor do we really understand the capital
25 depreciation point. It has not been put to us very

1 squarely, so we are not sure whether, when he says at
2 paragraph 46 of his skeleton argument that there could
3 be a reduction in tax liability through capital
4 depreciation of allowances, what he is talking about
5 relates to corporation tax or something different. So
6 perhaps that could be clarified overnight.

7 But we say that if there is going -- if this is
8 going to be an issue, and plainly it will be at some
9 stage, whether after the hearing -- after the trial or
10 before --

11 THE PRESIDENT: Yes.

12 MS. DEMETRIOU: -- we say that disclosure would be very
13 complicated because it would not only be the tax rate.
14 Of course, you have the point that there are lots of
15 claimants in different jurisdictions, but there would
16 also have to be an analysis of the position of each
17 individual claimant and the steps that they might have
18 taken in the counterfactual world that they had earned
19 more profit if there had not been an overcharge, the
20 steps that they may have taken to mitigate their tax
21 position or reorganise their tax affairs.

22 So we say because -- so we say that it is
23 potentially very complicated. That is why the
24 Tribunal's instinct is right, we say, which is to leave
25 it, as in the *Sainsbury's* case, for after the

1 trial. But we can return to it tomorrow.

2 THE PRESIDENT: Yes.

3 Well, Mr. Harris, if you are able, and this is not
4 a direction for those behind you, to write a letter just
5 explaining the VAT position and how it is said to arise,
6 that may assist, and we will look at this when we look
7 at disclosure.

8 MR. HARRIS: Sir, I can do better than that, because I do
9 not know whether it has escaped everybody's attention,
10 but I have in my hand, in bundle DG, B1, tab 8, the
11 witness statement of Mr. Grantham --

12 THE PRESIDENT: This is in which --

13 MR. HARRIS: It is in the Dawsongroup claim. So DG/B1.

14 THE PRESIDENT: This is Dawsongroup.

15 MR. HARRIS: B for Bertie, 1, Bravo 1, tab 8 {DG-B1/8/1}.

16 If one were to -- so Mr. Grantham is an expert
17 accountant, forensic accountant, at AlixPartners.

18 THE PRESIDENT: I do not think Ms. Demetriou has got that
19 because she is not in Dawsongroup.

20 MS. DEMETRIOU: We do not have that.

21 MR. HARRIS: Well, in that case, I am sure we can make some
22 arrangements.

23 THE PRESIDENT: Can that be supplied? If you want to rely
24 on that to explain the position, can that be supplied
25 to --

1 MR. HARRIS: Yes.

2 THE PRESIDENT: -- Hausfeld and their legal team overnight?

3 MR. HARRIS: We can make those arrangements.

4 Sir, can I respectfully invite the Tribunal to have
5 regard to this. If there is to be a dispute tomorrow
6 about what disclosure goes in each direction, then there
7 is a live application by Daimler for disclosure on this
8 question of taxation. The supporting material for that
9 is to be found on the taxation question under the
10 heading "Taxation" beginning on internal page 10 of
11 this -- not report, but witness statement from an expert
12 witness {DG-B1/8/10}. It sets out clearly over those
13 next three pages why -- what the issue -- what the
14 dispute is and why various aspects are needed.

15 Then that has to be -- if this is to happen
16 tomorrow, then that then has to be read closely in
17 conjunction with various moving target tables. I should
18 just preface this with the fact that you will be aware,
19 members of the Tribunal, that the defendants are opposed
20 to the prosecution tomorrow of various bits of inter
21 alia Dawsongroup's application for disclosure.

22 But I can -- I would like the opportunity to address
23 you on why that should not happen, even tomorrow. There
24 are a series of substantive reasons why it should not
25 happen. But if it did happen, then very much part and

1 parcel of that application is our application in the
2 other direction for disclosure of taxation material.
3 These are the supporting materials for it in large
4 measure, together with the schedules that keep moving
5 every day. But --

6 THE PRESIDENT: But you do not have an outstanding
7 application as against VSW, do you, for tax disclosure?

8 MR. HARRIS: No, that is a fair point, but that ties into
9 one of the reasons why we should not be doing it with
10 Dawsongroup, which is: in sharp contrast to Dawsongroup,
11 VSW, and through Messrs Hausfeld, have -- we have
12 already had one WP meeting, et cetera, et cetera.

13 THE PRESIDENT: Well, let us come back to that, but it will
14 greatly assist if your solicitors can provide the
15 witness statement you have just referred to, to the VSW
16 lawyers, and if that can be done --

17 MR. HARRIS: I am sure sensible arrangements can --

18 THE PRESIDENT: That should be done when we leave the
19 Tribunal today.

20 MR. HARRIS: Yes, yes.

21 THE PRESIDENT: Right. (Pause)

22 There were some smaller issues such as acquisitions
23 and ability of holding companies to claim damages. They
24 do not, I think, apply across the board. They are in
25 individual claims and I think it premature to consider

1 that at this CMC, but we did want to consider the
2 question of the scope of trucks covered by the decision,
3 because that could affect disclosure.

4 As I understand it, and I will be corrected if I am
5 wrong, the issue was raised as regards Daimler,
6 Mercedes-Benz Sprinter and Vario vehicles, as regards
7 the Iveco Daily range and as regards what have been
8 referred to as superstructures. Those seem to be the
9 areas.

10 Now, taking those in turn, as regards the
11 Mercedes-Benz Sprinter range, well, am I right that it
12 is -- in the VSW action, it is now accepted there is no
13 claim for Sprinter vehicles?

14 MS. DEMETRIOU: That is correct.

15 THE PRESIDENT: Is there any claim for Vario vehicles?

16 MS. DEMETRIOU: No.

17 THE PRESIDENT: Those are the two categories that you are
18 concerned with; is that right?

19 MR. HARRIS: That is right.

20 THE PRESIDENT: Is there anything in any of the other
21 actions concerning those two categories of Mercedes-Benz
22 vehicles?

23 MR. HARRIS: Not as far as I am aware. I believe that Ryder
24 has backed away from including Sprinter and Vario
25 insofar as they were there.

1 MR. BREALEY: Backed away? We never claimed for them.

2 THE PRESIDENT: Never claimed. So there are no other
3 Daimler vehicles, are there?

4 MR. HARRIS: No. I just wanted, before we lose sight of it
5 altogether, to just make a quick point, with permission,
6 on the holding companies point.

7 THE PRESIDENT: Yes.

8 MR. HARRIS: It is simply that -- I believe it was Mr. Ward
9 earlier who, but he will tell me if I have got this --
10 misremembered, I think his number 1 claimant wasn't
11 running a reflective loss claim as a holding company,
12 but that it had financing cost allegations.

13 THE PRESIDENT: Yes.

14 MR. HARRIS: He was invited to clarify that in his pleading.

15 THE PRESIDENT: Yes.

16 MR. HARRIS: The simple point: I take it, or may I take it,
17 that the same sort of clarification should be given for
18 other holding companies in the other claims, in the VSW
19 claims and in the Ryder claims?

20 THE PRESIDENT: Yes, I think I said in the VSW claims. I am
21 not sure in the Ryder one that there is a holding --
22 a claim by a company that did not buy trucks, is there?

23 MS. DEMETRIOU: Ah --

24 THE PRESIDENT: In Ryder. I may not have noticed it, but
25 I thought all your claims were for trucks.

1 MR. BREALEY: No. Obviously there are American companies,
2 but the claimant is not -- no.

3 THE PRESIDENT: No. In Wolseley, I think I did refer to
4 some company and I thought you said you would clarify
5 that in your amendment.

6 MS. DEMETRIOU: We did.

7 MR. HARRIS: I am very grateful, thank you.

8 THE PRESIDENT: So there is no issue about Daimler vehicles.
9 There is an issue about the Iveco Daily range. This is
10 in the VSW action and I think only in the VSW action; is
11 that right?

12 MS. BACON: Yes, that is right because Ryder has accepted
13 that the Dailys are outside the scope of the decision.
14 There is an issue as to how many Dailys are within the
15 scope of the VSW action, and subject to my comments
16 earlier about trying to nail down exactly which vehicles
17 are being claimed for, our current analysis indicates
18 that VSW are claiming for 76 Daily vehicles of 6 tonnes
19 or more.

20 THE PRESIDENT: 76?

21 MS. BACON: 76. There was a figure given of 36.

22 THE PRESIDENT: Yes.

23 MS. BACON: So that clarifies our current understanding of
24 the number of vehicles involved.

25 Now, there is a proportionality point --

1 THE PRESIDENT: Yes.

2 MS. BACON: -- there. In our submission, it in fact cuts
3 both ways, because although VSW say, well, the 36, now
4 76 -- I presume they say the same -- is a small number.

5 As Mr. Farrell's explained in his witness statement,
6 that is going to generate a very large amount of
7 evidence because of this point that during the period of
8 the infringement, or at least a significant part of the
9 period of the infringement, there were two completely
10 different business divisions within Iveco, one dealing
11 with light commercial vehicles such as the Dailys and
12 another dealing with medium and heavy trucks.

13 So effectively, there is going to be -- in order to
14 respond to this and deal with it in the context of the
15 trial over the overall actions, we are going to have to
16 get, effectively, twice as much evidence.

17 THE PRESIDENT: Yes.

18 MS. BACON: So that is one of the reasons why -- or one of
19 the main reasons why we have sought to propose
20 a preliminary issue, because if that is then excluded,
21 that will have a significant impact, we think, on the
22 extent of our evidence.

23 THE PRESIDENT: Yes. Can I ask you this, Ms. Bacon: if you
24 take one of the many copies of the decision that are in
25 the bundles in front of you and go to section 7.2.2 on

1 page 25.

2 MS. BACON: Yes, I have got that out.

3 THE PRESIDENT: "The basic amount of the fine to be imposed
4 on the undertakings concerned is to be set by reference
5 to the value of sales, that is to say the value of the
6 undertaking's sales of goods or services to which the
7 infringement directly or indirectly related..."

8 MS. BACON: Yes.

9 THE PRESIDENT: "In this case, the relevant value of the
10 sales is the undertaking's sales of medium trucks and
11 heavy trucks..."

12 Then they go on to explain that, at the end of
13 recital 110:

14 "Based on the... information provided by the
15 addressees, the Commission used the undertakings' sales
16 in the last full business year of their participation in
17 the infringement --"

18 MS. BACON: Yes.

19 THE PRESIDENT: -- "namely 2010". Then there is a table
20 redacted.

21 MS. BACON: Your --

22 THE PRESIDENT: You all have provided figures to the
23 Commission --

24 MS. BACON: Yes.

25 THE PRESIDENT: -- of sales of trucks.

1 MS. BACON: You are going to ask me: did that include the
2 Daily vehicles?

3 THE PRESIDENT: Correct. (Pause)

4 MS. BACON: I am being told no, because our understanding of
5 the scope of the decision was that it did not include
6 Daily vehicles.

7 THE PRESIDENT: Well, the Commission -- and the Commission
8 accepted, in the provision of the figures that you gave,
9 that it excludes Daily vehicles. Was that addressed in
10 communication with the decision -- with the Commission,
11 in the supply of the figures, what vehicles should be
12 covered?

13 MS. BACON: I think we are going to have a look at that.
14 I do not think I can properly answer that on my feet.
15 Of course, these are points that will have to be
16 canvassed in the trial of any preliminary issue on this.

17 THE PRESIDENT: Does it not go perhaps a bit earlier than
18 that, because if they accepted, in the way they approach
19 the trucks that were subject to the infringement, that
20 your figures do not cover the Daily range --

21 MS. BACON: Yes.

22 THE PRESIDENT: -- in a sense, they have accepted that that
23 is the position.

24 MS. BACON: Yes.

25 THE PRESIDENT: They are not trucks.

1 MS. BACON: You're suggesting that that has effectively
2 determined the issue.

3 THE PRESIDENT: That is what I am floating.

4 MS. BACON: Yes. I think that I -- we need to do a bit of
5 digging on our part to see what was said to the
6 Commission, because I do not want to give an answer on
7 my feet without having looked at that to see precisely
8 what was said. But that is a point that we will take
9 away.

10 THE PRESIDENT: Yes.

11 MS. BACON: Subject to that, we do want this determined in
12 one way or another before we have to get into the
13 exercise of getting evidence potentially from
14 a completely separate business division.

15 THE PRESIDENT: No, I ask that because I think in your
16 skeleton argument you indicate that having this as
17 a preliminary issue will involve expert evidence on
18 different kinds of truck and so on.

19 MS. BACON: Yes.

20 THE PRESIDENT: But this is a rather more direct route to
21 sorting it out --

22 MS. BACON: Yes.

23 THE PRESIDENT: -- although, of course, VSW, if they want,
24 they can run a stand-alone action saying -- or claim
25 saying that the infringement encompassed things other

1 than --

2 MS. BACON: Yes, which has not been --

3 THE PRESIDENT: -- heavy and medium trucks.

4 MS. BACON: Yes, which has not been pleaded --

5 THE PRESIDENT: But that is not the case at the moment.

6 MS. BACON: No, it has not been pleaded.

7 I think to answer the question about the expert
8 evidence, we would, of course, be saying that one looks
9 at the decision and can extract from that for the reason
10 that we have given in our pleading on this point --

11 THE PRESIDENT: You might accept that this is a binding
12 recital more generally.

13 MS. BACON: Again, I think I am going to have to go back to
14 that. But, no, our primary case is that on the face of
15 the decision, which refers to medium and heavy trucks,
16 these were not medium or heavy trucks.

17 THE PRESIDENT: Yes.

18 MS. BACON: But of course, alongside that, we would rely on
19 the differences -- the structural difference, if you
20 like, between the two types of vehicle.

21 THE PRESIDENT: Yes, I am trying to shortcut all that.

22 MS. BACON: Yes.

23 THE PRESIDENT: Ms. Demetriou, if, in fact, it seems it is
24 confirmed the values that the Commission used -- and it
25 would make quite a difference, because although you have

1 only claimed for 76 --

2 MS. DEMETRIOU: I think --

3 THE PRESIDENT: -- I saw somewhere there were some 55,000

4 Daily vehicles sold by Iveco, so including them or

5 excluding them in the total sales would be quite

6 significant from the point of view of the fine. If the

7 Commission excluded them, are you still wishing to

8 pursue an argument that they should be included?

9 MS. DEMETRIOU: I think we would also want to reflect,

10 because I think the thing to do, with the Tribunal's

11 permission, is not to proceed with the submissions I was

12 going to make, but to allow Ms. Bacon to come back with

13 the information that she says she was going to provide,

14 we look at it and take a view and we take it forward

15 from there.

16 THE PRESIDENT: That seems very fair and sensible. Clearly,

17 to have a preliminary issue about 76 trucks, or 76

18 vehicles, I should say, when the actual overcharge on

19 those 76, even for pass-through, might be quite small~--

20 MS. BACON: Yes.

21 THE PRESIDENT: I appreciate the disclosure point.

22 MS. BACON: It is not only disclosure, but also the

23 witness --

24 THE PRESIDENT: No, I understand.

25 MS. BACON: The evidence point. (Pause)

1 THE PRESIDENT: The next aspect of this is the
2 superstructures, as I think they are called. Is that
3 an issue in several of the claims or only in the VSW
4 claim?

5 MR. HOSKINS: It is only live in VSW.

6 THE PRESIDENT: The question is, as I understand it, as to
7 whether the superstructure body as well as the
8 underlying chassis is part of what has been covered by
9 the decision.

10 MR. HOSKINS: Indeed, whether the infringement covers
11 superstructures or not. There is a pleaded issue on
12 this. I cannot remember if I have done it in our
13 skeleton. I wanted to show you VSW's pleading on this,
14 so you can see what it is like between the parties.
15 Sorry, I did not want to interrupt you.

16 THE PRESIDENT: No, I was just introducing the issue for you
17 to explain how it --

18 MR. HOSKINS: Yes, in case there is a nice brief answer for
19 this point as well. I did not want to cut you off.

20 THE PRESIDENT: Where do we go for the pleading?

21 MR. HOSKINS: VSW, bundle A1, tab 2 {VSW-A1/2/12}. So this
22 is looking at the Suez Group amended particulars of
23 claim. This paragraph is in the same form in the three.
24 It is paragraph 45, which is on page 12.

25 You will see there is an explicit claim for the

1 bodies, another word for superstructure, and it is put
2 in two ways: either it was part of the infringement or
3 there was an umbrella overcharge in relation to bodies.

4 THE PRESIDENT: Yes.

5 MR. HOSKINS: So there is a pleaded issue in relation to
6 that.

7 THE PRESIDENT: So it is -- even if it is not -- is the
8 umbrella overcharge expressed as -- which is defined
9 just above, it is also in terms of trucks, is it not?

10 MR. HOSKINS: Yes, that does not solve the problem. I think
11 there is a claim in the alternative for superstructures.
12 Insofar as they were not in the scope of the
13 infringement decision, it is nonetheless said that they
14 would be -- that they had been inflated. That is my
15 understanding.

16 THE PRESIDENT: Yes.

17 MS. DEMETRIOU: Sir, yes, there is another nuance to this,
18 which is that in our pleading, we have made clear that
19 we plead not only on the basis of a claim following on
20 from the Commission decision, but also as a stand-alone
21 claim.

22 The plea at paragraph 45, where we say that the
23 chassis and the body -- so we are looking at the body
24 here, the superstructure -- was subject to the
25 overcharge, we plead that both on the follow-on and

1 a stand-alone basis. Then in the alternative, we plead
2 an umbrella claim.

3 So our short point is that a preliminary issue on
4 whether superstructures are within the scope of the
5 decision would not resolve the dispute because we
6 nonetheless maintain a stand-alone claim in respect of
7 the superstructures.

8 THE PRESIDENT: So it would not avoid disclosure or evidence
9 on superstructures?

10 MR. HOSKINS: I must confess that is the first time that has
11 been apparent to me because of the reference to the
12 overcharge in paragraph 45. That may be my fault, but
13 that is certainly not something that has leapt out at me
14 before.

15 MS. DEMETRIOU: Sir, it has been explained in
16 correspondence. I mean, the way that our pleading
17 operates generally is that we do not distinguish between
18 the follow-on and stand-alone elements of the claim.

19 But if you look at the letter in VSW D2 at tab 168 --

20 THE PRESIDENT: VSW D --

21 MS. DEMETRIOU: D2.

22 THE PRESIDENT: D2, 168?

23 MS. DEMETRIOU: Tab 168.

24 THE PRESIDENT: Yes, we will wait for that to come up on
25 screen.

1 MS. DEMETRIOU: I am sorry, it is D1, volume 2, tab 168. Is
2 that now on screen? No. VSW-D1, volume 2, tab 168.
3 Not volume 2. I am going to try again, VSW volume 1,
4 tab 168, I hope that works.

5 THE PRESIDENT: There is a D somewhere.

6 MS. DEMETRIOU: D1, this is it -- no, this is not it.

7 MR. HOSKINS: You see my problem.

8 MS. DEMETRIOU: I am going to try again, VSW-D1, tab 168.
9 I thought that is what I said {VSW-D1/168/1}. Here we
10 are. If you would look at the second main paragraph,
11 "We confirm that", you see at the end:

12 "We also confirm that our clients contend that such
13 specialist bodies fall within the scope of the
14 settlement decision. That was made clear in their
15 statement of 8 February ... In the alternative the
16 claimants will put their case forward on a stand-alone
17 basis."

18 We've also dealt with the point in our skeleton
19 argument, so I am not raising it for the first time
20 today, but that is the way that we put our case.

21 MR. HOSKINS: I am not sure that is what is the pleaded
22 case, so that is the problem that Ms. Demetriou has.
23 Now, it may be they can get round this problem if they
24 want to amend their case, but that is not the pleaded
25 case at the moment.

1 MS. DEMETRIOU: Well, we do not think we need to amend the
2 case because we have not purported in the pleading
3 generally to distinguish between --

4 THE PRESIDENT: Well, it is clear that is now the case. So
5 they are in issue, so there has to be disclosure and
6 evidence about them. I appreciate it may be said,
7 "Well, there could be some difference in level of
8 overcharge, whether it is an umbrella or direct", but it
9 is not really going to achieve much on that basis to
10 have a preliminary issue, is it?

11 MR. HOSKINS: Sir, I will be perfectly frank with you: I am
12 taken by surprise by this point and I would like to take
13 instructions on it, so if we can --

14 THE PRESIDENT: Maybe that is a sensible point to take our
15 break for five minutes. At the moment, I have not had
16 a chance to discuss it with my colleagues, but I do not
17 think --

18 MR. HOSKINS: I see the point, sir. That is why I would
19 like to take instructions.

20 THE PRESIDENT: Right. Well, we will come back at 3.45 pm.
21 (3.38 pm)

22 (A short break)

23 (3.50 pm)

24 THE PRESIDENT: Yes, Mr. Hoskins.

25 MR. HOSKINS: Sir, going back to the letter -- I will be

1 brief, hopefully useful. D1, so VSW D1, volume 2,
2 tab 168 {VSW-D1/168/1}. I want to address you on what
3 actually the pleaded case currently is and where that
4 leaves us.

5 You were taken, I think, to the third paragraph of
6 that letter:

7 "We confirm that the VSW Proceedings include claims
8 in respect of ... superstructures."

9 Then they say:

10 "We will also confirm that our clients contend that
11 such specialist bodies fall within the scope of the
12 settlement decision."

13 Which is what triggered the submissions being made
14 showing preliminary issue. Then they say:

15 "In the alternative the Claimants will put their
16 case forward on a stand-alone basis."

17 So the current contention is in the scope of the
18 settlement decision. In the alternative, they will put
19 their case on a stand-alone basis. But the skeleton
20 argument you were referred to is in precisely the same
21 terms; it talks about them in the alternative. If needs
22 be, they will put their case on a stand-alone basis.

23 Can we go back to the pleading. So that is VSW
24 bundle A1, tab 2, and you have just seen it,
25 paragraph 45 {VSW-A1/2/12}. That is the pleading on

1 superstructures.

2 Now, let us be clear about what a stand-alone claim
3 in relation to superstructures would be. What they are
4 saying is that this is on the assumption superstructures
5 have not been found to be part of the infringement in
6 the decision. So they are saying that they will allege
7 that there were completely different infringements in
8 relation to superstructures. That is the logic of the
9 position that has just been pleaded.

10 Now, if that were pleaded, you would need
11 particulars of it. This is a completely different
12 allegation of collusion. On this basis, there is
13 nothing about it in the decision, there is no express
14 pleading here and there is certainly no particulars.

15 Now, that is all very interesting, so where does
16 that take us practically? Well, it seems to us that VSW
17 must actually come clean on this, because, with all due
18 respect, they clearly have not so far, despite the
19 submissions you have just heard.

20 They are going to be putting in the amended
21 particulars of claim. If they want to put forward
22 a stand-alone claim in relation to superstructures, they
23 should do so in that amendment and they should give
24 proper particulars of the allegation of the said
25 stand-alone infringement.

1 Then if they do plead that out, then, subject to
2 issues about strikeout, et cetera, then I absolutely
3 accept the logic, sir, that you put to me; there is no
4 utility in a preliminary issue.

5 But if, when actually faced with the proper decision
6 of whether they want to put forward a stand-alone claim
7 with particulars, they balk at that, then we are back
8 where we are today, which is us submitting, actually,
9 a preliminary issue is going to be very important.

10 But the way forward in this is for them to plead
11 a stand-alone claim, if that is what they indeed intend
12 to do. They have not done it so far.

13 THE PRESIDENT: Yes, Ms. Demetriou.

14 MS. DEMETRIOU: Sir, we are content to provide particulars
15 of the stand-alone claim. We do think that we have
16 pleaded it, as matters stand, but I accept that there
17 are no particulars of the stand-alone.

18 We have seen the documents. We have reviewed the
19 documents. It is on that basis that we were running
20 a stand-alone claim, so it is not an idea that we have
21 plucked out of the air. We will, when we are serving
22 our amended claim, provide particulars, as Mr. Hoskins
23 has requested.

24 THE PRESIDENT: Yes, because what is pleaded at the moment
25 is that if it was supplied by third parties, as I think

1 it is said sometimes the superstructure was, then it
2 comes under the umbrella overcharge, but the umbrella
3 overcharge applies only to trucks.

4 So one gets back to the question of what -- are they
5 within the scope of trucks. If it is -- if it is not
6 a truck, but you say nonetheless it was subject to
7 collusion, then that is a stand-alone issue which I do
8 not think is in these particulars of claim.

9 MS. DEMETRIOU: Well, sir, we will amend and make it clear.

10 (Pause)

11 THE PRESIDENT: I mean, what I am not clear about is, as
12 I understand it, some of the superstructures were
13 purchased from third parties; is that not right?

14 MS. DEMETRIOU: But we apprehend that even in circumstances
15 where third parties manufactured and fitted the
16 superstructure, at least in many cases or some cases,
17 the cartelists controlled the overall price. We will
18 explain that and plead it out properly and provide
19 particulars.

20 THE PRESIDENT: Yes, I think you plead it. If there is
21 an objection to that amendment, it will be taken, or if
22 there are limitation issues, they will be taken. We
23 will deal with it then. We are certainly not in
24 a position to direct any preliminary issue now. At the
25 moment, it is not on the pleadings.

1 That concludes what we wish to address on the
2 question of preliminary issues. Is there anything else
3 anyone wants to raise on that?

4 In that case, we move on. A point was raised by
5 Ryder in its skeleton by Mr. Brealey and his team as to
6 whether there should be some sort of common issues trial
7 across all the claims, a rather broader idea than
8 preliminary issues dealing with certain aspects all of
9 how the cartel worked or whatever.

10 We are not immediately taken with that idea,
11 Mr. Brealey, because of its complexity, but if you
12 wanted to pursue it, now is the time.

13 MR. BREALEY: No. We floated it. We are not making any
14 application.

15 THE PRESIDENT: Yes.

16 MR. BREALEY: I mean, the bottom line is we have been in
17 *Interchange*. We know the risk of an
18 inconsistent judgment. To a certain extent, there is
19 only one version of the truth of, certainly, the
20 defendants' costs, margins, the way the cartel operated.

21 It just seems that there may be some scope for some
22 common approach to how the cartel operated, whether it
23 was gross/net. Did the defendants' margins increase
24 when there was an agreement on the pricing? Sterling
25 exchanges. There are a lot of issues relating to the

1 defendants which are common.

2 We quite understand there are a lot of
3 claimant-specific facts, but when it comes to the
4 cartelists, with respect, there is only one version of
5 the truth. Whether you will listen to the five experts
6 times four trials, and that is what we were floating and
7 I think someone -- the Tribunal may at some stage have
8 to reassess, because if there are going to be five
9 defendants dealing with their margins, whether that is
10 going to be heard four times in four trials, or two
11 trials or three trials, and how that can possibly be
12 managed.

13 That is all we are trying to articulate to have the
14 germ of some sort of common approach. We understand
15 that Mr. Ward is against it. We understand that
16 Ms. Demetriou is against it. We do not know about the
17 defendants.

18 But essentially, it is a case management decision
19 for the Tribunal. So we are not pushing it. We are not
20 making any application, but someone has got to raise the
21 point at some time that there is a risk, particularly
22 when it comes to the defendants' facts, their conduct,
23 whether this Tribunal or two separate Tribunals will
24 listen to the same evidence. Then we will get exactly
25 the same situation we got in *Interchange*, where

1 you had three trials, three divergent judgments. That
2 is essentially why we put that in our skeleton.

3 THE PRESIDENT: Yes. In no sense are you being criticised
4 for putting it in your skeleton, because it is a very
5 valid point to raise and consider.

6 There are great difficulties, I think, logistically
7 in this case, given that some claims are against only
8 one defendant, some are against five groups, some are
9 against three groups, and so on. It may be that in the
10 end, a series of trials is unavoidable, even if there is
11 some risk.

12 But it may be that a judgment in one, if there is
13 a judgment, will help to encourage those in another to
14 allow -- come to an arrangement. We start here with
15 this Commission's decision in *Interchange*. Of
16 course, it was really all, mostly, a sort of stand-alone
17 UK case.

18 MR. BREALEY: Well, the Supreme Court did not sort that one
19 out, maybe, but yes, I know, yes.

20 THE PRESIDENT: It is a different situation.

21 MR. BREALEY: It is.

22 THE PRESIDENT: Aside from all that, there will be other
23 claims to come which are not even represented in this
24 room. Some were started. There no doubt may be more.
25 It is clearly utterly impossible to have them all heard

1 together.

2 MR. BREALEY: No, we understand that, but we thought we
3 needed to raise it because it is something that the
4 Court of Appeal was obviously very taxed by --

5 THE PRESIDENT: Yes.

6 MR. BREALEY: -- and I will leave it there.

7 THE PRESIDENT: No, I appreciate that, and we are very alert
8 to trying to find ways to -- and that is why we have
9 been looking at all these different preliminary
10 issues --

11 MR. BREALEY: I understand.

12 THE PRESIDENT: -- and why we still have a somewhat open
13 mind on pass-on.

14 One issue that we want to revisit -- I will just
15 mention it now; we are not going to deal with it now --
16 is whether the Ryder claim and the Dawsongroup claim can
17 be heard together because they are a similar sort of
18 business. We appreciate they are competitors, but --
19 which at least reduces what are presently four separate
20 trials to three, but that is something that we will
21 return to at a later stage.

22 MR. BREALEY: I am obliged.

23 THE PRESIDENT: I do not think we can follow the common
24 issues trial at the moment.

25 There is one particular point, though, that we are

1 concerned about when you talk about inconsistent
2 judgments, and that is this: as we understand it, some
3 of the -- part of the claims by the VSW claimants are
4 for trucks that were rented, not purchased. It is said
5 that the rental payments on those trucks were higher.

6 Some of those trucks that were rented, as we
7 understand it, were rented from Dawsongroup or Ryder,
8 and Dawsongroup and Ryder are claiming for the increased
9 purchase price of those trucks.

10 So that there is a possibility that the same truck
11 is, on the one hand, the subject of a price overcharge
12 claim by, Mr. Brealey, your client, no doubt saying
13 limited pass-through and VSW saying, "We claim for the
14 rental that we had to pay to Ryder on that truck on the
15 basis of high pass-through". The one thing that we
16 really must avoid is a direct inconsistency about the
17 particular specific goods.

18 Is that right, that there were some trucks that, as
19 it were, feature in both actions?

20 MS. DEMETRIOU: Yes, there are a few.

21 THE PRESIDENT: I do not know how many we are talking about.
22 Does anyone know how many?

23 MS. DEMETRIOU: Sir, our current view on that is that in the
24 Wolseley proceedings, there are two Ryder trucks.
25 Dairy Crest is claiming in respect of 85 Dawsongroup

1 trucks and four Ryder trucks.

2 THE PRESIDENT: Just one minute. Dairy Crest is --

3 MS. DEMETRIOU: Is part of the Wolseley claim.

4 THE PRESIDENT: In Wolseley. So Dairy Crest has four Ryder

5 trucks.

6 MS. DEMETRIOU: So perhaps we can put it this way: in the

7 Wolseley proceedings as a whole, there are 85

8 Dawsongroup group trucks and six Ryder trucks.

9 THE PRESIDENT: Yes.

10 MS. DEMETRIOU: In the Veolia proceedings, there were two

11 Ryder trucks and seven Dawsongroup trucks.

12 THE PRESIDENT: In Suez?

13 MS. DEMETRIOU: None that we have identified.

14 THE PRESIDENT: Yes. So it is not very many.

15 MR. BREALEY: So it is eight Ryder.

16 THE PRESIDENT: But nonetheless, it is something we are

17 going to have to find a way of grappling with sensibly.

18 MR. BREALEY: Yes.

19 THE PRESIDENT: We have not yet worked out what that way

20 might be, but we would like you to consider between now

21 and the next CMC what we should do about that, because

22 if there is an issue about what a pass-through might be

23 on that truck, it needs to be decided once, not twice.

24 MR. BREALEY: Of course.

25 THE PRESIDENT: Whether that means a part of the VSW claim

1 is, as it were, heard with Ryder or whether it is VSW
2 are having a chance to participate in a way that
3 everybody's bound, I do not know, but there has to be
4 some way of dealing with this, bearing in mind it is not
5 a very significant number, but still it has got to be
6 done sensibly.

7 MR. BREALEY: We will certainly have -- we will liaise. I
8 think it is a Dawsongroup --

9 THE PRESIDENT: So if Dawsongroup and Ryder could discuss
10 that with VSW before next time.

11 MR. BREALEY: Of course.

12 THE PRESIDENT: Thank you. There are a few, given that
13 disclosure is coming tomorrow, relatively, we believe,
14 short points that we think can be disposed of.

15 Expert evidence: we think it is premature to address
16 that today. There is the question about -- that the VSW
17 defendants have raised about a single common expert on
18 issues of interest and pass-on, because pass-on, in any
19 event, is going to wait for some time for the Supreme
20 Court and we are not going to take a view on it.

21 MS. DEMETRIOU: Sir, we are content with that, subject to
22 one point, which is that what we do not want to find is
23 that our application comes back and at that stage we are
24 told one of the additional reasons relied on by the
25 defendants is that they have now spent money considering

1 this with their experts, and so the horse has bolted and
2 it is much too late. Subject to that point, we are
3 content for it to be dealt with later.

4 THE PRESIDENT: Yes.

5 MR. HARRIS: Sir, that is already the case, of course. That
6 horse has long since bolted.

7 THE PRESIDENT: You have all got economists engaged, but how
8 far they have worked on the detail as far as interest,
9 and the tax we have said we will deal with afterwards --

10 MR. HARRIS: Sir, I think you said you were going to revisit
11 the question of timing of the tax disclosure if we do --

12 THE PRESIDENT: Tax disclosure, yes.

13 MR. HARRIS: Yes.

14 THE PRESIDENT: But then the next issue on the agenda,
15 point 8, was only put on the agenda because there was
16 a liberty to apply on the order. Nobody has applied, so
17 there is nothing further to consider on that. The order
18 is that the evidence in the one stands in the other and
19 vice versa.

20 Point 9, multiple translations. As we understand
21 it, everybody agrees there should not be multiple
22 translations, but nobody has yet made a proposal as to
23 how that is to be achieved.

24 I do not think that is something for us to order.
25 We would hope that you can get together sensibly and

1 come up with an arrangement whereby that should be done,
2 whether it is by appointing a single agreed, presumably,
3 firm of translators or translators for each particular
4 language involved, as has been suggested in one of the
5 skeletons, or in some other way. But I imagine people
6 are starting to make translations, and it would be
7 sensible for you to co-ordinate and come up with some
8 arrangement. I would hope by the time of the next CMC,
9 we can be told what that is.

10 Other matters raised there: we have got one other
11 matter that we will mention today, because it concerns
12 Scania, who are not, I think, involved in any disclosure
13 applications other than as regards the Scania decision.

14 MR. POBJOY: That is not right. We are resisting the VSW
15 application, disclosure application.

16 THE PRESIDENT: You are?

17 MR. POBJOY: We are.

18 THE PRESIDENT: I see. You have to come tomorrow in any
19 event. I was hoping we could find a way of, as it were,
20 releasing you for tomorrow.

21 There is a question that is raised as to whether the
22 liability of the additional defendants should be tried
23 with the main claims, which was reserved at the last
24 CMC.

25 We are not, at the moment, going to direct that any

1 of the cases should be set down for trial, because there
2 is going to be a preliminary issue. There is the
3 decision on what is the proper approach to pass-on that
4 will come from the Supreme Court.

5 The argument before the Supreme Court, Mr. Brealey,
6 I think told us this, is on 20 January, so we do not
7 know obviously when the judgment would come. One would
8 hope by the summer, but we really do not see that even
9 the BT/Royal Mail case, which also involves pass-on, of
10 course, can then be heard before one has the Supreme
11 Court judgment, and that may say something about the
12 approach to evidence.

13 So at the moment, we do not see anything can be
14 heard before the autumn of 2020 at the earliest. We
15 would propose, Mr. Ward, to fix a further CMC at which
16 that could be considered.

17 MR WARD: Would the Tribunal just give us leave to reflect
18 on that overnight?

19 THE PRESIDENT: Yes.

20 MR WARD: Because obviously there has been a number of
21 developments in the course of the debate this afternoon
22 that we would like to contemplate.

23 THE PRESIDENT: Yes. You can certainly do that. What we
24 envisage, given that the preliminary issue will be heard
25 in mid-November, is that it is sensible to have the next

1 CMC after you have judgment on the preliminary issue,
2 and that it would be in January 2020.

3 MR. BREALEY: All getting very old.

4 THE PRESIDENT: I am sure you will still be fighting fit,
5 Mr. Brealey.

6 At that point, one can consider -- we will be much
7 further forward in a lot of ways; foreign law, the
8 Scania decision, et cetera, et cetera. That will be the
9 appropriate time to consider setting down, but we can
10 see that it might then be appropriate to think about
11 potentially setting down the Royal Mail/BT case, which
12 might need to be heard first. (Pause)

13 Yes, Mr. Jowell.

14 MR. JOWELL: I was just going to say for the MAN defendant,
15 that certainly seems eminently sensible.

16 THE PRESIDENT: Yes, that is always --

17 MR. PICKFORD: On timing, the Supreme Court case to which
18 you have referred, there are a number of people in this
19 room that are in that. That is listed towards the end
20 of January. I think it is the 20th to the 23rd.

21 THE PRESIDENT: Yes.

22 MR. HOSKINS: It just the danger of -- if we have a CMC in
23 this case in January, that may be an incentive because
24 you may want to have a number of us in front of you. It
25 would be a shame not to keep the continuity.

1 THE PRESIDENT: You will be in another place, is what you
2 are saying.

3 MR. HOSKINS: That is the expression.

4 Sir, maybe if -- February, but to be -- I just make
5 that plea because there are -- seriously, there is
6 a number of -- there is at least three leading counsel
7 here that will be in another place.

8 THE PRESIDENT: Yes, and the week after that, you will be
9 recovering, I suppose.

10 MR. HOSKINS: Having a lie down. If it is like the Court of
11 Appeal, I certainly will be.

12 THE PRESIDENT: We will consider that tomorrow. We have
13 a lot to deal with on disclosure, I think, or
14 potentially, depending which route. Is there anything
15 else that we should usefully do today?

16 What we would like, please, is some indication of
17 what we should read on disclosure, because more
18 documents seem to be arriving all the time. I am told
19 that a witness statement arrived while we have been
20 here, and I think there is an updated schedule and
21 I want to make sure we have got the right one, that we
22 are not looking at one that is already out of date.

23 MR WARD: Sir, the one that is, I hope, the most helpful is
24 the composite schedule served by my solicitors about
25 lunchtime yesterday --

1 THE PRESIDENT: Yes.

2 MR WARD: -- which is dated 1 May in the top right-hand
3 corner.

4 THE PRESIDENT: Yes, I have that. That is now the up to
5 date?

6 MR WARD: Well, it was up to date when it was served. Last
7 night we had a few additional observations from
8 Volvo/Renault. I hope that there will be more
9 discussions this afternoon, because, of course, the
10 object is to narrow, narrow, narrow the issues for the
11 Tribunal. But if you were to look at one, that one is
12 very substantially up to date. The Volvo/Renault did
13 not dramatically change the picture. It would not be a
14 waste of time.

15 THE PRESIDENT: Yes. Mr. Harris first, then Mr. Pickford.

16 MR. HARRIS: Sir, with all manner of caveats -- for
17 instance, we do not accept even the accuracy of that
18 statement. Various parts of that statement are said to
19 be agreed; they are not. That is just wrong. It has
20 moved umpteen times. We have had four versions of that
21 in the last nine working days. But in terms of what you
22 could usefully read beforehand is a very long list, if
23 you are going to engage with the substance.

24 As you know, tomorrow on behalf of the defendants
25 I would like to persuade the Tribunal that we do not

1 engage in the substance and that is -- one key reason
2 for that is it keeps on moving and it keeps on narrowing
3 but --

4 THE PRESIDENT: No, we saw that point, but you say they
5 should be discussed separately.

6 MR. HARRIS: But if you are going to prepare to engage in
7 the substance, then there are -- and I am only speaking
8 on behalf of Daimler, because I have not had a chance to
9 read all my co-defendants, but there is Mr. Grantham's
10 witness statement, to which I have already taken you.
11 That will need to be read in its entirety, because it
12 goes to a whole series of continued disputes on
13 disclosure. Many of these documents are to be found in
14 DAF DG-B1 and then --

15 THE PRESIDENT: Which?

16 MR. HARRIS: DG-B1. DG for the Dawson group.

17 THE PRESIDENT: Yes.

18 MR. HARRIS: Then there are no less than three substantive
19 witness statements from Mr. Coulson, who prosecutes the
20 application as instructing solicitor on behalf of
21 Bryan Cave, and they all use different versions of the
22 schedule with different numbering. Then there are three
23 expert statements from his expert Mr. Harvey. Then just
24 speaking for Daimler, there is then Mr. Grantham, who
25 deals with certain issues such as taxation and interest,

1 and that is evolved stuff. It cannot be done except by
2 reference to the schedule that he was looking at at the
3 time, which has now moved on.

4 Then there is Mr. Rainer Nitsche, who is an expert
5 economist on behalf of Daimler, and his statement needs
6 to be looked at as well. Then, although I cannot name
7 them, there are additional expert-type statement and
8 factual statements from DAF and from Volvo and what have
9 you. If we are going to engage in the substance, then
10 that material will have to be looked at and that is an
11 enormous task. It has been virtually impossible for us
12 on this side, given the moving feast, but all I can say
13 is in terms of pre-reading that will need to be gone
14 through, some of it line by line in the hearing if it is
15 not pre-read, and in any event some of it line by line.

16 Then there are at least two letters to which I draw
17 your attention of being highly germane to the question
18 of whether or not the substantive disclosure application
19 should even progress. One of them is written by my
20 instructing solicitor, somebody will doubtless provide
21 me with the bundle reference, but it is 30 April, so
22 only the day before yesterday, in which for a whole
23 series of reasons that we have identified in the
24 two-and-a-half-page letter, the substantive application
25 should not progress.

1 THE PRESIDENT: That is the first. What is the second one?

2 MR. HARRIS: The second one is a letter of only yesterday
3 from Bryan Cave Leighton Paisner, 1 May {DG-D/251/1},
4 written to all the defendants in which, inter alia, they
5 say:

6 "We enclose an 'updated quantum disclosure
7 schedule'."

8 Then on top of that they then say, for the first
9 time ever, that:

10 "Having made enquiries with Dawsongroup ... it has
11 been established that the Dawsongroup holds a repository
12 of information that can be searched for spreadsheet
13 documents known as 'build sheets'."

14 That is a critical letter, because when you do turn
15 to Mr. Coulson's first, second and indeed third
16 statements, that proceeds essentially on the premise
17 that there is something called the AS400 database. To
18 put not too fine a head on it, Dawsongroup, via their
19 solicitors, have taken the stance up until only a matter
20 of days ago that that is all they were going to provide
21 because that is all that they could readily obtain
22 access to. Amongst other things, we have said, "Well,
23 hang on a minute" --

24 THE PRESIDENT: Well, do not get into the argument. I am
25 just trying to make sure I have got the right letter.

1 So that is a letter of 1 May --

2 MR. HARRIS: Yes.

3 THE PRESIDENT: -- from Bryan Cave Leighton Paisner to the

4 various defendants.

5 MR. HARRIS: That is right.

6 THE PRESIDENT: Is it the one that says "we refer to

7 Dawsongroup's skeleton argument"?

8 MR. HARRIS: Correct. When you --

9 THE PRESIDENT: Yes, I have got that.

10 MR. HARRIS: The top page of the next -- the top line of the

11 next page --

12 THE PRESIDENT: Yes. So we have got those two letters.

13 MR. HARRIS: You may also want to refer to a letter from

14 Mr. Hoskins' instructing solicitors, which I think was

15 last night, so dated 1 May, yesterday, which advances

16 some of the same and some additional reasons why it is

17 not sensible and not an appropriate course to proceed

18 with the substance of the Dawsongroup application.

19 THE PRESIDENT: That is Freshfields of 1 May?

20 MR. HARRIS: That is right. I am afraid I cannot provide

21 you with the references, but I expect we will be able to

22 deal with that shortly.

23 THE PRESIDENT: Yes. Well, we have got, okay, three

24 letters. Thank you.

25 MR. WARD: Sir, can I make just a brief observation about

1 this. We are nowhere near as downhearted as Mr. Harris
2 about any of this. There is a very, very large area of
3 agreement. You will see that on the schedule. It is in
4 black. It is possible there are some mistakes in there,
5 but, at the end of the day, what we want is progress, we
6 just want some progress, and we are being bitterly
7 criticised for updating the schedule by narrowing the
8 areas of disagreement. My clients have made a whole
9 series of concessions to be pragmatic. We think it is
10 not a lost cause.

11 THE PRESIDENT: Mr. Pickford.

12 MR. PICKFORD: Sir, as innocuous as the submission of
13 Mr. Ward might seem in relation to which schedule we
14 should look at, it probably was his most controversial
15 submission of today.

16 The issue of schedules is one I am going to have to
17 address you on tomorrow, but our disclosure application
18 has been renumbered, reorganised and generally mucked
19 around with repeatedly for about the last month. I am
20 not going to be making my application by reference to
21 his schedule, because it is still wrong, and it caused
22 me about five hours of trying to piece together the
23 numbering problems yesterday. So I am going to be
24 making it by reference to our schedule which is to be
25 found at DG-C1, tab 8, page 182 {DG-C1/8/182}.

1 In terms of the evidence that supports that, there
2 are two witness statements. They are third Edwards,
3 which is to be found at DG-B1, tab 10 {DG-B1/10/1}, and
4 6th Edwards, which is to be found at DG-C1, tab 11.1
5 {DG-C1/11.1/1}. Then there are two Compass Lexecon
6 letters that I would -- referred to in each of those,
7 and I can give you the references to those as well if
8 that would be of assistance.

9 They are ... (Pause).

10 Sorry, it is also being suggested to me that fifth
11 Edwards would be additionally helpful, I beg your
12 pardon. That is at B1, tab -- so DG-B1, tab 17
13 {DG-B1/17/1}. Then the two Compass Lexecon letters are
14 to be found at DG-B1, tab 10, 29 {DG-B1/10/29}, so the
15 first one is at the end of the third Edwards statement.
16 It is annexed to it, but it is not in the exhibits. The
17 second Compass Lexecon letter, the one of 1 May, is
18 at --

19 THE PRESIDENT: When you say, the first one DG-B1, 10 --

20 MR. PICKFORD: Tab 10, page 29.

21 THE PRESIDENT: Page 29, yes.

22 MR. PICKFORD: It follows directly after Ms. Edwards' third
23 statement. So it is attached to it as opposed to being
24 an exhibit.

25 The next one I think is actually exhibited instead,

1 and that is at DG-C1, 11.1, and that is at pages 1 to 5
2 {DG-C1/11.1/1}. Again, I would make the same submission
3 as Mr. Harris that actually the economic disclosure
4 application is not in a proper state where it can
5 actually be properly determined by the Tribunal --

6 THE PRESIDENT: Yes.

7 MR. PICKFORD: -- but if the Tribunal wishes to hear it,
8 I will do my best to make it.

9 THE PRESIDENT: Yes.

10 Ms. Bacon, you want to add to our overnight
11 pleasure?

12 MS. BACON: Well, not really. I have got two points. One
13 is a timing point, and that is a number of us are not in
14 this application. So I was going to respectfully
15 suggest that we could deal with the TDDB minute issue
16 first --

17 THE PRESIDENT: Yes.

18 MS. BACON: -- after which perhaps the Tribunal could
19 release those who are not involved in the Dawson group
20 disclosure issue.

21 The only other issue which I think might usefully be
22 able to be revisited before Dawson group is the question
23 about the Dailys. If we can do our best overnight to
24 get information -- we may not be able to, but if we can
25 then we might be able to deal with that first thing in

1 the morning as well.

2 So if I could suggest that we deal with those two

3 issues first.

4 THE PRESIDENT: Yes. We had in mind to deal with the TDDB

5 minutes first.

6 MS. BACON: Yes.

7 THE PRESIDENT: The Dailys it is up to you to raise it if

8 you have sorted --

9 MS. BACON: Insofar as we are able to, yes.

10 THE PRESIDENT: -- something out.

11 MS. BACON: Then in terms of a reading list, I was not going

12 to give you one, but if the Tribunal wanted to just go

13 over what was said in the witness statements, I can just

14 give you the references. The relevant witness

15 statements are in the VSW bundle E --

16 THE PRESIDENT: The witness statements concerning what?

17 MS. BACON: The TDDB minutes issue. You might --

18 THE PRESIDENT: Yes, I think we have seen. We have looked

19 at that.

20 MS. BACON: You have that already? Okay.

21 MS. DEMETRIOU: Sir, we are grateful for the indication that

22 you will hear the TDDB minutes application first. Could

23 you also, please, hear next the submissions on timing of

24 tax disclosure, because we are also involved in that,

25 and I do not think then we are involved in anything else

1 and there clearly would be a significant cost saving if,
2 on our side, we could be released thereafter if the
3 Tribunal is happy.

4 The other practical point is that our disclosure
5 application has been served in the form of confidential
6 documents. We have asked for confirmation, because
7 there is now --

8 THE PRESIDENT: This is the TDDB minutes application?

9 MS. DEMETRIOU: Yes, that is right. We do not see any
10 reason why it should be heard in private because all of
11 the documents that are referred to I think are now
12 agreed are not confidential. We have asked for
13 confirmation. We have not quite got confirmation from
14 everyone, but it would be helpful, I think, if that is
15 clarified so that the Tribunal knows whether it has to
16 sit in private tomorrow or not.

17 THE PRESIDENT: I think that last point is quite important,
18 and I think the skeleton argument in support of that
19 application is indeed marked "confidential" at the
20 moment. Is there any reason why --

21 MS. BACON: In relation to our skeleton argument, it was not
22 marked "confidential". As far as we are concerned, the
23 issue against Iveco can be dealt with in open court, and
24 I believe the position is that nearly all of the other
25 documents have now been or will be de-designated as

1 confidential. So I think it is safe to proceed that,
2 unless we let the Tribunal know otherwise, we should
3 proceed in open court, but we can update you at the
4 start of the hearing tomorrow.

5 THE PRESIDENT: Because we may be taken, possibly, to some
6 of the minutes that have been disclosed to support
7 an argument of relevance, it seemed to me. As
8 I understand it, those are not confidential documents
9 now, in which case it is hard to see why the application
10 at all is confidential.

11 MS. DEMETRIOU: Sir, it is not Iveco, it is MAN and DAF that
12 haven't yet provided us confirmation.

13 THE PRESIDENT: Yes. Well, are you able to do that?

14 MR. PICKFORD: Sir, for our part we can provide that
15 confirmation. Post-de-designation, we do not have any
16 issue.

17 MR. JOWELL: Likewise.

18 THE PRESIDENT: Well, in that case it is not confidential,
19 and if anyone has a desire to see that skeleton argument
20 it can be made available on that basis.

21 Yes, Mr. Hoskins.

22 MR. HOSKINS: Sorry, I was hoping to pop up and add to the
23 misery in the reading list. I doubt you will have time
24 to look at it but I will give you the references of our
25 most recent material on the Dawsongroup disclosure

1 application --

2 THE PRESIDENT: Yes.

3 MR. HOSKINS: -- just so you do not waste time on anything
4 that is out of date. It is second Frey, Dawsongroup
5 bundle B1, tab 19 {DG-B1/19/1}. Then in amongst all the
6 various iterations, we served a schedule last night
7 trying to respond to -- some poor soul sent it out late
8 last night when it was finalised, not me, and that
9 responds to the sixth version of the Dawsongroup
10 schedule, but there is now a seventh which has overtaken
11 us, but that is our most recent schedule. That went out
12 last night.

13 THE PRESIDENT: Where will we find it?

14 MR. HOSKINS: I will get you a reference and we will give it
15 to you. I should just reiterate that the Dawsongroup
16 schedule in black says everything in black is agreed,
17 and there are a number of issues, fundamental issues,
18 where it is not agreed. The real issue is that
19 sometimes we have agreed that categories are relevant,
20 but we have not said what they are proposing is
21 proportionate or can be done proportionately. So that
22 is one of the real issues we have. Yes, we have been
23 talking in narrowing down what categories might be
24 relevant, but our real concern is there are real issues
25 on proportionality. The schedule, the Dawsongroup

1 schedule, is misleading insofar as there are black
2 elements where there are still live issues on
3 proportionality. That is all I wanted to say to set the
4 scene.

5 THE PRESIDENT: It would be very helpful for the hearing
6 tomorrow -- obviously it cannot be done for our
7 reading -- if there were a schedule that was accurate
8 and agreed by everyone. Now, just -- I mean, at the
9 moment you cannot agree about what is agreed --

10 MR. HOSKINS: No, we cannot. No, that is why it is not --

11 THE PRESIDENT: -- which seems unfortunate.

12 MR. HOSKINS: Sir, but the trouble is we have had~-- it is
13 at least four and I think it might be five schedules in
14 the month of April and May. Now, the reason why we did
15 our last schedule in response to the sixth schedule was
16 precisely to try and put the Tribunal in the position to
17 deal with it. But, with all due respect, even with all
18 the will in world, to try and overnight catch up with
19 a seventh schedule, it is just not going to be possible.
20 I know there are a lot of people here, but it -- people
21 are kicking furiously under the surface.

22 THE PRESIDENT: Yes.

23 MR. HOSKINS: I would like to say we are just the beautiful
24 swans in the front row, we do not even get that, but
25 there are a lot of people doing a lot of work on this

1 case.

2 THE PRESIDENT: No, we realise that.

3 Is there anything else anyone wants to raise this
4 evening apart from suggesting we read even more? Very
5 well. 10.30 am tomorrow morning.

6 (4.30 pm)

7 (The Tribunal adjourned until 10.30 am
8 on Friday, 3 May 2019)

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